

GENDER-BASED POVERTY AND CEDAW

A Study on the Relationship between Gender-Based Poverty and
the Convention on the Elimination of All Forms of
Discrimination Against Women

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ABSTRACT

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This thesis makes a unique contribution in exploring the relationship between international legal commitments and women's poverty. Three normative arguments underpin this thesis. First, that poverty is a gender-based phenomenon. Second, that gender-based poverty is an obstacle to human rights. Third, if the promise of human rights is to be realised for all people it is necessary to move gender-based poverty into the realm of international human rights law.

The ideal place to theorise on the relationship between human rights and gender-based poverty is CEDAW. Notwithstanding that CEDAW addresses civil, political, economic, social and cultural rights and negative cultural attitudes on women, there is no substantive provision in CEDAW requiring State to ameliorate gender-based poverty. The first part of my thesis argues that this gap can be overcome by an evolutionary interpretation of CEDAW. I make the argument, that equality and non-discrimination, two norms that permeate all of CEDAW, can be interpreted to incorporate the harms of gender-based poverty comprehensively into the treaty framework. I use public international law interpretative framework and the Committee's own work to demonstrate that the commitment to eliminating discrimination against women and achieving gender equality in CEDAW necessarily requires State to respect, protect and fulfill the human rights of women in poverty.

The second part of thesis shifts to examine how this interpretation can be integrated into the work of the Committee. To ensure a coherent and comprehensive approach to gender-based poverty that is consistent with my proposed interpretation of CEDAW I propose: (i) modifications to the State reporting guidelines and (ii) a comprehensive General Recommendation on women and poverty. This thesis lays the necessary theoretical and practical groundwork so that the Committee and other relevant national and international actors can hold States accountable for women in poverty's human rights.

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California Law Review	Cal L Rev
Canadian Journal of Women and the Law	Can J of W and the L
Canadian Journal of Law and Jurisprudence	Can J of L and Juris
Civil Society Organisations	CSOs
Commission on the Status of Women	CSW
Committee on the Convention of the Rights of the Child	CCRC
Committee on the Elimination of All Forms of Discrimination Against Women	The Committee
Committee on Economic Social and Cultural Rights	CESCR
Convention on the Elimination of All Forms of Discrimination Against Women	CEDAW
Division for the Advancement of Women	DAW
Economic and Social Council	EcoSoc
European Journal of International Law	EJIL
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Court of Justice	ICJ
International Labour Organisation	ILO
International Monetary Fund	IMF
Human Rights Committee	HRC
Human Rights Quarterly	Hum Rts Q

Millennium Development Goals	MDGs
Office of the High Commissioner for Human Rights	OHCHR
Organisation for Economic Co-operation and Development	OECD
Optional Protocol to CEDAW	OP-CEDAW
Oxford Poverty and Human Development Initiative	OHPI
South African Journal of Human Rights	SAJHR
Stanford Law Review	Stan L Rev
United Nations Development Programme	UNDP
United Nations Development Fund for Women	UNIFEM
United Nations Educational, Scientific and Cultural Organisation	UNESCO
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INTRODUCTION

Throughout the world women disproportionately live in poverty.¹ In Kenya women use up to 85 percent of their daily calorie intake fetching water.² Indian women spend 352 minutes a day on unpaid care work while in comparison Indian men spend 52 minutes a day on this type of work.³ In Burkina Faso, more than twice as many men than women report owning housing.⁴ The evidence indicates that there is something unique about being a woman that both causes and contributes to women's poverty. While the relationship between sex, gender and poverty is being examined by various actors, paradoxically at the same time, women in poverty continue to be marginalised or ignored in key platforms. In the Millennium Development Report: 2014, detailing the progress in implementing the MDGs, the latest figures on the Goal 1—to eradicate extreme poverty and hungry indicates that the number of people living in extreme poverty fell by 700 million and that 1.2 billion people still live in conditions of extreme poverty.⁵ However, this data is not disaggregated for sex. This makes it impossible to know if women have benefited equally from the programmes developed to achieve MDG-Goal 1. Nor is it possible to know how many women still continue to live in dire conditions of extreme poverty.⁶

¹ UN Special Rapporteur on extreme poverty and human rights, 'Final draft of the guiding principles on extreme poverty and human rights' (2012) A/HRC/21/39 [23].

² UNDP, 'Gender and Poverty Reduction'
<http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty/> .

³ OECD, 'Balancing paid work, unpaid work and leisure'
<<http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure.htm>>.

⁴ World Bank, 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014) 135.

⁵ The Millennium Development Report: 2014, 8-9
<<http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf>>.

⁶ The report on MDG 3 on gender equality provides no information on the prevalence of poverty among women. *ibid.*

The aim of this thesis is to shine a spotlight on women's poverty. In this thesis I argue that poverty is not gender neutral and that women experience poverty differently from men. Furthermore, given the depth and prevalence of women's poverty in Chapter 1, I make the case that it is imperative that the gender-based aspects of poverty receive specific attention and tailored and meaningful remedies. There are many different methods for ensuring women's poverty is sufficiently addressed. The Sustainable Development Goals, which are to be released in 2015, could be crafted to ensure that development aid and policies are targeted towards reducing the number of women who live in poverty.⁷ This thesis however takes a different standpoint and approaches women's poverty from a human rights perspective. Women in poverty are routinely denied the enjoyment and exercise of their human rights. The UN Special Rapporteur on extreme poverty and human rights describes how poverty is an obstacle to women's enjoyment of their civil, political, economic and social rights.⁸ There is increasing recognition that human rights are a powerful tool that can and should be used to address this obstacle and improve the lives of millions of women who live in poverty. Unlike economics policies or development programmes, human rights set normative standards and places duties on the duty bearer to respect, protect and fulfill human rights standards towards the right holder.⁹ Conceptualising women's poverty as an issue of human rights means women living in poverty are not passive recipients of development aid but are active rights holders who can draw on human rights standards to hold the State and other relevant actors accountable.¹⁰ Women who live in poverty are routinely marginalised, isolated, stigmatised, voiceless and

⁷ 'Open Working Group, 'Proposal for Sustainable Development Goals' (2014) A/68/970. Goal 1: 'end poverty in all its forms everywhere' is currently gender neutral.

⁸ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 1) [23].

⁹ OHCHR, 'Who Will be Accountable: Human Rights and the Post-2015 Development Agenda' (2014) HR/PUB/13/1 ix.

¹⁰ UN Special Rapporteur on extreme poverty and human rights 'Guiding Principles' (n 1) [45].

powerless.¹¹ A-human rights approach which empowers the right holder can effectively address these crucial aspects of women's poverty in a way that development is simply not able to. These issues are explored in greater detail in Chapter 1. The relationship between poverty and human rights and the potential for human rights to address poverty is only beginning to be explored. This thesis contributes to this evolution and makes a unique contribution by focusing exclusively on how human rights can combat women's poverty.

There are various human rights forums in which to develop the relationship between women, poverty and human rights. In some respects focusing on how to interpret one or more domestic constitutions to incorporate gender-based poverty would make an important contribution because of the direct impact it could have on domestic laws, policies and programmes on women's poverty. However, I have chosen to situate my thesis within the UN human rights system. More specifically, I examine the potential to incorporate gender-based poverty into Convention on the Elimination of All Forms of Discrimination Against Women¹² and how the Committee, the body that monitors State's implementation of CEDAW,¹³ can use its various forums and activities to hold the State accountable for respecting, protecting and fulfilling the rights of women who live in poverty. There are three over-arching reasons for developing the relationship between women, poverty and human rights in the international sphere and CEDAW in particular which I discuss below.

First, international human rights law has been at the forefront in the evolution of human rights. For example, CEDAW was one of the first advocates for using human rights to uncover and

¹¹ World Bank, 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014).

¹² 1249 UNTS 13 (entered into force 3 September 1980) (CEDAW).

¹³ See Article 17 of CEDAW.

remedy the patriarchal origins of violence against women¹⁴ and the Committee on the International Covenant on Economic, Social and Cultural Rights (CESCR)¹⁵ has been a leader in developing monitoring mechanisms for socio-economic rights.¹⁶ Prominent actors within the UN system: the UN Special Rapporteur on extreme poverty and human rights, the Working Group on Elimination of Discrimination Against Women in Law and Practice, CESCR and the OHCHR have similarly been pioneers in advocating for a human rights based approach to poverty. This means there is a wealth of valuable and underutilised secondary material from actors operating within the same human rights system as CEDAW that can aid and enrich in the interpretation of the legal obligations in CEDAW. Second, although UN human rights treaties such as CEDAW often do not have the same effect in domestic law as national constitutions or legislation,¹⁷ international human rights bodies develop the State's open-textured legal obligations. These standards can be used to empower grass-roots organisations and CSOs throughout the world and equally as important it can prompt States to change domestic laws and policies. Examining the relationship between women, poverty and human rights in CEDAW, one of the most widely ratified international human rights treaties, can spark a global dialogue on the importance of recognising that poverty is gender-based and on developing best practices in human rights to ameliorate the lives of women in poverty. Third, as is argued in detail in Chapter 1 and highlighted in Chapter 3, the other treaty based bodies, CESCR and Human Rights Committee (HRC)¹⁸ have not paid sufficient attention to the gender-based dimensions of human rights. CEDAW, on the other hand is, has an exclusive mandate to address

¹⁴The Committee, 'General Recommendation No. 19: on violence against women' (1992) CEDAW/C/GC/19.

¹⁵ CESCR monitors the implementation of ICESCR, 999 UNTS 3 (entered into force 3 January 1976).

¹⁶ CESCR, General comment No. 3: The nature of the State parties obligations (1991) E/1991/23.

¹⁷For a description on the relationship between international and domestic law see James Crawford, *Brownlie's Principles of Public International Law* 8th ed (OUP, 2012).

¹⁸ HRC monitors the implementation of ICCPR, 999 UNTS 171 (entered into force 23 March 1976).

the interaction between gender and human rights and the Committee has a nuanced and sophisticated understanding of women's issues. CEDAW is the ideal treaty regime to being to explore the relationship between women, poverty and human rights. All of these reasons combined demonstrate that there is great value in studying how CEDAW can be used to account for the human rights violations women in poverty experience.

Although prominent actors in the UN are recognising the importance of using human rights to ameliorate women's poverty, there is still much to be done to develop this relationship. The UN Special Rapporteur on extreme poverty and human rights and the OHCHR are discussing women, poverty and human rights in the abstract.¹⁹ By this I mean, they are not interpreting specific legal obligations with reference to women and poverty. The next crucial step is to situate the relationship between women, poverty and human rights in binding international legal commitments. The challenge, which is explored in Chapters 1 and 3, is that none of the main UN human rights treaties, including CEDAW, contain substantive obligation requiring States to remedy women's poverty. This thesis responds to this challenge by focusing on two research questions: (i) how can CEDAW be interpreted so as to enrich the substantive obligations already in the treaty so that States are legally obligated to take all appropriate measures to respect, protect and fulfill the human rights of women in poverty? And (ii) how can this interpretation be successfully integrated into the work of the Committee?

Part I begins by making two normative arguments that underpin the thesis. First, that poverty is a gender-based experience and second that women's poverty is an obstacle to human rights and therefore human rights must be sensitive and contextualised to meet this obstacle. I then argue that because women's poverty is inherently connected to gender-based socio-cultural norms, CEDAW is best international treaty to incorporate the harms of gender-based poverty. As mentioned above,

¹⁹ This is discussed in Chapter 3.

there is no substantive provision in CEDAW referring to poverty. My hypothesis is that this gap can be overcome by interpreting equality and non-discrimination, two norms that permeate all of CEDAW, in a manner which incorporates the role of gender-based poverty in obstructing women's human rights. Part I investigates the legitimacy of this hypothesis and argues that my proposed interpretation of CEDAW is consistent with the text and respects the scope of the State's obligations under the treaty. In Part II the thesis shifts to examine the second research question: how can my proposed interpretation of CEDAW be taken forward? I examine how the Committee currently approaches gender-based poverty to identify precisely how it can be coherently and comprehensively integrated into the activities of Committee. The analysis in Part II reveals the need to reform the State reporting guidelines and to release a General Recommendation on women and poverty. The purpose of this is to ensure that the Committee is in a strong position to make persuasive and authoritative recommendations from a human rights perspective on women's poverty. Furthermore, it is hoped that its advocacy will act as a catalyst for directing attention towards women's poverty and for changing national and international level laws and policies.

I. Methodology

I employ several methodologies to answer the research questions I have posed. In Part I, I draw on the principles of interpretation in public international law²⁰ to make a normative argument for my proposed interpretation of CEDAW. I use Article 31(1) of the VCLT interpretative framework which holds that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' to interpret the text of CEDAW. This methodology ensures that my interpretation remains within the boundaries of the State's consent. Given the horizontal and voluntary nature of international human

²⁰ 1155 UNTS 331 (entered into force 27 January 1980).

rights law to ensure the persuasiveness and authoritativeness of my proposed interpretation it is of primary importance that the arguments in Part I of the thesis respect the limits of international law. The interpretation of CEDAW in Part I is supplemented by the Committee's General Recommendations, Concluding Observations and Individual Communications under the OP-CEDAW.²¹ The legal authority to use these sources to interpret CEDAW is canvassed in Chapter 3. Furthermore, a comparative analysis of similarly situated UN human rights bodies that are also examining the relationship between women, poverty and human rights is used in Part I for two purposes. First, it provides further justification for choosing to situate my thesis in CEDAW. Second, a comparative analysis illuminates the different methods that can be used to bring women's poverty into CEDAW and ultimately strengthens my arguments that interpreting equality and non-discrimination to incorporate the harms of women's poverty is the best method for including it in CEDAW.

In Part II I analyse the work of the Committee in the Concluding Observations and Individual Communications and again draw on comparisons with CESCR to make the normative argument that for the Committee to comprehensively and coherently ensure that women in poverty enjoy their human rights the Committee needs to reform the State reporting guidelines and release a General Recommendation on women in poverty.

II. Chapter Structure

To conclude, I will briefly outline the arguments in the thesis. Chapter 1 sets out the parameters of the problem this thesis seeks to investigate. Drawing on the evidence and academic literature, I first make the argument that poverty is not a gender neutral experience. Women's poverty is not merely the redistribution wrongs of not having access to economic resources but is inherently connected to

²¹ 2131 UNTS 82 (entered into force 22 December 2000).

socio-cultural gender norms that devalue and exclude women. The chapter draws on the arguments of various UN actors to support the claim that gender-based poverty is an obstacle to women's human rights and that it is imperative that the international human rights framework address women's poverty. The chapter then transitions to explain the importance and potential of ICESCR to remedy gender-based poverty but has chosen to situate the analysis of gender-based poverty and international human rights on CEDAW because CEDAW has an exclusive mandate to examine the relationship between gender and human rights. The final section in Chapter 1 explains the central problem Part I of the thesis seeks to answer. Given that there is no provision in CEDAW on gender-based poverty is it possible to amend or interpret CEDAW to fill this gap? I argue that an interpretation of gender equality and non-discrimination can understand how gender-based poverty is an obstacle to all the substantive obligations in CEDAW.

Before turning to investigate the legitimacy of my proposed interpretation, I investigate the drafting history of CEDAW to understand why no obligation on gender-based poverty was included in the treaty. This reveals that there has always been an implicit understanding that CEDAW was to ameliorate gender-based poverty. The changes in the socio-political climate from the time of drafting demonstrate that it is time to explicitly unlock the potential of CEDAW to incorporate the harms of gender-based poverty. Furthermore, the reasons why States did not explicitly include a provision on gender-based poverty provide insights into the nature and scope of the State's obligations under CEDAW which are drawn upon in Chapter 4.

A comparative assessment of similarly situated UN human rights bodies in Chapter 3 demonstrates that there are three models on how to interpret gender-based poverty into CEDAW: through an individual right in CEDAW, comprehensively that engages all provisions in the text or through establishing poverty as a ground of discrimination. These options are then assessed in Chapter 4. The fourth chapter then approaches the task of interpreting the text of CEDAW using

the VCLT interpretative framework. After canvassing the various options identified in Chapter 3, I argue for a comprehensive interpretation of the CEDAW that interprets equality and non-discrimination to incorporate the harms of gender-based poverty. This chapter concludes with an assessment on the nature of the State's obligations to respect, protect and fulfil women's human rights in poverty. The State is not obligated to eliminate poverty rather it needs to ensure that all laws, policies and programmes further the aims of eliminating discrimination against women and achieving gender equality so that women can enjoy their human rights.

Chapter 5 begins to investigate how the interpretation of CEDAW can be included into the work of the Committee. The starting point is to analyse how the Committee currently understands gender-based poverty in the Concluding Observations and Individual Communications. This investigation demonstrates that the Committee is working towards interpreting equality and non-discrimination to incorporate the harms of gender-based poverty but it has not done this consistently or comprehensively. Chapter 6 maps the reasons for the Committee's current inconsistent approach to gender-based poverty by analysing the publically available material submitted to the Committee during the periodic reporting process. This chapter points towards reforming the reporting guidelines to ensure the Committee has the necessary information to evaluate the State's law, policies and programmes during the periodic reporting process. To further engage the State and CSOs, it is also crucial to release a General Recommendation on women and poverty.

A General Recommendation on women and poverty is an evolution in international human rights law. It would be the first General Comment or Recommendation from any of the UN human rights treaty bodies that focuses exclusively on poverty. To ensure that it is a persuasive and authoritative statement on women's poverty, Chapter 7 analyses past evolutionary General Recommendations and Comments from the Committee and CESCR. In Chapter 8 the arguments

from the thesis are drawn together to propose a General Recommendation on women and poverty. The General Recommendation explains the legal basis for interpreting CEDAW to incorporate the harms of gender-based poverty, re-contextualises the obligations in CEDAW in light of poverty and share best practices to ameliorate the lives of women in poverty.

CHAPTER 1

MAPPING THE PROBLEM

I. Introduction

Poverty is an obstacle to human flourishing. The OHCHR explains that the ‘defining feature of a poor person is that she has very restricted opportunities to pursue her well-being.’¹ The work of the UN Special Rapporteur on extreme poverty and human rights demonstrates that poverty is also a serious impediment to the enjoyment of human rights. She argues ‘poverty is an urgent human rights concern... it [is] characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights.’² Alongside the recognition of the relationship between poverty and human rights, there is a growing understanding that similar to violence, poverty is gender-based. The low valuation of work traditionally assigned to women, their role in reproduction, their disproportionate responsibility for care giving, their exclusion from public life, education, credit and property and prejudices and stereotypes on the role and value of women create a unique experience of human rights violations which is different from men who live in poverty.

The evidence demonstrates that gender-based poverty is a contributing factor to women’s non-enjoyment of their human rights.³ However, none of the UN human rights treaties explicitly refer to women and poverty. There are no direct obligations on the State to understand how gender and poverty interact to limit women’s human rights and no direct obligations to take appropriate measures to remedy gender-based poverty. ICESCR is seemingly the logical choice to develop an

¹ OHCHR, ‘Human Rights and Poverty Reduction: A Conceptual Framework’ (2004) HR/PUB/04/1 [15].

² UN Special Rapporteur on extreme poverty and human rights, ‘Final draft of the guiding principles on extreme poverty and human rights’ (2012) A/HRC/21/39 [3].

³World Bank, ‘Voice and Agency: Empowering Women and Girls for Shared Prosperity’ (World Bank, 2014) and World Bank, ‘The World Development Report: Gender Equality and Development’ (World Bank, 2012).

understanding of the relationship between gender, poverty and human rights as it protects various socio-economic rights. The rights in ICESCR are to be enjoyed equally on the basis of sex, but at the same time the rights in the treaty are to be progressively realised.⁴ ICESCR is focused on the development of resources to realise rights and ensuring that development is equal between men and women. It is important to ensure that ICESCR is sensitised to the human rights obstacles women in poverty face. This thesis, however, focuses exclusively on the relationship between gender, poverty, equality, non-discrimination and human rights in CEDAW.

CEDAW with its exclusive focus on women is in principle the ideal treaty body to comprehensively understand the problem of gender-based poverty. The obligations in CEDAW's unique perspective is that it investigates from an asymmetrical standpoint how gender discrimination and inequality negatively impact women's human rights and proposes tailored solutions to remedy the gendered aspects of human rights violations. It is a strong advocate for women's issues including modifying negative gender stereotypes.⁵ Despite this commitment to women, there is a gap in CEDAW. There is no specific obligation in CEDAW on women's poverty. Although the preamble notes that the State parties are 'concerned that in situations of poverty women have the least access to food, health, education, training and opportunity for employment and other needs,' there is no substantive provision in the treaty to mirror this concern.

There is a choice among international human rights treaties on where to develop the relationship between poverty, gender and human rights. My thesis argues that gender-based poverty is a human rights issue that is best dealt with through CEDAW, notwithstanding its silence as to poverty. There are two important reasons for preferring CEDAW. While protecting socio-economic rights is important, it is not a complete solution to gender-based poverty. Gender-based poverty is a

⁴ Article 3 and Article 2(1) of ICESCR.

⁵ Article 5(a) of CEDAW.

complex, cross-cutting problem. Women in poverty experience a reinforcing web of human rights violations, including violations of their civil and political rights.⁶ Unlike ICESCR, CEDAW protects both civil and political and economic and social rights. Therefore, it offers the best option of understanding this web of violations. Furthermore, CEDAW has a sophisticated understanding of the relationship between gender and human rights. It has a strong mandate to understand how gender and poverty combine to deny women their human rights. CEDAW can capture the role socio-cultural norms play in contributing to women's poverty.⁷ Moreover, CEDAW's commitment to equality and non-discrimination implicitly includes a commitment to redress the gender-based aspects of poverty. In this thesis, I make the case that gender equality and non-discrimination in CEDAW can be interpreted so as to ensure that the treaty accounts for how poverty contributes to women's non-enjoyment of their human rights.

The thesis is divided into two parts. The first part asks: given the absence of any specific obligation, can CEDAW be interpreted to bring gender-based poverty within the auspices of the treaty? I argue that equality and non-discrimination, two norms that permeate all of CEDAW, offer a persuasive and compelling basis to ensure a rich understanding of how gender-based poverty limits the rights already articulated in CEDAW. There are two over-arching reasons for preferring this approach. First, understanding gender-based poverty as an issue of gender equality and non-discrimination captures and emphasises the complex, entrenched, interlocking and gender-based nature of women's poverty. Second, this approach ensures that all of the substantive obligations in CEDAW are understood in light of the experiences of women in poverty. The second part of the thesis broadly investigates how the Committee can take this interpretation forward. I examine how the Committee currently approaches the problem of gender-based poverty and analyse what factors

⁶ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 2) [3].

⁷ Article 5(a) of CEDAW.

contribute to it focusing on gender-based poverty. The final chapter brings these insights together to propose a General Recommendation on women and poverty.

The purpose of this chapter is first to map the problem I have identified and second to outline the solution I have proposed, which is then investigated in greater detail in the thesis. The first part of this chapter investigates the fundamental problem this thesis seeks to address: gender-based poverty. Relying on women's experiences and drawing on the academic literature gender-based poverty is defined as the redistribution wrongs of not having access to economic resources coupled with the recognition and participation harms that exclude and devalue women and restrict their agency. The second part argues that gender-based poverty is a serious obstacle to women's human rights. The third part explores in greater detail why CEDAW is the ideal treaty body to understand the relationship between human rights and gender-based poverty by investigating the obligations in ICESCR. The fourth part explains the gap in CEDAW: that there is no comprehensive obligation requiring States to ameliorate the situation of women in poverty. It is argued that this gap is problematic given the evidence that poverty is gender-based and an impediment to women's human rights. The final part explains why an interpretation via equality and non-discrimination is the best available option to bring gender-based poverty into the CEDAW framework and then maps out the impact this interpretation could have on the work of the CEDAW Committee.

II. Defining Poverty and Gender-Based Poverty

Historically poverty has been 'defined as insufficient income to buy a minimum basket of goods and services.'⁸ This definition of poverty reveals how many people are unable to access good and

⁸ CESCR, 'Substantive Issues arising in the implementation of ICESCR: Poverty and ICESCR' (2001) E/C.12/2001/10 [7].

services. Nearly 870 million people were undernourished between 2010-2012.⁹ The UN estimates that one in five people in the developing world live on less the \$1.25 a day.¹⁰ However, reducing poverty to economic want is a limited understanding. Poverty has multiple, interlocking and reinforcing dimensions. People who live in poverty report that poverty is more than material disadvantage and it also encompasses powerlessness, exhaustion, exclusion, rejection, isolation, loneliness, insecurity, vulnerability, invisibility, worry, fear, anger, low self-confidence, frustration, stigma, humiliation and shame.¹¹ The study found that poor people regularly indicate they are trapped in a web of powerlessness and voicelessness.¹² The definition of poverty has to reflect the lived experience of the people who actually live in poverty.

While many organisations, such as the UNDP and the OHCHR, have accepted the limitations of defining poverty as an economic disadvantage, there is no consensus on precisely how a broader concept of poverty or gender-based poverty should be defined. In 2005, UNIFEM observed that there ‘are several broad approaches to understanding and measuring poverty and well-being.’¹³ The OHCHR and CESCR have both used the capabilities theory to define poverty. In this section I examine this theory and how it has been used by various UN bodies. This section concludes by analysing how the capabilities theory can be modified to capture gender-based poverty.

The most prominent understanding of poverty at the UN derives from Sen and Nussbaum’s capabilities approach. This has been embraced by the OHCHR, CESCR and the UNDP-Human

⁹ The UN FAO, ‘The State of Food Insecurity in the World’ (2012) 1
<<http://www.fao.org/docrep/016/i2845e/i2845e00.pdf>>.

¹⁰ *The Millennium Development Report: 2014* 8-9
<<http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf>>.

¹¹ Deepa Narayan et al *Voices of the Poor: Crying out for Change* (OUP and World Bank, 2000) 31.

¹² *ibid* 265.

¹³ UNIFEM, ‘Progress of the World’s Women 2005: Women, Work and Poverty’ 15
<http://www.unifem.org/attachments/products/PoWW2005_eng.pdf>.

Development Index (HDI).¹⁴ This approach focuses on ‘human capabilities and on the choices or freedom of poor people.’¹⁵ The capabilities approach explained by Nussbaum transcends a focus on income. It does not ask ‘How much in the way of resources is Vasanti able to command?’ Instead it asks ‘What is Vasanti actually able to do and be?’¹⁶ The purpose of this approach is to make the individual a dignified being that can shape her life.¹⁷ Nussbaum’s list of capabilities required for humanity is comprehensive: life; bodily integrity; sense, imagination and thought; emotions; practical reason; affiliation; other species; play; being able to participate in effective political choices and being able to hold property.¹⁸ Although there is no provision for material resources, Nussbaum acknowledges that the capabilities will require a ‘greater material equality than exists in most societies, since we are unlikely to get all citizens above a minimum threshold of capability for truly human functioning without some redistributive policy.’¹⁹

Prominent UN bodies have embraced this understanding of poverty. The UNDP has used the capabilities theory to devise the HDI, where poverty is measured on life expectancy at birth, years of education and gross national income per capita.²⁰ Other UN bodies have also connected a denial of basic capabilities to poverty. CESCRR adopts a multi-dimensional definition of poverty grounded in the capability theory. Poverty is ‘as a human condition characterized by sustained or chronic

¹⁴ OHCHR (n 1); Stephan Klasen and Dana Schuler, ‘Reforming the Gender Related Development Index and Gender Empowerment Measure: Implementing Some Specific Proposals’ (2011) 17(1) *Feminist Economics* 1; Sabina Alkrine, ‘The Missing Dimensions of Poverty Data: An Introduction’ (OPHI Working Paper Series 00, 2007); OPHI <<http://www.ophi.org.uk/>>.

¹⁵ *Progress of the World’s Women 2005* (n 13) 15.

¹⁶ One of the women Martha Nussbaum uses in *Women and Human Development: The Capabilities Approach* (CUP, 2000).

¹⁷ *ibid* 72.

¹⁸ *ibid* 79-80. Sen chooses not to define a set list of capabilities arguing instead that this should be left to the reasoning of the society. See Amartya Sen, ‘Human Rights and Capabilities’ (2005) 6(2) *J of Hum Dev* 151-66.

¹⁹ *ibid* 86.

²⁰ UNDP, ‘Human Development Index’ <<http://hdr.undp.org/en/statistics/hdi/>>.

deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.²¹ The OHCHR stresses that poverty is the failure to achieve a basic level of capabilities.²² Poverty is ‘the absence or inadequate realization of certain basic freedoms, such as the freedoms to avoid hunger, disease, illiteracy and so on.’²³ There is still a role for material disadvantage but it is more nuanced than purely economic definitions of poverty. Poverty is not low income but an inadequate command over economic resources that ‘must play a role in the causal chain leading to the non-fulfillment of human rights.’²⁴

A multi-dimensional definition of poverty is essential to accurately capture what it means to live in poverty. It is crucial to appreciate the different factors that contribute to poverty so that poverty reduction laws, programmes and policies not only address the experience of poverty but also its root causes. The European Court of Human Rights made a similar observation in respect to understanding the racial overtones of violence against minorities: ‘Treating racially-induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with [the non-discrimination provision in the European Convention on Human Rights].’²⁵ To meaningfully address and remedy poverty is it essential to appreciate its causes. The causes of poverty are complex and inter-locking. Natural disasters, conflict and post-conflict situations, climate change, endemics, large-scale tax evasions, tax abuse and illicit

²¹ CESCR, ‘Poverty and ICESCR’ (n 9) [8].

²² OHCHR (n 1) 7.

²³ *ibid* 17.

²⁴ *ibid* 10.

²⁵ *Ciorcan v Romania*, Application No 29414/09 and 44841/09, Merits, 27 January 2015 [158].

financial flows, the decisions of global financial institutions all cause and contribute to poverty. There is increasing recognition that ‘discrimination and exclusion are among the major causes and consequences of poverty...persons living in poverty often experience disadvantage and discrimination’ based on different ideas and experiences.²⁶ This thesis exclusively examines the relationship between one status-based ground, gender, and poverty.²⁷ This section examines the experience of women who live in poverty and the sex- and gender-based causes of poverty to derive at a sophisticated and nuanced definition of gender-based poverty

Women’s experience of poverty is inherently multi-faceted. Poverty for women is not merely insufficient income but is ‘as much about agency compromised by abuse, stress, fatigue and voicelessness.’²⁸ While women in poverty may be working outside of the home ‘the demanding responsibilities of running a household remain largely with them.’²⁹ Due to this double burden women in poverty have very little time for skills training, community events or socialising.³⁰ Thus, women’s economic deprivation is connected to and re-enforced by compromised autonomy, exclusion from social life, political marginalization, stigma and bodily and psychological insecurity that are rooted in their gender. This is consistent with the gender neutral definition of multi-dimensional poverty canvassed above. However, it is necessary to appreciate that the economic disadvantage, compromised autonomy, exclusion and participation harms women in poverty experience are often rooted in gender-based social norms. For women in poverty it is the unique interaction between gender-based socio-cultural norms and an inadequate command over economic

²⁶ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principle’ (n 2) [8].

²⁷ OHCHR (n 1) 8.

²⁸ Caroline Sweetman, *Gender, Development and Poverty* (Oxfam, 2002).

²⁹ Narayan (n 11) 114.

³⁰ *ibid.*

resources that result in women being denied their capabilities. The conceptualization of gender-based poverty therefore needs to be crafted to incorporate and reflect the lack of power poor women experience. It is important to conceptualise gender-based poverty as distinct from poverty because for many women the reason they live in poverty is routinely underpinned by patriarchal power relationships between men and women. If women's poverty is to be meaningfully addressed it is important to understand this predominant cause: gender social norms. At the same time, it is important to acknowledge that there may be situations where women experience poverty that is not connected to their gender; for example an epidemic or natural disaster. However, the response to these experiences and situations would have to be carefully analysed to ensure that remedial measures are not based on prejudicial and stereotypical gender norms that create or exacerbate gender-based poverty.³¹ Below I examine how gender and poverty interact to define gendered poverty in a manner that accurately reflects the causes and lived experiences of women in poverty.

While the capabilities approach offers important insights, it is important to identify the role of gender in denying capabilities. Burrows writes that for 'most women, what it is to be human is to work long hours in agriculture or the home, to receive little or no remuneration and to be faced with political and legal processes which ignore their contribution to society and accord no recognition of their particular needs.'³² These factors to varying degrees apply to men in poverty, but they operate differently for women because the reasons for their poverty are different. The gender division of labour in both the formal and informal labour market, the lack of legal regulation of the informal labour market, the concentration of women in low paying and often precarious jobs, the low valuation of work traditionally assigned to women, unequal pay for work of equal value, gender

³¹ The Committee, 'General Recommendation No. 18 on women and AIDS' (1990) CEDAW/C/GC/18.

³² Noreen Burrows, 'International Law and Human Rights: The Case of Women's Rights' in T. Campbell et al (ed) *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986) 82.

power imbalances in the home, the disproportionate amount of unpaid care work they perform and the limited access to education, bank loans and land all combine to create a unique experience for poor women.³³

Cultural norms exclude women from public discourse, marginalise their voice within the household and limit their ability to access economic resources. Socio-cultural norms dictate that women perform a disproportionate amount of unpaid care work. This means they have fewer opportunities for education and so are less likely to be economically independent.³⁴ In startling numbers they do not have control over resources.³⁵ If a woman does try to assert her property rights she may be perceived as egotistical and selfish by the community.³⁶ Often the lack of control over land or other property is dictated by the law. Family, property and inheritance law are constructed to ensure women do not have control over resources.³⁷ Marriage, divorce or widowhood can detrimentally effect a woman's financial situation.³⁸ Women bear a 'greater cost than men upon the breakdown of the family and may be left destitute upon widowhood.'³⁹ Due to the socio-cultural norms and power imbalances in the household, women may receive less than men even though there are sufficient resources to meet a minimum basic needs standard.⁴⁰ Nussbaum illustrates this

³³ Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 Can J of W and the L 184; Sweetman (n 29).

³⁴ The World Bank, 'World Development Report 2012' (n 3) 82.

³⁵ *ibid* 80-81.

³⁶ Ingunn Ikdahl, 'Property and Security: Articulating Women's Right to their Homes' in Anne Hellum and Henriette Singding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 270

³⁷ World Bank, 'Voice and Agency' (n 3) Chapter 5-Control Over Land and Housing.

³⁸ World Bank, 'World Development Report 2012' (n 3) Chapter 4-Promoting Women's Agency.

³⁹ The Committee, 'General Recommendation No. 29: Economic consequences of marriage, family relations and their dissolution' (2013) CEDAW/C/GC/29 [4].

⁴⁰ Sylvia Chant, 'Re-thinking the 'Feminization of Poverty' in relation to Aggregate Gender Indices' (2007) 7:2 J of Hum Dev 201.

point by examining the daily life of Jayamma, a woman who lives in southern India. Jayamma ‘takes sugar in her tea, for example, while she allows her husband and her children to take the more expensive milk.’⁴¹ Calculating that the home has access to resources cannot account for the fact that Jayamma does not have milk in her tea. Women like Jayamma are often powerless ‘to determine the way in which livelihoods are made and money is spent.’⁴² As a further example women and girls may undergo harmful cultural practices which limit their ability to complete their education and fully participate in the community.⁴³ The CEDAW Committee has also recently observed that ‘women often do not equally enjoy their family’s economic wealth and gains.’⁴⁴

To truly capture one of the predominant causes of women’s poverty and women’s experiences it is necessary to unmask the role of gender. Fraser’s redistribution and recognition paradigm is helpful here.⁴⁵ Redistribution harms are ‘rooted in the economic structure of society’ and involve the economic deprivation of the individual.⁴⁶ Recognition harms, on the other hand, manifest in cultural domination, non-recognition and disrespect and the remedy lies in ‘re-evaluating disrespected identities [and] positively valorising cultural diversity.’⁴⁷ Fraser argues ‘two dimensionally subordinated groups suffer both mal-distribution and misrecognition in forms where neither of these injustices is an indirect effect of the other, but where both are primary.’⁴⁸ She uses gender as

⁴¹ Nussbaum (n 16) 57.

⁴² Sweetman (n 28) 4.

⁴³ The Committee and CCRC, ‘General Recommendation No. 31: on harmful practices’ (2014) CEDAW/C/GC/31 [14], [56], [61].

⁴⁴ ‘General Recommendation No. 29’ (n 38) [1].

⁴⁵ Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A political-philosophical exchange* (Verso, 2003).

⁴⁶ *ibid* 13.

⁴⁷ *ibid*.

⁴⁸ *ibid* 19.

the classic example of a two dimensional subordinate group. Another good is the struggle for equal pay for work of equal value. Fredman observes ‘the value system on which pay is based is deeply gendered, reflected in the inferior recognition afforded to women’s work in the labour market’ which results in lower pay.⁴⁹ Lower pay itself contributes to the low status of work done by women. Therefore, it is important to include in the definition of gender-based poverty the recognition harms associated with gender.

Theories of justice often place a primary role on participation. This in turn highlights the harm of exclusion. Fraser’s theory places the parity of participation at its normative core. She argues ‘the distribution of material resources must be such as to ensure participant’s independence and voice.’⁵⁰ Similarly, Young places central importance on participation in decision making processes.⁵¹ Both Fraser and Young argue that to remedy both the redistribution and recognition harms of gender, decision making processes must be more inclusive and emphasise the importance of participation. It is important to conceptualise participation as including a voice in both public and private decision making processes because as the CEDAW Committee notes ‘women in both developing and developed countries generally share the experience of being worse off economically than men in family relationships.’⁵² This is reflected in the example of Jayamma who does not have access to household resources. Equal participation in the home is vital for women who live in poverty.

Drawing all these insights together, gender-based poverty is conceptualised as the redistribution wrongs of not having access to economic resources coupled with the recognition and

⁴⁹ Sandra Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23 SAJHR 214, 219.

⁵⁰ Fraser and Honneth (n 45) 36.

⁵¹ Iris Young, *Justice and the Politics of Difference* (PUP, 1990) 36.

⁵² ‘General Recommendation No. 29’ (n 38) [5].

participation harms that devalue women and exclude them from public and private life. It is the combination both of material disadvantage and gendered socio-cultural norms that limit the ability of women in poverty to create a meaningful life.

Before proceeding to assessing how the international human rights framework understands gender-based poverty and human rights, it is important to clarify two issues. The first issue is of terminology. In the literature there is, at times, a distinction drawn between extreme poverty and poverty. Extreme poverty is marked by a prolonged and vicious degree of powerlessness, stigmatization, exclusion and material deprivation.⁵³ While poverty has the same features it is generally understood not to engage the same level of severity. The distinction may have some legal significance. Arguably circumstances of extreme poverty could be classified as cruel, inhuman or degrading treatment, violating Article 7 of ICCPR. The text of CEDAW does not distinguish between extreme poverty and poverty. Nor are there provisions in CEDAW similar to Article 7 in ICCPR. This means the question of which rights apply only in cases of extreme gender-based poverty does not arise in the context of CEDAW. CEDAW is designed to apply to all women regardless of their geographical, cultural, religious, social or economic context.⁵⁴ CEDAW is meant to empower all women regardless of their identity, circumstances or context. Therefore no distinction will be drawn between gender-based poverty and extreme gender-based poverty. It is interesting to note that although the mandate of the Special Rapporteur is on extreme poverty and human rights, she emphasises that the guiding principles on extreme poverty ‘should not be interpreted as indicating that specific obligations or recommendations may not also apply to persons

⁵³ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 2) [4].

⁵⁴ The Committee, ‘General Recommendation No. 25: on temporary special measures’ (2004) CEDAW/C/GC/25 [14].

living in poverty generally.⁵⁵ The principles for a human rights-based approach to poverty are similarly applicable to gender-based poverty and extreme gender-based poverty.

There is another important reason why gender-based poverty as a whole must be dealt with under an international human rights framework. Extreme gender-based poverty tends to focus on conditions in the developing world.⁵⁶ Only focusing on extreme gender-based poverty has the potential to obscure poverty in the developed world. However, women in both the developed and developing world suffer from poverty. CESCR also advocates poverty eradication for all States ‘no matter what their stage of economic development.’⁵⁷ Therefore, no distinction is drawn between these two conceptions of poverty. The definition of gender-based poverty, while including cases of extreme gender-based poverty, is broader to include gender-based poverty that is not marked by a degree of severity.

Second, the experience and causes of poverty are complex and cross-cutting. Similarly, gender-based poverty cannot be attributed to one single actor. For women both private and public actors within the State can create and perpetuate gender-based poverty. There is increasing recognition that actors external to the State can also play a meaningful role in gender-based poverty. The Working Group on Discrimination Against Women in Law and Practice observes that ‘mobility of corporations and free trade agreement have resulted in the amassing of political power vis-as-vis host States...the move of production by transnational corporations to export processing zones, the reliance on home and sweatshop sectors, and land dispossession by extractives industries are a locus

⁵⁵ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 2) fn 1.

⁵⁶ The World Bank, ‘Poverty: Data’ <<http://data.worldbank.org/topic/poverty>>. There is no data on poverty from Western Europe, North America, Australia or New Zealand.

⁵⁷ CESCR, ‘Poverty and ICESCR’ (n 8) [19].

for corporate abuse and violation of human rights, and most of the victims are women.’⁵⁸ Salomon also notes that one of the consequence of the growth of organisations like the World Bank and International Monetary Fund ‘is that governments have increasingly less control in determining their economic and social policies within their own territories, particularly developing countries.’⁵⁹ UN Women argues ‘that national and international macroeconomic policies ‘do not adequately consider the importance of unpaid care and domestic work...they have also artificially constrained the resources available to governments to finance policies and programmes for gender equality.’⁶⁰ The challenge is that the international human rights regime has been developed with a statist framework, only States are bound by human rights obligations and the treaty bodies only have authority to monitor the actions of state parties. There is an increasingly attention to how non-state actors such as transnational corporations and international financial institutions can be held accountable for human rights violations and how states can work together to tackle global problems, such as gender-based poverty.⁶¹ It is outside the scope of this thesis to engage in depth with how to hold external actors accountable. However, in Part II the thesis makes some tentative contributions to developing the accountability of non-state actors and the global economic order for gender-based poverty drawing on the State’s duty to cooperate and the State’s duty to protect.

⁵⁸ Working Group on Discrimination Against Women in Law and Practice, ‘Discrimination against women in economic and social life, with a focus on economic crisis’ (2014) A/C/26/39 [69].

⁵⁹ Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, 2007) 45-6.

⁶⁰ UN Women, ‘Progress of the World’s Women 2015-2016: Transforming Economies and Realising Rights’ (UN Women, 2015) Chapter 4.

⁶¹ OHCHR, Report of the United Nations High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights (2005) E/CN4/2005/91.

III. Gendered Poverty as an Obstacle to Human Rights

This section canvasses the relationship between poverty and human rights and then examines the unique relationship between gender-based poverty and human rights. This is then used in the proceeding sections to justify using CEDAW to include gender-based poverty. This thesis is firmly situated within the UN human rights framework; therefore I investigate in this section how the relevant UN actors have conceptualised the relationship between poverty and human rights.

The UN human rights actors consistently explain that poverty is an obstacle to human rights and a cause of human rights violations. As explained above, the OHCHR holds that poverty is legally relevant when the lack of control over economic resources is causally connected to the denial of human rights.⁶² The HRC and CESCR both routinely conceptualise poverty as an obstacle to human rights and this is explored in greater detail in Chapter 3. The UN Special Rapporteur on extreme poverty and human rights also refers to poverty as an obstacle to human rights.⁶³ She notes that poverty is both a cause and consequence of human rights violations.⁶⁴ This relationship avoids determining if there is a right to be free from poverty but examines how poverty acts as an obstacle to the enjoyment of established human rights.

Both the OHCHR and UN Special Rapporteur on extreme poverty and human rights explain that all rights are at stake when understanding and remedying poverty. The Special Rapporteur clarifies that poverty is ‘characterised by multiple reinforcing violations of civil, political, economic, social and cultural rights.’⁶⁵ People in poverty ‘are confronted by the most severe obstacles to accessing their rights and entitlements. Consequently, they experience many interrelated

⁶² OHCHR (n 1) 10.

⁶³ See UN Special Rapporteur on extreme poverty and human rights, ‘Draft guiding principles on extreme poverty and human rights’ (2010) A/HRC/15/41 [34].

⁶⁴ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 2) [3].

⁶⁵ *ibid.*

and mutually reinforcing deprivations that prevent them from realising their rights and perpetuate their poverty.⁶⁶ An example helps illustrate this point. If children are under-nourished because their family cannot afford nutritious food, they are more likely to perform poorly in school.⁶⁷ Often due to negative stereotypes and stigmatization, deprived neighbourhoods are not as well serviced and poor children have to ‘travel a long way to access public services such as health care, education and sanitation facilities.’⁶⁸ People in poverty lack voice, agency and power to tap into the political process to advocate for food subsidies or new schools.⁶⁹ Without an education it is difficult to ensure decent employment, which traps people in exploitative work.⁷⁰ A lack of education can isolate people in poverty from participating in public life and ‘entrenches stigmatization that often labels [them] as lazy, criminally minded or incompetent further excluding [them] and hampers the realisation of their rights.’⁷¹ This is one example of the inter-locking human rights violation that routinely occur for people in poverty.

The OHCHR holds that ensuring the enjoyment of *all* human rights is necessary to effectively account for the harms of poverty.⁷² They explain that while poverty might be defined by the lack of traditional socio-economic rights, ‘an effective anti-poverty strategy will certainly have to address a much wider range of human rights. This is because human rights can be relevant to poverty in multiple ways.’⁷³ They identify three ways that human rights are relevant to poverty:

⁶⁶ *ibid* [4].

⁶⁷ UN Special Rapporteur on extreme poverty and human rights, ‘Draft Guiding Principles’ (n 63) [24].

⁶⁸ *ibid* [26].

⁶⁹ OHCHR (n 1) 13-14.

⁷⁰ UN Special Rapporteur on extreme poverty and human rights, ‘Draft Guiding Principles’ (n 63) [24].

⁷¹ *ibid* [31].

⁷² OHCHR (n 1) 11.

⁷³ *ibid*.

constitutive, instrumental and constraint-based relevance.⁷⁴ Constitutive relevance is when inadequate resources result in a denial of the right to health or food. To explain instrumental relevance, the OHCHR draws on Sen's work on famines. Sen's analysis demonstrates that famines never occur when there is 'a reasonable degree of civil-political freedom.'⁷⁵ Civil and political rights give the individual voice and allow them to hold the State accountable. This in turn ensures that the State takes measures to realise socio-economic rights, which ultimately prevent famines. In relation to constraint-based relevance, human rights can 'have a bearing on the nature and content of poverty reduction strategies by ruling out certain types of actions as impermissible.'⁷⁶ A poverty reduction strategy can include population control, but 'it would not be permissible to adopt draconian measures such as forced sterilization that violate people's personal integrity and privacy.'⁷⁷

For women in poverty, it is both their gender and material deprivation that combine to act as an obstacle to human rights; 'gender inequality causes and perpetuates poverty.'⁷⁸ Women 'are disproportionately represented among the poor owing to the multifaceted and cumulative forms of discrimination that they endure.'⁷⁹ The UN Special Rapporteur on the right to food notes that women face discrimination not only in the law but also in the result of 'social norms or customs, linked to certain stereotypes about gender roles; unequal access to productive resources such as land and to economic opportunities, such as decent wage employment; unequal bargaining positions within the household; gendered division of labour within households.'⁸⁰ The Working Group also

⁷⁴ *ibid.*

⁷⁵ *ibid.*; Amartya Sen, *Development as Freedom* (OUP, 1999) 188.

⁷⁶ *ibid.* 12.

⁷⁷ *ibid.* 12.

⁷⁸ UN Special Rapporteur on extreme poverty and human rights, 'Draft Guiding Principles' (n 63) [45].

⁷⁹ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 2) [23].

⁸⁰ UN Special Rapporteur on the right to food, 'Women's rights and the right to food' (2013) A/HRC/22/50 [2].

observes that ‘discriminatory legislation, often through application of personal law systems, continues to create an almost impassable barrier to women’s equal economic and social opportunity.’⁸¹ These forms of discrimination amount to serious human rights violations against women.⁸² Gender discrimination not only plays a pivotal role in condemning women to lives of poverty, it is also a serious obstacle limiting women’s rights, such as the right to food, education, decent work and land. It is the combination of gender discrimination, inequality and poverty that prevents women from fully enjoying their human rights. This thesis brackets out the question if there is a right to be free from poverty or gender-based poverty and focuses on how gender-based poverty interacts and violates the commitment in CEDAW to eliminate discrimination against women and achieve gender equality so that women can enjoy their human rights and fundamental freedoms.

IV. Why Not ICESCR?

Gender-based poverty is a multi-dimensional and a complex obstacle to women’s human rights. Seemingly the first choice to understand the problem of gender-based poverty is ICESCR. This section explains how ICESCR could potentially be interpreted to tackle gender-based poverty but argues that due to the nature of the State’s obligations under ICESCR and CEDAW, this thesis exclusively examines how gender-based poverty can be incorporated into CEDAW.

Economic, social and cultural rights are perceived as the human rights response to poverty.⁸³ ICESCR guarantees rights to gainful employment, fair wages and equal remuneration for work of equal value, social security, maternity benefits, standard of living and the continuous improvement

⁸¹ Working Group (n 58) [14].

⁸² UN Special Rapporteur on the right to food (n 80) [4].

⁸³ Daniel Whelan and Jack Donnelly, ‘The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight’ (2007) 29 Hum Rts Q 908, 930-931.

of living conditions, health and education.⁸⁴ All of these are crucial elements in remedying women's poverty. CESCR notes that these rights 'lie at the heart of the Covenant [and] have a direct and immediate bearing upon the eradication of poverty.'⁸⁵ Moreover, under Article 3 States are required to ensure 'the equal right of men and women to the enjoyment of all' rights in ICESCR. CESCR explains that Article 3 'should be read in conjunction with each specific rights guaranteed under' ICESCR. This means for example, although, Article 11 of ICESCR holds 'everyone has a right to an adequate standard of living for himself and his family' CESCR has clarified that this should be interpreted from a gender perspective. The right to an adequate standard of living requires the State to recognise women as the head of the household, to ensure women have the right to own economic resources, to ensure women have control over food production and address gender-based social norms that dictate women eat less nutritious foods.⁸⁶ This is a sophisticated approach as it addresses both the redistribution and recognition wrongs of gender-based poverty. At the same time, there has been criticism that CESCR has not been consistently or comprehensively integrated a gender perspective into its interpretation of ICESCR.⁸⁷ Thus, the full potential of ICESCR to remedy the harms of gender-based poverty is just beginning to be uncovered.

However, this thesis focuses exclusively on how incorporating the harms of gender-based poverty into CEDAW. First, CEDAW under Article 5 has a very strong mandate to address and remedy gender-based social norms that disadvantage women. Gender-based poverty is deeply rooted

⁸⁴ Articles 6-13 of ICESCR.

⁸⁵ CESCR, 'Poverty and ICESCR' (n 9) [5].

⁸⁶ CESCR, 'General Comment No.16: The equal right of men and women to the enjoyment of economic, social and cultural rights' (2005) E/C.12/2005/4 [28].

⁸⁷ Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights 1; Dianne Otto, 'Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' (2002) 14 Can J of W and the L 1; Sandra Fredman, 'Engendering socio-economic rights' in Anne Hellum and Henriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International Regional and National Law* by (CUP, 2013) 232.

in gender-based social norms, CEDAW and the CEDAW Committee are in a strong position to uncover the gender-based aspects of women's poverty. Second, the obligations in CEDAW and ICESCR are different. Under Article 2(1) of ICESCR States are obligated 'to take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights' in ICESCR. Alston and Quinn explain that there is an immediate obligation to take steps that aim at achieving the full realisation of economic, social and cultural rights and the "progressive realisation" obligation and "maximum available resources" depends on the State's level of economic development.⁸⁸ ICESCR is focused on both immediate steps and the progressive development of resources to realise human rights. There is a further immediate obligation in ICESCR. Article 3 guarantees equality between men and women in economic, social and cultural rights. CESCR explains that this is 'a mandatory and immediate obligation of State,'⁸⁹ but it does not explain how this immediate commitment to gender equality interacts with the progressive realisation standard. Reading these two provisions in together suggests that all immediate steps taken to progressively realise rights need to further equality between men and women. The States measures to realise an adequate standard of living or health care under ICESCR cannot disproportionately favour men.

CEDAW, on the other hand, is premised on eliminating discrimination and achieving gender equality. The Committee explains this means the obligations in CEDAW are to be immediately realised.⁹⁰ Using the obligations in CEDAW to alleviate gender-based poverty places the State obligation on a different standard. The Working Group of Discrimination Against Women in Law and Practice explains that the commitment to gender equality 'concerns the division of existing resources, not the development of resources, and therefore the principle of progressive realisation

⁸⁸ Philip Alston and Gerald Quinn, 'The Nature and Scope of the State Parties' Obligation under ICESCR' (1987) 9 HRQ 156.

⁸⁹ CESCR, 'General Comment No. 16' (n 87) [16].

⁹⁰ The Committee, 'General Recommendation No. 28: on the core obligations' (2010) CEDAW/C/GC/28 [15].

does not apply.⁹¹ This means there is an immediate obligation to remedy the discriminatory and unequal laws, policies and programmes that create and contribute to gender-based poverty. This is an important difference and further justifies examining how CEDAW can immediately incorporate and remedy the harms of gender-based poverty. The challenge of an immediate obligation to achieve gender equality in relation to gender-based poverty is further explored in detail in Chapter 4.

Situating gender-based poverty in CEDAW is not to be taken as marginalising the role of ICESCR in remedying gender-based poverty. A rich understanding on gender-based poverty can and should be incorporated into ICESCR and the other human rights instruments. This approach is modelled after Van Leeuwen’s insights that the UN has a two-pronged complementary approach to women’s human rights through the ‘principles of non-discrimination and equality in [the] *mainstream* human rights treaties and through these principles in [the] *women-specific* human rights treaties.’⁹² A sophisticated approach to gender-based poverty situated in the women-specific treaty can enrich the other human rights treaties. There is a strong precedent for this approach. In relation to gender-based violence, the CEDAW Committee was one of the first voices connecting violence against women to patriarchy and CESCR now adopts a comprehensive rights-based approach to violence.⁹³

V. The Gap in CEDAW

The failure of the mainstream international human rights system to take women’s human rights seriously prompted the UN to draft a treaty that exclusively focuses on the rights of women:

⁹¹ Working Group (n 58) [8].

⁹² Fleur Van Leeuwen, ‘Women’s Rights are human rights!?: the practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights’ in Anne Hellum and Henriette Sinding Aasen (eds) *Women’s Human Rights: CEDAW in International Regional and National Law* by (CUP, 2013) 246. Emphasis in the original.

⁹³ *ibid.*

CEDAW.⁹⁴ It has positioned itself as the definitive treaty for addressing women's human rights. It is a sophisticated instrument because in one document it protects civil, political and socio-economic rights.⁹⁵ Moreover, by Article 5 of CEDAW, States are obligated to modify socio-cultural patterns and eliminate prejudices and stereotypes on the roles of men and women. The CEDAW Committee is a strong advocate for empowering women in all aspects of public and private life. The Committee discusses the situation of women in prisons; the exploitation of women in the media; the gendered effects of austerity measures; abortion laws; sex education and bullying; the gender pay gap and affordable childcare; the necessity of temporary special measures to increase the participation of women in Parliament, the judiciary and private companies; the economic effects of divorce; the structure of social benefits and the situation of vulnerable women.⁹⁶ CEDAW's attention to a variety of women's issues and its ability to address socio-cultural norms makes it the ideal treaty to incorporate the inter-locking and complex nature of gender-based poverty.

Despite its commitment to address the totality of women's issues, there are some notable omissions from CEDAW. There are no provisions in CEDAW obligating States to address gender-based violence. This is rectified in General Recommendation No. 19 on violence against women.⁹⁷ Gender-based violence is firmly interpreted into the definition of discrimination against in women. Similarly, CEDAW is silent as to gender-based poverty. However, currently there is no General Recommendation discussing women and poverty.

At first glance CEDAW does appear to have provisions to address gendered poverty, but on closer inspection these fall short of a comprehensive obligation. As mentioned above, there is one

⁹⁴ DAW, 'Short History of CEDAW Convention' <<http://www.un.org/womenwatch/daw/cedaw/history.htm>>.

⁹⁵ Hanna Beate Schopp-Schilling, 'The Nature and Scope of the Convention' in Hanna Beate Schopp-Schilling and Cees Flinterman (eds) *The Circle of Empowerment: Twenty-Fives Years of the Committee on the Elimination of Discrimination Against Women* (Feminist Press, 2007) 25.

⁹⁶ The Committee, 'Seventh Concluding Observations: UK' (2013) CEDAW/C/GBR/CO/7.

⁹⁷ (1992) CEDAW/C/GC/19.

reference to poverty in the preamble: ‘a concern that women in poverty have the least access to food, health, education and employment opportunities.’ This concern does not directly translate into any substantive provision. However, the preamble and the reference to poverty in the preamble are used in Chapter 4 as an important interpretative aid.⁹⁸

The most promising is Article 14 (rural women). Article 14(2)(c) holds that State shall ‘ensure...the right: to benefit directly from social security programmes.’ Article 14(2)(h) creates a right to ‘enjoy adequate living conditions, particular in relation to housing, sanitation, electricity and water supply, transport and communications.’ There is one significant problem with Article 14 in relation to gender-based poverty. There is a geographic restriction. The chapeau of Article 14 makes it explicit that these rights are only granted to rural women, for the obligation holds that States ‘shall take all appropriate measures to eliminate discrimination against *women in rural areas*.’⁹⁹ There are no obligations for States to ensure an adequate standard of living or social assistance to urban women. As poverty is not confined to rural areas, this restriction is problematic. The reasons for confining basic socio-economic rights to rural women are explored in detail in Chapter 2. A similar problem arises under Article 11, on employment. The provision guarantees women the right to social security and paid leave.¹⁰⁰ However, the CEDAW Committee has been unclear if Article 11 applies to informal employment and if is restricted to the situation of employment. Another promising provision is Article 13, which requires the State to ensure that there is no discrimination in economic and social life. However, the treaty elaborates this to mean family benefits, rights to different forms of financial credit and the right to participate in the life of the community. While there has been some academic commentary on the potential of this provision to be interpreted to address gender-

⁹⁸ Christine Chinkin and Beate Rudolf, ‘Preamble’ in in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2013).

⁹⁹ Emphasis added.

¹⁰⁰ Article 11(1)(e) of CEDAW.

based poverty, it is an under-developed right.¹⁰¹ Moreover, Articles 11, 13 and 14 of CEDAW read in isolation do not address the interactions between civil and political rights and social-cultural norms that cause and contribute to gender-based poverty. On the other hand, while there is no independent right to equality or non-discrimination in CEDAW, these two norms permeate and unite the entire treaty. Interpreting equality and non-discrimination to incorporate the harms of gender-based poverty means that all the substantive provisions in CEDAW can be used to combat gender-based poverty. The limits of incorporating gender-based poverty in an individual right and the case for interpreting equality and non-discrimination to incorporate gender-based poverty is canvassed in Chapter 4. At this stage it is only important to note that there are no obligations in CEDAW that directly relate to gender-based poverty.

VI. Mapping the Solution

The gender-based poverty gap in CEDAW is a significant problem. CEDAW, with its comprehensive focus on all women's issues, civil, political, socio-economic and cultural and its proven track record of being a strong advocate for women's human rights is the ideal choice, notwithstanding its lack of specific substantive obligations on poverty. There are several possible solutions to remedy this gap. The first is an amendment to CEDAW or an Optional Protocol which creates a new obligation on States to combat gender-based poverty, and the second is an interpretation of the existing provisions in CEDAW to understand how gender-based poverty is an obstacle to human rights. I argue for the latter approach, specifically that the conception of equality and non-discrimination in CEDAW can be interpreted so as to comprehensively understand how gender-based poverty is an obstacle to human rights. This section will briefly canvass the two

¹⁰¹Beate Rudolf, 'Article 13' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012).

identified solutions, the methodology that will be used and set-up the research questions that will be investigated in the remaining chapters.

In domestic law when a gap has been identified the natural response is to amend the legislation to fill it. Due to the nature of international law, amendments are not as straightforward. International law is a horizontal and voluntary system of law. The CEDAW Committee cannot unilaterally amend the treaty. States must draft an amendment or Optional Protocol. This would be a long and drawn out process that would require a significant political commitment. Drafting international treaties takes time and when drafted a threshold number of states have to ratify the treaty for it to have any legal effect. It took almost 14 years to draft CEDAW.¹⁰² The drafting of the Optional Protocol to ICESCR began in 1990. It was adopted by the UN General Assembly in 2008, and only came into force on the 5 May 2013 after ten States had ratified it. The total time for having a functional Optional Protocol to ICESCR was 23 years.¹⁰³ Given the critical need of women in poverty, waiting is unacceptable.

The second option, which I argue is more compelling, is an interpretation of CEDAW that understands the relationship between gender-based poverty and human rights. This understanding can then be used by the Committee as a basis for recommendations on gender-based poverty in the General Recommendations, Concluding Observations and Individual Communications. An interpretation which includes gender-based poverty would not suffer the delays of an amendment.¹⁰⁴ There is a precedent for this approach. Gender-based violence was not included in CEDAW, but the CEDAW Committee has persuasively interpreted it into the treaty and States have accepted this

¹⁰² 'Short History of CEDAW' (n 94).

¹⁰³ UN Treaty Database <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en>.

¹⁰⁴ Although States may still object to this interpretation and refuse to acknowledge it, this is investigated in Chapter 3.

interpretation.¹⁰⁵ This solution to the gender-based poverty gap in CEDAW raises many questions. Are there specific terms, phrases or words that can be interpreted to incorporate the harms of gender-based poverty into CEDAW? Is it best to situate gender-based poverty in one specific right in CEDAW or is a comprehensive interpretation which engages the entirety of CEDAW preferable? What impact would such an interpretation have on the work of the Committee? These questions are explored throughout the thesis.

Here it is important to pause and define some key terms used in the thesis. A comprehensive interpretation means all the substantive provisions of CEDAW are interpreted in light of gender-based poverty and can be used by the Committee to ensure that States report on and remedy gender-based poverty. A helpful way to explain this is with a metaphor. A comprehensive interpretation is similar to an octopus; each of the eight legs is used by the animal while still being connected to the centre to move. Each element of CEDAW, under a comprehensive interpretation, is to be used to combat the complexity of gender-based poverty. For the remainder of my thesis a comprehensive interpretation of CEDAW means gender-based poverty permeates each provision of the treaty. Similarly, my proposed solution to the gap in CEDAW is to interpret equality and non-discrimination in a manner which incorporates the role of gender-based poverty in obstructing women's enjoyment of human rights and therefore the Committee can be in position to remedying these unique human rights violations. I will be using this terminology throughout the thesis to explain my proposed solution.

Lastly, it is useful to briefly consider what CEDAW means by the term "women." The text does not define "women" or "sex." In feminist scholarship there is a distinction drawn between sex and gender-based differences. Sex is defined as the biological differences between men and women, while gender is the socially and culturally constructed differences or 'the excess cultural baggage

¹⁰⁵State routinely report on the efforts they have taken to address gender based violence in the periodic reporting process.

associated with biological sex.’¹⁰⁶ This is an important insight as it makes it possible to demonstrate how hierarchical relationships between women and men that are supposedly based on irrefutable biological fact are actually based on deeply embedded social and cultural norms.¹⁰⁷ The distinction between sex and gender was accepted by the Committee. It explained that the definition of discrimination in Article 1 of CEDAW refers to ‘any distinction’ that impedes women’s human rights and this includes both sex and gender-based distinctions.¹⁰⁸ However, the Committee appears to still be embracing the category of “women.” In feminist theory there is a debate on the usefulness of the conception of women.¹⁰⁹ The Committee has never explored what it means when it refers to “women.” For the purposes of this thesis it is simply necessary to note that CEDAW protects women from both sex and gender-based discriminatory differences. Furthermore, as will be canvassed in Chapter 4, CEDAW uses “women” in a nuanced and sophisticated manner that embraces the rich and varied identities and experiences of all women.

Before turning to explore how gender-based poverty can be brought into the CEDAW framework, I will briefly outline the remainder of the thesis. The next chapter examines the drafting history and seeks to understand why gender-based poverty was not included in CEDAW. This chapter investigates the State’s reasoning process in relation to gender-based poverty to have a deeper appreciation of the structure of the treaty. The second purpose of Chapter 2 is to chart the evolution in conceptualising gendered poverty. This lays the necessary base for further exploration in Chapter 3 that poverty and gender-based poverty are becoming a human rights issue.

¹⁰⁶ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (MUP, 2000) 3.

¹⁰⁷ See Joan Scott, ‘Gender: A Useful Category of Historical Analysis’ (1986) 91(5) *The American Historical Review* 1053, 1054.

¹⁰⁸ ‘General Recommendation No. 28’ (n 90) [5].

¹⁰⁹ For those questioning the usefulness of the term ‘women’ see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1989) 6. For those arguing for its continued use see Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990).

The third chapter investigates how the UN has approached the problem of poverty and human rights. A comparative analysis is not meant to dictate how CEDAW should be interpreted nor ignore the importance of interpreting the actual text of CEDAW. Rather it is to gain insight into how similarly situated bodies have addressed the same problem and investigate what interpretative techniques these bodies have relied upon. Particularly does the work of the UN on gender-based poverty or even poverty more generally help clarify whether the interpretation should focus on one specific right in CEDAW or whether a more comprehensive approach to gender-based poverty and human rights is preferable? Methodologically, this relies on Article 31(3)(c) of the VCLT which holds that there shall be taken into account ‘any relevant rules of international law between the parties.’ While this is a contested and complex provision, there is some authority for examining other treaties under Article 31(3)(c).¹¹⁰

The fourth chapter then approaches the task of interpreting the text of CEDAW. The first step is to identify an interpretative methodology. The VCLT ‘constitutes a single framework for treaty interpretation [and] can now be identified as generally applicable and that those rules should be understood and used by all engaged in treaty interpretation.’¹¹¹ The International Court of Justice (ICJ) has held these rules are applicable to the interpretation of all treaties.¹¹² Given the status of the VCLT rules, they are used to analyse how CEDAW can be interpreted to incorporate and remedy gender-based poverty. Article 31(1) of the VCLT holds that the terms of a treaty should be given their ordinary meaning in context and in light of the treaty’s object and purpose. Thus seemingly the first place to start would be with the text of CEDAW. However, although Chapters 2 and 3 do not start with the treaty this is not as problematic as it first appears. Gardiner argues interpretation is not

¹¹⁰ Richard Gardiner, *Treaty Interpretation* (OUP, 2008) 282.

¹¹¹ *ibid* 6.

¹¹² *Avena and other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep [83]; *Arbitration regarding the Iron Rhine Railway (Belgium/Netherlands)* Award of 24 May 2005 (2005) 27 RIAA 35 [45].

a purely mechanical application of the rules to the text.¹¹³ Thus, the first two chapters are useful contextual knowledge for understanding the root problem that a comprehensive interpretation is meant to remedy: gendered poverty, human rights and the structure of CEDAW.

Building upon the insights from the analysis of the *travaux préparatoires* and similarly situated UN human rights bodies, Chapter 4 then applies the VCLT framework to assess how CEDAW can be interpreted to understand gender-based poverty. I argue for a comprehensive interpretation of the CEDAW that uses equality and non-discrimination to incorporate the harms of gender-based poverty. All of these issues will be explored in greater detail in the proceeding chapters, at this stage this serves to map out the solution to the gender-based poverty gap in CEDAW.

The thesis then shifts to Part II and asks the second central question: how can this interpretation of CEDAW be successfully included in the Committee's activities? It is hoped that if the Committee becomes a strong advocate for approaching gender-based poverty as a human rights issue in CEDAW this will prompt other relevant actors to do the same. Chapter 5 acts as a bridge between theory and application by investigating how the CEDAW Committee currently approaches the issue of gender-based poverty. This analysis reveals that the Committee is working towards understanding gender-based poverty as an issue of gender equality, but it is not doing this consistently. Chapter 6 explores how the periodic reporting process contributes to these inconsistencies. The analysis in both of these chapters demonstrates the importance of drafting a General Recommendation on women and poverty to ensure both the Committee and the State understand the relationship between gender-based poverty and human rights. To gain insight into how to draft a General Recommendation, Chapter 7 analyses evolutionary General Recommendation and Comments. Finally, Chapter 8 brings all these threads together to demonstrate the effect of comprehensively

¹¹³ Gardiner (n 110) 29.

interpreting gendered poverty into CEDAW by proposing a General Recommendation on women and poverty.

VII. Conclusion

Poverty is not gender neutral. The reasons why men and women are poor can be drastically different. For women poverty is the redistribution wrongs of not having access to material resources connected with the recognition and participation harms that exclude and devalue women. Poverty is a major contributing obstacle to the non-enjoyment by women of their human rights. How is the international human rights framework able to address this problem?

ICESCR has potential to meaningfully remedy gender-based poverty through its commitment to gender equality (Article 3 of ICESCR) and the progressive realisation of economic, social and cultural rights. However, this thesis examines the relationship between gender-based poverty and CEDAW. The ideal body to begin to tackle gender-based poverty is CEDAW; the treaty regime that was specifically designed to remedy the gender-based nature of human rights violations. There is a further complication as CEDAW is silent as to poverty. There is no obligation on the State to report on or remedy women's poverty.

There are two possible solutions to this problem: an amendment or an interpretation of the existing provisions of CEDAW. As the procedure for an amendment can be very prolonged, an interpretation of CEDAW which includes gender-based poverty offers the best solution to the gap in the treaty. My proposal is that an interpretation of gender equality and non-discrimination in CEDAW can be used to understand how gender-based poverty is an obstacle to all the substantive obligations in the treaty. A comprehensive interpretation can ensure that all possible legal tools are used to require States to approach gender-based poverty as a serious human rights issue. From there,

my thesis investigates and evaluates how this proposed interpretation can be included in the work of the Committee. This culminates in a proposed General Recommendation on women and poverty.

CHAPTER 2

THE DRAFTING OF CEDAW

I. Introduction

Chapter 1 explained what was missing from CEDAW: a comprehensive obligation requiring States to remedy women's poverty. The only explicit reference to gender-based poverty in CEDAW is in the preamble. My proposed solution to this gap is to interpret equality and non-discrimination, two norms that permeate the entire treaty, to incorporate the harms of gender-based poverty into CEDAW. Before turning to examine the treaty, it is illuminating to examine why no such obligation was included in CEDAW. This chapter analyses the *travaux préparatoires* and concludes that there were multiple reasons why the drafters did not include a substantive provision on gender-based poverty in CEDAW. These reasons provide key insights into CEDAW that are drawn upon throughout the thesis. One subset of reasons for not including gender-based poverty in CEDAW demonstrates that other substantive provisions in the treaty (Article 11-employment and Article 14-rural women) were implicitly meant to improve women's socio-economic status. This reveals that there has always been a latent understanding that CEDAW is meant to combat gender-based poverty. This provides further support to the arguments made in Chapter 1: that CEDAW should now explicitly be used to incorporate and remedy the harms of gender-based poverty. Another subset of reasons reveals that the State's were concerned about the budgetary implications in using rights to improve women's economic status. This insight is used in Chapter 4 to explore how including gender-based poverty in CEDAW affects the State's obligations. Furthermore, the insights from this analysis will be repeatedly drawn on in the second part of the thesis in examining how to

include my proposed interpretation into the work of the Committee. It is also important to clarify what this chapter is not doing. The analysis of the *travaux preparatoires* is not being used as a supplementary means of interpretation (Article 32 of the VCLT). The drafting documents are not analysed to understand what the drafters intended ‘equality’ and ‘non-discrimination’ in CEDAW to mean. This will be canvassed in Chapter 4. The purpose of this chapter is to examine the wider socio-political context of CEDAW and to gain further insight into the treaty’s relationship with gender-based poverty and the State’s obligations under CEDAW.

In answering the question: why did the drafters choose not to include poverty in CEDAW, the analysis will begin with an examination of the different methodologies for understanding history. This investigation primarily uses the larger historical context to gain insight into the drafting documents. The second section summarises the drafting process. The third section maps when gender-based poverty and related issues were discussed along with which States brought these issues to the table. The final section argues that there were several concurring reasons why gender-based poverty was not incorporated into the CEDAW. First, gender-based poverty at this time was not seen as a source of discrimination against women or even more broadly as a human rights issue. Rather, women’s poverty was viewed both as a political and a development issue. There was only a nascent understanding on the relationship between equality, development, poverty and human rights which is reflected in Article 14 (rural women). Second, the possibility of discussing poverty was foreclosed by the politics of the Cold War which made it impossible to engage in a debate on women’s poverty as the capitalist and communist systems would deny that their economic system had poverty. However, the drafters used the employment provision (Article 11) as a guise for improving women’s economic standing. Third, States, especially those from the West were concerned about increased expenditure associated with anti-poverty measures. From this analysis I conclude that although poverty is not explicitly referred to at the time of drafting, the *travaux*

preparatoires demonstrates that CEDAW is implicitly meant to remedy gender-based poverty. This chapter provides further impetus for explicitly unlocking the potential of CEDW to tackle women's poverty. Furthermore, the State's concerns on the budgetary implications raise an important question on the nature of the State's obligations under CEDAW in relation to gender-based poverty. This will be examined in further detail in Chapter 4.

II. Methodology

The aim of this chapter is to understand why the drafters did not include a substantive provision on gender-based poverty. Answering this involves understanding how the drafters conceptualised women's poverty. The purpose of this investigation is to 'explain why events transpired as they did and why they did not come out differently... locating the origins and impacts of legal rules and ideas'

¹ Analysing the *travaux préparatoires* raises methodological challenges. Rehof notes that due to the background political forces and compromises 'some of [the] real considerations could not be expressed openly...some of them may therefore be cloaked in vague concepts and terms.'² For example, when drafting CEDAW the USSR wanted to avoid detailed and specific provisions while the UK, Norway and Barbados wanted the perfect alchemy of flexible but precise terms.³ The inherent tensions in drafting international human rights treaties are compounded by the challenge of translating subjective intent into the objective language. Peller argues 'meaning does not "exist" anywhere; it is constructed in differential relations, in the blanks spaces and silences of

¹ William Fisher, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1996-1997) 49 *Stan L Rev* 1065, 1088.

² Lars Adam Rehof, *Guide to the Travaux Préparatoires of the UN Convention on the Elimination of all Forms of Discrimination Against Women* (Nijhoff, 1993) 3.

³ E/CN.6/574 [15]; E/CN.6 591 [14]-[15].

communications.⁴ The omissions or what is not said is just as illuminating in this analysis as what is said. The political constraints and limitation of linguistic expression present real challenges when examining the *travaux préparatoires*.

The methodology of intellectual history offers helpful tools to address these challenges. Intellectual history is ‘the history of what people have thought about and believed.’⁵ Fisher classifies four different methodologies in intellectual history: structuralism, contextualism, textualism, and new historicism. In this chapter I rely on all four methodologies. Structuralism is the study of continuities and discontinuities in the history of the particular idea.⁶ It follows a certain idea throughout its history and examines the moments of change on the timeline. Contextualism argues that the language used is ‘radically dependent upon the systems of words and concepts in which the author moved when she was writing [and] the central job of the intellectual historian is to reconstruct that context and then to interpret the text in light of it.’⁷ The political, economic and social context of the community can limit how an individual understands and expresses an idea.⁸ The aim of contextualism is to understand the assumptions that guided the drafter. Textualism seeks to ‘brush history against the grain.’⁹ It asks questions which challenge the ideological contexts in which texts were written.¹⁰ To use an example, what can the Magna Carta, a document where women were not even mentioned, tell us about the relationship between women and the neo-liberal state? Lastly, new

⁴ Gary Peller, ‘The Metaphysics of American Law’ (1985) 73 Cal L Rev 1151, 1167-68.

⁵Fisher (n 1) 1065.

⁶ Philip Petit, *The Concept of Structuralism: A Critical Analysis* (University of California Press, 1975).

⁷ Fisher (n 1) 1068.

⁸ J.G.A. Popcock as referred to in Joyce Appleby, ‘Ideology and the History of Political Thought’ (1980) 2 Intellectual History Newsletter 10, 15.

⁹ Dominick La Capra, ‘Intellectual History and Its Ways’ (1992) 97 American History Rev 425, 435-37.

¹⁰ *ibid.*

historicism ‘focus[es] on small events or anecdotes...that they believe are suggestive of the ‘behavioural codes, logics and motive forces controlling a whole society.’¹¹

While drawing on all four methodologies, this chapter primarily relies on contextualism. As Fisher describes, this entails ‘immersion in the world of one’s subject, mastery of [her] vocabulary, sensitivity to the problem [she] was trying to solve.’¹² At the drafting table, there were representatives from diverse religious, traditional, cultural and political ideologies: capitalist and communist States, newly de-colonised and developing States. With the plurality of perspectives engaged in drafting CEDAW, textualism and new historicism’s critique of contextualism need to be layered into the analysis of the *travaux préparatoires*. These critiques expose the fallacy of reading the drafting documents to seek for a definitive context and highlight the challenge of reading the documents to infer causal connections between the individual and political ideologies. Appreciating the limitations of contextualism furthers the aims of this chapter: it identifies with greater precision why States did not include a substantive provision on gendered poverty in the treaty and it highlights how the ideological differences meant gendered poverty was only implicitly included in CEDAW.

First, contextualism has been criticized as creating a hegemonic view of the past. Applying one context to a document does a disservice to the richness of the debates, perspectives and counter-perspectives of the past. Fisher notes ‘one should not expect to find in any society a “closed static, singular and homogenous ideology.”’¹³ Similar to today’s debates, ‘past world views would be “heterogeneous and unstable, permeable and processual.”’¹⁴ Not only was there a wide range of cultural, religious and political ideologies at the drafting table, there were also diverse understandings

¹¹ Fisher (n 1) and H. Aram Veesser, ‘Introduction’ in H. Aram Veesser (ed) *The New Historicism* (Routledge, 1989) xi.

¹² Fisher (n 1) 1095.

¹³ *ibid* 1072 citing Louis A. Montrose, ‘Professing the Renaissance: The Poetics and Politics of Culture’ in H. Aram Veesser (ed) *The New Historicism* (Routledge, 1989) 22.

¹⁴ *ibid*.

of feminism. When CEDAW was drafted, within the West there were debates between liberal feminists,¹⁵ radical feminists,¹⁶ black feminists¹⁷ and socialist feminist.¹⁸ This is just a snapshot of the tensions in the West, without looking at pluralistic feminist perspectives from other regions. The drafters would bring all these diverse understandings of feminism to the drafting of CEDAW. Thus, it is a fallacy to seek for a definitive context and the documents must be read within a multiple, conflicting and chaotic contextual framework.

Second, contextualism has been criticized that their conclusions are based on meagre evidence. Fisher warns that ‘too often [they] content themselves with identifying similarities between the vocabularies employed during the same period in two discursive communities and then infer a causal connection between the two.’¹⁹ First, this approach whitewashes the past and forecloses the possibility that different communities may use the same language to express different meanings. It denies the possibility of multiple contexts. Second, it makes impermissible logical leaps. It is difficult to draw a conclusion that the US was promoting a model of gender discrimination based on *The Feminine Mystique* by Betty Friedan because the US representative used language similar to the book without knowing if the representative was familiar with Friedan’s work.

In the context of this analysis, a State may be associated with particular feminist beliefs. However, does this mean that Sweden’s representative would further the State’s ideology during the drafting process? There are conflicting perspectives on how closely representatives reflected their government’s political stances. Ghodsee, one of the US representatives at the Copenhagen

¹⁵ Betty Friedan, *The Feminine Mystique* (W.W. Norton & Co., 1963).

¹⁶ Kate Millet, *Sexual Politics* (Double Day, 1970).

¹⁷ Patricia Haden et al, ‘A Historical and Critical Essay for Black Women’ in Leslie Tanner (ed) *Voices from Women’s Liberation* (Signet, 1971).

¹⁸ Juliet Mitchell, ‘Women: The Longest Revolution’ (1966) 40 *New Left Rev* 11.

¹⁹ Fisher (n 1) 1091; Victoria Saker, ‘Between a Doctrine and a Hard Place’ (1993) 21 *Reviews in American History* 279.

Conference in 1980, the second of three global conferences on women's issues, noted that 'of course, it must be acknowledged that the women sent to the official meetings to represent their governments were under the firm control of the male politicians back home.'²⁰ Although she is not referring to any of the meetings or working groups on the drafting of CEDAW, it is only a year after CEDAW opened for signature and is contemporary evidence of a general ethos around the role of State representatives in relation to women's issues and international human rights. Fraser concurs; she wrote 'individual people didn't speak at these conferences, governments spoke.'²¹ Tinker also noted 'some women were convinced that the governments used women's conferences as a proxy for global debate, recognizing that many women delegated had no alternative to following the political line.'²² These commentators all identify the individual as a conduit for the State's political ideology.

On the other hand, Leticia Ramos Shahani, from the Philippines who worked as the assistant secretary for the UN in the 1960s-1970s, indicates in her reflections that she wrote the Philippines' draft of CEDAW without consultation with her government.²³ She felt this was necessary to ensure that at the first meeting there was a draft to begin the process of refining the Convention. She believed that if she had gone through the usual government channels this would have unduly delayed the drafting process. Shahani did receive a telegram from the Philippines reprimanding her 'for not having sought the permission of the government to present the draft paper, which contained several topics not yet resolved nor reflected in...national laws.'²⁴ John P. Humphries, the

²⁰ Kristen Ghodsee, 'Revisiting the United Nations Decade for Women: Brief Reflections on Feminism, Capitalism and Cold War Politics in the Early Years of the International Women's Movement' (2010) 33(1) *Women's Studies Intl Forum* 3, 5.

²¹ Arvonne Fraser, personal communication with Ghodsee (2005) referred to in *ibid.*

²² Irene Tinker, 'Introduction: Ideas Into Action in Developing Power' in Arvonne S. Fraser and Irene Tinkers (eds) *Developing Power: How Women Transformed International Development* (Feminist Press, 2007) xxi.

²³ Leticia Ramos Shahani, 'The UN, Women, and Development: The World Conference on Women' in Arvonne S. Fraser and Irene Tinkers (eds) *Developing Power: How Women Transformed International Development* (Feminist Press, 2007) 32.

²⁴ *ibid.*

first Director of the UN Secretariat Division of Human Rights, noted that ‘many governments had appointed as their representatives women who were militants in their own countries.’²⁵ This indicates the representatives involved in the international process could be progressive. In turn, this means understanding the State’s stance on women’s human rights may not accurately reflect the context of the representative at the drafting table. With these conflicting viewpoints on the autonomy of the representatives, it is difficult to decisively conclude that for example, when Iran proposes an amendment it is following State ideology. The most that can be done is to detect overlaps, correlations and echoes within the drafting documents and the larger context to draw as far as legitimately possible an inference on what the drafters intended.

Due to political constraints that operate during the drafting of an international human rights treaty and the inherent limits of language, it may never be possible to uncover the drafters’ exact intentions and reasoning processes. The methodology of intellectual history however does provide tools so as to fruitfully analyse the *travaux préparatoires* to understand why there was no explicit provisions in CEDAW on gendered poverty.

III. Historical Timeline

Before investigating the *travaux préparatoires*, this section provides a brief history of the drafting of CEDAW. The impetus for CEDAW began in 1960s and it was drafted in the 1970s, in the middle of the Cold War. The geopolitical landscape was dominated by the US and the USSR. This also a period of rapid decolonisation and there were many new States emerging. In addition, there were numerous new feminist organizations being established.²⁶ They focused on a wide-range of issues: sexuality, family, the workplace and reproductive rights.²⁷

²⁵ Johannes Morsink, ‘Women’s Rights in the Universal Declaration’ (1991) 13(2) Hum Rts Q 229.

The idea of a binding international human rights treaty that exclusively focused on women originated with the Commission for the Status of Women (CSW). The CSW was established in 1946 as a functional commission of EcoSoc and its aim was to promote women's human rights.²⁸ In the 1960s there were numerous international treaties that touched upon women's human rights. As explained in Chapter 1, ICESCR and ICCPR contain specific provisions that guarantee the rights in their respective Covenants are to be equally enjoyed by men and women.²⁹ However, the Convention on the Elimination of Racial Discrimination makes no reference to women.³⁰ There were specific UN treaties that addressed certain aspects of women's human rights: trafficking and exploitative prostitution,³¹ political rights³², nationality of married women³³ and consent to marriage, the minimum age for marriage and the registration of marriages.³⁴ The ILO also had numerous conventions on women such as night work, equal pay and maternity.³⁵ From the CSW's perspective there were two problems with this approach. First, there was concern 'that the general human rights

²⁶ For example the National Organization for Women was founded in 1966 and the National Black Feminist Organisation in 1973.

²⁷ *ibid.*

²⁸ UN Entity for Gender Equality and Empowerment of Women, 'Commission on the Status of Women' <<http://www.un.org/womenwatch/daw/csw/>>.

²⁹ Article 3 of ICESCR and ICCPR.

³⁰ 660 UNTS 195 (entered into force 4 January 1969).

³¹ 96 UNTS 271 (entered into force 25 July 1951).

³² 135 UNTS 193 (entered into force 7 July 1954).

³³ 65 UNTS 309 (entered into force 11 August 1958).

³⁴ 521 UNTS 231 (entered into force 9 December 1964).

³⁵ ILO Convention No. 3 (1919) concerning the Employment of Women before and after Childbirth, ILO Convention No. 41 (Revised 1934) concerning Employment of Women during the Night, ILO Convention No. 100 (1951) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Convention No. 103 (Revised 1952) Maternity Protection Convention and ILO Convention No 111 (1958) concerning Discrimination in Respect of Employment and Occupation.

regime was not, in fact, working as well as it might to protect and promote the rights of women.³⁶ Second, the women specific Conventions in place at the time ‘were fragmentary because they failed to deal with discrimination against women in a comprehensive way.’³⁷ To comprehensively protect women’s human rights CSW submitted the draft Declaration on the Elimination of Discrimination Against Women (DEDAW) to the UNGA which was adopted on 7 November 1967.³⁸ DEDAW, similar to CEDAW, calls upon states to end discrimination against women as it limits their equality with men and is an offence against human dignity.³⁹ More specifically, it contained provisions on eliminating discrimination in laws and customs, enshrining equality in national constitutions, eradicating prejudice and customary practices, the right to vote, hold public office, nationality, family life, removing discrimination in penal codes, trafficking and exploitative prostitution, education and employment. However, DEDAW was a limited mechanism. Even though there was a reporting procedure, it was voluntary and never successfully implemented.⁴⁰ Furthermore DEDAW was ‘merely a statement of moral and political intent and was not intended to be, nor in the main was it considered to be, legally binding.’⁴¹

The CSW decided that ‘a binding treaty [to] give normative force to the provisions’ in DEDAW was necessary.⁴² In 1972, capitalizing on the perceived political momentum regarding women’s rights, the CSW requested the States submit their proposals on a binding Convention.⁴³ In

³⁶ DAW, ‘Short History of CEDAW Convention’ <<http://www.un.org/womenwatch/daw/cedaw/history.htm>>.

³⁷ *ibid.*

³⁸ A/Res 2199 (XXI); A/Res 2263 (XXII).

³⁹ Article 1 of DEDAW.

⁴⁰ Rehof (n 2) 7.

⁴¹ Noreen Burrows, ‘The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (1985) 32 *Netherlands Intl L Rev* 419, 419.

⁴² ‘Short History of CEDAW Convention’ (n 36).

1974 the CSW set up a working group to consider these proposals.⁴⁴ Three different drafts of CEDAW were submitted to the working group: from the Philippines, the USSR and a joint Philippines-USSR draft.⁴⁵ For these specific drafts DEDAW served as a frame of reference.⁴⁶ All three drafts contain provisions on eliminating discrimination, modifying cultural attitudes and ensuring equality in political participation, nationality, criminal, civil and family law, legal capacity, prostitution and trafficking, education and employment. While DEDAW did serve as a model, the first drafts submitted to the working group in 1974 were not duplicates. The USSR said their draft ‘took account certain changes which had taken place since the adoption of the Declaration.’⁴⁷ In the USSR’s draft there were protections for working mothers, free or moderately priced child care and restrictions on night work, heavy labour and working conditions that were physically harmful.⁴⁸

The draft of CEDAW from the 1974 working group was distributed for States to review. In 1976, the CSW submitted a draft to the twenty-sixth session of EcoSoc.⁴⁹ At this stage the provision for rural women (Article 14) and temporary special measures (Article 4) had been included.⁵⁰ In 1977, a draft of CEDAW was submitted to the Third Committee of the UNGA.⁵¹ It established three working groups who met 45 times throughout 1977 to 1979 to finalize CEDAW.⁵² It was at this stage that provisions for health (Article 12) and economic and social life (Article 13) were

⁴³ E/CN.6/591.

⁴⁴ *ibid.*

⁴⁵ E/CN.6/573, E/CN.6/AC.1/L.2; E/CN.6/AC.1/L.4.

⁴⁶ E/CN.6/573 [39]; E/CN.6/574 [15].

⁴⁷ E/CN.6/574 [15].

⁴⁸ E/CN.6/AC.1/L.2 Articles 5, 11 and 12.

⁴⁹ E/CN.6/L.716 ; E/CN.6/591/Add.1.

⁵⁰ E/CN.6/L.687; E/CN.6/L.709.

⁵¹ E/Res. 2058 (LXII).

⁵² A/C.3/33/WG.1/CRP.1; Rehof (n 2) 10-11.

added.⁵³ Previously, these obligations had been subsumed in employment (Article 11). It was also at the later stages that the provisions requiring the amendments to penal codes were dropped.⁵⁴ In 1979 the UNGA adopted the final draft and invited signatures and ratification and in 1981 CEDAW entered into force.⁵⁵

IV. Mapping Poverty

In this section I chronologically map where States made proposals during the drafting process to include gender-based poverty or gender-based poverty-related provisions in the treaty and then examine where States made counter-proposals to restrict the scope of CEDAW to combat gender-based poverty. All parties seem to unquestioningly accept that socio-economic rights be included in CEDAW. Early in the drafting process Byelorussia, the USSR, the German Democratic Republic and Poland observed that the ‘provisions of articles 10-14 (education, formal and informal employment, protections for working mothers and child-care facilities) would help achieve genuine equality between men and women.’⁵⁶ The Federal Republic of Germany noted that ‘the strong emphasis the draft placed on economic, social and cultural rights corresponds to the need to make improvements in the conditions of life for women, the first priority.’⁵⁷

While there was support for socio-economic rights, it was States from the South and Scandinavia that were strong advocates for incorporating gender-based poverty into CEDAW. In the 1976 meetings of the CSW working group, Mexico ‘suggested that the concept of development should be reflected in...the Preamble and proposed the addition of the phrase: ‘the elimination of the

⁵³ A/C.3/WG.1/CRP.1/Add.3; A/C.3/WG.1/CRP.5/Add.11.

⁵⁴ A/C.3/34/WG.1/CRP.6

⁵⁵ A/Res 34/180.

⁵⁶ E/CN.6/591 [27].

⁵⁷ A/32/218 [9].

gap between developed and developing countries.”⁵⁸ This proposal was not included in the final draft of CEDAW. The only reference to development in the final version of the Convention is the importance of development for the welfare and peace of the world. It was also at this stage of the drafting process that the provisions for rural women (Article 14) were introduced by Egypt, India, Indonesia, Iran, Pakistan, Thailand and the US.⁵⁹ Early in the drafting process, Guyana proposed that women should have the same basic wage as men.⁶⁰ This is slightly different than the equal pay for work of equal value, since it hints at an obligation for a minimum wage. This proposal was never included in any of the drafts of CEDAW.

When the drafting process moved to the Third Committee of the UNGA, more gender-based poverty related measures were brought forward. Romania, the Philippines and Rwanda proposed that the title be changed to “The Convention on Elimination of *All Forms of Discrimination Against Women*” where previously it had been “The Convention on the Elimination of Discrimination Against Women.”⁶¹ The record does not indicate why these States felt the need to modify the title, but the effect is to make explicit that CEDAW was meant to apply to all aspects of life. There were two other areas where gender-based poverty was referred to: the preamble and rural woman. Bangladesh, Indonesia, Pakistan, Singapore and Somalia submitted a new paragraph for the preamble on poverty: ‘concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.’⁶² This proposal was included in the final draft of CEDAW and is the only explicit mention of poverty in the treaty. In

⁵⁸ *ibid* [8].

⁵⁹ E/CN.6/L.687.

⁶⁰ E/CN.6/574 [86].

⁶¹ A/C.3/32/WG.1/CRP.2.

⁶² A/C.3/32/L.59.

addition, a series of States proposed mention of the new international economic order in the preamble. Bangladesh, Indonesia, Pakistan, Singapore and Somalia proposed:

Convinced that full realization of equality between women and men is possible only if a new socio-economic order is created where women and men participate equally in development and decision making processes.⁶³

Mexico proposed:

Emphasizing that underdevelopment subjects women to a twofold burden of exploitation and that the full implementation of national development policies aimed at removing that burden is seriously hampered by the existing unjust system of international economic relations.⁶⁴

Kenya proposed:

Convinced that the establishment of a new international economic order will contribute significantly toward the promotion of equality between men and women, and in particular the elimination of the prevailing inequitable relationship between developed and developing countries which limits the latter's capacity to advance the position of women.⁶⁵

These proposals ultimately became the paragraph 9 of the preamble: 'convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women.' Any mention of inequality in development between States had been removed. No reasons are recorded for rejecting these proposals.

Bangladesh proposed a chapeau to the substantive provisions on Article 14 (rural women): 'State parties shall take into account the significant roles women play in economic survival of their families in the rural areas by working in the non-monetized sectors of the economy.'⁶⁶ Bangladesh

⁶³ A/C.3/32/WG.1/CRP.2.

⁶⁴ A/C.3/32/WG.1/CRP.2.

⁶⁵ A/C.3/32/WG.1/CRP.6.

also proposed adding the clause that the State should ensure that rural women ‘receive adequate nutrition during pregnancy and lactation.’⁶⁷ Kenya proposed that ‘state parties shall undertake all measures necessary to improve living conditions of rural women, particularly in fields of housing, water supply, health services, transport and communication.’⁶⁸ Both of these amendments were included in the final draft of CEDAW (Article 12(2) and Article 14(2)(h)).

With respect to employment, Kenya proposed changing ‘the right to work as an inalienable right of all human beings’ to ‘the right to work *and benefits accruing there from* as an inalienable right of all human beings.’⁶⁹ This could suggest women are entitled to all social security benefits stemming from employment or that payment for employment should be given directly to the women worker rather than to the man as customary head of the household. This proposal was not included in the final draft of CEDAW.

States from the West, particularly Scandinavia, also proposed provisions that contained anti-poverty features. Sweden proposed that under the employment provision working women should be granted free medical services in connection with pregnancy, confinement and the post-natal period.⁷⁰ Denmark and Norway, in October 1978, proposed a separate article of general application for women’s health and access to medical and family planning services.⁷¹ Guyana had proposed under employment the sub clause: ‘equal access to bank loans, mortgage and any other forms of financial credit’ and ‘the right to participate in and enjoy leisure and cultural activities.’⁷² It was Denmark and

⁶⁶ A/C.3/32/WG.1/CRP.6/Add.4.

⁶⁷ A/C.3/WG.1/CRP.1/Add.2.

⁶⁸ A/C.3/32/WG.1/CRP.6/Add.3.

⁶⁹ A/C.3/32/WG.1/CRP.6/Add.2.

⁷⁰ A/C.3/33/WG.1/CRP.5/Add.1.

⁷¹ A/C.3/33/WG.1/CRP.5/Add.11.

⁷² A/C.3/33/WG.1/CRP.5/Add.4.

Norway who proposed that Guyana's proposal form the basis of a stand-alone article.⁷³ Lastly, Denmark proposed including in the introductory comments to the Article on rural women the right 'to benefit from rural development.'⁷⁴ There is no record of any states contesting or modifying these amendments and the Danish and Norwegian proposals became the final versions of Articles 12 (health), 13 (economic and social life) and 14 (rural women) of CEDAW.

In contrast, there were counter proposals and amendments which reduced the role of gender-based poverty in CEDAW. The UK, Japan, Norway and Ethiopia complained, in 1976, that the 'text was overloaded with provisions on protection and welfare.'⁷⁵ The UK, in respect to employment (Article 11) observed 'the text imposes obligations in the field of social policies which are too rigid and sweeping and that the text in its present form would be unacceptable.'⁷⁶ Canada and the US took issue with free retraining for women under the Article 11 (employment). Canada proposed changing 'free retraining' to 'opportunity for retraining.'⁷⁷ The US stated that free retraining and vocational training 'was unacceptable because it transferred to public expense programmes that were presently financed through private insurance.'⁷⁸ With respect to maternity leave, the US wanted to delete the clause stating that 'the cost of this protection should be borne by social security systems or other public funds or collective systems.' Additionally, the US wanted to insert the word "needy" in respect to pregnancy and child-care services. This would restrict the provision of these services rather than make them applicable to all women.⁷⁹ At one point maternity

⁷³ A/C.3/33/WG.1/CRP.5/Add. 11.

⁷⁴ A/C.3/33/WG.1/CRP.8

⁷⁵ E/CN.6/591.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ A/32/218.

⁷⁹ A/C.3/33/WG.1/CRP.3.

leave was defined as paid maternity leave but, Japan proposed that the word “paid” be struck out.⁸⁰ Japan also wanted to change free care during pregnancy to ‘adopt relief measures, including financial assistance, for confinement expenses.’⁸¹ The UK proposed deleting the provision in maternity leave treating the periods of leave as equivalent to periods of work actually performed. This change would allow the State to pay women less during maternity leave.⁸² The Netherlands wanted to replace the words ‘and to grant free medical services’ with the words ‘and to ensure women’s access to medical services.’⁸³ These objections had impact. In the final draft, the State has the discretion on how to provide maternity benefits and the level of benefits are not tied to any standard (Article 11(2)(b)). Under Article 11(2)(c), States are only encouraged to provide child-care facilities. There is only a provision to receive re-training with no mention of who bears the cost of this training (Article 11(1)(c)). Under Article 12, medical services maternal health should be free only where necessary.

V. Explanations for Why Poverty Was Not Included in CEDAW

Although States were discussing gender-based poverty during the drafting process, the actual measures that explicitly address women’s poverty are limited. What explains this discontinuity? Why didn’t these discussions translate into a substantive obligation for States to remedy women’s poverty? The drafting documents do not give a direct answer. The larger political and socio-cultural context reveals that there is no single justification but rather several reasons operating together that offer the best explanation for this silence.

⁸⁰ A/C.3/32/WG.1/CRP.8/Add.4.

⁸¹ A/32/218, Annex I.

⁸² A/C.3/32/WG.1/CRP.6/Add.3.

⁸³ A/C.3/32/WG.1/CRP.4.

First, at the time of drafting poverty was pre-dominantly seen as an issue of politics and development. I argue that poverty was only beginning to be understood as an obstacle to human rights and there was still uncertainty if gender-based poverty was best remedied through development or equality. The nascent recognition of the relationship between poverty, development, gender and human rights does find expression in CEDAW: Article 14 on rural women. Second, the politics of the Cold War meant an open discussion on gender-based poverty was impossible as both prominent economic systems at the time would deny that poverty existed. However, both the East and the West used the employment provision (Article 11) to improve women's economic status. These first two reasons reveal that CEDAW was implicitly designed to incorporate some of the harms of gender-based poverty. Moreover, with the passage of time the reasons for not explicitly dealing with poverty are no longer relevant. Gender-based poverty as argued in Chapter 1 is now understood not only as a political or developmental issue but also as a serious obstacle to women's human rights. The Cold War is over and the political constraints that muted discussions on gender-based poverty no longer exist. It is possible to openly examine the potential of CEDAW to combat gender-based poverty. The third reason relates to the cost to States on fulfilling their CEDAW obligations. This is still a relevant concern which is canvassed in Chapter 4. In this subsection I examine these reasons in greater detail and explain their implications for a modern interpretation of CEDAW.

(i) Poverty as Politics

The most prominent reason that poverty was not included in CEDAW was that it was not conceived as a human rights issue. During the drafting process, there were very few instances where States noted the connection between poverty and human rights. Bangladesh, Indonesia, Pakistan, Singapore, Somalia and Kenya wanted to include reference to a new economic order increasing

equality between men and women.⁸⁴ However, this is a limited example. There is no record of any debate on understanding gender-based poverty as an issue of equality, non-discrimination or human rights. Appleby writes ‘men [or women] cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is.’⁸⁵ If poverty was never conceptualized as an issue of human rights, States would not have the ability to frame poverty in these terms.

Rather than being seen as a human rights issue, women’s poverty was a multi-faceted issue and one of those facets was politics. The novel aspects of the preamble and the fact that poverty is confined to it suggest that poverty was perceived as a political issue. The preamble of CEDAW is an outlier among international human rights treaties. Burrows notes that ‘the preamble to a convention should in principle lay down the purposes and reasons behind [its’] contents.’⁸⁶ CEDAW breaks with this drafting tradition and ‘makes “what are essentially political statements,” some of its paragraphs couched as political rhetoric, raising contemporaneous issues not immediately directed to the core goal of the Convention—to eliminate discrimination against women.’⁸⁷ The first few paragraphs of the CEDAW preamble are explain the motivation for creating a separate treaty for women’s rights, namely that despite the existence of various UN international instruments, discrimination against women still exists. However, the remaining nine paragraphs of CEDAW refer to poverty, the new international economic order, apartheid, racism, colonialism, neo-colonialism, aggressive foreign occupation, domination and interference, international peace and security, disarmament, nuclear disarmament, self-determination, national and territorial sovereignty, social progress, development,

⁸⁴ E/CN.6/591.

⁸⁵ Appleby (n 8) 15

⁸⁶ Burrows (n 41) 423.

⁸⁷ Christine Chinkin and Beate Rudolf, ‘Preamble’ in in Marsha A. Freeman, Chrstine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2013) 36.

peace, family, the social significance of maternity, parenthood and the roles of men and women. CEDAW does not contain any substantive provisions with respect to poverty, economic order, world peace, apartheid or etc. Even the rejected proposals referring to the unjust international economic system and closing the gap between developed and developing countries were proposals for the preamble not the substantive body of the treaty.

The political nature of the CEDAW preamble has been commented on by the drafters and academics. The UK observed the preamble was too long and too political⁸⁸ and the representative stated ‘some of those paragraphs...were unquestionably politically controversial and in some cases had little, if any, relevance to the Convention!’⁸⁹ Meron observes that ‘the importance of the elimination of foreign domination may be clear, as is the desirability of achieving international agreement on disarmament, but the relevance of these matters to the efforts to end sexual discrimination cannot be assumed a priori.’⁹⁰ Reanda comments that ‘[i]ts language is considerably closer to that of a political declaration than that of an international treaty.’⁹¹ The inclusion of poverty and the new international economic order in the preamble in close proximity to other major contemporary geo-political issues and in contravention of drafting traditions suggests the State representatives perceived women’s poverty as a political issue. This is not to detract from the legal status of the preamble. The reference to poverty in the preamble is used as an interpretative aid in Chapter 4 to argue that for CEDAW to realise its goals of eliminating discrimination and achieving gender equality so that women can enjoy their human rights it needs to account for how gender-based poverty.

⁸⁸ A/C.3/34/S.R.

⁸⁹ As cited in Burrows (n 41) 424.

⁹⁰ Theodor Meron, ‘The Convention on the Elimination of All Forms of Discrimination Against Women’ in *Human Rights Law Making in the UN: A Critique of Instruments and Processes* (OUP, 1986) 58.

⁹¹ Laura Reanda, ‘The Commission on the Status of Women’ in Philip Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (OUP, 1992) 265.

(ii) *Poverty as Development*

Poverty was also conceived as a development issue. If poverty was connected to development and if there was uncertainty if development could or should be linked to non-discrimination, equality or human rights it explains why there was no direct substantive provision in a treaty on gender-based poverty that is premised on eliminating discrimination to achieving equal enjoyment of women's human rights. This offers a further explanation for why gender-based poverty was not explicitly included in CEDAW. At the same time, there was also a limited but growing recognition that gender-based poverty, development and gender equality were connected; however, there were strong opponents to drawing this connection. The debates on the inter-connections between development, equality and poverty also provide greater clarity on the substantive provisions in CEDAW. Article 14 of CEDAW guarantees, on the basis of equality, participation in development and basic socio-economic rights to rural women. The early recognition of this relationship and how this was incorporated into the treaty indicates the concealed potential to use CEDAW as a vehicle to combat gender-based poverty.

There is limited evidence in the *travaux préparatoires* on the conflicting understandings on the connections between development, equality and gender-based poverty. Hungary noted 'the status of women is affected by the stage of development in different parts of the world.'⁹² This implies a relationship between development and gender equality. Mexico drew the most overt connection between poverty, development and women's rights. The State representative noted 'under-development subjects women to exploitation, development policies hampered by existing unjust system of international economic relations.'⁹³ On the other hand, Denmark observed 'that rural

⁹² E/CN.6/591.

⁹³ A/C.3/32/WG.1/CRP.2.

women could benefit from rural development.⁹⁴ This stresses the importance of development rather than equality in improving rural women's lives.

The varying perspectives come to the fore when examining the socio-political context outside of the drafting table. The CSW held three conferences: Mexico City in 1975, Copenhagen in 1980 and Nairobi in 1985. The meetings around these conferences demonstrate two very different perceptions on the development, equality, poverty and human rights. First, there is ample evidence that some actors believed gender-based poverty was best solved through development. A joint meeting of the Social Development Commission and the CSW in 1972 'stressed that the low status of women, especially in developing countries was a major factor in global concerns such as poverty, rapid populations growth, illiteracy, forced urbanization, poor nutrition and health.'⁹⁵ It is important to note that it is at a *development* meeting that the low status of women is connected to global poverty. At a planning meeting for the Copenhagen conference held in 1976, some CSW members '...suggested that special place and emphasis should be placed on community *development*, on women in economic *development* and on methods for increasing employment opportunities for women.'⁹⁶ Shahani, the Philippines representative who had submitted the first draft of CEDAW also stressed the importance of development. She argued that 'in order for human rights to be realised and exercised...in developing countries, the proper economic and social conditions—such as rights to education, employment and freedom of expression—had to be created and put in place...*development* would create these conditions. Women's issues began to evolve in the direction of *development*.'⁹⁷

⁹⁴ A/C.3/33/WG.1/CRP.8.

⁹⁵ Kristen Timothy, 'Walking on Eggshells at the UN' in Arvonne S. Fraser and Irene Tinkers (eds) *Developing Power: How Women Transformed International Development* (Feminist Press, 2007) 53.

⁹⁶ E/CN.6/L.716/Add.4.

⁹⁷ Shahani (n 23) 29.

These comments draw a connection between development, economics and employment suggesting that for some the perceived solution to women's low economic status was through development.

There is also evidence that the CSW was concerned that focusing on development would foreclose discussions on women's equality. The original perception was that 'too much attention to economic development would divert the commission from its primary goal of women's equal rights.'⁹⁸ The CSW is pitting equality and development against each other. Ester Boserup, who, in 1970 wrote the landmark book on women's role in economic development, remembers that in 1972 the CSW Secretariat saw development 'as a means...to change their focus from the generally unpopular subject of abstract women's rights to the popular one of economic development.'⁹⁹

The tension between gender, development and equality is also evident in setting the agenda for the global conferences on women. There was a perception that in the 1970s, women from the North saw gender as the main site of women's oppression.¹⁰⁰ Consequentially, they were focused primarily on male-female relations.¹⁰¹ In contrast, 'for women from the South fresh from colonial domination, issues such as apartheid, the global economy...were integral to improving the status and station of women.'¹⁰² Tinker also observes a disagreement on the substantive content of women's issues. She remembers that at the conferences 'many women of the North preferred to separate "women's issues" from "global issues" and questioned the usefulness of spending time at women's meetings attempting to influence policy that would be decided by the [UNGA].'¹⁰³ Women from the

⁹⁸Devaki Jain, *Women, Development, and The UN: A Sixty-year Quest for Equality and Justice* (Indiana University Press, 2005) 35.

⁹⁹ Ester Boserup, *My Professional Life and Publications 1929-1998* (Museum Tusulanum Press, 1999) 49.

¹⁰⁰ Johanna Bond, 'Gender, Discourse and Customary Law in Africa' (2010) 83 S Cal L Rev 509, 529.

¹⁰¹ Margaret Synder, 'Walking My Own Road: How a Sabbatical Year Led to a United Nations Career' in Arvonne S. Fraser and Irene Tinkers (eds) *Developing Power: How Women Transformed International Development* (Feminist Press, 2007) 42.

¹⁰² *ibid.*

¹⁰³ Tinkers (n 22) xxi.

developing world ‘felt that poverty or powerlessness of women cannot be addressed by looking at gender alone but must be seen as a consequence of the Third World’s economic dependency on the industrialized North.’¹⁰⁴ This perspective is reflected in Mexico’s proposal for the preamble of CEDAW: on the current unjust international economic systems that hampers development policies.¹⁰⁵ Synder, reflecting on the Mexico City Conference, felt that the women from the South were disillusioned with the international process as ‘male-female issues could not be resolved while oppressions of whole societies prevailed.’¹⁰⁶ She points out, women from the South were asking: ‘how can women achieve equality when their nations are subject to global inequalities?’¹⁰⁷ One delegate from the South at Mexico City said ‘to be equal in poverty with men is no blessing, we need development.’¹⁰⁸ This is not to imply that CEDAW needs to address all aspects of poverty, its mandate as explained in detail in Chapter 4 is to the gender-based aspects of poverty. Rather these statements this are evidence that at the time of drafting poverty was conceptualised as an issue of development which was disconnected from gender equality.

On the other hand, there is some limited evidence of a positive relationship between development, equality and human rights. The proposals for the preamble from Bangladesh, Indonesia, Pakistan, Singapore and Somalia did draw a tenuous relationship between development and equality: ‘convinced that the full realization of equality between women and men is possible only if...women and men participate equally in development and decision making process.’ At a planning meeting for the Copenhagen conference where some representatives called for a greater emphasis

¹⁰⁴ *ibid* xxii.

¹⁰⁵ A/C.3/32/WG.1/CRP.2.

¹⁰⁶ Margaret Synder, ‘Unlikely Godmother: The UN and the Global Women’s Movement’ in Myra Marx Ferree and Aili Mari Tripp (eds) *Global Feminism: Transnational Women’s Activism, Organizing and Human Rights* (NYUP, 2006) 32.

¹⁰⁷ *ibid* 24.

¹⁰⁸ *ibid* 32.

on development, in contrast there were also CSW members who felt equality and development must be addressed concurrently. Some representatives ‘felt that development could not be approached separately from equality and peace, for women though they participated in development were not equal to men and the possibility of continuation of conflict posed a threat to development.’¹⁰⁹ This suggests that gender equality and development could be used together to improve women’s socio-economic status.

The drafting of CEDAW was influenced by these debates and this can best be seen in Article 14 (rural women). Article 14 draws a tentative connection between poverty, development, gender equality and human rights. For example Article 14(1) recognises the importance of rural women’s work to their families’ survival in the non-monetized sector. The sub provisions ensures rural women participate in development planning (Article 14(2)(a)), that they benefit directly from social security programmes (Article 14(2)(c)) and enjoy adequate living conditions particularly in relation to housing, sanitation, electricity, water supply, transport and communications (Article 14(2)(h)).

Pruitt and Burrows interpret Article 14 as addressing development not equality of rural women. They have suggested that the fact that the rights to standard of living, housing and water are solely provided to rural women means that “rural” should be read as “developing.” Pruitt argues that the mention of development in Article 14 assumes that ‘rural places are in need of development.’¹¹⁰ The provisions are primarily programmatic and set ‘forth aspirational ‘future policy for governments to follow in their *development* planning.’¹¹¹ She uses textualism to argue that Article 14 was meant to address developing women because the UNGA Resolution on the “Effective Mobilization of

¹⁰⁹ E/CN.6/L.716/Add.4.

¹¹⁰ Lisa Pruitt, ‘Deconstructing CEDAW’s Article 14: Name and Explaining the Rural Difference (2011) 17 William & Mary J of W and the L 347, 364.

¹¹¹ *ibid* 362, citing Burrows (n 41) 447 [emphasis added].

Women in Development”¹¹² echoes Article 14(2)(d)-(g): inclusion in self-help groups, access to credit, loans, co-operative and community activities.¹¹³ Similarly, Burrows believes Article 14 was meant to address poverty in the developing world. She writes that it is ‘a manifestation of the impact of delegates of women from the Third World on the Commission on the Status of Women’ and could be seen as ‘perhaps an inevitable culmination of the work of the UN linking question of development with those women.’¹¹⁴

The conflicting perspectives on poverty, development and equality reflect the emergence of a new understanding on the relationship between these elements. As with any new idea there will be contradictory debates on it. What these remembrances add up to is that at the time of drafting there was uncertainty. Some actors thought gender-based poverty was best tackled through development and development was something separate from equality. Other actors argued both development and equality were needed to empower women. This tension is reflected in Article 14 (rural women). This provision tentatively joins together development, equality and key provisions: social security and adequate living conditions, necessary to combat gender-based poverty. This contextual analysis first offers an explanation for why there is no explicit obligation in CEDAW on gender-based poverty. Second it demonstrates how poverty was implicitly included in CEDAW.

(iii) *The Politics of the Cold War*

CEDAW was drafted in a period of *detente* during the Cold War. However, there were still the attendant tensions. These factors played out during the drafting process and affected the ability of States to openly discuss poverty as a gender-based phenomenon connected to human rights. Neither

¹¹² Resolution 31/75 (1976).

¹¹³ Pruitt (n 110) 364.

¹¹⁴ Burrows (n 41) 447.

the capitalist nor communist system could admit that their economic system created or maintained women's poverty. However, both of these political and economic ideologies placed importance on the role played by formal employment in improving living conditions. Consequentially, at the drafting table it was also through employment (Article 11) that key aspects of gender-based poverty were incorporated into CEDAW. The drafting parties have a history of building consensus around women's employment and socio-economic status as evidenced by the various ILO Conventions, referred to above, on women's equality in the labour market.

Before proceeding, it is necessary to pause and note the difficulty of finding source material from the Eastern States detailing their involvement in the drafting of CEDAW or more generally their participation in the UN during the 1960s and 1970s. Eastern women have not written memoirs that are easily accessible to English scholars. Socialist and materialist feminists who at the time of drafting were analysing Marx, Engels and Lenin were Western women.¹¹⁵ Thus, it is impossible to truly paint the whole picture. All that is readily available are contemporaneous Western understandings of communism and socialism. Despite this limitation, the available material, especially the writings of Marx and Engels permit a broad understanding of the ideological contexts at play during the drafting of CEDAW. These texts were highly influential and Havelkova, writing on gender under State socialism in Czechoslovakia, identifies this as one of the main features of State Socialist law.¹¹⁶ Throughout the Cold War and particularly in the Stalinist period 'the canonic interpretation of Marxism by the socialist legal scholars and the Party was followed like a religion...law was used to bring about various tenets of Marxism, including its response to the

¹¹⁵ See Mitchell (n 31); Heidi Hartmann, 'The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union' in Lydia Sargent (ed) *Women and the Revolution: A Discussion of the unhappy marriage of Marxism and Feminism* (Black Rose Books Ltd, 1981); Iris Young, 'Beyond the Unhappy Marriage: A Critique of the Dual Systems Theory' in Lydia Sargent (ed) *Women and the Revolution: A Discussion of the unhappy marriage of Marxism and Feminism* (Black Rose Books Ltd, 1981).

¹¹⁶ Barbara Havelkova, 'Gender in Law under and after State: Socialism: the example of the Czech Republic' (DPhil Thesis, University of Oxford 2012).

“woman question.”¹¹⁷ Using the foundational sources for communism does permit a contextual understanding on how the representatives from the Eastern bloc understood women, poverty and employment.

State representatives could not have explicitly included an obligation on women’s poverty as neither of the powerful and dominant players, the US and the USSR, would admit on the international stage women’s poverty was a problem. Both the capitalist and communist systems believed that their economic systems had or would ultimately solve the problem of poverty; therefore there was no need to discuss it in relation to women’s equality.¹¹⁸ Ghodsee noted that ‘the women’s issues promoted by the US government were those seen as being free of any discussion of comparative economic systems and focused narrowly on the inequalities between men and women.’¹¹⁹ Representatives were to focus on ‘employment discrimination, inequalities in educational attainment or women’s representation in political office.’¹²⁰ The US’s agenda for women at the UN specifically foreclosed any assessment of how economic structures discriminate against women. Trying to trace the role of capitalism in discriminating against women ‘was characterized as irrelevant communist propaganda.’¹²¹

On the other side of the Iron Curtain there was also an unwillingness to engage with women’s poverty. Rehof notes that the socialist countries took issue with including a paragraph in the preamble of CEDAW on the continuing existence of discrimination against women since they

¹¹⁷ *ibid.* Citing Příbáň, ‘Na stráží jednoty světa: Marxismus a právní teorie (Guarding the Unity of the World: Marxism and Legal Theory)’ 48-49.

¹¹⁸ See Hartmann (n 115).

¹¹⁹ Ghodsee (n 20) 6.

¹²⁰ *ibid.*

¹²¹ *ibid.*

felt ‘that discrimination against women had been eliminated in their countries.’¹²² While the Eastern Bloc is not explicitly stating that women’s poverty does not exist under socialism or communism, this comment does suggest an unwillingness to engage in critical reflection on the status of women. Havelkova notes an institutional trend against self-examination. She writes ‘State Socialist law often expressed achievement—whether or not the statements were in any way connected to reality.’¹²³ This dogmatic approach to equality filters into their understanding of women’s economic status. By Marxist theory, equality was conceived in terms of class and the primary method to achieve this was the overthrow of capitalism.¹²⁴ In the Eastern Bloc ‘as economic equality was considered already achieved—through the socialist ownership of means of production—much of the legal writing on equality was congratulatory.’¹²⁵ In 1964 Czech academics were arguing that the change from a market based system to a planned economy ‘guaranteed women actual real equal wage for equal work with men.’¹²⁶ At this time however, women earned 66% of men’s wages.¹²⁷ Under this new regime, all the workers had an equal share in the means of production and thus none should be living in poverty. Consequentially, it was not possible to discuss the reality of women’s poverty.

This ideologically enforced silence was even more pronounced on the international arena, as Rehof notes in his study on the *travaux préparatoires* of CEDAW.¹²⁸ The CEDAW drafting processes

¹²² Rehof (n 2) 35; A/C.3/32/L.59

¹²³ Havelkova (n 116).

¹²⁴ Hartmann (n 115).

¹²⁵ Havelkova (n 116).

¹²⁶ *ibid* citing Jiří Jirásek, ‘Některé otázky postavení žen v pracovních vztazích (Some issues of women's standing in labour relations)’ [1964] *Právník* 177.

¹²⁷ *ibid* citing Alena Křížková and Marta Vohlídalová, ‘Czech labour market’ in Hana Hašková and Zuzana Uhde (eds), *Description of legislation and statistical data on childcare leaves, childcare benefits, childcare facilities and work-life balance arrangements in the Czech labor market since the WWII* (Unpublished report for FEMCIT grant [2007] 6. RP EU, No. 028746-2. On file with the Havelkova 2007).

¹²⁸ Rehof (n 2).

and the UN conferences were an opportunity to showcase the best of each economic system.

Ghodsee notes that ‘championing the cause of women’s rights was an integral part of the Soviet Union’s strategy of winning nations to the communist cause in the developing world.’¹²⁹

Additionally, mentioning poverty might, as Ghodsee indicates be perceived as comparing economic systems which easily could have lead into a political minefield and derailed the drafting of CEDAW.

With these forces at play, it would have been a challenge to have gender-based poverty on the agenda for CEDAW and further explains why States were largely silent as to women’s poverty. A structuralist methodological lens supports this argument. Prior to the dissolution of the USSR, there were very limited UN references to poverty. Almost immediately after the end of the Cold War, the UN began to focus more openly on poverty. The HDI was developed in 1990 ‘to shift the focus of development economic from national income accounting to people centred policies.’¹³⁰ CESCR began releasing General Comments on socio-economic rights in 1989. In comparison the HRC and the CEDAW Committee began releasing general comments in the early 1980s. There may be a variety of reasons why CESCR did not release comments until the end of the Cold War, but this coinciding with a major geo-political change does indicate at least the possibility that end of US-USSR tensions was beneficial to discussions on poverty.

Both the East and West used their ideological understandings on the role of employment in improving the lives of women as a screen for discussing women’s economic situation. Here I will briefly sketch the two regimes understanding of women and formal employment and then trace how these perspectives were incorporated into Article 11 (employment) of CEDAW. First, from the Soviet perspective: ‘most Marxist analysis of women’s position takes as their question the

¹²⁹ Ghodsee (n 20) 5.

¹³⁰ UNDP, ‘About Human Development’ <<http://hdr.undp.org/en/humandev/>>.

relationship of women to the economic system.¹³¹ Marx, Engels and Lenin argued that women's participation in the formal labour force was the key to their emancipation and necessary prerequisite so they can participate in the proletarian revolution.¹³² Hungary, a member of the Eastern Bloc, reflects this position during the drafting and observed that employment is a necessary condition of equality.¹³³ The liberal feminists of the West also placed a premium on paid employment in improving women's status. They focused on expanding women's participation in public life, of opening up the male world to women and this included formal employment.¹³⁴ Liberal feminists were arguing that economic independence would result in improved male-female relations, but this independence would consequentially have a positive impact on women's poverty. At the drafting of CEDAW, the US wanted to emphasize the need for legislation to ensure equal employment opportunities and was concerned that protectionist legislation prevented women from getting high paid jobs.¹³⁵

Although the ideological underpinnings for connecting formal employment with women's economic status were different, both the West and the East incorporated many poverty related measures under Article 11 (employment). In the USSR draft, submitted to the CSW in 1974, the preamble called for an expansion of women's participation in the formal labour force.¹³⁶ It is under employment that working women have the right to free re-training, social security, pensions, free

¹³¹ Hartmann (n 115) 3.

¹³² *ibid.*

¹³³ E/CN.6/591.

¹³⁴ Dalton Clare, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987-88) 3(1) *Berkeley Women's LJ* 1.

¹³⁵ E/CN.6/L.680.

¹³⁶ E/CN.6/AC.1/L.2.

medical care during pregnancy and free or low cost child care.¹³⁷ In the USSR draft, there is an obligation for the State to treat part time workers identical to full-time workers and an obligation to take all measures to allow women to work and fulfil their maternal care-giving role.¹³⁸ During the drafting process, other poverty related measures were also originally proposed under the employment obligation. Access to medical services and pregnancy related health services were originally sub-clauses of Article 11 (employment).¹³⁹ Primarily, the US was focused on opposing the USSR's proposal to include protectionist provisions on night work and heavy lifting. With respect to the role of protectionist provisions, both sides were so intransigent that it was agreed that delegates from the US and the USSR should meet separately to work out a compromise.¹⁴⁰ The glimmers of tensions that survive in the record indicate that an open discussion of women's poverty was simply not possible. However, both countries were using the Article 11 (employment) to further their own ideological understanding of women, equality and economic status

(iv) The Expense of Gender-Based Poverty

The drafting record also indicates an apprehension regarding the costs of alleviating gender-based poverty through the provision of rights in an international treaty. States from the developed world—US, Canada, UK, Japan, France and Netherlands—in the latter stages of the drafting process removed obligations to provide rights free of charge. Their proposed amendments made these rights either more narrowly tailored or created ambiguity. For example, the right to “free medical services” became the right to “access medical services.”¹⁴¹

¹³⁷ *ibid* Article 11.

¹³⁸ *ibid* Article 12 and 13

¹³⁹ A/C.3/32/WG.1/CRP.4; A/C.3/32/WG.1/CRP.5/Add.1; A/C.3/33/WG.1/CRP.5/Add.6.

¹⁴⁰ E/CN.6/SR.647.

¹⁴¹ A/C.3/32/WG.1/CRP.4.

An analogy with poverty is helpful in explaining the hesitation about the costs of using human rights to remedy gender-based poverty. The West's uneasiness about providing rights perceived as making demands on public finances is well documented.¹⁴² This is reflected in the bifurcation between civil and political rights and socio-economic rights. Civil and political rights are perceived as creating negative duties which incur minimal costs to the State while socio-economic rights create positive duties which are regarded as costly.¹⁴³ As a legacy of this historically rooted fear, there are two international human rights covenants, ICCPR and ICESCR. These treaties separate civil and political rights from social, economic and cultural rights. Both were entered into force in the 1970s and serve as contextual evidence on perception of the costs associated with using rights to understand poverty. The ICESCR creates an obligation to improve the standard of living, a right to be free from hunger and to social security. However, it has been described as a 'promotional covenant'¹⁴⁴ because of the nature of the State's obligation to ensure these rights. States are only required by Article 2(1) of ICESCR to use the maximum available resources to progressively achieve the full right. Furthermore, Article 2(3) of ICESCR allows developing States due to their national economy to limit the socio-economic rights of non-nationals. This acknowledges that developing States may not be able to afford to protect the socio-economic rights to the fullest extent. In comparison, under ICCPR rights are to be realized immediately and there is no mention of national economies limiting civil and political rights. The different implementation standards, with the lower standard for rights more closely associated with poverty is a 'recognition of...the fact that resources may not be immediately available to fulfil the right.'¹⁴⁵

¹⁴² Barbara Stark, 'The International Covenant on Economic, Social, and Cultural Rights and Monitoring' [2009] Hofstra University School of Law Legal Studies Research Paper Series; Research Paper No 08-18

¹⁴³ David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute, 1998).

¹⁴⁴ E. Schwelb, 'Some aspects of the International Covenants on Human Rights of December 1966' in A. Eide and A. Schou, (eds) *International Protection of Human Rights* (Nobel Symposium 7, 1968) 103.

¹⁴⁵ Sandra Fredman, *Human Rights Transformed* (OUP, 2008) 80.

Adding further complexity, the rights in CEDAW are premised on non-discrimination and equality. They are immediately enforceable obligations.¹⁴⁶ Unlike ICESCR, in CEDAW there are no provisions allowing States to gradually realize rights. Consequentially, States would be concerned about creating a full, immediate and costly right to remedy gender-based poverty for example, free health services or child care facilities. These issues are explored in greater detail in Chapter 4 when analysing how to incorporate gender-based poverty into CEDAW. At this stage, it is useful to note that the budgetary implications on using rights to combat poverty and gender-based poverty provides a further explanation why there is no explicit obligation to remedy gender-based poverty in CEDAW.

VI. Conclusion

At the drafting table, while the States made proposals that implicitly referred to poverty, there was no substantive provision requiring States to ameliorate gender-based poverty. There are several reasons for this gap in CEDAW. First, poverty was understood as an issue of politics and development and not of equality or human rights. Second, the tensions of the Cold War foreclosed any open discussion on poverty, gender equality and human rights. These two reasons are no longer relevant. The Cold War is over and there are no equivalent international geo-political forces requiring States to ignore gender-based poverty and there is an understanding that poverty is an obstacle to human rights. However, the reasons for not discussing poverty when drafting CEDAW also indicate that States used Article 11 (employment) and Article 14 (rural women) to understand and remedy women's economic status. Third, State's expressed concerns on the budgetary implications of ensuring gender equality and women's human rights. Concerns on the nature of the State's obligations and the implications on the State's resources are, given the current climate of

¹⁴⁶CESCR, 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (2009) E/C.12/GC/20 [7].

austerity, still prevalent. This means that when interpreting CEDAW to understand the harms of gender-based poverty it is necessary to explain the implications to the State's obligations towards women in poverty. This is canvassed in Chapter 4. The passage of 40 years means it is time to explore openly how to use CEDAW to tackle gender-based poverty. To gain further knowledge on how this can best be accomplished, the next chapter investigates how similarly situated UN human rights bodies have understood the relationship between gender, poverty and human rights.

CHAPTER 3

POVERTY AND THE UN HUMAN RIGHTS SYSTEM

I. Introduction

Although there is no explicit obligation in CEDAW on gender-based poverty, the analysis in Chapter 2 demonstrates that several Articles in CEDAW were implicitly meant to improve women's socio-economic status. Since the drafting of CEDAW, ideas on the nature of poverty have substantially shifted. The UN Special Rapporteur on extreme poverty and human rights has argued that 'eradicating extreme poverty is not only a moral duty but also a legal obligation [in] existing international human rights law.'¹ With this shift in thinking this is an opportune moment to explore how CEDAW can explicitly address gender-based poverty. My proposed solution to the gender-based poverty gap in CEDAW is that equality and non-discrimination can be interpreted so as to incorporate the harms of gender-based poverty. Before turning to examine the text of CEDAW to evaluate the legitimacy of this proposal, in this chapter I examine how various UN human rights bodies have approached gender-based poverty. At first glance, looking at these external sources is irrelevant to interpreting CEDAW. Any interpretation of gender-based poverty in CEDAW must be faithful to the text of the treaty. The material generated by these external sources is not binding legal authority on how to interpret CEDAW. In this chapter I argue that there are valuable insights to be gained from actors who are embedded in the same human rights system as CEDAW and that are grappling with similar problems to the CEDAW Committee. The aim is to identify various interpretative approaches these bodies have taken to gender-based poverty. This is important so that

¹ UN Special Rapporteur on extreme poverty and human rights, 'Final draft of the guiding principles on extreme poverty and human rights' (2012) A/HRC/21/39.

in Chapter 4 all possible options for incorporating gender-based poverty can be evaluated to strengthen my claim that equality and non-discrimination offers the best option for including gender-based poverty into CEDAW.

This chapter is multi-purposed. The first purpose is to map and identify the challenges of using the VCLT interpretative framework, particularly in the context of a multi-lateral human rights treaty. This analysis is used to accurately detect how the UN treaty bodies have included poverty in their respective human rights treaties. The second section investigates the legal authority of the activities of select treaty and Charter-based bodies to properly understand their relationship to CEDAW. The third section analyses how these comparatively situated actors approach gender-based poverty. There are two conclusions from this analysis. First, the HRC and CESCR have interpreted individual rights to account for how poverty is an obstacle to these rights. CESCR has also established socio-economic status as an analogous ground of discrimination in ICESCR. The Charter based bodies consistently advocate that all human rights need to be used in a comprehensive manner to remedy gender-based poverty. Second, this analysis also reveals that the treaty-based bodies have pre-dominantly understood gender inequality and poverty as two separate wrongs. While there is a growing momentum to interpret rights with reference to poverty, there is a limited understanding on the connection between gender, equality, poverty and human rights. There is a further need for CEDAW, the leading UN human rights body on gender, to take the next step and bring these concepts together. The applicability of these different interpretative routes identified in this chapter for including gender-based poverty into CEDAW is examined in Chapter 4.

II. The Alchemy of Interpretation

(i) Article 31 of the VCLT

This section maps out the interpretative methodology for international treaties. This section and the next highlight the challenges this methodology poses when interpreting UN human rights treaties.² The purpose of this analysis is to be able to properly identify the interpretative techniques employed by the UN human rights bodies in the third section of this chapter and is drawn on again when interpreting the text of CEDAW in Chapter 4. The VCLT is the definitive methodology for the interpretation of international treaties. Article 31(1) holds that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ There is no hierarchy within Article 31(1). The International Law Commission’s Special Rapporteur explains ‘that the process of interpretation [is] essentially a simultaneous one, though logic might dictate a certain order of thought.’³ This means the interpreter has to keep ‘open the interpretation until the very conclusion of the interpretative process.’⁴

Examining the three elements in greater detail: the first factor, “ordinary meaning” means the words of the treaty should be read in their plain, obvious and natural meaning.⁵ The second factor, “context” is narrowly defined and is not a license to investigate the wider socio-political context. By Article 31(2) context is limited to the remaining text of the treaty, any preamble, annexes or any agreement made at the conclusion of the treaty. As Orakhelashvili explains context ‘refers to the

² There is a debate if human rights treaties are a special category of international treaties. See Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP, 2014). In the section below rather than resolve this debate I point out the challenges of using the work of UN bodies when interpreting international human rights treaties.

³ Richard Gardiner, *Treaty Interpretation* (OUP, 2010) 30.

⁴ *ibid* 10.

⁵ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2008) 318.

textual aspects of treaty provisions other than those directly at stake in the interpretative process. The aim of this factor is to ensure that the meaning ascribed to the treaty clauses does not contradict the meaning that other clauses of the same treaty may possess.⁶ Context is designed to ensure the interpretation is internally coherent. Alongside context, the interpreter is to consider any subsequent agreement between the parties on the interpretation of the treaty, any subsequent practice on the application of the treaty which establishes its meaning and any other relevant rules of international law applicable between the parties.⁷

The last factor, “object and purpose” is used to shed ‘light on the ordinary meaning of terms used in context.’⁸ The goals of the treaty are derived from a holistic examination of the preamble, text, its general design and a comparison with other treaties.⁹ The interpreter is trying to ascertain the ‘general sense and spirit’ of the treaty.¹⁰ While it is clear that the object and purpose ‘cannot be used to alter the clear meaning of a term,’¹¹ how should it be properly used? Linked to this question is the concept of effectiveness. The ICJ has connected the principle of effectiveness to the object and purpose under of Article 31(1).¹² Gardiner explains that effectiveness is the notion that the interpretation of a treaty should ‘provide an outcome that advances the aims of the treaty.’¹³ The goals of the treaty are used to arrive at an interpretation that achieves its aims while still being

⁶ *ibid* 339.

⁷ Article 31(3) of the VCLT.

⁸ Gardiner (n 3) 199.

⁹ Orakhelashvili (n 5) 339.

¹⁰ William Hall, *A Treatise on International Law* (1895) (Kessinger Publishing, 2010) 353-354 as cited in Orakhelashvili (n 5) 344.

¹¹ Gardiner (n 3) 198.

¹² *Territorial Dispute (Libyan Arab Jamahiriya/ Chad)* [1994] ICJ Reports 6 [25]-[26], [51]-[52].

¹³ Gardiner (n 5) 190.

consistent with the ordinary meaning and context of the treaty.¹⁴ In conclusion, although Article 31 is relatively straightforward to explain, its application can be controversial.¹⁵ As Gardiner explains, ‘the rules are not a set of simple precepts that can be applied to produce a scientifically verifiable result.’¹⁶

This serves as an overview of the methodological framework for international interpretation. For the purpose of the analysis in this chapter, there are two further interpretative techniques which although not explicitly referred to in the VCLT need to be investigated: evolutionary and comparative interpretation. Both of these approaches are pertinent to understanding how to persuasively interpret CEDAW.

(ii) *Evolutionary Interpretation*

The evolutionary approach to interpretation recognises that words and phrases in the treaty should be interpreted in light of new developments in international law. The ICJ explains that some words are ‘by definition evolutionary...and not static.’¹⁷ Judge Jessup notes: ‘The law can never be oblivious to changes in life, circumstance and community standards...Treaties—especially multi-partite treaties of an institutional or legislative character—cannot have an absolutely immutable character.’¹⁸ A court must ‘take into consideration the changes which have occurred [since drafting], and its

¹⁴ Orakhelashvili (n 5) 395.

¹⁵ Jonas Christofferesen, ‘Impact on General Principles of Treaty Interpretation’ in Menno Kamminga and Martin Scheinin (eds) *The Impact of Human Rights Law on General International Law* (OUP, 2009) 40.

¹⁶ Gardiner (n 3) 6.

¹⁷ *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West-Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 31.

¹⁸ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* [1966] ICJ Rep 6, 439 (Judge Jessup, Dissenting Opinion).

interpretation cannot remain unaffected by the subsequent development of the law.¹⁹ On the other hand, the principle of contemporaneity holds that words should be interpreted as they were defined at the time of drafting.²⁰ The challenge is in determining whether an evolutionary or contemporaneity approach should be taken to interpreting a specific treaty.

The VCLT framework gives very little guidance in relation to time and interpretation.²¹ International courts and tribunals have not consistently clarified why they are taking one approach or the other.²² Bjorge, however, convincingly argues that the touchstone for an evolutionary or non-evolutionary interpretation is: what did the parties intend?²³ He explains that ‘the evolutionary interpretation of treaties is not a separate method of interpretation; it is rather the result of a proper application of the usual means of interpretation, as means by which to establish the parties intention.’²⁴ Was it the intention of the parties that the treaty should take account of the passage of time?²⁵ Intention can be derived not only from the *travaux préparatoires* but also from the language, structure and object and purpose of the treaty.²⁶ For example in *Gabčíkovo–Nagymaros Project (Hungary/ Slovakia)*²⁷ the ‘language of the treaty indicates that States have committed to a programme

¹⁹ *ibid.*

²⁰ Gardiner (n 3) 64; also see *Namibia* (n 17) 182 (Judge de Castro, Dissenting Opinion).

²¹ Gardiner (n 3) 256.

²² *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 231 [10] (Judge ad hoc Guillaume, Declaration).

²³ Bjorge (n 2).

²⁴ *ibid.* 2.

²⁵ *Namibia* (n 17) [53].

²⁶ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 317. Also see Bjorge (n 2) 92.

²⁷ [1997] ICJ Rep 14, 67-68.

of progressive development.²⁸ While in *Award in the Arbitration regarding the Iron Rhine (Ijzereen Rijn)* (*Belgium v Netherlands*)²⁹ ‘an evolutionary interpretation was chosen as that would ensure that the intention of the parties as reflected by reference to the object and purpose.’³⁰ The ICJ has evolved a presumption in favour of an evolutionary interpretation when interpreting generic or open-textured terms.³¹ A generic term is explained as ‘a known legal term, whose content the parties expected would change over time.’³² The ICJ also examines the nature of the legal regime: is this a narrow contract-like treaty between two States or a multi-lateral quasi-legislative treaty? and time: is the treaty fixed term or meant to withstand the test of time?³³ The more enduring, legislative or institutional in nature the treaty the more likely the presumption of an evolutionary interpretation will apply. This presumption is not without criticism.³⁴

The most established use of evolutionary interpretation is in the context of human rights.³⁵ Human rights are in constant change.³⁶ They are sensitive to external influences and should not be read as frozen politics.³⁷ As ideas on the nature of humanity expand so too do ideas on the protections offered by human rights. Human rights treaties are meant to transcend time. The terms

²⁸ Bjore (n 2) 119.

²⁹ (2005) 27 RIAA 35.

³⁰ Bjorge (n 2) 119.

³¹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] ICJ Rep 3 [77].

³² *Kasikili/Sedudu Island (Botswana/Namibia)*, [1999] ICJ Rep 1045, 1113-14 (Judge Higgins Declaration).

³³ *Costa Rica v. Nicaragua* (n 22) [6] (Judge Skotnikov, Separate Opinion).

³⁴ibid; Martin Dawidowicz ‘The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua’ (2011) 24(1) *Leiden J of Intl L* 201, 221.

³⁵ Dawidowicz (n 36) 214; Gardiner (n 3) 254.

³⁶ Karel Vasak, *Towards a Specific International Human Rights Law* (Greenwood Press, 1982) 672.

³⁷ L.D. Eriksson, ‘The Indeterminacy of Law or Law as a Deliberate Practice’ in A. Hirvonen (ed) *Polycentricity: The Multiple Scenes of Law* (Pluto Press, 1998) 46.

in human rights treaties tend to be open-textured. Human rights bodies routinely adopt an evolutionary approach to interpretation.³⁸ For example, the European Convention on Human Rights (ECHR) is described as a 'living instrument which...must be interpreted in light of present-day conditions.'³⁹ The HRC has also embraced this approach when deciding individual communications.⁴⁰ The CEDAW Committee has also held that CEDAW is a dynamic legal instrument.⁴¹ This means the interpretation of human rights treaties are not necessarily bound to past understandings.

(iii) *Comparative Interpretation*

Comparative interpretation recognises that international law is an inter-connected legal system.⁴² Treaties are not drafted in isolation of each other. With the explosion of international law, there is a concern that it is becoming fragmented. To ensure its legitimacy, stability, coherence and continued viability there is a growing impetus to interpret one treaty with reference to another.⁴³ Koskenniemi argues that the key point in comparative interpretation is that the interpreter should examine the wider normative framework in which the treaty operates.⁴⁴ McLachlan argues that the legal basis for this is Article 31(3)(c) of the VCLT (any relevant rules of international law).⁴⁵ Orakhelashvili is skeptical of this approach fearing that it will only add further complications and confusion to the

³⁸ Gardiner (n 3) 254.

³⁹ *Tyrer v United Kingdom*, [1978] 2 EHRR 1.

⁴⁰ *Roger Judge v Canada*, (2003) CCPR/C/78/D/ 829/1998 [10.3]-[10.4].

⁴¹ The Committee, 'General Recommendation No. 25: temporary special measures' (2004) CEDAW/C/GC/25.

⁴² McLachlan (n 26).

⁴³ Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group of the International Law Commission' A/CN.4/L.682 [416].

⁴⁴ *ibid* [415].

⁴⁵ McLachlan (n 26).

already difficult scientific-art of interpretation.⁴⁶ He does raise some important questions: what legal instruments should be compared, how is this to be systematically achieved, what conditions are necessary so as to rely on instrument that a State may not have consent to?⁴⁷ His concerns are particularly legitimate in the wider context of public international law. When, how and why should a treaty on depleting resources between the United Kingdom and Iceland be used as a comparative interpretative tool for a treaty regarding a maritime boundary dispute between El Salvador and Honduras?

These concerns are not quite so prominent in the international human rights for several reasons. First, human rights treaties are designed as universal declarations. They are not narrow treaties designed only to govern a particular issue between two or more specific parties. Human rights treaties are broad and meant to apply to all human beings for all time. Second, ‘all human rights are universal, indivisible and interdependent and interrelated.’⁴⁸ This means human rights do not operate in isolation; rather, they must be interpreted and understood in relation to each other. Third, CEDAW is part of the UN human rights system. Any interpretation of CEDAW is happening within a more formalized multi-lateral holistic legal system that needs to be internally coherent rather than two or more independent sovereign States negotiating a legal issue. The OHCHR is continually advocating for greater consistency and coherence between international human rights treaty bodies.⁴⁹ Fourth, international human rights bodies who interpret these treaties are faced with similar legal questions to such an extent that it is not only self-evident, but in fact beneficial to examine the reasoning process involved in answering similar questions. This is not to say that all international

⁴⁶Orakhelashvili (n 5) 382.

⁴⁷ *ibid* 367.

⁴⁸ Vienna Declaration and Program of Action (1993) A/CONF.157/23.

⁴⁹High Commissioner for Human Rights, ‘Strengthening the UN Human Rights Treaty Bodies’ (2012) 25 <<http://www2.ohchr.org/english/bodies/HRTD/docs/HCREportTBStrengthening.pdf>>.

legal commitments must be interpreted consistently; but rather that drawing on the common pool of knowledge and assessing why to accept or reject another similar situated body's assessment of the same human rights problem can immeasurably enhance the quality of legal reasoning.⁵⁰

There are numerous precedents for a comparative approach to international human rights law. The European Court of Human Rights (ECtHR) refers to the Convention on Torture (CAT) to clarify the meaning of Article 3, the prohibition against torture and degrading treatment in the ECHR,⁵¹ and the ILO Conventions, ICCPR and ICESCR to conclude that municipal servants could form trade unions.⁵² The ECtHR explains that 'the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation...it must also take into account any relevant rules and principles of international law.'⁵³ The HRC explicitly relies on various forms of both binding and non-binding law when deciding individual complaints.⁵⁴ Keller and Grover in their study on the HRC conducted a series of questionnaires and interviews with the members of the Committee. These interviews reveal that the HRC tries 'to reconcile the Covenant in a principled manner with the content of hard and soft laws.'⁵⁵ For example, the HRC draws on the reasoning and non-binding material of various UN human rights treaty bodies.⁵⁶ Dr Eckart Klein, a previous member of the HRC, indicates that even if a General Comment does not explicitly cite another treaty body, the drafter might have taken a 'close look at the parallel provisions of other human

⁵⁰ Sandra Fredman, 'Foreign fads or fashions? The role of comparativism in human rights' (on file).

⁵¹ *Soering v UK*, [1989] 11 EHRR 439; *Selomuni v France*, [2000] 29 EHRR 403.

⁵² *Demir and Bekyara v Turkey*, [2008] ECHR 1345 [98]-[104].

⁵³ *ibid* [67].

⁵⁴ *Sarma v Sri Lanka*, (2003) CCPR/C/78/D/950.2000 [9.2]; *Sharma v Nepal*, (2008) CCPR/C/94/D/1496/2000 [7.4]; *Madoui v Algeria*, (2008) CCPR/C/94/D/1495/2006 [7.2].

⁵⁵ Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 157.

⁵⁶ *ibid*.

rights instruments and the jurisprudence and literature related to them in order to enrich...[her] own knowledge and to avoid contradictions.⁵⁷ Dr Walter Kalin, another former HRC member, provided specific examples: in the General Comment on equality before the courts the HRC harmonised its interpretation of how juveniles were protected with the reasoning of the CCRC⁵⁸ and with respect to admissibility of evidence obtained under torture the General Comment ‘broadly aligns itself with the reasoning of the [CAT] Committee.’⁵⁹ As a further example of the interpretative cross-harmonisation happening at the UN, the CEDAW Committee and the CCRC due to their overlapping mandate released a joint General Recommendation on harmful practices.⁶⁰ There is also evidence of informal cross-fertilisation. In the last session for CESCR, the Committee ‘sought to coordinate its work with that of other bodies to the greatest extent possible and to draw as widely as it can on available expertise in the fields of competence’⁶¹ and it consistently consults with UN bodies and Special Rapporteurs.⁶² There is a joint Working Group for the CEDAW and the HRC which consists of members from each treaty body.⁶³ This all demonstrates that there is a clear attempt to harmonise the UN human rights framework which Keller and Grover conclude ‘from a legal policy perspective...makes good sense.’⁶⁴

⁵⁷ *ibid* 157. Citing Klein questionnaire.

⁵⁸ *ibid*. Citing Kalin questionnaire.

⁵⁹ *ibid*. Citing Kalin interview.

⁶⁰ The Committee and CCRC, ‘General Recommendation No. 31: on harmful practices’ (2014) CEDAW/C/GC/31.

⁶¹ CESCR, ‘Report on the 46th and 47th Session’ (2011) E/2010/22/E/C.12/2011/3 [57].

⁶² *ibid*.

⁶³ The Committee ‘Report on the Committee on the Elimination of Discrimination Against Women: 55th session’ (2013) A/69/38, Decision 55/VII.

⁶⁴ Keller and Grover (n 55) 158.

III. The Legal Authority of UN Human Rights Bodies

The above section described the current methodology for interpreting international human rights treaties. While there is a drive within the UN to ensure human rights are interpreted in an evolutionary, consistent and coherent manner, this still raises the question: what is the precise legal authority for using the various material generated by these other actors to gain further insight into CEDAW? To what extent can the material from the CEDAW Committee be relied upon to interpret CEDAW? This section investigates the legal authority of the treaty and Charter-based bodies' work. Only States can make international law. The advent of international organizations, like the UN is questioning this accepted fact. These bodies regularly engage with the scope of a State's legal obligation through the release of General Comments or Recommendations, Concluding Observations, Individual Communications and working reports. The legal effect and legitimacy of this is still a matter for debate.⁶⁵ As these sources are used throughout the thesis and specifically in this chapter for understanding the UN's approach to gender-based poverty, this section will briefly highlight key aspects of this debate so as to understand the precise extent this material can be relied on while interpreting CEDAW.

Both treaty and Charter-based bodies are mandated to develop standards to 'flesh out the meaning and implications of the relatively bare norms' in international human rights law.⁶⁶ However, it is important to note the distinction between these bodies, as this analysis investigates materials from both sources. As Alston and Goodman describe, 'the UN human rights regime reflects a two-track approach.'⁶⁷ Treaty-based bodies are established by the treaty itself. Article 17 of CEDAW establishes a Committee to monitor the implementation of the treaty. Treaty bodies have a 'limited

⁶⁵ International Law Association, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (Berlin Conference, 2004) [25]-[26].

⁶⁶ Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (OUP, 2013). See UNGA Resolution 60/251 (2006); UNGA Resolution 48/141 (1993).

⁶⁷ *ibid* 691.

mandate reflecting the terms of the treaty.⁶⁸ The CEDAW Committee can consider State reports (Article 18), make General Recommendations (Article 21) and decide Individual Communications that a State has not fulfilled its CEDAW obligations (OP-CEDAW). On the other hand, the UN Charter-based bodies derive their authority from the UN Charter. Charter-based bodies include the the OHCHR and groups or individuals accorded specific mandates by those organs such as the UN Special Rapporteur. The UN ‘Charter-based bodies are political organs.’⁶⁹ They directly criticize specific governments on their human rights record and ‘have a much broader mandate to promote awareness, to foster respect and to respond to violations’ of human rights.⁷⁰

Each has a different process for how human rights standards are developed which can affect their legal weight. The treaty bodies have to ensure consensus among its members. The Committee has twenty-three members who all have to agree on the text of a General Recommendation, Concluding Observation and Individual Communications. This promotes consensus but the effect of this process is ‘compromise, the blunting of positions [and] the failure to take the bolder step.’⁷¹ In contrast, the decisions by the Charter-based bodies are authored by one individual or a small group of people and can be made by ‘strongly contested majority voting.’⁷² Although this can create factional and political battles, it also allows the Charter-based bodies to take a stronger stance on human rights.

⁶⁸ *ibid.*

⁶⁹ Alston and Goodman (n 66) 693.

⁷⁰ *ibid.*

⁷¹ Alston and Goodman (n 66) 765.

⁷² *ibid* 693.

(i) *Treaty-Based Bodies*

There are ten human rights treaty bodies.⁷³ As the HRC and CESCR are the most prominent and have been subject to the most academic commentary, this section will only analyse these two bodies. Similar to the CEDAW Committee, both the HRC and CESCR monitor the implementation of their respective treaties via the Concluding Observations, Individual Communications and General Comments. This generates a sizable volume of material. To examine all of these sources in the detail required is not feasible. Therefore, this analysis is confined to the General Comments. This is the logical choice as the General Comments are meant to consolidate the experience of the HRC and CESCR from reviewing State reports and individual complaints.⁷⁴ As Alston explains the General Comments are the means by which the treaty body ‘distils its considered views on an issue...in the context of a formal statement of its understanding...the aim is to... make more accessible the “jurisprudence” emerging from its work.’⁷⁵

Keller and Grover have identified three functions of the General Comments: legal analytical, policy recommendation and practice direction.⁷⁶ They note that the legal analytical functions ‘enable the [HRC] to develop objective standards for monitoring and promoting compliance...by fleshing out the scope and content of vaguely articulated rights.’⁷⁷ In the policy recommendation function, the treaty body offers suggestions on best practices for States to pursue; and in the practice directions the treaty body provides guidance on what the States should include in the periodic State

⁷³ OHCHR, ‘Treaty bodies’ < <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>>.

⁷⁴ Philip Alston, ‘The Historical Origins of the Concept of ‘General Comments’ in L. Boisson de Chazournes and V. Gowland Debbas (eds) *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff, 2001) 763.

⁷⁵ *ibid* 764.

⁷⁶ Keller and Grover (n 55) 124-126.

⁷⁷ *ibid* 126.

report.⁷⁸ These functions are analysed in greater detail in Chapter 7 when examining of evolutionary General Recommendations and Comments.

While the General Comments have a legal function, they are not legally binding interpretations of the treaty. Since they are drafted by a group of individuals, they are not a series of amendments or the creation of a new subsidiary treaty. The exact extent of the legal significance of General Comments is contested. They have been described as ‘indispensable sources of interpretation’ and as ‘broad, unsystematic statements which are not always well founded.’⁷⁹ There are two main theories explaining the legal weight of General Comments: first, that the General Comments are evidence of subsequent practice by States which by Article 31(3)(b) of the VCLT means they are an interpretative tool for the treaty itself; and second, in the alternative that they are non-binding but persuasive and authoritative interpretations.⁸⁰ The subsequent practice theory holds that unless a State contests a General Comment, it constitutes subsequent State practice and can be taken into account when interpreting the original instrument.⁸¹ This means that prior to using the General Comment to interpret the treaty ‘the reception of [it] by state parties...would have to be analysed in detail.’⁸² There have been some attempts to argue that subsequent practice could be evidenced by the treaty body itself rather than the State.⁸³ By this theory, the practice of the

⁷⁸ *ibid* 125.

⁷⁹ *ibid* 118.

⁸⁰ *ibid* 128.

⁸¹ *ibid* 131.

⁸² *ibid*.

⁸³ *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 490 and 500; Gardiner (n 3) 239.

Committee without regard to the State could be sufficient so as to legitimately use the General Comment to interpret the treaty.⁸⁴ This position remains controversial.⁸⁵

The second theory holds that the General Comments from treaty-based bodies should be considered non-binding, authoritative interpretations. There are several potential sources for this authority. First, the authority of the General Comments comes from the fact that they are drafted by an independent, impartial body of human rights experts. Article 28 of ICCPR requires that the HRC members shall be of ‘high moral character and recognised competence in the field of human rights.’ Alston and Goodman argue the General Comments are significant because they are drafted by ‘a body entrusted and empowered by States to determine authoritatively whether the rights have been violated.’⁸⁶ Second, no other body is mandated to interpret these treaties. States do not generally release statements explaining how they interpret their obligations.⁸⁷ Rather, treaty bodies have been delegated authority by the States to use their expertise to draft General Comments.⁸⁸ This exclusive mandate ‘enhances their persuasiveness’⁸⁹ and ensures ‘international norms are “usable” within national legal systems.’⁹⁰ The ICJ adopts the non-binding authoritative approach to General Comments. When interpreting ICCPR the Court notes that ‘it is in no way obliged, in the exercise of

⁸⁴ International Law Association (n 65).

⁸⁵ *ibid*; Kerstin Mechlem ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt J of Transnational L* 905, 919-20.

⁸⁶ Alston and Goodman (n 66) 792.

⁸⁷ Alston (n 74) 768.

⁸⁸ Article 40(4) of ICCPR; Article 18 of ICESCR.

⁸⁹ Keller and Grover (n 58) 129.

⁹⁰ Alston (n 74) 768.

its judicial function, to model its own interpretation of the Covenant on that of the [HRC, but] it believes that it should *ascribe great weight* to the interpretation adopted by this independent body.⁹¹

(ii) *Charter-Based Bodies*

There are numerous Charter-based bodies, including the Security Council and UNGA. This analysis relies on material from the OHCHR and Special Rapporteurs, so only the legal significance of their role will be explored.

The OHCHR is the principal human rights office of the UN. Its goal ‘is to work for the protection of all human rights for all people...and to assist those responsible for upholding such rights in ensuring that they are implemented.’⁹² The OHCHR works with the entire UN system to ‘develop and strengthen capacity...for the protection of human rights in accordance with international norms.’⁹³ The OHCHR ‘today speaks out on virtually any significant human rights issue around the world.’⁹⁴ The High Commissioner for Human Rights, the head of the OHCHR, has been described as the champion and conscience of human rights. He or she is ‘able to speak out honestly when political forces [keep] others silent or fearful.’⁹⁵ The OHCHR is designed to act independently of States and respond quickly to human rights violations. At times it has been criticized as been overly political. For example, the High Commissioner for Human Rights was criticized by the US Ambassador to the UN when she questioned the US’s use of secret prisons. The US Ambassador said it ‘was inappropriate and illegitimate for an international civil servant to second-guess conduct

⁹¹ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 693 [emphasis added].

⁹² OHCHR, ‘Who We Are: Mission Statement’ <<http://www.ohchr.org/EN/ABOUTUS/Pages/MissionStatement.aspx>>.

⁹³ *ibid.*

⁹⁴ Alston and Goodman (n 66) 744.

⁹⁵ Felice Gaer, ‘Book Review’ (2004) 98 AJIL 391, 392.

that we are engaged in.⁹⁶ The legal significance of the reports of the OHCHR is unclear and has not been the subject of much scholarship. The High Commissioner's mandate does not indicate the legal authority of its findings.⁹⁷ However, similar to the treaty bodies, the High Commissioner is a person of high moral standing, is an impartial, objective expert on human rights.⁹⁸ Their interpretations on human rights while not binding legal authority are persuasive and should be given authoritative interpretative weight.

The same legal uncertainty is true of the work by the Special Rapporteurs. The Special Rapporteurs are appointed by the Human Rights Council. Their mandate is either State specific or on a particular human rights issue; for example extreme poverty and human rights, discrimination against women in law or practice, Cambodia or Somalia. They are selected 'on the basis of their expertise, experience, independence, impartiality, integrity and objectivity.'⁹⁹ Special Rapporteurs have been described as an attempt by the UN 'to pierce the veil of national sovereignty of States to handle serious cases of human rights violations.'¹⁰⁰ In this role Special Rapporteurs perform various functions: investigate alleged violations, undertake fact-finding missions, study a particular right and advocate human right issues to States.¹⁰¹ Subedi, the Special Rapporteur on the situation of human rights in Cambodia, notes that 'because they are not part of an intergovernmental body [Special Rapporteurs] have greater freedom of action, greater flexibility, and fewer political constraints on

⁹⁶ Alston and Goodman (n 66) 745.

⁹⁷ UNGA Resolution 48/141 (1993).

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ Surya Subedi, 'Protection of Human Rights Through the Mechanism of UN Special Rapporteurs' (2011) 33(1) Hum Rts Q 201, 202.

¹⁰¹ 'Manual of Operation of the Special Procedures of the Human Rights Council 5 <http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf>.

speaking their mind.¹⁰² Reports by Special Rapporteurs ‘can make important contributions to the overall body of knowledge in the field and to the understanding of complex problems and their possible solutions.’¹⁰³ Similar to the OHCHR, the Special Rapporteurs have been criticized on political grounds and States have ‘challenged [their] professionalism, impartiality and objectivity.’¹⁰⁴

Reports from Special Rapporteurs are also not legally binding. Special Rapporteurs have a political role, as they directly criticize States, which suggests their work should have little legal significance. At the same time, Alston and Goodman note that their reports can have ‘a major impact when judged by the...uptake of their ideas by judges, governments, human rights groups [and] scholars.’¹⁰⁵ This indicates that there may be de facto legal significance to the findings of Special Rapporteurs. When a report is of high quality and of persuasive legal reasoning it may, notwithstanding its unclear legal weight, become influential through an informal process. By being relied on by the relevant stakeholders working on the frontline of human rights, the work of Special Rapporteurs can have real impact. The same argument also holds true for General Comments, the higher quality of argument can ensure a wider acceptance and use by the relevant stakeholders. Similar to the treaty bodies and the OHCHR, the Special Rapporteurs expertise and role at illuminating specific human rights issues imply that their work could have some persuasive interpretative weight.

For the purposes of this analysis, it is not necessary to conclusively resolve the precise legal authority of norm interpretation by UN human rights bodies. It is clear that these sources are not legally binding for interpreting CEDAW. Even the work of the CEDAW Committee is not a

¹⁰² Subedi (n 100) 218.

¹⁰³ Alston and Goodman (n 66) 728.

¹⁰⁴ Subedi (n 100) 219.

¹⁰⁵ Alston and Goodman (n 66) 728.

binding interpretation of the treaty. However, these are impartial and independent experts grappling with gender, equality, poverty and human rights. Thus, it is beneficial to investigate how these sources understand gender-based poverty. This helps illuminate possible interpretative routes within the text of CEDAW which are explored in detail in Chapter 4.

IV. Poverty and the UN Human Rights Treaty Bodies

None of the core UN human rights treaties creates a right to be free from poverty. This section investigates how the HRC and CESCR interpret ICCPR and ICESCR to bring poverty and gender-based poverty into the treaty framework. I focus particularly on the interpretative techniques used by both bodies, how they have conceptualised poverty, what methods they have used to understand poverty as a human rights issue and any connections drawn between gender equality and poverty. This analysis reveals that the treaty bodies conceptualise poverty as an obstacle to human rights. Both the HRC and CESCR have relied on the VCLT framework to interpret individual rights to account for poverty and in the case of CESCR have established socio-economic status as a ground of discrimination. Notwithstanding this progress, the interaction between gender, equality, poverty and human rights has not been sufficiently understood. To illuminate the shortfalls of seeing gender inequality and poverty as separate problems, particular attention will be paid to CESCR's methodology with respect to the right to water. Similar to gender-based poverty in CEDAW, the right to water is missing from the actual text of ICESCR making the General Comment on water a useful analogy. In this section I do not investigate the meaning of equality and non-discrimination in ICCPR or ICESCR - that analysis is saved for Chapter 4. In this section I am simply investigating how the HRC and CESCR have incorporated poverty and gender-based poverty into their respective treaties.

(i) *Poverty in ICESCR and ICCPR*

The treaty bodies take different approaches to poverty. CESCR applies a consistent framework for interpreting human rights to account for poverty while the HRC's approach is more sporadic. CESCR interprets each right in ICESCR with respect to "physical and economic accessibility", "availability" and "adequacy."¹⁰⁶ This framework tackles the redistribution and recognition harms of poverty. Economic accessibility requires the normative content of the right to take account the costs of enjoying it. For example, for the right to housing, the 'personal or household financial costs associated with the acquisition...should be at a level that the attainment and satisfaction of other basic needs are not threatened or compromised.'¹⁰⁷ A right is undermined when the individual has to choose between different basic needs or when it is so costly the right in question remains illusory. The two remaining factors, "availability" and "adequacy" also have a role in alleviating poverty. CESCR argues that the socio-economic rights in the treaty should not be interpreted narrowly.¹⁰⁸ The normative content of the right should not be reduced to the science of survival. Food and water should not be equated to daily intake of calories or litres of water. This approach recognizes that poverty is not exclusively economic deprivation. The right must be interpreted in its social, economic, cultural, climatic and ecological context.¹⁰⁹ While CESCR does not provide specific examples, "availability" and "adequacy" could take account of the type of food, water and housing available and the manner of acquiring it. For example, for nomadic people like the Roma it would be culturally inadequate to interpret a right to housing to include permanent houses.

¹⁰⁶ CESCR, 'General Comment No. 12: The right to adequate food' (1999) E/C.12/1999/5 [6]-[13].

¹⁰⁷ *ibid* [13]. Also see CESCR 'General Comment No. 4: The right to adequate housing' (1992) E/1992/23 [8].

¹⁰⁸ CESCR, 'General Comment No. 4' (n 107) [7].

¹⁰⁹ CESCR, 'General Comment No. 12' (n 106) [6].

The HRC does not understand poverty in a similarly comprehensive manner. While it has held that the right to life should be expansively interpreted, there are limited references to poverty in the General Comments.¹¹⁰ The registration of voters ‘should not be imposed in such a way to exclude the homeless from the right to vote.’¹¹¹ The HRC notes that poverty is an impediment to freedom of movement which can negatively impact a person’s ability to vote.¹¹² The imposition of costs in litigation, court fees and a lack of legal aid is identified as having a negative impact on the right to equality before the courts.¹¹³ However, the most recent General Comment on the right to freedom of expression does not mention how the voices of the poor can be marginalized. This patchwork interpretation reflects the fact that there is no framework to analyse how each right in ICCPR could be interpreted to incorporate poverty.

While both treaty bodies to varying degrees have begun to understand the connection between human rights and poverty, it is important to investigate how they have precisely framed this relationship. Both HRC and CESCR are interpreting the rights in their respective treaties by examining if the right in question is effectively accessible. The HRC describes poverty as an impediment and as a factor preventing access to the right.¹¹⁴ Similarly CESCR’s framework stresses the importance of access, both physical and economic. A right to adequate food is ‘realized when every man, woman and child...have physical and economic *access* at all times to adequate food.’¹¹⁵ The accessibility dimension accounts for barriers, such as poverty, that impede effective enjoyment of

¹¹⁰ HRC, ‘General Comment No. 6: The right to life’ (1982) HRI/GEN/1/Rev.6 [5].

¹¹¹ HRC, ‘General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service’ (1996) CCPR/C/21/Rev.1/Add.7 [11].

¹¹² *ibid* [12].

¹¹³ HRC, ‘General Comment No. 32: The right to equality before the courts and tribunals and a fair trial’ (2007) CCPR/C/GC/32 [11].

¹¹⁴ *ibid*; HRC, ‘General Comment No. 25’ (n 111).

¹¹⁵ CESCR, ‘General Comment No. 12’ (n 106) [6].

rights. Accessibility then is linked to the concept of effectiveness, discussed above in relation to the object and purpose element of the VCLT framework. Is the right achieving its aims on the ground? If it is not then the barriers have to be accounted for when understanding the normative content of the right and the State's obligations. Schlutter argues that the effectiveness is an attractive methodology because it can guarantee a legitimate interpretation.¹¹⁶ She does not clarify precisely why, but presumably because effectiveness ensures interpretation remains within the boundaries of State consent. Effectiveness does not read in new rights, but only ensures the enjoyment of rights already in the treaty.

The HRC has only a limited understanding of poverty and only relies on an effectiveness interpretation. CESCR has a more comprehensive understanding of poverty and uses other interpretative techniques. For example, CESCR draws on normative values such as dignity as the basis for an expansive interpretation on the right to housing. The right 'should not be interpreted in a narrow or restrictive sense....rather it should be seen as the right to live in security, peace and dignity.'¹¹⁷ This is arguably reflective of an object and purpose interpretation, as the goal of ICESCR is to ensure 'the inherent dignity of the human person.'¹¹⁸ This connection is also made in respect to the rights to food, social security and water.¹¹⁹ Furthermore, in relation to housing, CESCR elaborates that the 'inherent dignity of the human person....requires the term "housing" to be interpreted to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.'¹²⁰

¹¹⁶ Birgit Schlutter, 'Aspects of human rights interpretation by the UN treaty bodies' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy (Studies on Human Rights Conventions)* (CUP, 2012) 319.

¹¹⁷ CESCR, 'General Comment No. 4' (n 107) [7].

¹¹⁸ Preamble ICESCR.

¹¹⁹ CESCR, 'General Comment No. 12' (n 106) [4]; CESCR, 'General Comment No. 19: the right to social security' (2008) E/C.12/GC/19.

CESCR is using the norm of dignity to justify an interpretation of the right to specifically account for poverty.

There is also evidence of CESCR using other elements of the VCLT framework. CESCR generally begins by placing the right in question in context of the other provisions in ICESCR. It notes that water, food and health are important for the realization of other rights in the ICESCR.¹²¹ In the General Comment on the right to health, CESCR relies not only on the object and purpose, but also on text and the *travaux préparatoires* to argue for an evolutionary interpretation. The Committee notes that the drafting records indicate that the States intended a wide understanding of health and that the notion of “health” has substantially changed since ICESCR was drafted.¹²² A contemporary interpretation means ‘the express wording [of the provision] acknowledge[s] that the right to health embraces a wide range of socio-economic factors...and extends to the underlying determinants of health such as food and nutrition, housing, access to safe and potable water and adequate sanitation.’¹²³

(ii) *Economic Discrimination in ICESCR and ICCPR*

The two treaty bodies are beginning to interpret individual rights to incorporate the harms of poverty. CESCR has also begun to explore the relationship between poverty and discrimination. Article 2(2) of ICESCR contains a non-exhaustive list of prohibited grounds of discrimination. CESCR is a pioneer in arguing that economic and social status discrimination is an analogous ground. It is a ground of discrimination because of ‘the experience of social groups that are

¹²⁰ *ibid.*

¹²¹ See CESCR, ‘General Comment No. 12’ (n 106) [1].

¹²² CESCR, ‘General Comment No. 14: the right to the highest attainable standard of health’ (2000) E/C.12/2000/4 [10].

¹²³ *ibid* [11].

vulnerable and have suffered and continue to suffer marginalisation.¹²⁴ It notes that ‘living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to’ socio-economic rights.¹²⁵ This reflects an object and purpose interpretation as CESCR is drawing on the normative aims of ICESCR to include new grounds of discrimination. This ‘is an immediate and cross-cutting obligation’.¹²⁶ It requires States to pay sufficient attention to the de facto situation, to adopt necessary measures and devote greater resources to people who suffer socio-economic discrimination.¹²⁷ Recognising socio-economic discrimination is a powerful tool to assess how the State has ensured the socio-economic rights of people living in poverty.

(iii) Gender Equality in ICESCR and ICCPR

The rights in both treaties are to be enjoyed without discrimination and equally between men and women.¹²⁸ Both Committees have released General Comments on the meaning of this guarantee and demonstrate how a commitment to gender equality requires a new interpretation of human rights. The right against slavery and servitude requires an end to trafficking and the HRC recognises that slavery can be disguised as domestic servitude.¹²⁹ As a further example, the HRC interprets the right to be free from torture and inhumane treatment to include a right to be free from gender-based

¹²⁴ CESCR, ‘General Comment No. 20: Non discrimination in economic, social and cultural rights’ (2009) E/C.12/GC/20 [27], [35].

¹²⁵ *ibid.*

¹²⁶ *ibid* [7].

¹²⁷ *ibid* [5]-[6], [39].

¹²⁸ See Article 3 of ICCPR and ICESCR.

¹²⁹ HRC, ‘General Comment No. 28: equality of rights between men and women’ (1999) CCPR/C/21/Rev.1/Add.10

violence and female genital mutilation.¹³⁰ Similarly, CESCR has reinterpreted rights to account for gender equality. Article 11 of ICESCR holds that everyone has the right to adequate housing for ‘himself and his family’ but CESCR explains ‘the phrase cannot be read today as implying any limitations...to female-headed households.’¹³¹ Article 7, the right to just and favourable conditions of work, requires addressing the obstacles men and women face in ‘reconciling professional and family responsibilities’ and the causes of unequal pay, such as cultural attitudes and perceptions on the productivity of men and women.¹³² While the approach of the HRC and CESCR has been criticized as not comprehensive and as merely ‘slot[ting] women in to existing male dominated structures’, it is evidence of the potential of equality to reinterpret rights.¹³³

(iv) *Gender-Based Poverty in ICESCR and ICCPR*

While both poverty and equality have been used by the HRC and CESCR to recast rights, there is little evidence of understanding how gender-based poverty limits the enjoyment of human rights. There is only one instance where gender-based poverty has been mentioned by the HRC. In the General Comment on equal rights of men and women, HRC states that the right to life in the ICCPR requires the States to assess when poverty jeopardizes women’s lives.¹³⁴ However, the HRC misses the connection between women, poverty and the remaining civil and political rights. The right not to be held in servitude should be reinterpreted to account not only for domestic servitude but also for early forced marriage which disproportionately affects poor girls in the developing

¹³⁰ *ibid* [10].

¹³¹ CESCR, ‘General Comment No. 4’ (n 107) [6].

¹³² CESCR, ‘General Comment No. 20’ (n 124) [25].

¹³³ Sandra Fredman, ‘Engendering Socio-Economic Rights’ (2009) 25 SAJHR 517. See analysis in Chapter 1. .

¹³⁴ HRC, ‘General Comment No. 28’ (n 129) [10].

world.¹³⁵ CESCR has also not consistently interpreted rights through the double lens of gender inequality and poverty. It has identified the right to social security as having a role in alleviating poverty.¹³⁶ However, there is no assessment on how the structure of benefits often perpetuates the male breadwinner model which denies women agency and access to household resources.¹³⁷ Similarly, the right to housing does not address how laws and custom impede access women's access to credit, cultural norms that deny women a right to housing¹³⁸ or how widowhood can result in homelessness.¹³⁹ The right to food is entirely gender neutral. The UN Special Rapporteur on the right to food notes that women's right to food is often compromised due to unequal bargaining positions and the gender-based division of labour within the home which denies women the ability to earn an income so as to access food or decide on the allocation of the household budget.¹⁴⁰ These gaps as explained in Chapter 1 are highly problematic.

(v) *The Right to Water*

The right to water in ICESCR illuminates the interpretative techniques with respect to poverty and the lack of understanding that poverty is gender-based. Similar to CEDAW and poverty, the word “water” does not appear in ICESCR. However, CESCR has interpreted the right to water into the

¹³⁵ Girls Not Brides ‘What is the Impact of Child Marriage: Poverty’ <<http://www.girlsnotbrides.org/themes/poverty/>> ; ‘General Recommendation No. 31: harmful practices’ (n 63) [16]-[23].

¹³⁶ CESCR, ‘General Comment No. 19’ (n 119) [1].

¹³⁷ Beth Goldblatt, ‘The Right to Social Security-Addressing Women’s Poverty’ (2009) 25 SAJHR 442, 458 and CEDAW Committee ‘Seventh Concluding Observations: UK’ (2013) CEDAW/C/GBR/CO/7 [62].

¹³⁸ Ingunn Ikdahl, ‘Property and security’ articulating women’s right to their homes’ in Anne Hellum and Henriette Singding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 270.

¹³⁹ Leilani Farha, ‘Is there a woman in the house? Re/conceiving the Human Right to Housing’ (2002) 14 Can J of W & L 118.

¹⁴⁰ UN Special Rapporteur on the right to food, ‘Women’s rights and the right to food’ (2012) A/HRC/22/50 [2],[5], [7].

treaty framework. CESCR implicitly uses the VCLT interpretative methods for an evolutionary interpretation of ICESCR. It begins with a textual analysis of Article 11 of ICESCR. This provision holds that ‘everyone has a right to an adequate standard of living including adequate food, clothing and housing.’ CESCR notes ‘the use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive.’¹⁴¹ The context of ICESCR also mandates reading water into an adequate standard of living. Water is a pre-requisite for enjoying the right to food, health and cultural practices.¹⁴² The General Comment also draws on the object and purpose of ICESCR by highlighting the connection between a right to water and human dignity.¹⁴³ This is explored in greater detail in Chapter 7, but here is it interesting to note that CESCR also uses a comparative approach. It cites various binding and non-binding commitments on the right to water to explain the legal basis of water in ICESCR.¹⁴⁴ From this analysis, the CESCR concludes ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living.’¹⁴⁵

General Comment No. 15 on water does refer to the needs of those in poverty and women. CESCR observes ‘lack of water is exacerbating existing poverty.’¹⁴⁶ A right to water must be enjoyed without discrimination and this puts a special obligation on States ‘to provide for those who do not have sufficient means with the necessary water.’¹⁴⁷ CESCR notes that ‘poorer households should not be disproportionately burdened with water expenses.’¹⁴⁸ The State has an obligation to employ ‘low

¹⁴¹ CESCR, ‘General Comment No. 15 the right to water’ (2002) E/C.12/2002/11 [3].

¹⁴² *ibid* [1].

¹⁴³ *ibid* [1].

¹⁴⁴ *ibid* [4]-[5].

¹⁴⁵ *ibid*.

¹⁴⁶ *ibid* [1].

¹⁴⁷ *ibid* [15].

¹⁴⁸ *ibid* [27].

cost techniques and technologies...appropriate pricing policies such as free or low-cost water...and income supplements.¹⁴⁹ With respect to gender, CESCR requires that ‘women are not excluded from decision-making processes concerning water resources and entitlements [and] the disproportionate burden women bear in the collection of water should be alleviated.’¹⁵⁰ The General Comment highlights that disadvantaged women farmers should have equitable access to water.¹⁵¹

Hellum in her analysis demonstrates how the General Comment does not sufficiently account for gender-based poverty.¹⁵² CESCR does not assess how a lack of water and sanitation facilities negatively impacts young girls’ ability to go to school.¹⁵³ It gives priority to domestic over commercial use of water. Hellum points out that this is problematic in the context of kitchen gardens which blur the boundary as they are used both for personal consumption and commercial sales ‘to meet the day to day needs of families.’¹⁵⁴ In effect this continues to uphold the private and public divide which does not reflect the ‘holistic way rural woman manage and use water.’¹⁵⁵ This is symptomatic of the reasoning of both CESCR and the HRC. Gender inequality and poverty are seen as two separate social ills and they have not been comprehensively brought together to account for the double burden of gender-based poverty.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid* [16].

¹⁵¹ *ibid.*

¹⁵² Anne Hellum, ‘Engendering the Right to Water and Sanitation’ in M Langford and A Russell (ed) *The Right to Water: Theory, Practice and Prospects* (forthcoming, on file).

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

V. Poverty and the UN Charter Bodies

The UN Charter-based bodies, such as the OHCHR and the Special Rapporteurs are not bound by any legal treaties. There is ample evidence that the UN-Charter based bodies draw on the international human rights framework in developing their specific mandate.¹⁵⁶ However, while drawing on UN human rights treaties, the UN Charter-based bodies are not directly interpreting a specific treaty. This section, therefore, does not examine how these bodies have used the VCLT framework but rather looks at how they have conceptualised the relationship between poverty, gender, equality and human rights.

Similar to the HRC and CESCR, the Charter-based bodies have consistently framed poverty as an obstacle to human rights. The first comprehensive study by the UN on poverty and human rights was done by the UN Special Rapporteur on minorities in 1996.¹⁵⁷ He argues that poverty deprives individuals of their rights¹⁵⁸ and observes that ‘a consensus emerged that extreme poverty and social exclusion...stood in the way of the full and effective enjoyment of human rights.’¹⁵⁹ In 1999 the Special Rapporteur on extreme poverty and human rights explains that poverty was ‘the principal cause of human rights violations in the world’ and described poverty as inhibiting human rights.¹⁶⁰ Similarly, the OHCHR also holds that poverty leads to the non-fulfillment of human rights.¹⁶¹ In

¹⁵⁶ Working Group on Discrimination Against Women in Law and Practice, ‘Discrimination against women in economic and social life, with a focus on economic crisis’ (2014) A/C/26/39 [7], [47], [60], [85]-[87]; UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 1) [11]

¹⁵⁷ UN Special Rapporteur on minorities, ‘The Realization of Economic, Social and Cultural Rights: Final report on human rights and extreme poverty’ (1996) E/CN.4/Sub.2/1996/13 [14].

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ UN Special Rapporteur on extreme poverty and human rights, ‘Economic, Social and Cultural Rights: Human Rights and Extreme Poverty Report’ (1999) E/CN.4/1999/48.

¹⁶¹ OHCHR, ‘Human Rights and Poverty Reduction: A Conceptual Framework’ (2004) HR/PUB/04/1.

2012, the UN Special Rapporteur on extreme poverty and human rights concludes that poverty is a cause of and a consequence of human rights violations.¹⁶²

Unlike the treaty bodies which have interpreted individual rights in light of poverty and gender equality, the Charter-based bodies emphasise that poverty is a cross-cutting obstacle that affects all human rights. Poverty cannot be equated to a violation of one single right, rather ‘poverty is a denial of *all* human rights.’¹⁶³ The inter-relatedness, inter-dependence and indivisibility of human rights means the entire spectrum of rights is engaged in a rights-based approach to poverty.¹⁶⁴ The UN Special Rapporteur on minorities writes that ‘poverty is a violation not only of economic and social rights, as is generally assumed from an economic standpoint, but also to an equal degree of civil, political and cultural rights.’¹⁶⁵ He further explains ‘extreme poverty involves the denial, not of a single right or a given category of rights, but of human rights as a whole.’¹⁶⁶ The Special Rapporteur on extreme poverty and human rights explains that for people living in poverty there are ‘multiple [and] reinforcing violations of civil, political, economic, social and cultural rights.’¹⁶⁷ Therefore, all rights should have evaluative reference to poverty.¹⁶⁸ The OHCHR draws a helpful analogy with other human rights strategies to explain the relationship between poverty and human rights. It notes ‘a strategy to combat torture, sexual stereotyping or unfair trials would have to address a much wider range of rights than those by which these phenomena are defined.’¹⁶⁹ The

¹⁶² UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 1) [3].

¹⁶³ UN Special Rapporteur on extreme poverty and human rights, ‘Report’ (n 160) [116] [emphasis added].

¹⁶⁴ OHCHR, ‘A Conceptual Framework’ (n 160) 11.

¹⁶⁵ UN Special Rapporteur on minorities (n 156) [176].

¹⁶⁶ *ibid.*

¹⁶⁷ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 1) [3].

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

right to fair trial would include not only the presumption of innocence (Article 14 of ICCPR) but also just and favourable working conditions for judges (Article 7 of ICESCR). As explained in Chapter 1 gender-based poverty cannot be reduced solely to socio-economic rights.¹⁷⁰ A woman living in the street is vulnerable to gender-based violence. She may not seek help due to strained relationships with law enforcement and without a fixed address if arrested she faces longer pre-trial detention. This violates her rights to life, physical integrity, access to justice, equal protection before the law and an adequate standard of living. Assessing her situation through the lens of one right cannot capture or remedy the inter-locking wrongs.

The Charter-based bodies have paid significant attention to gender-based poverty. The Special Rapporteur on extreme poverty and human rights highlights that ‘women are disproportionately represented among the poor owing to the multifaceted and cumulative forms of discrimination that they endure. She then traces various aspects of the relationship between gender and poverty: traditional attitudes, gender-based violence, access to economic opportunities, legal capacity over economic resources, access to decision making power, equality in marriage and family and public services, the relationship between unpaid work, women and poverty and the gender dimensions of conditional cash transfers.¹⁷¹ The UN Special Rapporteur on the right to food reports on the relationship between gender discrimination and the right to food¹⁷² and the UN Special Rapporteur on the right to health has investigated maternal mortality.¹⁷³ The Working Group on Discrimination Against Women in Law and Practice (Working Group) has studied discrimination

¹⁷⁰OHCHR, ‘A Conceptual Framework’ (n 160) 10.

¹⁷¹ *ibid*; UN Special Rapporteur on extreme poverty and human rights, ‘Unpaid care work, poverty and women’s human rights’ (2013) A/68/293; UN Special Rapporteur on extreme poverty and human rights, ‘Conditional Cash Transfers Programmes’ (2009) A/HRC/11/9.

¹⁷² UN Special Rapporteur on the right to food (n 140).

¹⁷³ UN Special Rapporteur on the right to health, ‘The right to highest standard of health: reduction of maternal mortality’ (2006) A/61/338.

against women in economic and social life with a focus on the recent economic crisis.¹⁷⁴ This material is investigated in detail throughout the thesis and particularly in Chapter 8, so at this stage it is only necessary to note the extensive assessment by Charter-based bodies on the relationship between gender-based poverty and human rights.

If the UN Charter bodies are advocating for a greater understanding of gender-based poverty, is there any need to locate it in CEDAW? As mentioned above, the legal weight of the outputs of both treaty- and Charter-based bodies is uncertain. Given this uncertainty, I am not arguing that the treaty bodies have a higher legal force than the Charter-based bodies. The proposed interpretation of CEDAW in Chapter 4 and the proposed General Recommendation in Chapter 8 and the Annex are non-binding interpretation of the state's *legal* obligations in CEDAW. In contrast, the output of the Charter-based bodies such as the Working Group while being informed by and drawing significantly on the legal obligations in CEDAW is not a direct interpretation of the text of treaty. While the Working Group and various UN Special Rapporteurs make important contributions to the understanding of gender-based poverty, this does not make the proposed interpretation of CEDAW redundant. This is because the CEDAW framework and the Charter-based bodies pursue similar aims but work in slightly different forums. For example, the Working Group is tasked with developing a dialogue with States on eliminating discrimination against women, to study the ways states can eliminate discrimination against women and make recommendation to improve legal responses to women's disadvantage.¹⁷⁵ It accomplishes this through country missions and thematic reports. On the other hand, the Committee's mandate is to consider the progress made in the implementation of CEDAW.¹⁷⁶ The Committee has developed a formalised and sophisticated

¹⁷⁴ Working Group (n 156).

¹⁷⁵ Human Rights Council, 'Elimination of Discrimination Against Women' (2010) A/HRC/RES/15/23.

¹⁷⁶ Article 17 of CEDAW.

review process which is analysed in Chapter 5. The proposed interpretation and General Recommendation which is informed by the Charter-based bodies, such as the Working Group's report on economic and social life, provides a basis for continued dialogue between the Committee and the state on the nature of gender-based poverty through the periodic reporting process and individual communications procedure. These are new forums in which to engage with the state on the commitment to gender equality and gender-based poverty. Thus, rather than seeing these proposed General Recommendation as repetitive or the two actors in competition with each other for legal or normative force, they should be seen as complimentary and part of multivalent, holistic and comprehensive human rights framework to engage the state and other relevant actors with gender-based poverty.

VI. Conclusion

This Chapter has mapped out the interpretative methodology that will be used in the next Chapter when interpreting the text of CEDAW. In this Chapter it was used to analyse how the UN bodies have understood the connection between poverty, equality, gender and human rights. All of these actors have recognised that poverty is an obstacle to human rights. The Charter-based bodies have consistently understood it as an obstacle that negatively impacts the enjoyment of *all* human rights and called upon States to take a comprehensive approach to poverty reduction. The treaty-based bodies, particularly CESCR, have interpreted the individual substantive obligations to account for poverty using various aspects of the VCLT framework. CESCR has gone a step further and recognised socio-economic status as a ground of discrimination. However, HRC and CESCR have not to date assessed in depth the interaction between gender, poverty and human rights. This means it is important for CEDAW to fill this gap. The various UN human rights bodies approach to poverty and gender-based poverty raises questions on how to interpret CEDAW: through an

individual right in CEDAW, comprehensively that engages all substantive provisions of CEDAW or through establishing poverty as a ground of discrimination. These possibilities are explored in the next chapter which focuses on interpreting the text of CEDAW to incorporate the harms of gender-based poverty.

CHAPTER 4

GENDER-BASED POVERTY IN CEDAW

I. Introduction

This chapter investigates how CEDAW can be interpreted to incorporate gender-based poverty and maps out the implications of bringing gender-based poverty into the treaty. Chapter 1 argued that gender-based poverty is an obstacle preventing women from enjoying their human rights. When CEDAW was drafted poverty was not perceived as an issue of gender equality or human rights. Chapter 3 demonstrated that there is a growing momentum to conceptualise poverty as an impediment to human rights and that the UN Charter and treaty bodies have employed various techniques on how to account for this obstacle. The two primary treaty bodies, the HRC and CESCR, however have not paid sufficient attention to the gender-based aspects of poverty. CEDAW, as the leading treaty body for women, is ideally situated to fill this gap as it has a strong and exclusive mandate to understand the interaction between gender and human rights. My hypothesis is that equality and non-discrimination offer the most compelling basis for incorporating gender-based poverty in CEDAW. This chapter explores the feasibility and legitimacy of this hypothesis.

The first section investigates possible interpretative routes. One route is to follow the lead of the HRC and CESCR and to interpret one individual right in CEDAW to encompass all of the harms of gender-based poverty. I argue that this approach to gender-based poverty in CEDAW is limited. An individual provision is not able to account for the inter-locking and complex harms of gender-based poverty. This points toward using equality and non-discrimination as these norms permeate the entire treaty and would serve as an ideal basis for a comprehensive approach to

gender-based poverty. The example of gender-based violence, an issue also originally missing from CEDAW, provides further impetus for using equality and non-discrimination. Using this as a comparator demonstrates that understanding gender-based poverty as an issue of equality and non-discrimination best captures the patriarchal origins of gender-based poverty and its entrenched nature.

The second section examines whether the two key norms in CEDAW, equality and non-discrimination, can be interpreted to incorporate the harms of gender-based poverty. The VCLT framework requires that equality and non-discrimination be interpreted in their ordinary meaning, in light of their context and the object and purpose of CEDAW. This analysis reveals first, that equality and non-discrimination are closely intertwined in CEDAW. Second, both of these are multi-faceted concepts that can be interpreted so as to understand how gender-based poverty is an obstacle to women's human rights. Most importantly these two norms can incorporate all aspects of gender-based poverty.

The final section investigates the implication of this interpretation on the State's obligations in CEDAW. Gender-based poverty raises questions on the role of the minimum core, progressive realisation and the development of benchmarks and indicators. These concepts have been used by ICESCR and various UN Special Rapporteurs in monitoring compliance with socio-economic rights.¹ However, gender equality is routinely described as an immediate obligation.² A careful reading of the text of CEDAW and situating the State's obligations within the UN structure reveals a way through this impasse. The State is obligated not to immediately end poverty but to demonstrate with evidence that its laws and poverty reduction programmes take account of the

¹ CESCR, 'General Comment No. 15: the right to water' (2002) E/C.12/2002/11; UN Special Rapporteur on the right to health, 'The right to highest standard of health: reduction of maternal mortality' (2006) A/61/338.

² Working Group on Discrimination Against Women in Law and Practice 'Discrimination against women in economic and social life, with a focus on economic crisis' (2014) A/C.26/39 [8] (Working Group).

gender-based aspects of poverty. The Committee's mandate is to evaluate whether States measures are compliant against equality and non-discrimination standards. Incorporating gender-based poverty as an issue of gender equality and non-discrimination in CEDAW is a comprehensive and legitimate solution to the gap in CEDAW. My proposed interpretation ensures that the complexity of gender-based poverty can be incorporated into the Convention while at the same time, being faithful to its text, goals and the State's obligations under CEDAW.

II. Potential Interpretations of CEDAW

(i) The Problem of the Individual Rights Approach

My proposal is that interpreting equality and non-discrimination to incorporate gender-based poverty is the best method for bringing gender-based poverty into CEDAW. This raises questions of alternative interpretations. Rather than approaching the gap in CEDAW through equality and non-discrimination, perhaps it would be feasible to interpret the normative content of an individual right to incorporate the wrongs of gender-based poverty. Although in Chapter 2, I argued Article 11 (employment) and Article 14 (rural women) were implicitly designed to improve women's economic status, both of these rights have limitations. Article 11 requires an employment relationship and Article 14 is limited to rural areas. The rights with the most potential are Article 12, equal access to health care services and Article 13, equality in economic and social life. This subsection canvasses the possibility of interpreting single rights to incorporate gender-based poverty into CEDAW but concludes that this is problematic. This lends further support to using equality and non-discrimination to interpret CEDAW so as to incorporate gender-based poverty.

At first glance, a right to health can easily be interpreted to incorporate gender-based poverty. A lack of basic income creates profound deprivations of physical and psychological health.³ Poverty ‘engenders ill health...limited access to physical and mental health care including medicine, insufficient nutrition and unsafe living environments deeply affect the health status of persons living in poverty.’⁴ The current understanding of the right to health is evolving to focus on the underlying determinants to health. It is being interpreted to include ‘a wide range of socio-economic factors’ such as ‘food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.’⁵ An expansive interpretation of the right to health has the potential to capture many of the wrongs of gender-based poverty into one right. Women disproportionately suffer from malnutrition and food insecurity: ‘seventy per cent of the world’s hungry are women.’⁶ Ensuring appropriate and culturally sensitive sanitation services in schools can increase the likelihood of girls completing their education.⁷ Requiring employers to have health and safety plans can prevent incidents similar to the fire in 2012 in Bangladesh that killed over 100 garment workers, most of whom were women.⁸ Attention to these and other health related factors could improve both the health and well-being of women who live in poverty.

³ Gwen Brodsky and Shelagh Day ‘Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty’ (2002) 14 Can J of W & L 185.

⁴ UN Special Rapporteur on extreme poverty and human rights, ‘Final draft of the guiding principles on extreme poverty and human rights’ (2012) A/HRC/21/39 [81].

⁵ OHCHR, ‘Human Rights and Gender equality in Health Sector Strategies: How to Assess Policy Coherence’ (2011) 15 <<http://www.ohchr.org/Documents/Publications/HRandGenderEqualityinHealthSectorStrategies.pdf>>.

⁶ Beate Rudolf, ‘Article 13’ in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 343.

⁷ *Environment & Consumer Protection Foundation v. Delhi Administration* 2012 STPL (Web) 543 SC [4] (Indian Supreme Court).

⁸ Pratima Paul-Majumder and Anwara Begum, ‘The Gender Imbalance in the Export Oriented Garment Industry in Bangladesh’ (2000) <<http://siteresources.worldbank.org/INTGENDER/Resources/trademajumder.pdf>>.

There is also the possibility of using Article 13, the right to equality in economic and social life, to bring gender-based poverty into CEDAW. This may appear to be the natural place to situate an understanding of gender-based poverty. Rudolf argues the text of Article 13—“other areas of economic and social life”—should be interpreted as a comprehensive right to equality in economic and social life.⁹ She believes it should include ‘all rights not explicitly mentioned in [CEDAW] which are relevant in economic and social life.’¹⁰ Article 13 should look ‘beyond rights guaranteed and take into account the denial of access to resources and opportunities.’¹¹ Specifically, she argues that the rights under Article 13 of CEDAW should include food, housing, clothing, social services, water, sanitation, healthy environment and participation in cultural activities.

Nevertheless while these rights can be expansively interpreted, there are several problems with exclusively situating a human rights-based approach to gender-based poverty in a single right. First, interpreting one right to encompass all the wrongs of gender-based poverty would strain the logic of interpretation. Second, although these rights can be interpreted very broadly and each right does have a connection to poverty, there would still be significant gaps in using an individual right to address the inter-locking facets between gender-based poverty and human rights. I use several examples below to illustrate this argument. This is not to argue that each specific right should not be given a rich interpretation, but rather that all the substantive provisions in CEDAW should be used to incorporate gender-based poverty. Certain aspects of gender-based poverty: inadequate funding for maternal health or social assistance schemes that perpetuate gender power imbalances should be tackled through a right to health (Article 12) and a right to economic and social life (Article 13). My

⁹ Rudolf (n 6) 337.

¹⁰ *ibid* 339.

¹¹ *ibid*.

argument is that all of the issues of gender-based poverty should not be addressed through only one of these rights. These points are elaborated below.

The first difficulty with sole reliance on a single right to capture the harms of gender-based poverty is that it strains the logic of interpretation. The Committee is currently in the process of drafting a General Recommendation on access to justice.¹² The UN Special Rapporteur on extreme poverty and human rights in relation to access to justice observes that the poor are often unable to register initial complaints due to high court filing fees; are unlikely to have court decisions in their favour fully implemented; language barriers and cultural pressures can limit access to free legal assistance.¹³ How a right to health encompasses these wrongs is not entirely straightforward. A right to health brings to mind issues of physical and mental disease, health care systems and reproductive health. It does not usually address how unequal pay makes accessing the courts impossible. Even though the right to health has been expanded to encompass underlying determinants of health these do not usually include access to justice or other civil and political rights. Similarly, the applicability of Article 13 is not readily apparent. Women have greater difficulty accessing forms of financial credit or may be denied their share of an inheritance because of social norms and traditional customs.¹⁴ At the most extreme end, this can result in homelessness.¹⁵ Without a fixed address women are likely to be denied bail when arrested.¹⁶ Interpreting equality in economic and social life to capture all of these inter-connected wrongs possibly stretches the normative content beyond its limits. Gender-based poverty is a cross-cutting problem that affects all areas of women's lives. Trying to subsume

¹² 'General Discussion on 'access to justice' <www2.ohchr.org/english/bodies/cedaw/accesstojustice.htm>.

¹³ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 4) [67]-[68].

¹⁴ The World Bank, 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014) 125-126.

¹⁵ OHCHR and UN Habitat, 'The right to adequate housing' (Fact Sheet No. 21) 16-18.

¹⁶ UN Special Rapporteur on extreme poverty and human rights, 'Access to Justice' (2012) A/67/278 [49].

all aspects of it into one right would involve interpreting this right beyond its boundaries. While all human rights are inter-related and inter-dependent, they have not been collapsed into one all-encompassing human right. Rights are connected but still remain distinct. Given the nature of the problem, interpreting one right to encompass all of the harms of gender-based poverty simply does not seem feasible.

The second problem is that even if the right is very broadly interpreted, significant gaps still remain. Again an example helps illustrate this point. Girls may be pulled out of school to help with domestic responsibilities (child care, fetching water and firewood) and in times of financial restraint they are more likely than boys to be pulled out of school.¹⁷ It is not certain that situating gender-based poverty in Article 13, equality in economic and social life, even when expansively interpreted, would be able to grasp the relationship between gender-based poverty and education. This potentially results in a gap in using human rights to understand gender-based poverty. Moreover, CEDAW has provisions on education (Article 10), so it is counter-intuitive to understand the impact of poverty on education in a provision on economic and social life. The lack of easily accessible water, firewood and childcare facilities and household poverty deny a girl her right to education (Article 10), not her enjoyment of economic and social life (Article 13). Similar limitations would apply with respect to health under Article 12. This demonstrates the fallacy of using one individual right to interpret gender-based poverty into CEDAW. A right to education must also be able to encompass and account for the constraints of gender-based poverty. Women in poverty experience a reinforcing web of violations of their political, civil, economic, social and cultural rights. A single right approach forecloses a nuanced and sophisticated understanding of gender-based poverty.

¹⁷ Working Group (n 2) [36].

(ii) *The Example of Gender-Based Violence*

The above analysis demonstrates the limitations of an individual right approach to gender poverty. This leads to the conclusion that the interpretation of CEDAW must be comprehensive to properly understand the nature of gender-based poverty. There is also another important reason for preferring this approach as can be seen from the comparative example of gender-based violence in CEDAW. Similar to poverty, there is no specific right to be free from violence in CEDAW. Examining the history leading up to General Recommendation No. 19 on violence against women, released in 1992, where the Committee unequivocally identified violence as an issue of gender discrimination, reveals that the Committee faced a comparable choice in regards to violence against woman as it currently does to gender-based poverty, between locating violence within an individual right or adopting a comprehensive interpretative approach.¹⁸ An analysis of the UN reports discussing violence against women, the General Recommendations and academic commentary prior to the Committee's decision illuminates the reasoning process for framing gender-based violence as a matter of discrimination against women. This offers a useful analogy for gender-based poverty and CEDAW. The differences between gender-based poverty and gender-based violence also highlights some of the challenges of interpreting gender equality and human rights to incorporate gender-based poverty that are explored throughout Part II of the thesis.

At the UN in the 1980s and early 1990s, violence against women was predominantly understood as an issue of criminal law or as a private issue within the family. Chinkin demonstrates how the various branches of the UN did not conceptualize the role of gender in violence or see violence as a human rights issue. In 1982, the UN Committee on Crime Prevention and Control identified violence against family members, not against women, as an important issue of crime

¹⁸ The Committee, 'General Recommendation No. 19: violence against women' (1992) CEDAW/C/GC/19.

prevention and control.¹⁹ EcoSoc acting on the recommendations of the CSW described violence against women and children as blatant and inhumane abuses which caused serious physical and mental health problems.²⁰ This does connect violence to women but it does not explicitly address the relationship between gender power imbalances and violence. The UNGA, in 1985, adopted a resolution that noted ‘abuse and battery in the family are critical problems that have serious physical and psychological effects on individual family members.’²¹ The resolution called for research ‘on domestic violence from a criminological perspective.’²² The three UN Conferences on Women held between 1975-1985 also failed to connect violence to gender equality or human rights. At Mexico City, there was no mention that women were disproportionate victims of gender-based violence. Violence was again situated within family conflicts.²³ Five years later in Copenhagen, violence was located within health policies and was to be remedied by protecting women from physical and mental abuse.²⁴ In Nairobi, violence was understood as a social problem and an obstacle to peace but not to equality.²⁵ Chinkin notes that these approaches obscured the role of gender in creating and maintaining violence against women. Connecting violence to the family localizes it within the private sphere while linking it to peace portrays it as a violation of the social order. Chinkin argues

¹⁹ Christine Chinkin, ‘Violence Against Women’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 445.

²⁰ *ibid.* See EcoSoc resolution 1982/22.

²¹ Chinkin, ‘Violence Against Women’ (n 19) 445.

²² *ibid.*

²³ Secretariat of the United Nations ‘Ending Violence Against Women: From Words to Action’ (2006) 7 <www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf>.

²⁴ Chinkin, ‘Violence Against Women’ (n 19) 445.

²⁵ Secretariat (n 23) 8.

this frames violence against women as the result of deviant behaviour of an individual.²⁶

Consequentially, solutions were focused on health policies or criminal law.

The CEDAW Committee approached gender-based violence in a similar matter up to the release of General Recommendation No. 19. In General Recommendation No. 12 from 1989, States are called on to protect women against violence in the family, workplace and social life. The obligation is based, without any explanation, on Articles 2 (the State's core obligation), 5 (cultural attitudes), 11 (employment), 12 (health) and 16 (family life). In this General Recommendation the Committee falls back on the language of protection which implies a criminal perspective to gender-based violence. There is no explicit connection to gender equality. In a similar vein, General Recommendation No. 14 on female circumcision identifies female genital mutilation as harmful to women's health.²⁷ At this stage, the Committee is still not truly identifying gender-based violence as an entrenched problem or advocating a rights-based solution. When drafting General Recommendation No. 19 there was a real possibility of continuing in this framework and interpreting gender-based violence solely into an individual provision in CEDAW, such as health or family.

At the same time, there was a growing recognition of the limitations of this approach. This was the result of a combination of factors, most strikingly a global grassroots campaign to bring attention to the pervasiveness and seriousness of violence against women.²⁸ This movement emphasized the fact 'that violence against women was not the result of individual acts of misconduct, but was deeply rooted in structural relationships of inequality between women and

²⁶ Chinkin, 'Violence Against Women' (n 19) 445.

²⁷ This was included as violence against women in 'General Recommendation No. 19' (n 18).

²⁸ Secretariat (n 23) 8.

men.²⁹ The UN study on violence against women, from 1989, as an exception to the general trend at the UN, concluded that violence is ‘a function of the belief that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.’³⁰ The same year, Bunch wrote a seminal article connecting gender-based violence to human rights. She forcefully challenged the myths that violence was an individualized problem. Instead she demonstrated that gender-based violence is the result of the structural relationships of power and domination between men and women.³¹ Recognizing that violence against women is linked to power imbalances and inequality between men and women consequentially links violence to discrimination against women, gender equality and human rights.³²

The Committee when re-visiting the issue of gender-based violence in 1992 was faced with a choice on how to interpret it into the treaty: as a matter of a specific right or an issue of non-discrimination and equality. Evatt in her study on the early history of the CEDAW demonstrates that until the final draft of General Recommendation No. 19 the Committee preferred the former approach. When reviewing State reports on compliance with CEDAW, the Committee would discuss violence against women in relation to several different rights.³³ The Secretariat of the Working Group which was convened to draft General Recommendation No. 19 circulated ‘an analysis of Article 6 [prostitution and trafficking] under which States had reported on violence against women.’³⁴ This would suggest an interpretation of gender-based violence only through a

²⁹ *ibid* 9.

³⁰ Chinkin, ‘Violence Against Women’ (n 19) 446. See *Violence Against Women in the Family* (1989) UN Sales No E/89/IV/5.

³¹ Charlotte Bunch, ‘Women’s Rights as Human Rights: Towards a Re-vision of Human Rights’ (1990) 12 *Hum Rts Q* 486, 489.

³² *ibid* 491.

³³ See Elizabeth Evatt, ‘Finding a Voice for Women’s Rights: The Early Days of CEDAW’ (2002-2003) 34 *George Washington Intl L Rev* 515, 545, fn 154.

single right. However, the Committee ultimately chose the comprehensive interpretation, arguing that violence against women is discrimination.

Unfortunately, there is no summary record of the Working Group's discussion to explain this shift.³⁵ Nevertheless, with the available evidence, it is possible to infer an explanation for the Committee's choice. First, at the time of drafting the recommendation, the CSW was advocating for a separate legally binding instrument to address violence against women. The Committee may have wanted to retain its position as the foremost legal instrument for women's human rights and therefore favoured the comprehensive interpretation. Second, for the first time in its history, the Committee invited CSOs to contribute background information for the drafting of the General Recommendation.³⁶ It is possible that the Committee was aware of the growing movement to conceptualize violence as an issue of discrimination and equality. The reasoning of General Recommendation No. 19 suggests the Working Group and Committee may have been persuaded by the arguments from CSOs on the relationship between violence and gender. For example, General Recommendation No. 19 explains there is a 'close relationship between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.'³⁷ The role of gender is specifically emphasized; the definition of gender-based violence is 'violence that is directed against a woman because she is a woman or that affects women disproportionately.'³⁸ The Committee is identifying the gender-based nature of violence and linking it to discrimination against women and gender equality.

³⁴ *ibid* 547.

³⁵ *ibid* 546-547.

³⁶ *ibid* 546.

³⁷ 'General Recommendation No. 19' (n 18) [4].

³⁸*ibid* [6].

It is now firmly accepted that gender-based violence is a matter of gender equality and non-discrimination in CEDAW. In the Individual Communications and Concluding Observations the Committee routinely analyzes gender-based violence.³⁹ The reporting guidelines ask the State to include information on legislation prohibiting violence against women.⁴⁰ There is no evidence that States have objected to this interpretation of CEDAW. Rather, they have accepted it as they provide statistics and data on gender-based violence in the reports they submit to the Committee.⁴¹ When faced with an individual complaint on violence, States provide evidence on how their laws and national machinery protect women.⁴² They do not argue that gender-based violence is outside the purview of CEDAW. It is also interesting to note how the Committee structures its concerns and recommendations on violence. This is a good example of how a comprehensive interpretation works in practice. In the latest Concluding Observations the Committee has a sub-heading dealing with violence against women and integrates the analysis on violence into many of the substantive provisions of CEDAW: education (Article 10), employment (Article 11), health (Article 12) and access to justice (Article 15).⁴³

The Committee's choice, to comprehensively interpret gender-based violence into CEDAW as an issue of inequality and discrimination provides an additional argument as to why gender-based poverty must be similarly interpreted. It helps identify the gender-based and entrenched nature of poverty. Poverty has traditionally been identified as a moral failing of the individual. The poor are

³⁹ See *Yildirim v Austria*, (2007) CEDAW/C/D/39/6/2005 and The Committee, 'Seventh Concluding Observations: Canada' (2008) CEDAW/C/CO/C/7.

⁴⁰ OHCHR, 'Complication of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties: Report of the Secretary-General' (2009) HRI/GEN/2/Rev. 6, 66.

⁴¹ See 'Sixth and Seventh Combined Periodic Report: Canada' (2007) CEDAW/C/CAN/7 [61]-[68].

⁴² See *Yildirim* (n 39).

⁴³ The Committee, 'Seventh Concluding Observations: UK' (2013) CEDAW/C/GBR/CO/7 [23], [26], [34], [45], [56], [58].

perceived as 'lazy, unwilling to work, grasping, immoral, responsible for their own unfortunate condition, and undeserving of help.'⁴⁴ Again similar to original perceptions of gender-based violence, poverty has been conceived as a private failing. Furthermore, as Brodsky and Day argue, it is not an accident that women are disproportionately poor.⁴⁵ Women's disproportionate share of unpaid care work, unequal pay, gender job segregation, gender-based violence, lack of control of sexual and reproductive health, limited access to education, land, financial credit and property combined with pervasive negative social and cultural norms all contribute to women's poverty. Using equality and non-discrimination to understand women's poverty also helps capture the entrenched and gender-based nature of poverty. A comprehensive interpretation of CEDAW that is not localized in an individual right best captures the reasons and the experiences of gender-based poverty. It helps express the true nature of the problem in a way that locating the problem within one right is simply not plausible.

There are two important differences between gender-based poverty and gender-based violence: the perpetrators and institutions that are already in place to remedy the identified problem. These differences are important as they illuminate the challenges of using CEDAW to incorporate the harms of gender-based poverty. First, in certain circumstances it is comparatively easy to identify the perpetrators of gender-based violence.⁴⁶ The UN Special Rapporteur on violence against women identifies three primary sources: violence in the family (ie. domestic violence), violence in the community (ie. sexual assault and harassment in institutions) and violence perpetrated or condoned

⁴⁴ Gwen Brodsky et al, 'Gosselin v Canada' (2006) 18 Can J of W and the L 189, 193.

⁴⁵ Brodsky and Day (n 3) 189.

⁴⁶ There is growing awareness that gender-based violence also transcends state boundaries, particularly in relation to trafficking. See '15 Years of the UN Special Rapporteur on violence against women, its causes and consequences (1994-2009): A Critical Review' <<http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf>> 28.

by the State (ie. violence against women from indigenous and minority groups).⁴⁷ As highlighted in Chapter 1, it can be challenging to pin-point the precise actor for gender-based poverty. Private and public, national, regional and international actors can all act in concert to create and perpetuate gender-based poverty. The Committee's use of Article 2(e) of CEDAW—the State must 'take all appropriate measures to eliminate discrimination against women by an person, organisation or enterprise'⁴⁸—to require the State to protect women from gender-based violence by non-State actors offers a useful model for developing the State's duty to protect in relation to actors external to the State. This is explored in greater detail in Chapter 8. Second, violence, unlike poverty generally involves conduct that is prohibited by the criminal law. A central component of the advocacy on gender-based violence has been to ensure that the individuals and institutions that respond to violence are sensitised to the gender-based roots of violence against women.⁴⁹ This is not to imply that gender mainstreaming the police and judicial system is a complete solution to gender-based violence.⁴⁹ Solutions to gender-based violence need to be comprehensive and multi-faceted. However, in comparison, there is no similar underlying prohibition on poverty or established institutions to remedy poverty that need to incorporate a gender perspective to address gender-based poverty. Therefore, there is an additional challenge to using CEDAW to incorporate the harms of gender-based poverty: the need to create and modify structures to meaningfully remedy gender-based poverty. This issue is canvassed in Chapter 8 when re-contextualising the obligations to CEDAW to incorporate the harms of gender-based poverty.

⁴⁷ibid 4-5.

⁴⁸ The CEDAW Committee, 'Report of the Inquiry Concerning Canada of the CEDAW Committee under Article 8 of the OP-CEDAW'(2015) CEDAW/C/OP.8/CAN/1.

⁴⁹ The UN Special Rapporteur on violence against women advocates for a multi-faceted approach to remedying gender-based violence that addresses the root causes and the unequal power relations between men and women. See '15 years' (n 46).

III. A Comprehensive Interpretation of CEDAW

A comprehensive interpretation of CEDAW reflects the complexity, entrenched nature and gender-based aspects of women's poverty. There are three options on which to base a comprehensive interpretation: non-discrimination, equality or an approach that uses both equality and non-discrimination. Only these two norms permeate CEDAW to the necessary extent to achieve a comprehensive interpretation. In this section I apply the VCLT interpretative framework to CEDAW to interpret equality and non-discrimination so as to assess which of the identified options is best able to bring gender-based poverty into CEDAW. The conclusion from this analysis is that due to the structure of CEDAW and the open-textured definition of equality and non-discrimination, the two norms together provide an intellectually coherent and legitimate basis for incorporating gender-based poverty in CEDAW.

Before turning to examine the ordinary meaning of equality and non-discrimination in light of the context and object and purpose of CEDAW, it is helpful to address a few methodological points. First, the section begins with an assessment on the role of equality in CEDAW. The title of CEDAW indicates a central role for non-discrimination. The role of equality is not as overt. The first sub-section examines how the text frames and uses equality in CEDAW. This analysis demonstrates that equality is a crucial concept within CEDAW and permeates the entire treaty. This justifies examining the meaning of equality in the proceeding sub-sections.

Second, ordinary meaning, context and object and purpose are to be used simultaneously to arrive at the interpretation of CEDAW.⁵⁰ Below I begin by examining the ordinary meaning of equality and non-discrimination then proceed to examine the context and object and purpose. However, this is not to imply that any element takes precedence over any other, but rather reflects

⁵⁰ Richard Gardiner, *Treaty Interpretation* (OUP, 2010) 9.

the practical reality that ‘one has to start somewhere.’⁵¹ Starting with the ordinary meaning of equality and non-discrimination is simply a useful first impression.⁵² Each element has equal value when interpreting CEDAW and all three elements are used harmoniously to ascertain the meaning of the text.

Third, Article 31(3)(a) requires that alongside context there shall be taken into account any subsequent agreements on the interpretation or application of the treaty. There is only one subsequent agreement to CEDAW, the OP-CEDAW, which empowers the Committee to consider individual communications that the State has failed to fulfill its CEDAW obligations.

Notwithstanding any question on whether the OP-CEDAW is a subsequent agreement on the interpretation or application of CEDAW, the text of the OP-CEDAW is sparse and does not provide any further insights into the interpretation of equality or non-discrimination. Therefore, it is not considered here. Article 31(3)(b) also requires that State practice be taken into account under context and this is canvassed in detail below.

Fourth, as explained in Chapter 3, various UN human rights bodies are developing an understanding of equality, gender and poverty. A comparative approach based on Article 31(3)(c) (the relevant rules of international law) would point towards examining how the HRC or CESCR has defined non-discrimination, equality, and particularly, gender equality. However, these bodies shed very little light on the meaning of equality in CEDAW. When discussing equality, particularly in the context of gender, the HRC and CESCR, reiterate the definition of discrimination in Article 1 of CEDAW and the work the Committee has done to develop non-discrimination and equality.⁵³

⁵¹ *ibid* 162.

⁵² *ibid* 161-62.

⁵³ CESCR, ‘General Comment No.16: The equal right of men and women to the enjoyment of economic, social and cultural rights’ (2005) E/C.12/2005/4 [11]; HRC, ‘General Comment No. 28: The equality of rights between men and women’ (1999) CCPR/C/21/Rev.1/Add.10

Therefore, looking at these sources is not particularly useful. This should not be read as undermining the comparative assessment in Chapter 3. The previous chapter importantly mapped out different models in conceptualising poverty. However, since these bodies do not illuminate the meaning of equality and non-discrimination in CEDAW, they are not relied on in this chapter.

Fifth, Article 32 of the VCLT allows recourse to supplementary material including the *travaux préparatoires* if the meaning is still ambiguous after an Article 31(1) analysis. There is a question whether a flexible, context specific interpretation of equality and non-discrimination would classify as ambiguous.⁵⁴ Notwithstanding this uncertainty, the analysis in Chapter 2 on the drafting history reveals that the *travaux préparatoires* are not very illuminating on this question. There is very little discussion in the material on how the States wanted to define equality and non-discrimination. Rehof noted that during the drafting the main issues around the definition of discrimination were first, whether the treaty should only protect women or both men and women and second, whether positive measures to empower women would be considered discrimination.⁵⁵ There was no substantive discussion on the meaning of equality or non-discrimination in any of the drafting documents. Given the various ideologies at the drafting table as described in Chapter 2, this is not surprising. Generating consensus on the precise meaning of these terms could have indefinitely delayed the drafting of CEDAW. Thus, the *travaux préparatoires* is not helpful in the process of interpreting these norms and is not relied upon in this analysis.

Sixth, this section also draws on the analysis in Chapter 3 on the legal authority of the work of the UN treaty bodies, such as the CEDAW Committee. The precise legal authority of treaty bodies is still a matter of debate, but there is a growing consensus that these are authoritative, non-

⁵⁴ Gardiner (n 50) 328.

⁵⁵ Lars Rehof, *Guide to the Travaux Préparatoires of the UN Convention on the Elimination of all Forms of Discrimination Against Women* (Nijhoff, 1993) 44-71. See also Andrew Byrnes, 'Article 1' in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 57-58.

binding interpretations.⁵⁶ Throughout this analysis, I draw on the work of the Committee in developing the meaning of equality and non-discrimination not as a binding source but as persuasive interpretations of CEDAW entitled to great weight.

Finally, this section is not meant to define equality and non-discrimination in the abstract,⁵⁷ but to understand how these norms can be used to understand gender-based poverty. Gender-based poverty, as defined in Chapter 1, includes the redistribution wrongs of not having access to economic resources and the recognition and participation harms which exclude women from the labour market, education and public life; segregate and devalue the work of women; perpetuate the low bargaining position of women in the home; and marginalize women from decision making processes; as well as social and culturally norms that generally see women as inferior. The analyses in the subsections below assess how equality and non-discrimination can be interpreted to incorporate the harms of gender-based poverty. I repeatedly draw on examples of gender-based poverty to explain how different models of equality and non-discrimination can incorporate the nature of this wrong.

(i) *The role of equality and non-discrimination in CEDAW*

Before engaging in an Article 31(1) interpretative analysis, it is important to examine the role of equality and non-discrimination in CEDAW. The elimination of discrimination appears to be the exclusive aim of CEDAW. Byrnes notes ‘the concept of discrimination is fundamental to the Convention; nearly every substantive article of the treaty identifies elimination of such discrimination as the core of the State party’s obligation.’⁵⁸ Nevertheless, there are no freestanding

⁵⁶ Kerstin Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt J of Transnational L* 905, 919.

⁵⁷ Byrnes, ‘Article 1’ (n 55).

⁵⁸ *ibid* 52.

rights to equality or non-discrimination in the text. Instead these norms permeate the treaty. A careful assessment of the text reveals two additional important features: (i) equality and non-discrimination are closely intertwined and (ii) equality is also a central organising principle of CEDAW. This indicates the difficulty of basing an understanding of gender-based poverty only on non-discrimination. The norms are so closely connected in CEDAW that it is challenging to discuss non-discrimination without referring to equality. This lends support to my hypothesis that using both values is the best approach to incorporating gender-based poverty into CEDAW.

The text of CEDAW creates a very close relationship between equality and non-discrimination. Article 1 holds:

For the purpose of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, *on a basis of equality of men and women*, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁵⁹

By Article 1, discrimination occurs when sex-based distinctions impair the equal enjoyment of women’s human rights. As is explained in detail below, when discussing the nature of the State’s obligations, equality is the standard used to assess whether a distinction is impermissible. If a distinction does not comply with equality there has been discrimination against women. Thus, Article 1 links equality and non-discrimination.

This connection is sustained throughout CEDAW. A careful reading of the substantive provisions demonstrates that the text envisions two purposes for equality. Equality is both an analytical framework for evaluating if the State has eliminated discrimination and the goal to be achieved in all fields of public and private life. As an example, Article 10 (education) requires State parties to ‘take all appropriate measures to *eliminate discrimination* in the field of education in order to

⁵⁹ Emphasis added.

ensure, *on a basis of equality of men and women*, the same rights.⁶⁰ The State is first obligated to eliminate discrimination in education. By the definition of discrimination in Article 1 the State is obligated to ensure the State based distinctions in education do not impede equality. Second, the State has to eliminate discrimination ‘in order to ensure’ the same rights for women in education. This indicates that goal of eliminating discrimination is gender equality and enjoyment of human rights. Equality is both the analytical framework for the State’s law and policies on education and the goal the State should be achieving, equal education. Rights to public life, employment, health, economic and social life and family life are all similarly phrased.

The Committee’s explanation on the role of equality and non-discrimination indicates that it too understands there is a close relationship between the two norms. It holds that the ‘objective of the Convention is the elimination of all forms of discrimination against women.’⁶¹ The next sentences explains that CEDAW ‘guarantees women equal recognition, enjoyment and exercise of all human rights’ in all fields ‘on a basis of equality.’⁶² The sentence structure in the General Recommendation hints that both eliminating discrimination and achieving gender equality are the objectives of CEDAW. The Committee also notes that the ‘State party must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that is targeted...towards the goal of fully eliminating all forms of discrimination against women and achieving women’s substantive equality with men.’⁶³ This again suggests that both non-discrimination and equality are the goals of CEDAW. Byrnes makes passing reference to equality in his discussion on Article 1 of CEDAW noting that the ‘complementary purpose of ensuring the

⁶⁰ Emphasis added.

⁶¹ The Committee, ‘General Recommendation No. 28: on the core obligations’ (2010) CEDAW/C/GC/28 [4].

⁶² *ibid.*

⁶³ *ibid.*

enjoyment of rights “on the basis of equality of women and men” also appears in many of the treaty’s provisions.⁶⁴ As is explained below, when evaluating the object and purpose of CEDAW, gender equality and non-discrimination are further linked to women’s human rights. At this stage, it is only important to note that the Committee also understands that there is a close connection between the two norms.

The text of CEDAW intertwines equality and non-discrimination, but equality is also a central organising concept absent any connection to non-discrimination. There are four provisions in CEDAW that solely emphasise equality: Article 3 (full advancement and development), Article 4 (temporary special measures), Article 9 (nationality) and Article 15 (equality before the law). Article 3 requires States to take all measures to ensure the full advancement and development of women ‘for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms *on a basis of equality with men*.⁶⁵ The role of equality in Article 3 is formulated in much the same manner as Article 1 (the definition of discrimination). The full development and advancement of women is similarly for the purpose of enjoying human rights on a basis of equality. This emphasizes the importance of women’s human rights but it also implies a pivotal role for equality. Human rights are enjoyed when gender equality has been achieved. Article 4(1) allows States to ‘adopt temporary special measures aimed at *accelerating de facto equality* between men and women’ and ‘these measures shall be discontinued when the objectives of *equality of opportunity and treatment* have been achieved.’⁶⁶ The purpose of temporary special measures is not to eliminate discrimination but rather to accelerate de facto equality between men and women.⁶⁷ This frames equality as an aim of

⁶⁴ Byrnes, ‘Article 1’ (n 55) 53.

⁶⁵ Emphasis added.

⁶⁶ Emphasis added.

⁶⁷ Frances Raday, ‘Article 4’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 124-25.

the treaty. Furthermore, temporary special measures can only be discontinued when ‘the objectives of equality of opportunity and treatment have been achieved.’ Equality is also then an aim and the analytical standard to determine when temporary special measures can be discontinued. This echoes the dual nature of equality in relation to many of the substantive provisions in CEDAW. Equality is both a measurement, temporary special measures can be discontinued when equality of opportunities has been achieved, and the goal, temporary special provisions are meant to achieve de facto equality. There are two further provisions that place a central role on equality. Article 9 requires States to ‘grant women equal rights with men to acquire, change or retain their nationality’ while, Article 15 ensures ‘women equality with men before the law.’

(ii) *The Ordinary Meaning of Equality and Non-Discrimination*

In Chapter 1 and Chapter 3, I argued that it was imperative that gender-based poverty be brought into the CEDAW framework. The above analysis demonstrates that there are three options for how to incorporate the harms of gender-based poverty into CEDAW: equality, non-discrimination and an approach that relies on both norms. The remaining sub-sections apply the VCLT interpretative framework to determine the meaning of equality and non-discrimination. The conclusion from this analysis is that all three elements of the VCLT framework support a context specific, open-textured definition of both equality and non-discrimination in CEDAW that can be interpreted so as to incorporate the harms of gender-based poverty.

Beginning with ordinary meaning, it is helpful to use the academic literature to assess if there is an authoritative ordinary meaning to equality and non-discrimination. The analysis below is not meant to reconcile different normative theories or be a comprehensive review of each of the contentious aspects of equality and non-discrimination. This section uses the literature to assess whether there is any authoritative ordinary meaning to these two norms. While this is just the first

step in the VCLT framework, this section concludes that there are multiple ordinary definitions of equality and non-discrimination.

a. Equality

There are many understandings of equality that have been developed in different disciplines. As CEDAW is a legal instrument, I examine the ordinary meaning of equality that has been prominent in legal discourse in relation to gender: formal and substantive equality. Formal equality is a mathematical application of treating likes alike. It requires consistent and fair treatment, prohibits arbitrary distinctions and ‘entails that everyone should be treated according to her merits.’⁶⁸ It is an important step in addressing gender-based poverty as it can address blatant wrongs such as explicit rules which require a husband’s permission to work, which prohibits a woman from inheriting property or exclude married girls from education.⁶⁹ This simultaneously addresses redistribution, recognition and exclusion wrongs by giving women and girls’ financial independence, redressing power imbalances and including women and girls in public institutions.

The problems with formal equality have been thoroughly canvassed and this serves as a brief summary. First, formal equality offers no moral framework for identifying when people are similar and when they are different. As Westen observes, equality ‘contains no standards for distinguishing “good” reasons from “bad” reasons.’⁷⁰ For centuries women were seen as different from men. This supposed difference was used to justify depriving women of property, rights over their own children and even their own bodies.⁷¹ Second, formal equality only requires that the two similarly-situated

⁶⁸ Sandra Fredman, *Discrimination Law* 2nd Edition (Clarendon, 2011) 8.

⁶⁹ The World Bank, ‘Gender at Work: A Companion to the World Development Report on Jobs’ (World Bank, 2014) 41, 43.

⁷⁰ Peter Westen, ‘The Empty Idea of Equality’ (1982) 95 Harvard L Rev 537, 575.

⁷¹ Fredman, *Discrimination Law* (n 64); Sandra Fredman, *Woman and the Law* (OUP, 1998) Chapters 1 and 2.

individuals being compared be treated consistently. Formal equality is indifferent whether the individuals are treated equally badly or equally well. If men are living on \$1.50 a day while women are living on \$1.25 a day, formal equality is satisfied if both men and women in equal measure are living on \$1.25 a day. Furthermore, formal equality requires a comparator. If there is no comparator it is difficult to remedy the wrong. This became apparent in the battle for pregnancy rights. Without a male comparator maternity benefits were sometimes characterised as violating equality.⁷² The same challenges can arise with respect to using formal equality to address maternal mortality which only affects women and disproportionately affects women in poverty.⁷³ In female dominated jobs it has been difficult to successfully argue for equal pay where there is no male equivalent.⁷⁴ Fourth, feminists argue that there is no neutral comparator. Comparisons when linked to consistent treatment actually require conformity to the comparator, which in the case of women requires conformity to the male norm.⁷⁵ This in turn devalues difference, can result in exclusion, and does little to address the misrecognition harms associated with gender. In practice, formal equality is a limited tool to break cycles of economic deprivation, social marginalization and exclusion.

Substantive equality seeks to transcend these limitations and infuse equality with a normative underpinning.⁷⁶ Substantive equality recognizes that men and women for historical, biological, social and cultural reasons are not the same and to achieve real equality different treatment may be required.⁷⁷ However, substantive equality is a contentious term with various meanings proposed.

⁷² *Bliss v Canada (Attorney General)*, [1979] 1 SCR 183.

⁷³ UN Special Rapporteur on the right to health, 'Maternal mortality' (n 1).

⁷⁴ *Dumfries and Galloway Council v North*, [2009] ICR 1363 (EAT).

⁷⁵ Catherine MacKinnon, *Feminism Unmodified* (HUP, 1987) 34.

⁷⁶ See *Minority Schools in Albania*, Advisory Opinion, PCIJ 1935, Ser. A/B No. 64.

⁷⁷ The Committee, 'General Recommendation No. 25: temporary special measures' (2004) CEDAW/C/GC/28 [8].

The four that have dominated the legal discourse are: equality of results, equality of opportunity, dignity and transformative equality. Below, I explain and then assess how each of these four models can incorporate the harms of gender-based poverty.

Equality of results examines the end-point. It is ‘primarily concerned with achieving a fair distribution of benefits.’⁷⁸ Equality of results ensures that socially valuable goods, jobs or places in academic institutions, are shared equally among all groups, including women. As an example, it requires an equal percentage of women in decision making bodies that reflects ‘their proportion in the population as a whole.’⁷⁹ There are a variety of ways to ensure women pursue a career in public office: removing explicit restrictions, encouragement, training and by establishing formal quotas. However, equality of results is problematic for several reasons. First, as Young observes it does little to challenge the structures and institutions which oppress and dominate.⁸⁰ For example, to achieve equality of results in public decision making bodies women may be forced to conform and assimilate to the male values and working patterns. To achieve socially or politically influential high status and well-paid jobs, women may delegate child-care responsibility to ‘other women, who remain underpaid and undervalued.’⁸¹ Second, equality of results is easiest to apply in areas which are quantifiable: representation in government or education. Recognition harms such as prejudice, stereotyping and humiliation are difficult to measure and often ignored.

In contrast to equality of results, equality of opportunity examines the starting point. Once this has been equalized everyone can be treated on the basis of individual merit and personal

⁷⁸ Fredman, *Discrimination Law* (n 68) 14.

⁷⁹ *ibid.*

⁸⁰ Iris Young, *Justice and the Politics of Difference* (PUP, 1990) 31-32.

⁸¹ Sandra Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights’ in Ineke Boerefijn et al (eds) *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia, 2003) 114.

responsibility. Equality of opportunities has the potential for radical redistribution if applied substantively. To facilitate genuine opportunity, the State can be required to take positive measures to address access and quality of education, to reconfigure work days, provide day care, and examine structures that perpetuate exclusion and lesser treatment such as the conception of merit which can operate as another guise for conformity to the male norm.⁸² However, as Fredman notes equality of opportunity has only been applied procedurally. Byrnes explains that equality of opportunity when applied in a formal or narrow sense does refer to ‘the practical circumstances that may make it difficult or impossible for members of the disadvantaged group to take advantage of these opportunities.’⁸³ It has removed word-of-mouth job recruitment but it has not guaranteed that women ‘will in fact be in a position to take advantage of those opportunities.’⁸⁴

Equality as dignity requires that the law demonstrate equal concern and respect for the moral worth of the individual. It is a powerful concept in advancing the recognition of women. Social assistance benefits that are only provided to the male as head of the home or have conditions which are deeply intrusive into a woman’s private life connote lesser moral worth. Dignity can also have a role in recognition harms by preventing decision makers from treating everyone equally badly. As Fredman observes ‘equality based on dignity must enhance rather than diminish the status of individuals.’⁸⁵ This prevents levelling down. However, the extent to which dignity can address redistribution harms is suspect. Does the inherent moral worth of the individual require access to a

⁸² Fredman, *Discrimination Law* (n 68) 18.

⁸³ Byrnes (n 55) 56.

⁸⁴ *ibid.*

⁸⁵ *ibid.* 21.

certain amount of economic resources? There are supporters on both sides of this question.⁸⁶ This conflict stems in part from the malleability of dignity. Similar to equality, dignity has conflicting interpretations. McCrudden argues that dignity is ‘culturally relative, deeply contingent on local politics and values, resulting in diverging, even conflicting conceptions.’⁸⁷ Therefore, its use as a sole normative underpinning for equality is perhaps inherently limited.

The final model of equality is transformative. This was developed and proposed by Fredman to bring together the insights from the other models of equality and create a synthesis. Her model of transformative equality is a multi-dimensional concept pursuing four overlapping aims.⁸⁸ Equality aims to break the cycle of disadvantage, to promote respect for dignity and worth, accommodate difference by achieving structural change and promote political and social inclusion.⁸⁹ This conception of equality is meant to remedy redistribution, recognition and exclusion harms. First, breaking the cycle of disadvantage recognizes that individuals and groups have suffered because of their personal characteristics. To redress this imbalance, positive measures are required. Precisely what aspects of disadvantage these measures should address is debatable. A narrow concept coincides with material goods while a broader notion can incorporate ‘power structures [which] impose on individuals because of their status’ or other obstacles to genuine choice.⁹⁰ Second, the inclusion of recognition harms in equality ‘addresses basic recognition ills including harassment and prejudice.’⁹¹ Third, with respect to structural change, rather than requiring individual conformity,

⁸⁶ See Denise Reaume, ‘Discrimination and Dignity’ (2003) *Louisiana L Rev* 1 in support of dignity requiring a redistribution of goods. For the contrary view see Christopher Essert, ‘Dignity, Equality and Membership’ (2006) 19 *Can J of L & Jurisprudence* 407.

⁸⁷ Christopher McCrudden, ‘Human Dignity and Judicial Interpretations of Human Rights’ (2008) *EJIL* 655, 698.

⁸⁸ Fredman, *Discrimination Law* (n 68) 25.

⁸⁹ *ibid.*

⁹⁰ *ibid* 27-28.

⁹¹ *ibid* 29.

equality requires institutions and structures to change. For example, the formal labour market is based on male working hours and patterns divorced from child-care responsibilities. This has excluded women from influential, high paid and status jobs. Equality demands that the formal labour market change to account for different life experiences. Fourth, the participation element requires the meaningful inclusion of women in all public, private, political and social decision making processes. Moreover, it recognises that women are not homogenous and may have different perspectives. Placing these four elements together highlights the connection between redistribution, recognition and exclusion harms. For example, a transformative equality analysis can capture how social benefits that are based on a male breadwinner model deny women access to financial resources, perpetuate relationships of powerlessness, inferiority, dependency and exclusion from decision making within and beyond the household unit.

(b) Non-Discrimination

This subsection canvasses the two models of discrimination: direct and indirect and evaluates how these can be used to understand the recognition, redistribution and exclusionary harms of gender-based poverty. Direct discrimination, has some similarities to formal equality. The underlying rationale for the prohibition of direct discrimination is also that likes should be treated alike.⁹² Under a discrimination framework, less favourable treatment on a protected ground is discriminatory. In cases of direct discrimination the less favourable treatment is usually explicit; for example, laws that explicitly prohibit women from inheriting property.⁹³ Discrimination is not always explicit.

Institutional structures operate to perpetuate disadvantage. The law has developed the concept of

⁹² Christopher McCrudden, 'Chapter 11: Equality and Non-Discrimination in D Feldman (ed) *English Public Law* (OUP, 2009) [11.123].

⁹³ The Committee, 'General Recommendation No. 21: equality in marriage and family relations' (1994) CEDAW/C/GC/21.

indirect discrimination. This is when unfavourable treatment is based on an apparently neutral rule but when applied disproportionately disadvantages a group that shares a protected characteristic. A rule is indirectly discriminatory unless it can be justified as proportionate or necessary.⁹⁴ For example, women are disproportionately employed as part time workers and legislation that does not protect these workers from unfair dismissal is indirectly discriminatory against women unless it can be justified for reasons unrelated to sex.⁹⁵

Discrimination law has had a substantial impact in addressing recognition harms. In the case of direct discrimination, when an individual is treated less favourably on the basis of a protected group characteristic there is the attribution of negative worth and inferiority to the individual because of that characteristic.⁹⁶ This in turn can create humiliation, stigma and indignity. By prohibiting less favourable treatment on certain grounds, non-discrimination forces the decision maker to examine the individual merit of the person and not assume they possess the negative stereotype because of their membership in the group.⁹⁷ This ensures that the individual's identity is properly recognized and gains respect for the protected characteristic; for example, removing prohibitions against night work for women dispels stereotypes that women are weak. This is also true when there is a finding of indirect discrimination. For example, requiring the seemingly neutral physical fitness qualifications for fire-fighters to be recalibrated to take account of women's different physiology ensures they are not excluded from fire-fighting because they do not meet the standard

⁹⁴ Equality Act 2010 (UK) s 19; Fredman, *Discrimination Law* (n 64) 177-180; *Griggs v Duke Power* (1971) 401 US 424 (US Supreme Court).

⁹⁵ Fredman, *Discrimination Law* (n 64) 105; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] IRLR 176 (HL).

⁹⁶ Reaume (n 86) 35-40.

⁹⁷ Fredman, *Discrimination Law* (n 64) 176; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55 [82].

based on the male norm.⁹⁸ This aids in the recognition of women as physically strong, capable and courageous.

However non-discrimination is not a complete solution to all the recognition harms associated with gender. Similar to formal equality, direct discrimination only requires removing the distinction and ensuring consistency of treatment.⁹⁹ It has not challenged the gender-based structures and institutions which perpetuate and contribute to the misrecognition and exclusion harms against women. Removing the direct prohibitions against women entering the formal labour market has not resulted in re-valuing the work traditionally assigned to women; they still remain concentrated in low status and low paid jobs.¹⁰⁰ Drawing on the fire-fighter example, removing any direct prohibitions and reconceptualising the fitness standards removes some, but not all, of the barriers preventing a woman from becoming a fire-fighter. It does not address ‘the underlying division of power within the family which leaves women with the primary responsibility for childcare.’¹⁰¹ The almost exclusive responsibility for child care means many women have no choice but to accept low paid and precarious part time work.¹⁰²

Non-discrimination has had a limited impact in the context of redistribution harms. The ability of women to work at night, to become fire-fighters, to inherit land and property, to be able to access credit in their own name and better protection for part time workers all break cycles of exploitation and positively impact a woman’s access to economic resources. However, discrimination law is

⁹⁸ *British Columbia Public Service Employees Relations Commission v BCGSEU*, [1999] 3 SCR 3.

⁹⁹ Fredman, *Discrimination Law* (n 68) 168.

¹⁰⁰ See Statistics Canada ‘Women in Canada: A Gender Based Statistical Report: Paid Work’ <<http://www.statcan.gc.ca/pub/75-001-x/2011001/pdf/11394-eng.pdf>> ; Kamala Sankaran and Roopa Madhav ‘Gender Equality and Social Dialogue in India’ (Working Paper 1/2011, ILO).

¹⁰¹ Fredman, *Discrimination Law* (n 68) 183.

¹⁰² Sandra Fredman, *Engendering Socio-Economic Rights* (2009) 25 SAJHR 517.

limited when it requires resources to remedy the wrong.¹⁰³ The limitations are similar to those under a formal equality analysis. As daycare workers are predominantly women, discrimination law cannot address their low pay because there is no male comparison with which to demonstrate less favourable treatment. Women are often foreclosed from taking high paid positions because of their child-care responsibilities and discrimination law cannot mandate the creation of daycares.¹⁰⁴

The meaning of equality and non-discrimination raises many challenging and complex issues. This sub-section is not an in-depth analysis but rather sketches the contours of these issues, highlighting the complexity and contestation surrounding the meaning of equality and non-discrimination. In conclusion, there is no singular ordinary meaning of equality or non-discrimination. A review of the wider academic literature reveals that there are several meanings of these terms. Moreover, each conception, albeit to varying degrees, can be interpreted to incorporate the redistribution, recognition and exclusion harms associated with gender-based poverty. This suggests they are open-textured terms whose ordinary meaning is capable of adapting to new situations.¹⁰⁵ The next section evaluates how the context sheds light on the interpretation of equality and non-discrimination in CEDAW.

(iii) Equality and Non-discrimination in the Context of CEDAW

This section asks what equality and non-discrimination mean in the context of CEDAW? Context examines the entire treaty to aid in giving meaning to precise terms. This includes titles, headings, the preamble and punctuation.¹⁰⁶ Article 31(3)(b) of the VCLT requires that the interpreter shall take

¹⁰³ Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequality' (2007) 23 SAJHR 214, 221.

¹⁰⁴ *ibid.*

¹⁰⁵ See *Convention concerning Employment of Women during the Night* PCIJ (1932) Series A/B No 50, 377 and Eirik Bjorge *The Evolutionary Interpretation of Treaties* (OUP, 2014).

¹⁰⁶ Gardiner (n 50) 178 and 245.

into account along with context any subsequent practice to the treaty. This sub-section investigates first, how the other provisions in CEDAW aid in the process of defining equality and non-discrimination and second, a sample of States' understanding of gender-based poverty in CEDAW. As explained above, this contextual analysis does not examine any subsequent agreements (Article 31(3)(a)) or other relevant rules of international law (Article 31(3)(c)).

(a) The Substantive Provisions in CEDAW

A contextual analysis also indicates that there is no singular meaning of equality or non-discrimination but rather that there are multiple conceptions of it within the one treaty. As Byrnes characterizes, CEDAW takes a flexible approach to equality which allows it to tackle a diverse range of gender equality wrongs.¹⁰⁷ Reading all of the substantive provisions together, formal equality and the different conceptions of substantive equality (results, opportunities and transformative) are all found within CEDAW. This further indicates that equality and non-discrimination in CEDAW are open-textured.

Formal equality is evident in numerous provisions in CEDAW. Article 15 guarantees legal capacity identical to that of men in civil matters, contracts, the administration of property, freedom of movement, residence, and in courts and tribunals. To ensure women's participation in public life (Article 7), international organisations (Article 8), the ability to keep and pass on nationality (Article 9), education (Article 10(a) and (b)), employment (Article 11) and access to financial credit (Article 13(a)), it is necessary to remove explicit or de jure barriers.¹⁰⁸ Every provision in Article 16 begins with the term 'the same right to...' and guarantees formal equality in respect to entering marriage, choice of spouse, responsibilities during marriage and divorce, to decide on the number and spacing

¹⁰⁷ Byrnes, 'Article 1' (n 55) 62.

¹⁰⁸ See the Committee, 'General Recommendation No. 23: participation in public life' (1997) CEDAW/C/GC/23 [15].

of children, over any children and rights over martial property. For example, CEDAW mandates the removal of a husband's permission to work or register land or provisions that grant the husband sole control over the household.¹⁰⁹ The Committee explains that removing these types of de jure barriers are 'essential prerequisites to true equality.'¹¹⁰

CEDAW has been criticized as only guaranteeing women formal equality.¹¹¹ This is a misreading, as substantive equality is also central to CEDAW. Byrnes convincingly argues that 'a broad approach to equality does not limit [CEDAW] to merely guaranteeing women an equal right to what men already have.'¹¹² The treaty has a broad understanding of substantive equality and does not exclusively embrace one meaning but in different contexts relies on different conceptions. However, three of the four models identified in the ordinary meaning analysis are present in the text: equality of results, equality of opportunity and transformative equality. This pluralism is also evident in the Committee's reasoning on equality.

Equality of results is not easily detected in the text of CEDAW itself. The treaty does not stipulate precise quotas in public office or educational facilities. Nevertheless, the Committee has relied on equality of results to explain the State's obligations in CEDAW. General Recommendation No. 25 explains that 'equality of results is the logical corollary of de facto or substantive equality' and notes that the Convention requires 'that women...be empowered by an enabling environment to achieve equality of results.'¹¹³ The Committee indicates that in political life the critical mass of 30 to

¹⁰⁹ The Committee, 'Sixth and Seventh Concluding Observations: Democratic Republic of the Congo' (2013) CEDAW/C/COD/CO/6-7 [37(a)].

¹¹⁰ 'General Recommendation No. 23' (n 108) [15].

¹¹¹ See Dianne, Otto, 'Holding up Half the Sky, but for whose benefit? A critical analysis of the Fourth Conference on Women' (1996) 6 Australian Feminist L J 7.

¹¹² Byrnes (n 55) 61.

¹¹³ 'General Recommendation No. 25' (n 77) [9].

35% female participation is necessary to achieve a real impact and recommends the ‘adoption of a rule that neither sex should constitute less than 40 per cent of the members of the public body.’¹¹⁴ It advocates setting numerical goals and quotas for women in all public positions and other essential professional groups.¹¹⁵

Unlike equality of results, equality of opportunity is expressly referred to in the treaty. Article 4(1) on temporary special measures requires these measures to be discontinued when ‘equality of *opportunity* and treatment have been achieved.’¹¹⁶ Equality of opportunity is at the forefront in the State’s obligations on education. Girls and women should have equal opportunities to participate in physical education (Article 10(g)), benefit from career guidance (Article 10(a)), continuing education (Article 10(d)), and scholarships (Article 10(e)). Equality of opportunity is also evident in the employment provisions. Women have the right to access jobs, benefits, vocational training and promotions.¹¹⁷ The Committee explains that ‘the Convention requires that women be given an equal start’¹¹⁸ and highlights the ‘Convention’s emphasis on...equality of opportunity [in] participation in public life and decision making.’¹¹⁹ However, the Committee has not clarified whether CEDAW embraces a thin or fully developed concept of equality of opportunity. The examples of equality of opportunity they provide indicate a thinner conception. The Committee recommends that appointments not be made by word of mouth but by objective criteria and processes.¹²⁰ This is an

¹¹⁴ *ibid* [16], [29].

¹¹⁵ *ibid* [15].

¹¹⁶ Emphasis added.

¹¹⁷ Article 11 (1) (b) and (c).

¹¹⁸ ‘General Recommendation No. 25’ (n 77) [8].

¹¹⁹ ‘General Recommendation No. 23’ (n 108) [7].

¹²⁰ *ibid* [38]; Fredman, *Discrimination Law* (n 68) 18-19.

important first step, but as explained above it does not necessarily guarantee that women are able to take advantage of these opportunities.

Dignity does not play a crucial role in equality in CEDAW nor has the Committee relied on it in any significant way. There is no reference to dignity in the substantive text of CEDAW. There are limited references to dignity in the preamble; but these are so brief that arguably it is not a fully fleshed out normative concept. So far as the Committee is concerned, its references to dignity tend to be superficial. It observes that prostitution and trafficking is incompatible with women's rights and dignity.¹²¹ Similarly, the right to informed consent to health care,¹²² to choose a spouse and the number and spacing of children is described as central to a woman's dignity and equality.¹²³

The transformative model of equality is prominent in the text of CEDAW.¹²⁴ The four elements of transformative equality—breaking the cycle of disadvantage, recognition, changing structures and participation—are evident in many of the provisions. The first element, breaking the cycle of disadvantage, means that treating women as identical to men is not sufficient and differential treatment is required. Temporary special measures (Article 4(1)) play a pivotal role in redressing disadvantage.¹²⁵ The Committee explains that temporary special measures require the State to take positive measures to accelerate gender equality. This can include creating support programs, targeting recruitment and reallocating resources.¹²⁶ In a similar vein, Article 10(f) recognises that girls are more likely than boys not to finish school and requires the creation of

¹²¹ 'General Recommendation No. 19' (n 22) [14].

¹²² The Committee, 'General Recommendation No. 24: women and health' (1999) CEDAW/C/GC/24 [22], [25].

¹²³ 'General Recommendation No. 21' (n 93) [16].

¹²⁴ Simone Cusack and Lisa Pusey, 'CEDAW and the rights to equality and non-discrimination' (2013) 14 *Melbourne J of Intl L* 54, 64.

¹²⁵ 'General Recommendation No. 25' (n 77) [8].

¹²⁶ *ibid.*

special programs for girls and women who have dropped out. In the context of employment, States are obligated to ensure equal pay for work of equal value and maternity leave benefits.¹²⁷ Rural women have the right to benefit directly from social security programmes and to adequate living conditions (housing, sanitation, electricity and water supply).¹²⁸ In numerous places CEDAW provides special protection for sexual and reproductive health.¹²⁹

The recognition element is also present in CEDAW. The strongest evidence of this is Article 5(a). States are ‘to modify the social and cultural patterns of conduct of men and women...based on the idea of inferiority or the superiority of either of the sex or on stereotyped roles of men and women.’ This is a powerful Article to address stigma, prejudice, stereotypes and the devaluation of women.¹³⁰ Chinkin explains that this provision is meant to ensure ‘a positive appreciation of women’s contribution to society.’¹³¹ Both the preamble and Article 5(b) require the State to ensure ‘family education includes a proper understanding of maternity as a social function...and the recognition of the common responsibility of men and women in upbringing and development of their children.’ This stresses seeing maternity as a positive value and challenges social norms which dictate that women have the responsibility for unpaid child care.¹³² Equal pay for work of equal value (Article 11(1)(e)) can also contribute to the proper recognition of work traditionally assigned to women. Article 14(1) (rural women) notes the ‘significant roles which rural women play in the

¹²⁷ Article 11(2)(b).

¹²⁸ Article 11(1)(d), 11(2)(c) and 14(2)(h).

¹²⁹ Articles 4(2), 10(h) and 12(2).

¹³⁰ Christine Chinkin, ‘Article 5’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 142.

¹³¹ *ibid.*

¹³² *ibid.*

economic survival of their families.’ In education, States are required to revise textbooks, school programs and teaching methods to eliminate stereotypes on the role of men and women.¹³³

The structural component seeks to value difference and requires institutions rather than individuals to change. The Committee advocates that the States adopt measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.’¹³⁴ There are numerous examples of the structural element of transformative equality in CEDAW to support the Committee’s understanding. CEDAW is a strong advocate for restructuring parenting both in the private and public sphere.¹³⁵ Under Article 11(2)(c) States are ‘to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.’ This could require States to change the structure of the work day and working hours to accommodate parenting obligations. The preamble also calls for ‘a change in the traditional role of men as well as the role of women in society and the family...to achieve full equality between men and women.’ Other provisions also have the potential to transform oppressive structures. Equal remuneration for work of equal value, in Article 11(1)(d) is a potentially revolutionary concept. It can challenge women’s low wages, gender-based job segregation and require a re-evaluation of the ‘tasks performed predominantly by women’ on objective gender-neutral criteria.¹³⁶ Evaluating equal pay for work of equal value challenges traditional definitions on qualifications and merit. The Committee recommends the concept of merit be ‘reviewed carefully

¹³³ Article 10(c).

¹³⁴ ‘General Recommendation No. 25’ (n 77) [9].

¹³⁵ See Article 5(b).

¹³⁶ Frances Raday, ‘Article 11’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 293.

for gender bias as they are normatively and culturally determined.¹³⁷ Article 14(2)(c) gives rural women the right to directly benefit from social security models which could be used to challenge head of household models of social benefits.

The participation element of transformative equality is apparent in Articles 7 and 8 which require States to ensure women participate in the formulation of government policy, non-governmental and international organisations. The Committee recommends that States ‘achieve a balance between women and men holding publicly elected positions’ and ‘equality of representation of women in the formulation of government policy.’¹³⁸ Under Article 14(2)(a) women have the equal right to participate in the implementation and development of all planning at all stages and all community activities. States are required to guarantee equal participation in recreation, sports and cultural life¹³⁹ and to reduce the female student drop-out rate at all levels of education.¹⁴⁰

Article 3 brings together all four elements of transformative equality. Article 3 requires States to take ‘in all fields...all appropriate measures to ensure the *full development and advancement* of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.’¹⁴¹ As Chinkin notes, Article 3 has not been sufficiently developed by the Committee.¹⁴² Full development and advancement could be trying to express the freedom ‘to develop individual personal abilities, pursue professional careers and make choices.’¹⁴³ Article 3 could be interpreted to be protecting ‘the development of opportunities which allow

¹³⁷ ‘General Recommendation No. 25’ (n 77) [23].

¹³⁸ ‘General Recommendation No. 23’ (n 77) [46]-[47].

¹³⁹ Article 13.

¹⁴⁰ Article 10(e).

¹⁴¹ Emphasis added.

¹⁴² Christine Chinkin, ‘Article 3’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 103.

¹⁴³ ‘General Recommendation No. 28’ (n 61) [22].

people to realise their full potential—the ability of each human being to develop their full potential and form mutually supporting human relationships in the home, community, workplace and society.¹⁴⁴ Full development and an advancement could similarly be interpreted to mean ‘the opportunity to live in the ways people value and would choose, so that everyone can flourish.’¹⁴⁵ Raday observes that Article 3 ‘locates women as rights-holders, not just as object or prospective beneficiaries of development policy.’¹⁴⁶ Whatever precise meaning is given to this term, what is clear is that to achieve the full development and advancement of women all aspects of transformative equality must be applied. To ‘develop, participate and flourish as human beings’¹⁴⁷ requires breaking cycles of disadvantage, ensuring proper respect and recognition of the women, modifying structures which exclude, oppress and demean and ensuring the participation of women in all aspects of life.

In conclusion, a contextual analysis of the treaty, like the ordinary meaning analysis, points towards an open-textured definition of equality that includes formal and a multi-dimensional substantive equality. Formal equality is the first step when accomplished needs be supplemented by substantive equality.¹⁴⁸ Equality in the context of CEDAW is a rich and varied concept. This is not as surprising as it first appears. CEDAW has been signed by 187 countries at various stages of development with regard to gender equality. A fluid understanding of equality can ensure the most effective model is used to understand the domestic problem at that precise moment in time.

¹⁴⁴ Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of Indigenous Jurisprudence’ (1998) 14 SAJHR 248, 254.

¹⁴⁵ Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing, 2011) 12.

¹⁴⁶ Frances Raday, ‘Gender and Democratic Citizenship: The Impact of CEDAW’ (2012) 10(2) ICON 512, 525.

¹⁴⁷ Sandra Liebenberg and Beth Goldblatt, ‘The Interrelationship between Equality and Socio-Economic Rights Under South Africa’s Transformation Constitution’ (2007) 23 SAJHR 335, 343.

¹⁴⁸ See ‘General Recommendation No 23’ (n 108).

Unlike equality, the treaty defines discrimination in Article 1. According to Article 1 the term ‘discrimination against women’ is any distinction on the basis of sex or gender¹⁴⁹ which in effect or purpose impairs the enjoyment by women, on the basis of equality of men and women, of their human rights. From this definition it is possible to derive a three part test for investigating when a State has failed to eliminate discrimination against women.

First, there must be a distinction. The use of the words ‘effect or purpose’ indicates that CEDAW prohibits both direct and indirect discrimination.¹⁵⁰ Second, the distinction must be made on the basis of sex or gender. This means there must be a causal connection between the distinction and the individual’s sex or gender.

Third, only distinctions based on sex or gender which impairs the enjoyment on a basis of equality of human rights and fundamental freedoms qualify as discrimination against women. The third step is the most challenging. The distinctions based on sex must impair human rights on the basis of equality. Equality is the evaluative framework that is applied to assess whether distinctions based on sex or gender are discriminatory. The text of CEDAW does not provide any further guidance on the definition of discrimination and the Committee has not developed this in any sufficient detail in the General Recommendations, Concluding Observations or Individual Communications. The challenge of using equality as an analytical tool is canvassed below when delineating the nature of the State’s obligations. At this stage of the analysis, it is only necessary to note the close relationship between equality and non-discrimination in CEDAW and the difficulty in conceptualising these as two distinct norms.

¹⁴⁹ The Committee held that Article 1 prohibits both sex and gender based discriminatory distinctions. See ‘General Recommendation No. 28’ (n 61) [5].

¹⁵⁰ ‘General Recommendation No. 25 (n 77) [7].

Interpreting equality and non-discrimination in light of gender-based poverty raises questions on the possibility of recognising poverty as a ground of discrimination in CEDAW. As explained in Chapter 3, ICESCR has adopted this approach. Article 2(2) of ICESCR requires the rights in that Convention to be guaranteed without discrimination on a variety of grounds: race, religion, etc. This list of grounds is open and CESCR has included economic and social situation as an analogous ground.¹⁵¹ CEDAW does not operate in the same manner. CEDAW does not have an open list of grounds of discrimination like ICESCR. Rather the treaty adopts several strategies for dealing with identity, experience and grounds of discrimination. Article 1 of CEDAW prohibits discrimination on the basis of sex. It also prohibits discrimination on the basis of marital status: women are to enjoy their human rights ‘irrespective of their marital status.’ The text of CEDAW also treats maternity as a ground of discrimination. Article 11(2) requires State to take appropriate measures ‘to prevent discrimination against women on the grounds of marriage or maternity.’ However, CEDAW does not only rely solely on a ground approach to discrimination. It also protects certain identities (Article 14-rural women) and prohibits discrimination in broad areas of life (Article 10-education, Article 12-health and Article 13-economic and social life).

The Committee has embraced a nuanced understanding of women’s identities and experiences.¹⁵² The Committee notes that ‘discrimination of women based on sex and gender is inextricably linked with other [identity] factors that affect women...State parties must legally recognise such intersecting forms of discrimination.’¹⁵³ CEDAW has chosen its one specific ground: women. Rather than adopting a specific ground-based approach and looking at the intersection between the grounds, the Committee adopts a fluid and expansive conception of “women” that

¹⁵¹ CESCR, ‘General Comment No. 20: non-discrimination in economic, social and cultural rights’ E/C.12/GC/20 [35].

¹⁵² See Raday (n 146).

¹⁵³ ‘General Recommendation No. 28’ (n 61) [18].

allows them to appreciate the various combinations and permutations of discrimination that women experience. Arguably this approach is derived from an object and purpose reading of CEDAW. To eliminate discrimination and achieve gender equality so women can enjoy their human rights it is necessary to appreciate and remedy all of the reasons for their disadvantage treatment. For example, in the *Teixeria* case, a poor, rural Afro-Brazilian women who died in childbirth die due to delays in receiving medical treatment it is necessary to appreciate how her poverty, race and living in a rural community contributed to her death so as to make meaningful recommendations on how to eliminate discrimination and achieve gender equality in health care (Article 12).¹⁵⁴ If women experience discrimination in relation to cross-cutting themes (violence or poverty) or in relation to certain identities or experiences (migrant status or age), because women experience these forms of discrimination in a unique way inherently linked to their sex and gender, they are protected under CEDAW. The Committee has used this approach to address migrant status,¹⁵⁵ age,¹⁵⁶ ethnic minorities,¹⁵⁷ disabilities,¹⁵⁸ women in prisons,¹⁵⁹ women with HIV,¹⁶⁰ refugees,¹⁶¹ albinos¹⁶², girls living in the street¹⁶³ violence¹⁶⁴ and armed conflict.¹⁶⁵

¹⁵⁴ *Alyne da Silva Pimentel Teixeira v Brazil* (2011) CEDAW/C/49/D/17/2008.

¹⁵⁵ The Committee, 'General Recommendation No. 26: women migrant workers' (2008) CEDAW/C/GC/26.

¹⁵⁶ The Committee, 'General Recommendation No. 27: older women and the protection of their human rights' (2010) CEDAW/C/GC/27.

¹⁵⁷ The Committee, 'Seventh Concluding Observations: UK' (2013) CEDAW/C/GBR/CO/7 [34].

¹⁵⁸ *ibid.* [42], [46]-[47].

¹⁵⁹ *ibid* [54].

¹⁶⁰ 'Sixth and Seventh CO: Democratic Republic of the Congo' (n 108) [9(h)].

¹⁶¹ *ibid* [35(c)].

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ 'General Recommendation No. 19' (n 22).

In conclusion, gender-based poverty is not a ground of discrimination in CEDAW. This also helpfully avoids the contentious debate on whether poverty should be a ground of discrimination.¹⁶⁶ The text of CEDAW and the Committee's interpretation of it shows that it uses sex and gender to encompass all of women's experiences and identities. Therefore, the issue of grounds does not arise in the same way in CEDAW as it does in ICESCR. The Committee prefers a more fluid approach to protecting multiple identities. It favours protecting both women's identity characteristics and their experiences as these are inextricably linked to discrimination against them.¹⁶⁷ Recognising gender-based poverty as an issue of gender discrimination and equality does not mean recognising gender-based poverty as a ground but rather that poverty is part of the spectrum of women's identities and experiences.

b. Subsequent Practice

Article 31(3)(b) VCLT requires that subsequent practice be assessed alongside context. Subsequent practice 'constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.'¹⁶⁸ The practice must be in the application of the treaty and establish the agreement of the parties on the treaty's meaning. Practice must be 'sufficiently constant and repeated.'¹⁶⁹ Gardiner points out that it is not necessary that every party to the treaty undertake such practice but 'it is

¹⁶⁵ The Committee, 'General Recommendation No. 30: on women in conflict prevention, conflict and post-conflict situations' (2013) CEDAW/C/GC/30.

¹⁶⁶ See Sandra Fredman 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22(3) Stellenbosch L Rev 566, 581-587.

¹⁶⁷ General Recommendation No. 28 (n 61) [18].

¹⁶⁸ *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Report 1045 [49] quoting from [1966] Yearbook of the ILC, vol II [15].

¹⁶⁹ Gardiner (n 50) 231.

sufficient if there is practice of one or more parties and good evidence that other parties have endorsed the practice.¹⁷⁰ There is uncertainty as to whether only the State's practice qualifies as subsequent practice or whether the work of the Committee would also qualify. There are those who take the position that only State practice is relevant as this is more consistent with the horizontal, voluntary nature of international law.¹⁷¹ On the other hand, the International Law Association advocates that the difference in human rights treaties from the 'presumed ideal type of multilateral treaty' means the practice of the treaty bodies should be included in subsequent practice.¹⁷² Without trying to resolve the debate, it is useful to highlight that the Committee has an established practice of using CEDAW to understand gender-based poverty. This is explored in detail in Chapter 5 through an assessment of the Concluding Observations and Individual Communications. In this subsection I examine subsequent State practice on gender-based poverty, gender equality and non-discrimination in CEDAW.

Analysing subsequent State practice to a treaty that has 187 signatories raises two methodological challenges. First, there are countless ways that the State can demonstrate whether it accepts or rejects an interpretation that connects gender-based poverty to gender equality and non-discrimination in CEDAW. For this analysis I have chosen to examine the summary records of the dialogue session between the State representative and the Committee during the periodic reporting process and any follow up reports submitted by the State after the Committee releases the Concluding Observations. There are two reasons for examining this material. First, rather than looking at court judgments or domestic legislation, the summary records and follow up reports directly relate to the State's interpretation of CEDAW. Second, I examine these sources rather than

¹⁷⁰ *ibid* 238.

¹⁷¹ *Japan – Alcoholic Beverages Case* AB-1996-2, Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

¹⁷² International Law Association, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (Berlin Conference, 2004) [25]–[26].

the State report because if a Committee member asks a question on poverty or the Committee makes recommendation in relation to poverty, these are the sources where the State is more likely to register its acceptance or objection to interpreting gender equality and non-discrimination to incorporate gender-based poverty into CEDAW.

Second, as Gardiner points out ‘the difficulty of locating, collating and assessing evidence of [State] practice makes short cuts particularly attractive.’¹⁷³ In the thirty-two years that the Committee has been reviewing State reports, they have conducted over twelve thousand dialogue sessions with the State. With this volume of primary material, some selection must be made to fruitfully evaluate subsequent State practice. This subsection analyses a sample of States from the last two periodic reporting sessions from 2001 to 2014. While this does limit the extent of the conclusions, it addresses both the need for concurrence and the consistency required for subsequent practice. Previous academic studies on CEDAW are not helpful in providing a framework for selection. First, some of the academic literature assesses how an individual State has complied with CEDAW.¹⁷⁴ As this type of analysis only uses the source material from one State, there is no requirement for any selection process. Second, when there is an analysis of more than one State, either the selection sample is very small¹⁷⁵ or it is not always clear how the States were chosen.¹⁷⁶ The former type of study does not provide a sufficient basis of material for a comprehensive analysis of State practice while the later studies are open to criticism of selecting States that only further a particular theory

¹⁷³ Gardiner (n 50) 239.

¹⁷⁴ See Maysa Bydoon, ‘Reservations on the Convention of Elimination of All Forms of Discrimination Against Women (CEDAW) Based on Islam and its Practical Application in Jordan: Legal Perspectives’ (2011) 25(1) Arab L Q 51; Chika Shinohara, ‘Global Pressure, Local Results: The Impact of CEDAW on Working Women in Japan’ (2008) 13(4) J of Workplace Rights 449.

¹⁷⁵ Lisa Pruitt and Marta R. Vanegas, ‘CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up’ (2012) 41 Baltimore L Rev 264.

¹⁷⁶ See Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012).

rather than an objective assessment of the primary material. To ensure the assessment is not vulnerable to allegations of selection bias, it is necessary to have a methodological framework for choosing summary records and follow-up reports to investigate in further detail.

Ideally, the study should have geographic breadth as gender-based poverty is a global problem. Furthermore, it should include countries at different stages of development with respect to gender equality and non-discrimination. To ensure the analysis draws on a wide variety of States, the UNDP Gender Inequality Index (GII) and the World Bank's classifications on gross national income and geographic locations were used as the second and third selection criteria. Before listing the States chosen for this analysis, I will briefly explain the GII and World Bank classification system.

The GII arose out of the failure of the Human Development Index (HDI) to capture gender inequality and discrimination when evaluating States on a multi-dimensional concept of poverty.¹⁷⁷ The HDI itself is an answer to income assessments of poverty. The HDI, which is derived from Sen's capabilities approach, is meant to assess poverty by evaluating individual flourishing and well-being.¹⁷⁸ It is a multi-dimensional poverty index which examines life expectancy at birth, years of education and the gross national income per capita. One of the critiques of the HDI is that it is not sensitive to intergroup inequality because it assumes that everyone had reached the average achievement levels.¹⁷⁹ This whitewashed the differences between men and women. To compensate for this, in 1995 the UNDP introduced the Gender Development Index (GDI) and Gender Empowerment Measurement (GEM). However, there were limitations to both of these approaches.

¹⁷⁷ Stephan Klasen and Dana Schuler, 'Reforming the Gender Related Development Index and Gender Empowerment Measure: Implementing Some Specific Proposals' (2011) 17(1) *Feminist Economics* 1. See also Sabina Alkrie and Maria Emma Santos, 'A Multidimensional Approach: Poverty Measurement and Beyond' (2013) 112(2) *Social Indicators Research* 239 for the development of a multidimensional approach to poverty.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

The GDI only ‘applies a “penalty” to the HDI value if gender inequality exists in any of the three dimensions of the HDI¹⁸⁰ while the GEM only measures women’s access to power in limited spheres—economics, politics and decision making.¹⁸¹ Beneria and Permanyer argue that these measurements were not true reflections of gender inequality.¹⁸² Moreover, in application the GDI and GEM are skewed in favour of developed countries.¹⁸³ The UNDP discarded both of these measurements in 2010 and now there is only one: the GII. It is a measurement with its own rank and value.¹⁸⁴ It ‘reflects women’s disadvantage in three dimensions—reproductive health, empowerment and the labour market.’¹⁸⁵ These three dimensions are measured on five indicators: maternal mortality, adolescent fertility, women’s representation in parliament, levels of education and participation in the formal labour force.¹⁸⁶ There are still notable gaps in the GII: the informal labour market and work in caring are not included.¹⁸⁷ Each year the UNDP releases States’ rankings for gender equality using the GII. Somewhat counter intuitively, countries that have a very high GII are those that have high levels of gender equality.

The World Bank has two axes of classifications: gross national income per capita (GNI) and geography.¹⁸⁸ GNI is calculated in US dollars. The classifications are: low income- \$1,035 or less, lower middle income - \$1,036-\$4,085, upper middle income - \$4,086-\$12,615 and high income -

¹⁸⁰ *ibid.*

¹⁸¹ Loudres Beneria and Inaki Permanyer, ‘The Measurement of Socio-Economic Gender Equality Revisited’ (2010) 41(3) *Development and Change* 375, 376-77.

¹⁸² *ibid.*

¹⁸³ Klasen and Schuler (n 177) 2.

¹⁸⁴ UNDP, ‘Gender Inequality Index’ <<http://hdr.undp.org/en/statistics/gii/>>.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ The World Bank, ‘How We Classify Countries’ <<http://data.worldbank.org/about/country-classifications>>.

\$12,616 or more. Only those countries ranked below higher incomes are further classified by geographic region. The regional breakdown is: Latin American & Caribbean, Europe & Central Asia, Middle East & North Africa, Sub-Saharan Africa, South Asia and East Asia & Pacific.

Using the GII rankings from 2012¹⁸⁹ and the World Bank's two classifications the States in Table 1 were selected for further study. This method is not purely mathematical and in some instances a choice had to be made between two equally "qualified" States. Notwithstanding this, the sample size provides a range of States with different levels of gender equality, gross national income per capita and geographic location.

Table 1: Selection of Countries for Investigation

Country	2013 GII Rank	GNI	Geographic Classification
Norway	5	High Income	Western Europe
Canada	18	High Income	North America ¹⁹⁰
Romania	55	Upper Middle Income	Europe & Central Asia
Turkey	68	Upper Middle Income	Europe and Central Asia
Argentina	71	Upper Middle Income	Latin America & Caribbean
Mexico	72	Upper Middle Income	Latin America & Caribbean
Philippines	77	Lower Middle Income	East Asia & Pacific
Jordan	99	Upper Middle Income	Middle East & North Africa
Kenya	111	Low Income	Sub-Saharan Africa
Egypt	126	Lower Middle Income	Middle East & North

¹⁸⁹ UN Data, 'Gender Inequality Index' <<http://data.un.org/DocumentData.aspx?q=HDI&id=332>> .

¹⁹⁰These are my own classifications because they are high income neither Norway nor Canada is geographically classified by the World Bank.

Bangladesh	130	Low Income	Africa South Asia
Ethiopia	173 HDI—GII not available	Low Income	Sub-Saharan Africa

For this evaluation, the States chosen for greater study have a gender inequality index ranging from 5 to 130. In relation to gross national income per capita, there are two high income countries, five upper middle income countries, two lower middle income countries and three low income countries. There is one country from Western Europe, one from North America, two countries from Europe & Central Asia, two from Latin American & Caribbean, one from East Asia & Pacific, two from Middle East & North Africa, one from South Asia and two countries from Sub-Saharan Africa. These three criteria and the twelve States selected ensure an objective and comprehensive understanding of how the State has understood gender-based poverty in relation to CEDAW.

The summary records from the periodic reporting session and the follow-up report demonstrate that States understand that gender-based poverty as an issue of gender equality and non-discrimination in CEDAW. Bangladesh’s opening statement to the Committee is strong evidence of this: ‘the Government of Bangladesh firmly believed that gender equality was a precondition for meeting the challenge of reducing poverty.’¹⁹¹ The Philippines draws a similar connection between poverty and gender equality. The State representative explains ‘progress in women’s rights and gender equality need to be examined in the context of other circumstances in the Philippines, such as poverty.’¹⁹² Egypt identified poverty as an obstacle to women’s advancement.¹⁹³ These States are implicitly calling for an interpretation of CEDAW and gender

¹⁹¹ The Committee, ‘Summary record of the 969th meeting’ (2011) CEDAW/C/SR.969 [1].

¹⁹² The Committee, ‘Summary record 747th meeting’ (2006) CEDAW/C/SR.747(A) [7].

¹⁹³ The Committee, ‘Summary record of 492nd meeting’ (2001) CEDAW/C/SR.492 [1].

equality that understands gender-based poverty as an obstacle to women's human rights. It is essential that State practice be reflected not only in statements but in actual acts. While Turkey and Romania only made passing reference to poverty reduction programs in their opening address to the Committee, Argentina, Bangladesh, Canada, Ethiopia and Kenya provide substantial information on the steps they have taken to reduce gender-based poverty. Bangladesh has 'launched a number of poverty-alleviation programmes whose objective was to ensure women's equal and active participation in social and economic life and to empower women.'¹⁹⁴ Similarly, 'Canada endeavoured to address specific gender related economic gaps...such as the National Child Benefit Supplement for low income families.'¹⁹⁵ Ethiopia's national poverty reduction strategy 'recognised women's stake in the country's development'¹⁹⁶

Gender-based poverty is a cross-cutting problem and States provide information on many facets of gender-based poverty without directly referring to poverty. All States provide information on violence, equal pay and on the allocation of property on divorce or widowhood. For example, Argentina explains efforts to decentralise health services and increase the availability of generic pharmaceuticals.¹⁹⁷ Norway's action plan focuses on equality in education, parenting and family friendly work life, gender segregated work life and the distribution of economic power.¹⁹⁸ Egypt notes that their tax laws have been reformed so that women are counted as head of the household and they removed husband's permission for applying for a passport.¹⁹⁹

¹⁹⁴ 'Summary record of the 969th meeting' (n 187) [8].

¹⁹⁵The Committee, 'Summary record of the 854th meeting' (2008) CEDAW/C/SR.854 [6].

¹⁹⁶ The Committee, 'Summary record of the 954th meeting' (2010) CEDAW/C/SR.954 [3].

¹⁹⁷ The Committee, 'Summary record of the 584th meeting' (2002) CEDAW/C/SR.584 [8].

¹⁹⁸ The Committee, 'Summary record of the 1024th meeting' (2012) CEDAW/C/SR.1024 [5].

¹⁹⁹ The Committee, 'Summary Records of the 918th meeting' (2010) CEDAW/C/SR.918 [31]; 'Summary Records of the 492th meeting' (2001) (n 189) [6], [27].

There were a few limited instances where the Committee asks questions during the dialogue session on gender-based poverty. There was no evidence of the State objecting to the appropriateness of the question or arguing that gender-based poverty was not within the mandate of CEDAW. Rather the State representative responds with further information on gendered poverty. The best example of this is Canada. The State representative provides detailed information on the social assistance rates and minimum wage.²⁰⁰ In response to questions on poverty reduction policies essentialising women as mothers, the State representative from Canada explains ‘efforts to advance gender equality and gender-based analysis of policies, were guided by three goals: improving women’s economic independence, ensuring that women’s human rights were protected and combating violence against women.’²⁰¹ When asked about their development programmes, the Ethiopian representative explains ‘that women’s issues were part and parcel of Ethiopia’s national strategy to promote rural development and, more broadly, its sustainable development and poverty reduction programme.’²⁰² Similarly after numerous questions on the depth and extent of poverty in Mexico, the representative explains the State’s free trade policies, national welfare laws and food programs.²⁰³

The Committee along with other treaty bodies is developing follow-up procedures so the constructive dialogue session can continue outside the formalised periodic reporting procedure. In the follow-up report the States expresses its views about the Concluding Observations and any further steps it is taking to address the Committee’s recommendations. In the follow up reports States provide further evidence of the measures they were employing to remedy gender-based

²⁰⁰ ‘Summary record of the 854th meeting’ (n 191) [31], [39].

²⁰¹ The Committee, ‘Summary record of the 603th meeting’ (2003) CEDAW/C/SR.603 [51].

²⁰² The Committee, ‘Summary record of the 646th meeting’ (2004) CEDAW/C/SR.646 [19].

²⁰³ The Committee, ‘Summary of record of the 752th meeting’ (2006) CEDAW/C/SR.752 [33]-[37].

poverty. Canada spends over 40 paragraphs detailing the structure of social assistance.²⁰⁴ Argentina explains the increased efforts to combat poverty among girls under 17 and provides information on free legal assistance to women.²⁰⁵ Norway provides extensive explanations on how it is regulating part-time work and transforming cultural norms on parenting.²⁰⁶ There are no examples of the State rejecting poverty within CEDAW. While this is only a sample of the State's subsequent practice in relation to CEDAW and gender-based poverty, it does indicate that States interpret equality and non-discrimination to incorporate gender-based poverty in CEDAW.

(iv) The Object and Purpose of CEDAW

The last element of the VCLT interpretative framework investigates how the object and purpose of CEDAW influences the interpretation of equality and non-discrimination. This section demonstrates that the foundational aims of CEDAW are to eliminate discrimination and achieve gender equality so that women can enjoy their human rights. These aims are broad and the Committee has clarified that they are to be understood as evolutionary and effective goals. This lends further support to a flexible interpretation of gender equality and non-discrimination that is responsive to newly recognised obstacles to women's human rights, such as gender-based poverty.

The purpose of CEDAW is to ensure women equally enjoy their human rights. The preamble begins by affirming the value and importance of human rights in various international instruments. The preamble then notes that notwithstanding these human rights guarantees women are still discriminated against. The preamble refers to poverty: 'concerned that in situations of

²⁰⁴ 'Information provided by Canada on the follow-up to the concluding observations of the Committee' (2010) CEDAW/C/CAN/CO/7/Add.1.

²⁰⁵ 'Information provided by Argentina on the follow-up to the concluding observations of the Committee' (2010) (2010) CEDAW/C/ARG/CO/6/Add.1 [10], [20].

²⁰⁶ 'Information provided by Norway on the follow-up to the concluding observations of the Committee' (2012) CEDAW/C/NOR/CO/8/Add.1.

poverty women have the least access to food, health, education, training and opportunities for employment and other needs.’ Chapter 2 argued that the reference to poverty in the preamble demonstrated that poverty was conceptualised as a political issue. At the same time, it also demonstrates an awareness of the connection between poverty and human rights. Chinkin and Rudolf argue the reference to poverty and contemporary international affairs ‘emphasises factors that States consider conducive to realising the purposes of the Convention.’²⁰⁷ The preamble expresses concern that women in poverty have the least access to food, health, education and employment opportunities. This is an implicit acknowledgement that poverty is an obstacle to women’s human rights and the substantive provisions in CEDAW: Article 10 (education), Article 11 (employment) and Article 12 (health). The importance of human rights is also emphasised in the substantive provisions of CEDAW. As explained above, Article 1 of CEDAW (definition of discrimination) places a central focus on human rights. Similarly, Article 3 requires the full advancement and development of women so that they can enjoy their human rights. The Committee explains that the object and purpose of the Convention ‘is to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men *in the enjoyment of their human rights...*’²⁰⁸ At another point the Committee states CEDAW ‘guarantees women the equal recognition, enjoyment and exercise of all human rights.’²⁰⁹ CEDAW is described as ‘part of a comprehensive international human rights framework directed at ensuring the enjoyment of all human rights.’²¹⁰

²⁰⁷ Christine Chinkin and Beate Rudolf, ‘Preamble’ in in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2013) 39.

²⁰⁸ ‘General Recommendation No 25’ (n 77) [4].

²⁰⁹ ‘General Recommendation No 28’ (n 61) [4].

²¹⁰ *ibid* [1].

There are a myriad of ways that human rights can be violated. CEDAW investigates how gender inequality and discrimination limit women's human rights. The Committee explains that the 'Convention focuses on discrimination against women, emphasizing that women have suffered and continue to suffer from various forms of discrimination because they are women.'²¹¹ The example of gender-based violence helps illustrate this point. Violence against the person is prohibited by many international human rights treaties. However, without approaching violence against women from a gender perspective, the patriarchal causes remain unaddressed. The Committee explains that 'the position of women will not be improved as long as the underlying causes of discrimination against women and of their inequality are not effectively addressed.'²¹² CEDAW highlights and seeks to remedy the specific gender-based dimension of the violation of all human rights.

The object and purpose of CEDAW is to eliminate discrimination and achieve gender equality so that women can enjoy their human rights. This conceptualises gender equality as a means to enjoying human rights. The Committee has explained that to achieve this aim CEDAW needs to be interpreted from an evolutionary and effective perspective. As canvassed in Chapter 3, an evolutionary interpretation of a text recognises that certain words through the passage of time are meant to be continually re-interpreted.²¹³ Furthermore, an evolutionary analysis is increasingly standard in human rights treaties.²¹⁴ The legitimacy of an evolutionary interpretation is rooted in the intention of the parties. The intention can be determined by examining the language, structure of the treaty and object and purpose of the treaty.²¹⁵ There is a textual basis for an evolutionary

²¹¹ 'General Recommendation No 25' (n 77) [5].

²¹² *ibid* [10].

²¹³ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2008) 291.

²¹⁴ Gardiner (n 50) 254.

²¹⁵ Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 317. Also see Bjorge (n 104) 92.

interpretation. Article 2, requires the States to eliminate discrimination in “*all forms*” and Article 3, which refers to women’s full advancement and development in “*all fields*”. The Committee argues these provisions indicate that CEDAW ‘anticipates the emergence of new forms of discrimination that had not been identified at the time of drafting’²¹⁶ and as such CEDAW is a dynamic instrument.²¹⁷ Similarly, the requirement to take appropriate measures to ensure the full development and advancement of women (Article 3) requires an understanding of de facto obstacles, even if these obstacles are new or emerging. Under Article 4(1) on temporary special measures, the Committee recognises ‘women’s needs may change’ and calls on States to be vigilant.²¹⁸ Article 1 requires states to eliminate discrimination and achieve gender equality so that women can enjoy their “human rights and fundamental freedoms” and not just to the substantive rights and obligations in the text.²¹⁹ Byrnes argues that this means CEDAW must be interpreted dynamically to respond to developments or issues, such as gender-based poverty, that were not considered as human rights issues at the time of drafting.²²⁰ This ‘has been at the heart of the Committee’s approach’ and is the basis for General Recommendation No. 19 on violence against women.²²¹ In General Recommendation the Committee notes that CEDAW ‘covers other rights that are not explicitly mentioned in the Convention but have an impact on the achievement of equality...which impact represents a form of discrimination against women.’²²² The treaty is meant to be responsive to changes in the nature of discrimination against women and gender inequality. As the understanding

²¹⁶ ‘General Recommendation No. 28’ (n 61) [8].

²¹⁷ ‘General Recommendation No. 25’ (n 77) [3].

²¹⁸ *ibid* [11].

²¹⁹ Byrnes (n 55) 67.

²²⁰ *ibid*.

²²¹ *ibid*.

²²² ‘General Recommendation No 28’ (n 61) [7].

develops on how different social wrongs, such as poverty, are connected to gender and human rights, the ideas of equality and non-discrimination in CEDAW can be interpreted to account for this change. There is clear precedence for this in respect to gender-based violence.

Second, an effectiveness interpretation requires the terms of the treaty to be interpreted so that CEDAW achieves its aims. The interpretation of non-discrimination and gender equality must be responsive to de facto obstacles to women's human rights. Chinkin explains that Article 3 (full advancement and development) requires States to be attentive to all obstacles to women's development and advancement, even obstacles not articulated in the treaty.²²³ As canvassed in Chapter 3 both treaty and Charter-based bodies consistently explain that poverty is an impediment to human rights.²²⁴ People in poverty 'are confronted by the most severe obstacles...to accessing their rights and entitlements.'²²⁵ As explained in Chapter 1, poverty is not gender neutral. There is ample evidence that poverty is a gender-based experience. Women's unequal share of undervalued care work, their lower levels of education, the inability to seek financial independence, marginalization in home and society and negative prejudices and stereotypes creates a vicious cycle of social and economic disempowerment and results in women being unable to exercise and enjoy their human rights.²²⁶ For women frequently the causes, consequences and harms of poverty are linked to gender. Women are 'disproportionately represented among the poor owing to the multifaceted and cumulative forms of discrimination that they endure.'²²⁷ This connects women's

²²³ Chinkin, 'Article 3' (n 150) 102.

²²⁴ UN Special Rapporteur on minorities, 'The Realization of Economic, Social and Cultural Rights: Final report on human rights and extreme poverty' (1996) E/CN.4/Sub.2/1996/13.

²²⁵ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 4) [5].

²²⁶ Sandra Fredman, 'Anti-discrimination laws and work in the developing world: A thematic overview' (Background Paper for World Development Report, 2013) 1
<http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Anti-Discrimination_Laws.pdf>.

²²⁷ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 4) [23].

poverty and the consequential human rights violations, to gender discrimination and inequality. This means that for CEDAW to effectively achieve its aim, non-discrimination and gender equality need to be interpreted to incorporate the interaction between poverty and gender as an obstacle to women's human rights.

(v) *Conclusion*

The central problem of the first part of my thesis is that gender-based poverty is not expressly included in CEDAW. This raises the question of whether and how the treaty can be interpreted to ensure that gender-based poverty is incorporated and remedied within CEDAW. The text of CEDAW reveals three options for a comprehensive interpretation: equality, non-discrimination or a combined approach that uses both equality and non-discrimination. Using the VCLT interpretative methodology it is apparent that both equality and non-discrimination can be interpreted so as to incorporate gender-based poverty. These are both evolutionary, open-textured, context-specific terms that can incorporate the harms of gender-based poverty. Given the close relationship in the text between equality and non-discrimination, it is only logical to use both norms to incorporate the harms of gender-based poverty in CEDAW. There are multiple ordinary meanings of equality and non-discrimination and all of these interpretations can be used to understand the complexity of gender-based poverty. Situating these norms in the context of CEDAW, we can see that there are multiple conceptions of equality in CEDAW, but most importantly, transformative equality. Non-discrimination can be used to understand the various life experiences and identities of women, including gender-based poverty. There is evidence of States interpreting their CEDAW obligations to include gender-based poverty. CEDAW's object and purpose, the fulfilment of women's human rights requires gender discrimination and inequality to be interpreted dynamically to incorporate the harms of gender-based poverty. This means that for different factual matrices there is an

interpretation of equality that is most suited to address that specific harm of gender-based poverty. In conclusion, non-discrimination and equality in CEDAW offer the best interpretative route to incorporate gender-based poverty comprehensively into the treaty.

IV. Nature of the State's Obligations

Conceptualising gender-based poverty as an issue of gender equality raises questions on the nature of the State's obligations in CEDAW. The analysis in Chapter 2 revealed that States were concerned about the costs of guaranteeing socio-economic rights in CEDAW. What does the State have to do fulfil its obligations to realise gender equality for women who live in poverty? Does the State have to end all poverty? Is the State required to review its allocation of resources to prioritize the needs of women in poverty? Is it required to raise revenue so as to increase the availability of resources to fund gender-based poverty reduction programmes? Are these immediate obligations or can they be realised over a period of time? If they can be progressively realised is there any component or minimum core of the obligation that is to be immediately realised? These are all very challenging questions that defy simple solutions. This section examines these questions. Chapman explains, in relation to CESCR: 'Monitoring state compliance is a complex and exacting process with numerous political and methodological prerequisites.'²²⁸ As similar challenges arise in evaluating compliance with socio-economic rights, this section canvasses the CESCR's understanding on the nature of the State's obligations and highlights the academic literature on progressive realisation and the minimum core. It then assesses how these concepts can illuminate the State's obligations in CEDAW in relation to gender-based poverty. As explained above, CEDAW only examines the gender-based aspects of human rights. The Committee's role is to evaluate whether the State has paid attention to

²²⁸ Audrey Chapman, 'A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Hum Rts Q 23, 24.

the needs of women in the design of law and programmes. In relation to gender-based poverty the State needs to demonstrate with evidence based reasoning how its current poverty reduction programme accounts for women's needs. They must show that any measures taken are not based on discriminatory reasoning and achieve gender equality.

Guaranteeing socio-economic rights can require significant expenditure and States may have limited resources. Thus, under ICESCR a State is only obligated to 'take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation' of economic, social and cultural rights.²²⁹ This is a challenging standard, as the CESCR is required to assess if the State has (i) used its maximum available resources and (ii) if it has taken steps towards the progressive realisation benchmark.²³⁰ The initial fear was that this standard was too flexible and that States would continue to treat their obligations under ICESCR as policy aspirations rather than legally enforceable human rights. In response to this, the CESCR explained that the 'the fact that realization is over time...should not be misinterpreted as depriving the obligation of all meaningful content.'²³¹ For each obligation the State is required to ensure the 'minimum essential levels of each right.'²³² As an example and explained in greater detail in Chapter 7, the 'core obligation to ensure the satisfaction, of at very least, [the] minimum essential levels' for the right to water has nine components, including an obligation to ensure the right to water on a non-discriminatory basis.²³³ The State has to immediately ensure these core obligations are fulfilled and immediately take steps to progressively realise the full right to water.

²²⁹ Article 2(1) of ICESCR.

²³⁰ Chapman, 'A Violations Approach' (n 228) 31.

²³¹ CESCR, 'General comment No. 3: The nature of the State parties' obligations' (1991) E/1991/23 [9].

²³² *ibid* [10].

²³³ CESCR, General Comment No. 15 (n 1) [37].

CESCR's approach to evaluating compliance is seemingly straightforward, but it has raised many questions and academics continue to be divided on its theoretical and practical use. One overarching challenge is as de Schutter explains 'the precise level of commitments [and] the precise speed at which progress should be made can't be determined without taking into account the capacity of the State and the level of development of achieved.'²³⁴ Applying Article 2(1) of ICESCR is so context specific that deriving a universally accepted framework for evaluating the realisation of socio-economic rights has proven elusive. Below, I examine two main features prevalent in the current discourse on socio-economic rights: the minimum core and progressive realisation.

Advocates of the minimum core believe it sets a standard for meaningful evaluation of socio-economic rights. Bilchitz argues that if socio-economic rights are to be treated as rights it is imperative that the State not be left with an 'amorphous standard by which to judge its own conduct.'²³⁵ There need to be 'determinate standards to evaluate what the government is doing.'²³⁶ This means there has to be content to socio-economic rights. He argues that supervisory bodies need to develop a 'general standard that constitutes the minimum core obligation of the state.'²³⁷ The minimum core allows for the development of benchmarks to evaluate 'the performance of States in meeting the needs of people.'²³⁸ He argues the minimum core is a function of basic survival. The minimum core is 'the duty to ensure that individuals are able to be free from threats to survival.'²³⁹ To illustrate his argument, Bilchitz argues in context of the right to housing that 'every person must have access to accommodation that involves, at least, protection from the elements in sanitary

²³⁴ Oliver de Schutter, *International human rights law: cases, materials, commentary* (CUP, 2010) 462.

²³⁵ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (OUP, 2008) 162.

²³⁶ *ibid* 164.

²³⁷ *ibid* 161.

²³⁸ *ibid* 221.

²³⁹ *ibid*.

conditions with access to basic services such as toilets and running water.²⁴⁰ The State has discretion on how it will achieve this minimal interest, but it must prioritize budgetary allocations to meet these needs. Failure to allocate sufficient funds and fulfill the minimal core obligation ‘needs to be justified by reasons of sufficient weight to justify [this] failure.’²⁴¹

There are others who are highly critical of using a minimum core to monitor State performance. In her influential article Young traces the various conceptions of the minimum core and concludes that all are imperfect measurements. She argues that equating the minimum core to a normative essence, such as survival ‘misses the important connections between dignity and human flourishing that are intrinsic to many interpretations of the right to life.’²⁴² Conceptualising the minimum core as the minimum needs to ensure a dignified life is also problematic as dignity is a highly contested concept, particularly in relation to the amount of resources necessary to ensure human dignity.²⁴³ Moreover, as Young points out there is no logical choice on which value—dignity, equality or survival—to use to define the minimum core.²⁴⁴ To overcome these challenges, some have advocated the consensus approach. This model proposes that universally agreed principles can be empirically uncovered to define a minimum core.²⁴⁵ For example, Alston has argued that CESCR through the periodic reporting process can identify the normative content of socio-economic rights.²⁴⁶ Detailed General Comments, such as CESCR’s General Comment on the right to water

²⁴⁰ *ibid* 198.

²⁴¹ *ibid* 213; General Comment No. 3 (n 231).

²⁴² Katharine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale J of Intl L* 113, 130.

²⁴³ See Essert (n 86).

²⁴⁴ Young (n 242) 138.

²⁴⁵ *ibid* 142.

²⁴⁶ *ibid* 143.

can further illuminate the meaning of specific human rights. On the other hand, there is a fear that under this approach States ‘will assume that they are obligated to do that minimum and nothing else...the “floor” will then become a “ceiling”’.²⁴⁷ Besides, methodological concerns of whose consensus counts, another challenge is determining if a consensus actually exists. Treaties like ICESCR and CEDAW apply to ‘tiny island nations to the world’s largest countries...with political systems ranging from advanced liberal democracies through socialist States to countries in turmoil.’²⁴⁸ Finding a global consensus on a minimal normative content of gender equality or health care is a daunting, if not impossible, task.

Part of the problem in defining the minimum core is that CESCR has never articulated its theoretical understanding of this concept. Fredman observes that the minimum core as described by CESCR as an ‘obligation of optimization.’²⁴⁹ Under ICESCR ‘the State is not required to do more than is possible given its resources; but it must be able to show that it could not do more than it has done, given its resources.’²⁵⁰ Thus she argues that the minimum core is ‘a set of basic conditions which should take precedence in almost all situations, but which can be outweighed in very particular situations.’²⁵¹ However, this level of theorisation and analysis is missing from CESCR engagement with the minimum core. Chapman points out that in the periodic reporting process CESCR actually focuses ‘on the status of enjoyment of particular rights with regard to specific

²⁴⁷ Chapman, ‘A Violations Approach’ (n 228) 148.

²⁴⁸ Andrew Byrnes, ‘Article 2’ in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2013) 48.

²⁴⁹Sandra Fredman, *Human Rights Transformed* (OUP, 2008) 85.

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

groups at that time.²⁵² Young similarly claims that CESCR's current approach is to delineate core obligations which 'signal "violations" under the Covenant.'²⁵³ CESCR has not coherently developed what it means by obligations. It only refers to 'the minimal essential levels' but does not connect this to any other norm. The core obligations as a result are unsystematic. Bilchitz observes that the minimum core on the right to health misses key life-saving aspects²⁵⁴ and Young notes that the minimum obligation on the right to work focuses almost exclusively on non-discrimination.²⁵⁵

The dissatisfaction with the using the minimum core has caused some commentators to focus more on monitoring progressive realisation. The OHCHR explains that indicators and benchmarks are indispensable in monitoring compliance with progressive realisation.²⁵⁶ This raises similar methodological challenges, for there are a variety of methods that can be used to set indicators and benchmarks.²⁵⁷ The UN Special Rapporteur on the right to health identifies 15 types of indicators: 'performance, statistical, variable, process, conduct, outcome, output, result, achievement, structural, screening, qualitative, quantitative, core and rated....the lack of a common approach to the classification...represents a challenge to those who wish to introduce a simple, consistent and rational system.'²⁵⁸ Two possible models can be highlighted. First, de Schutter explains that there are (i) institutional indicators: has the State ratified the international instruments and set up institutional mechanisms and adapted the necessary regulations; (ii) process indicators: has the State taken policy

²⁵² Audrey Champan, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights' in Shareen Hertel and Lanse Minkler *Economic Rights: Conceptual, Measurement and Policy Issues* (CUP, 2007) 145.

²⁵³ Young (n 242) 152.

²⁵⁴ Bilchitz (n 234) 224.

²⁵⁵ Young (n 242) 156.

²⁵⁶ OHCHR, 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' HR/PUB/06/12, [49].

²⁵⁷ See Olivier de Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing, 2013).

²⁵⁸ UN Special Rapporteur on the right to health, 'Right to health indicators' (2003) A/58/427[14].

measures and made the necessary budget commitments and (iii) outcome indicators: are the policies and institutional processes effective at realising the right.²⁵⁹ Second, Eibe Riedel, a former member of CESCR proposes the IBSA model for evaluating compliance under ICESCR. The Committee evaluates the choice of *indicators*, the choice of *benchmarks*, a discussion between the CESCR and *State* on the ambition and realism of the chosen indicators and benchmarks and an *assessment* of their effectiveness.²⁶⁰ There is some similarity between the different models, but there is no universal consensus on how best to evaluate progressive realisation. While academics debate different proposals, de Schutter helpfully points out that while focusing on the process of evaluating progressive realisation, it is important not to lose sight that the underlying aim is to assess if the substantive obligation has actually being met.²⁶¹ The debates on measurements and process should not distract from the importance of the full realisation of socio-economic rights. However, even focusing on meeting the substantive obligation raises difficulties. There are differing views on whether the availability of resources should define the content of the right or the State's obligations.²⁶² In conclusion, the strengths and weaknesses of the various theories on minimum core and progressive realisation illustrate Chapman's point that monitoring State compliance with socio-economic rights is a challenge and that how best to accomplish this task is still a matter of debate.

Interpreting gender equality to incorporate the harms of gender-based poverty raises questions as to the amount of resources necessary to eliminate the discriminatory gender-based aspects of poverty and achieve equality for women in poverty and the possibility of using the minimum core and progressive realisation to evaluate the State's compliance with CEDAW. There is no explicit

²⁵⁹ de Schutter, *International Human Rights Law* (n 225) 492. This is also the method adopted in *ibid*.

²⁶⁰ *ibid* 493-494.

²⁶¹ de Schutter, *International Human Rights Law* (n 225) 492.

²⁶² Bilchitz (n 235) 216-226.

textual basis in CEDAW permitting States to progressively realise gender equality. Article 2 delineates the States' core obligations and requires States 'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.' The remaining substantive provisions call on States to take appropriate measures in a variety of fields to eliminate discrimination and ensure the obligation in question on the basis of equality. Does "appropriate measures" implicitly permit the State to progressively realise their obligations to eliminate gender based-poverty and ensure the full enjoyment of human rights for women in poverty?

The Committee's explanation of the nature of the State's obligations is puzzling. The State has 'flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework.'²⁶³ The Committee further explains that 'the emphasis is on movement forward...to build on those measures continuously in the light of their effectiveness and new or emerging issues, in order to achieve [CEDAW's] goals.'²⁶⁴ This hints at the possibility that CEDAW is to be realised over an extended period of time. Byrnes in his commentary on Article 2 of CEDAW explains that the State has the discretion to 'determine the measures appropriate to achieve the goals (which may or may not be seen as immediately achievable).'²⁶⁵ However, Article 2 requires State to pursue this policy "without delay." The Committee notes that this 'makes it clear that the obligation of State parties to pursue their policy by all appropriate means is of an *immediate* nature.'²⁶⁶ While the use of the word "immediate" suggests an instantaneous obligation, it is unclear if this obligation is similar to the core and non-core obligations in ICESCR. For the right to water, the CESCR explains that the core obligations and the obligation to take steps to 'move as

²⁶³General Recommendation No. 28' (n 61) [23].

²⁶⁴ *ibid* [24].

²⁶⁵ Byrnes, 'Article 2' (n 246) 78.

²⁶⁶ 'General Recommendation No. 28' (n 61) [29].

expeditiously and effectively as possible towards the full realisation of the right to water' are both immediate.²⁶⁷ Does the State immediately have to eliminate the gender-based aspects of poverty or achieve or only have to immediately pursue a policy so that women in poverty can achieve gender equality? The Committee has not definitively answered this question

On the other hand, the wider UN human rights community routinely describes gender equality and non-discrimination as immediate obligations.²⁶⁸ The Working Group on Discrimination Against Women in Law and Practice (Working Group), states 'women's right to equality...is substantive, immediate and enforceable.'²⁶⁹ Both CESCR and the UNSR on extreme poverty and human rights explain that 'equality and non-discrimination are immediate and cross-cutting obligations...[and] as a matter of priority' States should ensure the human rights of people living in poverty.²⁷⁰ The Working Group explains that the immediate obligation means the State should be concerned about 'the division of existing resources, not the development of resources, and therefore the principle of progressive realisation does not apply.'²⁷¹

Without a firm textual basis the primary methods for evaluating compliance with socio-economic rights, the minimum core and progressive realisation should not be grafted onto CEDAW. The importance of realising the human rights of women in poverty makes a compelling case for understanding the State's obligations as immediate. However, if the Committee argues that CEDAW requires the State to immediately eliminate gender-based poverty there is a very real risk that the State will reject the interpretation proposed in this thesis. The solution to this impasse

²⁶⁷ CESCR, 'General Comment No. 15' (n 1) [17]-[18].

²⁶⁸ CESCR, 'General Comment No. 16' (n 53) [16].

²⁶⁹ Working Group (n 2) [8].

²⁷⁰ *ibid* and see UNSR on extreme poverty and human rights, 'Guiding Principles (n 4) [20].

²⁷¹ Working Group (n 2) [8].

comes from understanding the: (i) the asymmetry of CEDAW; (ii) the definition of gender-based poverty; (iii) the text of CEDAW and (iv) the institutional role of the Committee.

First, national and most international legal obligations ‘protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions.’²⁷² CEDAW is different because it ‘focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.’²⁷³ It is an asymmetrical treaty regime that exclusively focuses on ensuring women enjoy their human rights. This means the Committee is not focused on making recommendations on eliminating poverty per se but on the gender-based aspects of poverty. The development of resources to eliminate poverty for both men and women is best left to CESCR, which has a clear mandate to monitor the availability of resources under Article 2(1) of ICESCR. The Committee only has a mandate to examine the relationship between gender and human rights.²⁷⁴ This means it can only require the State to report on how gender and poverty negatively impacts the substantive obligation in CEDAW.

Gender-based poverty is not merely material disadvantage but also recognition and exclusion harms. Appreciating the complexity of gender-based poverty while applying the obligation to respect, protect and fulfill helps illuminate what the State is required to do to meet its requirements to women in poverty under CEDAW.²⁷⁵ The obligation to respect requires the State to refrain from contributing to gender-based poverty. This could, for example, oblige the State to remove any prohibitions on married or pregnant girls and women from attending school; remove the

²⁷² ‘General Recommendation No. 25’ (n 79) [5].

²⁷³ *ibid.*

²⁷⁴ See Article 1 of CEDAW.

²⁷⁵ In ‘General Recommendation No. 28’ (n 73) the Committee used this model to explain the obligations in CEDAW.

requirement of spousal permission for a woman to work; ensure women are able to inherit property and ensure that courts properly account for unpaid care work in allocating matrimonial property.²⁷⁶ All of these are highly gender-based factors that can contribute to women's poverty. None of these measures require the expenditure of resources but could have a positive and immediate impact on gender-based poverty by improving women's access to resources, give them agency over their lives and increase their participation in public and private life. The State has an obligation to identify these types of restrictions that exist within their national law, programmes and institutions and immediately remove these barriers.

The obligation to protect requires the State to prevent parties from causing gender-based poverty. As an example, this can require the State to ensure equal pay for work of equal value in the private sector, paid maternity and paternal leave. It can also require the State to regulate the informal labour market to ensure women are protected from exploitative working conditions. The obligation to fulfill requires the State to take positive steps to ensure gender equality. This can include education and social assistance grants or the provision of affordable housing or birth attendants. There may be a variety of ways that the State can protect and fulfill women in poverty human rights and 'much may depend on local political and social conditions as to which is the most effective or the most feasible.'²⁷⁷

An appreciation of the institutional role of the Committee and a careful reading of the text of CEDAW clarifies what the State has to demonstrate to fulfill the needs of women in poverty and how the Committee can properly evaluate the State's reasons and justifications. The Committee's task is to evaluate if the State has respected, protected and fulfilled women in poverty's human rights. The obligation to respect is relatively straightforward. The Committee can identify the aspects

²⁷⁶ The Committee 'Fifth Concluding Observations: Jordan' (2010) CEDAW/C/JOR/5 [35], [41], [49].

²⁷⁷ Andrew Byrnes, 'The Committee on the Elimination of Discrimination Against Women' in Anne Hellum and Henriette Singding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 49.

of gender-based poverty that are not resource dependent and make strong recommendations that the State immediately address these aspects.²⁷⁸ The obligation to protect and fulfill are more complex. *Teixeria* is a good example of this challenge. The individual died in childbirth and her mother argued to the Committee that her death was due to systemic discrimination in the funding of Brazilian maternal health care policies in light of the needs of poor, rural, Afro-Brazilian women. As Elson observes ‘in the case of public services...the problem is not discriminatory rules of access, but failure in the design, delivery and funding of programmes.’²⁷⁹ Evaluating the design, delivery and funding of maternal health care programmes seems to raise similar pitfalls as trying to connect the minimum core to a normative essence or how best to derive at monitoring indicators. However, the text of CEDAW gets around these challenges and clarifies the standard to be used when evaluating the State’s obligations to women in poverty: gender equality. Using Article 12 as an example, State parties are required to take ‘all appropriate measures to eliminate discrimination in the field of health care in order to ensure, *on a basis of equality* of men and women, access to health care services.’²⁸⁰ Equality is the benchmark against which to assess the State’s conduct. The Committee is not determining what the minimum core of women’s access to health care is but rather assessing whether the State’s existing laws and policies have given priority to its commitment to gender equality. This avoids many of the critiques of how to define the evaluative standard. As explained above, CEDAW embraces a fluid concept of equality. The Committee can choose which model of equality is best able to evaluate the State’s law or programme.

²⁷⁸ This is not to imply that the obligation to respect may never require resources or that the obligation to protect or fulfill always require expenditures, I am simply using this understanding to illustrate the nature of the State’s obligation.

²⁷⁹ Diane Elson, ‘Budgeting for Women’s Rights: Monitoring Government Budgets for Compliance with CEDAW’ (UNIFEM, 2008) 7.

²⁸⁰ Emphasis added.

Before demonstrating how to apply this standard, it is necessary to examine the purpose and function of the human rights treaty bodies. Under Article 17 of CEDAW, the Committee is established to monitor the implementation of CEDAW. The Committee is not a court. It operates in different framework and has a very different relationship to the State than a constitutional court does in a national context. Its primary function is accountability.²⁸¹ By Article 18 States are obligated to regularly report on the progress of implementing CEDAW. This process encourages the State to engage in critical self-reflection and to listen to contributions from civil society. Combined with the assessment by objective experts, it is hoped the periodic reporting process will hold the State accountable and 'have a significant impact at the domestic level.'²⁸² The Committee is not meant to be finding fault, but rather to engage in a constructive dialogue with States.²⁸³ Related to this, the State has a margin of appreciation in creating laws and programmes to achieve gender equality.²⁸⁴ The Committee is meant to be a strong advocate for women's human rights, provide meaningful guidance for the State to consider and share best practices but it is not meant to proscribe detailed remedies.²⁸⁵

All these factors combine to help unlock the nature of the State's obligations under CEDAW to women in poverty. Applying this to *Teixeria* helps explain how these duties operate in practice. This is a good example as maternal mortality is disproportionate among women in poverty.²⁸⁶ Brazil needs to come to the Committee explaining its assessment of the maternal health needs of women

²⁸¹ Harry Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (CUP, 2000) 50.

²⁸² *ibid* 32.

²⁸³ Byrnes, 'Article 2' (n 246).

²⁸⁴ *Elisabeth de Blok et al v The Netherlands* (2014) CEDAW/C/57/D/36/2012.

²⁸⁵ Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012).

²⁸⁶ See UN Special Rapporteur on the right to health, 'Maternal Mortality' (n 1) [7].

in poverty and provide details on the design, implement and funding of programs it has put in place to meet these needs. Brazil should provide reasons and justifications for why it has chosen these specific laws or programmes and how the budget allocation is sufficient to effectively implement these policies. The task for the Committee is to hold the State to account and evaluate the choices and justifications against Brazil's commitment to gender equality. The four dimensional model of transformative equality is particularly attractive in this context. There are two reasons for preferring this model as an evaluative framework. First, it is a nuanced model that is able to capture the interaction between recognition, redistribution and participation harms which contribute to gender-based poverty. Second, transformative gender equality is one of the fundamental aims of CEDAW.²⁸⁷

The first element, redressing disadvantage, investigates if the State has properly understood the unique needs of women in poverty and has it put in policies to meet these needs. For example, *Teixeria* and the UN Special Rapporteur on the right to health point out that for women living in poverty the cost of transportation to health centres can be prohibitive to them seeking medical treatment. The Committee can examine if the State has appreciated this and other similar barriers. In this process it can be greatly assisted by submissions from CSOs. How to engage CSOs is explored in greater detail in Chapters 6 and 8. As to the recognition element, the Committee can assess if the policies treat women as passive patients or empower and improve their autonomy by giving them knowledge and control of their reproductive health. For example, if health services were brought to the home this may reinforce women's exclusion from public spaces. The participation element examines if the State created policies after having meaningful consultation with women in poverty on their maternal health needs.

²⁸⁷ See 'General Recommendation No. 28' (n 61); Cusack and Pusey (n 124) 63.

The third element examines if the maternal health policies in place will change institutional structures. As Cook and Undurraga note in the context of health care ‘transformative equality requires reallocation or reorientation of health care resources.’²⁸⁸ Does the structure of health services equally benefit women in poverty? At this stage of the inquiry the Committee’s role is to question first, why out of available policies options the State made the choice it did and second, is the level of funding able to achieve transformation. For the first inquiry, the Committee can ask, for example: why has the State improved transport systems rather than build mobile rural maternal health clinics? Often the choice of programme will be a function of the budget allocated to combat maternal mortality. This leads to the second stage of the inquiry: does the budget give priority to gender-based poverty as an obstacle to gender equality and human rights? The State may argue that they have funded maternal health care policies to a certain level and explain they cannot provide any further funds as they have many other pressing budgetary priorities—prosthetics for veterans, prostate cancer or heart disease—that need to be funded from the limited pool of resources. The issue of resource trade-offs has plagued the monitoring of socio-economic rights.²⁸⁹ An imposition to fund maternal health policies to a greater degree could preclude spending on these other socially valuable endeavours. This is where it is important to remember the institutional role of the Committee. Its task is to hold the State accountable to its commitment to gender equality so it should not accept the State’s justifications at face value. While respecting the margin of appreciation the State has in designing law and programmes, its role is to interrogate the State’s justifications for funding gender-based health policies against the need of women in poverty. As Cook and Undurraga explain ‘for the health expenditures to be equal, State parties are required to treat men and women

²⁸⁸Rebecca Cook and Verónica Undurraga, ‘Article 12’ in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2012) 325.

²⁸⁹ Bilchitz (n 235) 208-214.

by reference to their relative incidence levels of conditions of ill-health diseases in their population.²⁹⁰ The Committee has to assess the entire health budget to determine if the distribution of funds is equitable. In the case of *Teixeria* the Committee could highlight that maternal mortality is a matter of extreme urgency. There is ‘no single cause of death and disability for men between the ages of 15 and 44 that is close to the magnitude of maternal death and disability.’²⁹¹ Tragic consequences can ensue when women are not able to access timely health care while giving birth. Maternal mortality when adequately funded is easily preventable. Given these factors, the Committee can examine the health budget to determine if the funding is equitable given the needs of women in poverty. If the Committee finds the State’s justifications for the limited funding unsupportable, or if their maternal health policies are inconsistent with the other elements of transformative equality, such as the policy was made without the participating of poor women, it’s task is to advocate for a stronger implementation of CEDAW.

The State has fulfilled its obligation to women in poverty if it can demonstrate using equality and with evidence based reasoning that the design, structure and allocation of funds takes proper account and priority of the health care needs of women. If the State cannot provide this information, the Committee should express concern and remind the State that its legal obligation to women in poverty requires a reallocation of funding and a reconfiguration of budget priorities. In some cases, this analysis may be straightforward as the budget for maternal health may be patently unable to secure equality. Or the State may have grossly underappreciated the extent of the problem and by bringing this to their attention the Committee can prompt the State to reconfigure their approach to maternal mortality. At other times, this may be a more challenging assessment. Evaluating the State’s obligation to women in poverty is not a scientific evaluation; it is a highly

²⁹⁰ Cook and Undurraga (n 282) 325.

²⁹¹ UN Special Rapporteur on the right to health, ‘Maternal mortality’ (n 1) [9].

contextual analysis. It is important to note Elson's observation 'that a single, simple quantitative, internationally applicable benchmark for gender equality expenditure priority ratio does not seem feasible.'²⁹² Using the four-dimensional transformative equality model allows States to be flexible and creative in designing laws and policies to ensure women in poverty enjoy their human rights. At the same time, it gives the Committee a necessary rubric in which to examine and weigh the State's reasons. This allows the Committee to fulfill its function to monitor the State's implementation of CEDAW.

There is one further issue to examine. If the State can provide evidence to prove it has properly accounted for its commitment to gender equality, does this mean in the next periodic reporting round the State can provide the same evidence? Using *Teixeria* as an example, if Brazil has demonstrated using an equality framework that the design and funding of maternal health policies was sufficient, does this preclude the Committee from requiring a re-design or further funding for these policies four years later in the next periodic report? This raises questions on the use of indicators and benchmarks to monitor how the State is implementing CEDAW. Should the Committee in the Concluding Observations be setting a goal for Brazil to achieve in the next four years, for example by further reducing maternal death by a certain percentage, and if it has not achieved this goal will Brazil then automatically be found in violation of CEDAW? It has not historically been the practice of the Committee to use indicators to chart the progress of the State in implementing CEDAW. There is also evidence that CESCR does not use indicators and benchmarks but rather focuses on violations at precise moments in time.²⁹³ Using indicators raises the challenges identified above at deriving at indicators. Moreover, indicators need to be country specific. Setting indicators for women in poverty for all of the substantive provisions in CEDAW

²⁹² Elson (n 279).

²⁹³ See CESCR 'Second Concluding Observations: Czech Republic' (2014) E/C.12/CZE/CO/2.

would require a significant amount of the Committee's already limited human and financial resources. This does not preclude the Committee from understanding the State's obligations to women in poverty from a dynamic perspective. In four years, the situation of women in poverty may have significantly altered. Changing demographic patterns, technological advances and shifts in the political, social, economic and environmental landscape, may mean that what was once sufficient against a transformative equality standard is no longer adequate. The four dimensions of transformative equality are sensitive to these changing and varying factors. It is not necessary to set indicators to monitor the progressive realisation of gender equality. Rather, the evaluative framework is able to capture changes over a period of time. This means for each periodic report the State needs to provide a new assessment of women in poverty's human rights.

In conclusion, monitoring compliance with international human rights treaties is a complex scientific-art. States have an immediate obligation to pursue a policy of gender equality. In relation to gender-based poverty this means the State's laws and policies will be evaluated against an equality framework. The obligation to respect requires the State to immediately remove de jure barriers to women in poverty's human rights. The State is required to protect and fulfill women in poverty's human rights through designing, implementing and funding a variety of gender-based poverty reduction programmes. The Committee evaluates these programs against an equality and non-discrimination framework. If the State can demonstrate that it has taken into account equality and non-discrimination in the design, implementation and funding of programmes, the State has fulfilled its obligations under CEDAW. If the Committee finds the State has not paid sufficient attention to the needs of women in poverty, its role as an international accountability body is to recommend that the State devote adequate resources to ensure women in poverty are able to enjoy the rights in

CEDAW.²⁹⁴ This approach respects the text of CEDAW, the purpose of the Committee while at the same time ensuring that the State has an immediate obligation to approach gender-based poverty as an issue of gender equality.

V. Conclusion

In this chapter I have investigated how gender-based poverty can be incorporated into the CEDAW framework. The first part of this chapter evaluates whether gender-based poverty can be exclusively situated within one individual right in CEDAW but concludes that this is a limited approach to a complex and inter-locking obstacle to human rights. The second part applies the VCLT interpretative framework to CEDAW. This analysis demonstrates that equality and non-discrimination are open-textured norms that can be interpreted so as to incorporate the harms of gender-based poverty in CEDAW. This interpretative approach highlights the entrenched and gender-based nature of women's poverty and ensures all of the substantive provisions in CEDAW are used to combat gender-based poverty. It is important to note that there is also consistent State practice of interpreting gender equality and non-discrimination in CEDAW to include gender-based poverty. The third part of this chapter delineates the State's obligation under CEDAW in relation to women in poverty. The State has to ensure that its law and programmes are consistent with its commitment to realise the human rights of women in poverty. The task of the Committee is to evaluate the State's justifications in relation to gender-based poverty against an equality and non-discrimination standard. If the Committee concludes the State's explanations in relation to gender-based poverty are not inadequate its role is to recommend for a greater implementation of CEDAW.

²⁹⁴ See Raday (n 142) 523. She makes a similar argument that the commitment to gender equality must have normative hegemony to cultural practices and religious norms.

The proposed evolutionary interpretation of CEDAW in this chapter is not a legally binding.²⁹⁵ The thesis now transitions to investigate how to move this interpretation forward into the work of the Committee, in the hopes that their advocacy will achieve two concurrent aims. First, that the Committee's work will prompt greater appreciation for gender-based poverty as an issue of gender inequality and as an obstacle to human rights. Second, to ensure the interpretation proposed in the thesis is incorporated into the Committee's work in a manner so that that while not legally binding, as explained in Chapter 3, the proposed interpretation can have de facto legal significance.

²⁹⁵ Geir Ulfstein, 'Individual Communications' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 74.

CHAPTER 5

THE COMMITTEE AND GENDER-BASED POVERTY

I. Introduction

The starting point for my thesis is that there is no explicit substantive obligation in CEDAW on gender-based poverty. In the previous chapter I have argued this could be overcome by interpreting both equality and non-discrimination in CEDAW to incorporate the harms of gender-based poverty. An interpretation of equality and non-discrimination can ensure that all aspects of CEDAW can be used to combat the gender-based aspects of women's poverty. The thesis now transitions to explore different ways my proposed interpretation of CEDAW can be fully included into the work of the Committee. It is hoped that if the Committee uses its various activities to highlight the relationship between poverty, gender and human rights, this will ultimately filter into the State's domestic law, policies and programmes on gender-based poverty. There is a strong precedent for this with respect to gender-based violence.¹

The first step in this process is to understand how the Committee currently approaches the problem of gender-based poverty. The Committee is meant to consider the progress of States in implementing CEDAW.² There are three forums in which it does this: the General Recommendations, Concluding Observations and Individual Communications. The General Recommendations were extensively canvassed in Chapter 4 and only demonstrate a limited engagement with gender-based poverty. This chapter focuses on the Committee's two other primary

¹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (Indian Supreme Court).

² Article 17 of CEDAW.

activities: the Concluding Observations and Individual Communications. States periodically submit a report for consideration by the Committee on the measures they have taken to give effect to the treaty.³ The Committee reviews this report and releases Concluding Observations which highlight areas of concern and provide a series of recommendations. The OP-CEDAW allows the Committee to evaluate and decide Individual Communications alleging that the State has not fulfilled its obligations under CEDAW. In this chapter I examine how the Committee uses these two activities to draw out the connections between gender-based poverty, equality, non-discrimination and human rights. This analysis reveals that the problem of women and poverty is so overwhelming that notwithstanding the fact that the only reference to poverty in CEDAW is in the preamble, the Committee's has evolved its understanding of gender-based poverty and now makes repeated reference to women who live in poverty.

The purpose of this chapter is two-fold. First, it acts as a bridge between my proposed interpretation of CEDAW and how this interpretation can be taken forward. While, as discussed in Chapters 3 and 4, it is still controversial if the work of the Committee would qualify as subsequent practice which establishes the interpretation of CEDAW under Article 31(3)(b) of the VCLT,⁴ Alston and Goodman convincingly argue that the work of human rights treaty bodies, notwithstanding their technical non-binding status are highly persuasive authority.⁵ Cusack and Pusey similarly argue the work of the Committee is of 'considerable practical importance for the interpretation and application of the rights...in CEDAW.'⁶ The Concluding Observations and the

³ Article 18 of CEDAW.

⁴ Richard Gardiner, *Treaty Interpretation* (OUP, 2008) 248.

⁵ Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (OUP, 2013) 691.

⁶ Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-discrimination and equality' (2013) 14 *Mel J of Intl L* 54, 58.

Individual Communications demonstrate how the Committee understands CEDAW. This material is also meant to act as guidance and States are encouraged to follow the Committee's recommendations. This means there is value in assessing how the Committee has incorporated and recommended remedies for gender-based poverty in these two forums. This chapter demonstrates that the Committee has implicitly used gender equality and non-discrimination to incorporate gender-based poverty into CEDAW. My proposed interpretation of CEDAW in Chapter 4 is thus consistent with and builds upon the work already done by the Committee in relation to gender-based poverty.

Second and at the same time, the assessment of the Committee's Concluding Observations highlights areas where it may fail to fully incorporate gender-based poverty. This chapter emphasizes the importance of explicitly and systematically drawing the connection between equality, non-discrimination, gender-based poverty and human rights so as to fully understand the extent of the problem and to create meaningful recommendations. The reasons for these inconsistencies are explored in Chapter 6 and how to draw together and expand the Committee's understanding of gender-based poverty are explored in Chapters 7 and 8.

This Chapter proceeds in the following manner. The first section explains the methodology for selecting Concluding Observations and Individual Communications to study. The second analyses the primary material. To best understand how the Committee draws connections between gender-based poverty, equality, non-discrimination and human rights, I use the analytical framework of transformative equality and the substantive provisions in CEDAW to map and analyse where the Committee makes reference to gender-based poverty. This framework illuminates the extent to which the Committee draws on equality and non-discrimination to incorporate and remedy gender-based poverty. The methodological choice of using a transformative equality framework is explained in detail below. The conclusion from this evaluation is that the Committee, to varying degrees, uses

all of the substantive provisions in CEDAW to draw attention to the problem of gender-based poverty. It frequently, albeit only implicitly, uses transformative equality to analyse the problem of gender-based poverty. However, it is argued here that without making an overt connection the Committee misses opportunities first, to understand how gender-based poverty impacts the enjoyment of human rights and second, to create useful recommendations to ameliorate gender-based poverty. While the Committee is not consistent in how it incorporates and remedies gendered poverty, this analysis demonstrates the Committee's evolutionary approach to interpreting CEDAW. Thus Chapter 5 marks important pathways for comprehensively incorporating and remedying gender-based poverty as an issue of gender equality and non-discrimination in CEDAW that will be explored in greater detail in Chapter 8.

II. Methodology

Analysing the Concluding Observations raises a similar challenge as that in Chapter 4 when analysing subsequent State practice. By Article 18 of CEDAW when a State becomes a signatory to CEDAW, it must report every four years on how it has implemented the treaty.⁷ The Committee reviews the written State report and submissions from CSOs and conducts an oral question and answer session with State representatives. It then releases Concluding Observations that highlight the positive aspects, areas of concern and provide recommendations on how to best implement CEDAW. The reporting process allows for a constructive dialogue between the State and the Committee and gives the Committee an opportunity to provide specific advice on how to eliminate discrimination against women.

The Committee has released over twelve thousand Concluding Observations. Some selection must be made for this evaluation. In this chapter I use the same twelve States used when analysing

⁷ Article 18 of CEDAW.

subsequent practice in Chapter 4. The States are: Norway, Canada, Romania, Turkey, Argentina, Mexico, Philippines, Jordan, Kenya, Egypt, Bangladesh and Ethiopia. As will be recalled, the States were selected based on their 2013 Gender Inequality Index, gross national income and geographic classification. They are diverse geographically and in relation to their gross national income and have a gender inequality index ranging from 5 to 130. The Concluding Observations examined here span from 1984 to 2012. There are only a limited number of decisions under the individual complaints procedure. As of January 2013 only 18 have been considered on their merits. With such a small volume, no selection will be made and all of the cases where relevant will be used in the analysis below.

III. Mapping the Concluding Observations and Individual Communications

With the above States selected for analysis, this section assesses how the Committee deals with gender-based poverty and draws out any relationship between gender-based poverty, equality, non-discrimination and human rights. While the Committee has never explicitly stated that poverty is a matter of gender inequality included in the definition of discrimination against women (Article 1), there are repeated references to poverty in the Concluding Observations and Individual Communications. The Committee engages with poverty to such an extent that there are too many direct references to simply map out where the Committee has used the word 'poverty'. Moreover, this does not capture when the Committee implicitly discusses gender-based poverty. To more effectively analyse the Concluding Observations and Individual Communications, I map how poverty is referred to under two axes: first, under each of the four dimensions of transformative equality; second, by examining how the Committee captures the interaction between the four dimensions. Under these axes the analysis is subdivided by the substantive provisions of CEDAW. This multi-layered structure demonstrates not only that that the Committee has taken steps towards

a comprehensive interpretation based on gender equality and non-discrimination, but reveals specifically which elements of equality and non-discrimination have been used to incorporate and remedy gender-based poverty in relation to which substantive provisions of CEDAW. At the same time this approach highlights where the Committee's reasoning is underdeveloped and marks out areas for further development.

Here it is useful to briefly summarize how equality and non-discrimination are defined in CEDAW. This is necessary so as to detect when the Committee implicitly makes connections between poverty, equality, non-discrimination and human rights. This also explains and justifies the methodological choice of using a transformative equality framework. The analysis in Chapter 4 revealed that there is no singular or definitive meaning of equality. Rather CEDAW speaks in many tongues when it refers to equality. Both formal and substantive equality can be found within CEDAW. Formal equality is where likes are treated alike⁸ while substantive equality infuses equality with a normative underpinning and recognises that to achieve equality different treatment may be required.⁹ There are multiple versions of substantive equality in CEDAW: equality of results, equality of opportunity and transformative equality. The Committee embraces all three of these models under its conception of de facto substantive equality. In the interests of space it is not practical to use four different models of equality to evaluate the Committee's use of equality in relationship to gender-based poverty in the Concluding Observations and Individual Communications. Since, the four elements of transformative equality feature so prominently in the text of CEDAW and the Committee's reasoning process in the General Recommendations,¹⁰ as shown in Chapter 4, the four dimensions of transformative equality and the interaction between the four dimensions is used as an

⁸ Sandra Fredman, *Discrimination Law* 2nd ed (Clarendon, 2011) 2.

⁹ The Committee, 'General Recommendation No. 25: on temporary special measures' (2004) CEDAW/C/GC/25 [8].

¹⁰ The Committee, 'General Recommendation No. 28: on the core obligations' (2010) CEDAW/C/GC/28 [8]-[13].

evaluative framework for analysing the connection the Committee draws between gender-based poverty, equality and human rights.

The meaning of transformative equality was explored at length in Chapter 4 and this acts as a brief summary. The four dimensions of transformative equality are: (i) breaking the cycle of disadvantage, (ii) addressing stereotyping, stigma, prejudice and violence, (iii) valuing difference by requiring structural change, and (iv) participation.¹¹ The disadvantage dimension recognises that women have suffered material and social harm for being women and requires specific and positive measures to address this imbalance. The recognition element requires promoting the dignity and worth of women and addresses stigma, stereotyping, humiliation and violence against women. The structural element seeks to ‘entail accommodation and positive affirmation and celebration of identity.’¹² The final dimension, participation, requires the inclusion of women in all public and private decision making processes. Placing these four elements together highlights the connection between redistribution, recognition and exclusion harms. A transformative equality analysis can be used to question whether the design of poverty alleviation programs truly furthers gender equality. While these programmes target economic disadvantage, transformative equality can highlight how the structure of these programs can entrench negative attitudes towards women or continue to essentialise women as primary care-givers.¹³ All four dimensions of transformative equality must be used to properly assess whether the law, program or policy actually ameliorates the lives of women in poverty.

¹¹ Fredman, *Discrimination Law* (n 8) 25.

¹² Sandra Fredman, *Human Rights Transformed* (OUP, 2008) 179.

¹³UN Special Rapporteur on extreme poverty and human rights, ‘Conditional Cash Transfer Programmes’ (2008) A/HRC/11/9 [58]-[60], [66]-[72].

Turning to discrimination, by Article 1 of CEDAW, discrimination against women is defined as any distinction, exclusion or restriction on the basis of sex or gender which impairs or nullifies, on the basis of equality, human rights. ‘On the basis of equality’ is the normative litmus test for determining if the distinction based on sex is in breach of CEDAW. Equality is the evaluative standard for eliminating discrimination. The text of CEDAW constructs and connects equality and non-discrimination in such a way that it makes it impossible to refer to non-discrimination without referring to equality. For the purposes of this analysis, this means the transformative model of equality can also be used to assess if the Committee is using non-discrimination to understand and remedy gender-based poverty.

Before beginning to analyse the Concluding Observations and Individual Communications, there is one further methodological point that needs to be explained. Part of the challenge of analysing the Committee’s treatment of gender-based poverty is that frequently the Committee does not link its comments on gender-based poverty to any specific provisions of CEDAW. When poverty is referred to without reference to for example, education (Article 10) or employment (Article 11), it appears the Committee is analysing gender-based poverty as if there is an articulated provision requiring States to protect women from poverty. As explained in Chapter 1, there is no such provision. As a point of clarity when the Committee refers to poverty in relation to a recognised provision in CEDAW it will be classified in the discussion below as being referred to in relation to that provision. When poverty is referred to independently of any articulated obligations in CEDAW, it will be classified as “poverty as an independent problem.”

(i) *The Disadvantage Element*

This element of substantive equality recognizes that the wrong is not so much differential treatment as disadvantage associated with personal characteristics. Disadvantage is disproportionately

concentrated and tracks onto personal characteristics. Consistent treatment is not always able to redress this imbalance. To achieve equality and to break the cycle of disadvantage, differential treatment, such as temporary special measures (Article 4), is required. The disadvantage element of transformative equality is explicitly asymmetric. In relation to gender-based poverty, the disadvantage element is used to understand that poverty is not a gender neutral experience. Gender stereotypes in education cause women to opt for traditional occupations. This segregates women into low paid jobs and perpetuates their disadvantage in the labour market.¹⁴ Similarly, women are often primary carers in the home which pushes them into informal labour or part time work, areas of employment which are both underpaid and under protected. Therefore, it is important to examine the extent to which the Committee pays attention to how poverty disadvantages women in all areas of life. CEDAW is asymmetric and therefore well equipped to approach equality in this way: what is important is the extent to which this is linked directly with gender-based poverty.

a. Poverty as an Independent Problem

There is a clear evolution in the way in which the Committee addresses the disadvantage element of transformative equality in relation to gender-based poverty. Repeatedly in the first periodic reports, the State identifies poverty as a major obstacle to compliance with CEDAW and paradoxically as an excuse for failure to comply with the Convention. For example, the State representative for Bangladesh explains in the first periodic report in 1987 that ‘Bangladesh faced the obvious problems of a developing country that had a large population, widespread poverty and a high level of illiteracy.’¹⁵ The Egyptian representative in 1990 notes: ‘With numerous economic and social

¹⁴ The Committee, ‘Sixth Concluding Observations: Argentina’ (2010) CEDAW/C/ARG/CO/6 [33].

¹⁵ The Committee, ‘First Concluding Observations: Bangladesh’ (1987) A/42/38 [515].

problems, women were not able to exercise their full rights.¹⁶ Similarly Ethiopia argues in 1996 that ‘poverty constituted the root cause of many problems faced by women.’¹⁷ In 1984 Mexico tries to explain and justify that discrimination against women was caused by poverty: ‘As a developing country Mexico had short comings in its social and economic structure... inevitably [this] affected the situation of women, particularly the more disadvantaged urban and rural women.’¹⁸ Romania in 1993 argues that ‘the economic means were still inadequate to bring women into political life on an equal footing with men.’¹⁹ Countries in the developed world also use economic conditions to justify the non-enjoyment by women of their human rights. In 1990, Canada notes that ‘progress was stalled in social services for the poor...owing to the economic conditions faced by the country.’²⁰

There are two problems with this early treatment of gender-based poverty. First, the Committee itself makes no substantive reference to poverty. It is the State that brings this issue to the attention of the Committee. While the Concluding Observations record the States’ comments on gender-based poverty, the Committee itself makes no substantive comments on poverty. Thus it is unclear whether the Committee accepts poverty as a valid excuse for the State not fulfilling their CEDAW obligations. This would seem to indicate that initially the Committee may have been unsure how gender-based poverty fits within the CEDAW framework. It seems initially unwilling to examine whether the problem of poverty was disproportionately experienced by women or whether the disadvantage of poverty was a unique experience for women. Second, the uncertainty as to the nature of the relationship between poverty, equality and women’s human rights in CEDAW

¹⁶The Committee, ‘Third Concluding Observations: Egypt’ (1990) A/45/38 [399].

¹⁷ The Committee ‘Combined First, Second and Third Concluding Observations: Ethiopia’ (1996) A/51/38 [137].

¹⁸ The Committee ‘First Concluding Observations: Mexico’ (1984) CEDAW/A/39/45 [69].

¹⁹ The Committee ‘First, Second and Third Concluding Observations: Romania’ (1993) CEDAW/A/48/38 [146].

²⁰ The Committee, ‘First Concluding Observations: Canada’ (1990) CEDAW/A/45/38 [433].

manifests itself in the complete absence of recommendations on how to minimize the impact of poverty on women's human rights. It is only possible to speculate on the reasons for the Committee's initial silence on poverty, as there is no publically available record on their reasoning process when drafting the Concluding Observations.

This uncertainty has now given way to a sophisticated and relatively comprehensive understanding of how women are disadvantaged by poverty. The Committee now consistently emphasizes that women are disproportionately disadvantaged by poverty in both developed and developing countries. With respect to Canada, in 1997 the Committee notes that 'the restructuring of the economy...appeared to have had a disproportionate impact on women' and is concerned 'about the deepening poverty among women.'²¹ In 2008 cuts to social assistance are identified as having 'a negative impact on the rights of vulnerable groups of women...who rely on social assistance for an adequate standard of living.'²² Similarly in Kenya in 2011, the Committee observes 'that female headed households are disproportionately represented among the chronically poor and households moving into poverty.'²³ In response to the 2000-2001 economic collapse in Argentina, the Committee draws to the State's attention 'the situation of women resulting from the growing increase in poverty and extreme poverty...which can have a disproportionately heavy impact on the female population.'²⁴ On the other hand, in relation to Egypt, Ethiopia, Norway and Romania the Committee makes no statement that women are disproportionately poor.

The disadvantage element of transformative equality is also implicitly used as the basis for the Committee's recommendations on how to reduce gender-based poverty. For Canada, the

²¹ The Committee, 'Third and Fourth Concluding Observations: Canada' (1997) CEDAW A/52/38 [321],[331].

²² The Committee, 'Seventh Concluding Observations: Canada' (2008) CEDAW/C/CAN/CO/7 [13].

²³The Committee, 'Seventh Concluding Observations: Kenya' (2011) CEDAW/C/KEN/CO/7 [35].

²⁴The Committee, 'Fourth and Fifth Concluding Observations: Argentina' (2002) CEDAW/A/57/38 part III [342].

Committee recommends ‘that social assistance programmes directed at women be restored to an adequate level²⁵ and that ‘funding decisions [on social assistance] meet the needs of the most vulnerable groups.’²⁶ Similarly, Canada is encouraged to ‘assess the gender impact of anti-poverty measures and increase its efforts to combat poverty among women.’²⁷ Canada is also specifically directed to assess how the amounts of social assistance low-income women receive from the State impacts their economic empowerment.²⁸ With respect to Kenya, the Committee recommends targeted measures: the State should ‘continue to intensify the implementation of gender sensitive poverty reduction and development programmes...and continue to develop target policies and support services for women aimed at alleviating and reducing poverty among women.’²⁹ The Committee recommends that Mexico ‘give priority to women in its poverty eradication strategy.’³⁰

b. Prostitution

States are obligated to suppress human trafficking and exploitative prostitution (Article 6). This provision is not premised on equality or non-discrimination yet the Committee, at times, uses the disadvantage element of transformative equality to understand the relationship between poverty, women and trafficking and exploitative prostitution. In Ethiopia in 2004, the Committee observes that there are ‘limited measures to address poverty as the root causes of trafficking’ and recommends that to overcome this disadvantage the State ‘enhances the economic potential of

²⁵ ‘Third and Fourth CO: Canada’ (n 21) [342].

²⁶ ‘Seventh CO: Canada’ (n 22) [26].

²⁷ The Committee, ‘Fifth Concluding Observations: Canada’ (2003) CEDAW/A/56/38 part I [358].

²⁸ ‘Seventh CO: Canada’ (n 22) [40].

²⁹ ‘Seventh CO: Kenya’ (n 23) [36].

³⁰ The Committee, ‘Sixth Concluding Observations: Mexico’ (2002) CEDAW/A/57/38 part III [434].

women.³¹ Similarly, in Philippines and Kenya the Committee is concerned ‘about the trafficking and sexual exploitation of girls stemming from poverty and from their need to provide support for their families.’³² In Romania in 2006, the Committee requires the State to address women’s ‘economic insecurity and improve women’s social and economic situation so as to eliminate their vulnerability’ to trafficking and exploitative prostitution.³³ Trafficking and exploitative prostitution also occurs in the developed world. In Norway’s last periodic report in 2012, the Committee notes that the *au pair* scheme has the potential to be a guise for trafficking and recommended that the State ensure these women have access to financial support.³⁴

However, the Committee’s treatment of poverty and prostitution is inconsistent. In Bangladesh’s second periodic report, the representative for Bangladesh identifies poverty as the main reason for both trafficking and prostitution.³⁵ Yet, in the next reporting cycle the Committee ignores the State’s insights and requires the State to conduct research on the causes of prostitution.³⁶ In a similar vein, the Committee is silent on any connection between disadvantage, gender-based poverty and prostitution in Canada, Egypt, Turkey, Jordan and Mexico.

c. Civil and Political Rights

There is only one instance in the Concluding Observations examined where the Committee makes a connection between nationality and gender-based poverty. In Jordan, children and foreign spouses

³¹ The Committee, ‘Sixth and Seventh: Concluding Observations: Ethiopia’ (2011) CEDAW/C/ETH/6-7 [25(c)].

³² The Committee, ‘Sixth Concluding Observations: Philippines’ (2006) CEDAW/C/PHI/CO/6 [19]; ‘Seventh: CO Kenya’ (n 23) [27].

³³ The Committee, ‘Sixth Concluding Observations: Romania’ (2006) CEDAW/C/ROM/CO/6 [23].

³⁴ The Committee, ‘Eighth Concluding Observations: Norway’ (2012) CEDAW/C/NOR/CO/8 [25]-[26].

³⁵ The Committee, ‘Second Concluding Observations: Bangladesh’ (1993) CEDAW/48/38 [261], [292].

³⁶ The Committee, ‘Third and Fourth Concluding Observations: Bangladesh’ (1997) CEDAW/A/52/38/Rev.1 [462].

of Jordanian women are denied access to education and health services. In 2012 the Committee recommends the State employ temporary special measures to ensure access.³⁷ Nationality is important as access to social welfare benefits is often tied to citizenship.³⁸ A very prominent situation where this arises is the case of migrant women who are disproportionately poor and may not have the necessary citizenship or documentation to qualify for social benefits.³⁹ In Norway's latest periodic report the Committee made passing reference to migrant women's access to social security benefits.⁴⁰ The Committee has yet to systematically assess how nationality contributes to gender-based poverty in the Concluding Observations. The disadvantage element of transformative equality can be used to bring this pressing issue into greater focus.

d. Economic and Social Rights

The Committee is keenly aware as to how gender-based poverty disadvantages women in respect of the economic and social rights. However, while accurately using the disadvantage element to uncover the impact of gender-based poverty on these rights, the Committee is not consistently using it to recommend targeted remedies.

The Committee is sensitive to how poverty disadvantages women and girl's education (Article 10). With respect to Argentina in 2002, the Committee is concerned that the economic crisis has affected access for women and girls 'to public education because they lack the resources needed to either begin or continue their education.'⁴¹ Bangladesh reports to the Committee that 'girls leave

³⁷ The Committee, 'Fifth Concluding Observations: Jordan' (2012) CEDAW/C/JOR/CO/5 [33].

³⁸ *Kbosa v Minister of Social Development*, 2004(6) BCLR 569 (CC) [59] (South African Constitutional Court).

³⁹ The Committee, 'General Recommendation No. 26: migrant women workers' (2008) CEDAW/C/GR/26 [22], [26(l)].

⁴⁰ 'Eighth CO: Norway' (n 34) [35]-[36].

⁴¹ 'Fourth and Fifth CO: Argentina' (n 24) [362].

school to work from home or in the fields at 8 or 10 years of age...[and that] the distance of schools from home...were considered negative factors in attendance of girls at school.⁴² In 1990, Egypt identifies economic factors and early marriage, which they connected to poverty, as two reasons for women's higher drop-out rates.⁴³ Indirect schooling costs such as clothing, transportation and food and long distance to schools are identified as obstacles to girl's education in Kenya, Ethiopia and the Philippines.⁴⁴

While being sensitive to the de facto barriers created by gender-based poverty in accessing education, the Committee is not consistently proposing recommendations to overcome these barriers. The Committee's recommendations can be general. Argentina best exemplifies this trend. After expressing concern that women and girls lack the economic resources to attend school, the Committee only recommends the State take all efforts to guarantee girls' access to education equal to that of boys.⁴⁵ Similarly broad recommendations can be found in Bangladesh, Kenya, Turkey and the Philippines.⁴⁶ On the other hand, in relation to Ethiopia, in 2009 the Committee draws on the disadvantage element of transformative equality to that Ethiopia 'strengthen support services, including scholarships, transport and tutorial support...as well as incentives and subsidies' to encourage parents to send their daughters to school.⁴⁷ In Jordan, the Committee goes one step further and recommends that the State amend the regulations to allow 'young women's access to

⁴² 'First CO: Bangladesh' (n 15) [553].

⁴³ The Committee, 'Second Concluding Observations: Egypt' (1990) A/45/38 (1990) [395].

⁴⁴ 'Sixth and Seventh CO: Ethiopia' (n 31) [30]; The Committee, 'Second Concluding Observations: Philippines' (1991) CEDAW/A/46/38 [209].

⁴⁵The Committee, 'Second and Third Concluding Observations: Argentina' (1997) CEDAW/A/52/38/Rev.1 [362].

⁴⁶The Committee, 'Seventh Concluding Observations: Bangladesh' (2011) CEDAW/C/BGD/CO/7 [28]; The Committee, 'Sixth Concluding Observations: Kenya' (2007) CEDAW/C/KEN/CO/6 [34]; The Committee, 'Sixth Concluding Observations: Turkey' (2010) CEDAW/C/TUR/CO/6 [31]; 'Sixth CO: Philippines' (n 32) [18].

⁴⁷ 'Sixth and Seventh CO: Ethiopia' (n 31) [21].

compulsory and free education without discrimination.⁴⁸ Jordan and Ethiopia, while models of best practice are outliers and it is unfortunate that there is no consistent recommendation to reduce the costs associated with education, to improve transport or to subsidize girl's education to ensure she is not taken out of school to support her family.⁴⁹

Employment (Article 11) is a crucial factor in ameliorating gender-based poverty. Yet it is interesting to note that unlike education there is no explicit use of the word 'poverty' in the Committee's discussion on employment. Rather the Committee implicitly uses Article 11 to draw to State's attention how the current structure of the labour market significantly disadvantages women and contributes to the material and social disadvantage of poverty.

Across the twelve States evaluated in this analysis, there is a marked uniformity in understanding how employment disadvantages women. For almost every State the Committee routinely observes that there is a gender pay gap, women are segregated into low and underpaid jobs, the work traditionally assigned to women is not regulated by law and women in the informal labour market are often denied social security benefits. It consistently notes that inadequate maternity leave, the lack of child-care facilities and the double burden of family care and employment negatively impact women's performance in the labour market. The best example of the Committee drawing all of these observations together is from Ethiopia in 2009. The Committee notes with concern:

the disproportionately high unemployment rate among women; the high proportion of women engaged in unpaid family work...and in low paid jobs, owing to family responsibilities, lack of resources necessary to acquire skills, limited access to land, credit and information and traditional attitudes; the high percentage of women working in the informal sector without access to social protection; unequal pay and benefits, discriminatory hiring and promotion practices and unfair

⁴⁸ 'Fifth CO: Jordan' (n 37) [36(a)].

⁴⁹ The Working Group on Discrimination Against Women in Law and Practice, 'Discrimination against women in economic and social life, with a focus on economic crisis' (2014) A/C/26/39 [36].

dismissals based on gender, marital status, family responsibility or pregnancy.⁵⁰

This demonstrates a very sophisticated use of the disadvantage element of transformative equality to diagnose how employment practices contribute to gender-based poverty. Women predominate in domestic work⁵¹, part-time work⁵², in the informal labour market⁵³, in unpaid work in the family business or family owned subsistence farms⁵⁴ and in unpaid role as caregivers for children.⁵⁵ While these observations may at first appear to only be re-treading well established ground, emphasising women are disproportionately in low or non-paid work is important as States continue to deny that the labour market is gender-based. In their latest periodic report from 2012 Norway argues that most women voluntarily chose part-time work.⁵⁶

Breaking the cycle of disadvantage of poverty through employment requires specific measures. The Committee tends to employ all elements of transformative equality to use the employment obligation to remedy gender-based poverty. Here I use two examples from the last reporting round to highlight how the Committee specifically uses the disadvantage element. Ethiopia is encouraged to create income generating opportunities and economic empowerment programs for women and to take temporary special measures such as priority to women in public sector

⁵⁰ 'Sixth and Seventh CO: Ethiopia' (n 31) [32].

⁵¹ The Committee, 'Seventh Concluding Observations: Egypt' (2010) CEDAW/C/EGY/7 [34].

⁵² 'Seventh CO: Canada' (n 22) [37].

⁵³ UN Special Rapporteur on extreme poverty and human rights, 'Unpaid work, poverty and women's human rights' (2013) A/68/293.

⁵⁴ *ibid.*

⁵⁵ 'Seventh CO: Canada' (n 22) [37].

⁵⁶ 'Eighth CO: Norway' (n 34) [29].

recruitment.⁵⁷ The Committee recommends that Canada use temporary special measures in non-traditional jobs to encourage women to enter traditional male occupations.⁵⁸

Marriage and family relations (Article 16) are also a contributing source to women's poverty.⁵⁹ The evidence indicates that women, in both the developed and developing world, are worse 'off economically than men in family relationships and following the dissolution of those relationships' and that in some countries widowhood may leave a woman destitute.⁶⁰ The vast majority of the recommendations the Committee makes with respect to family law and poverty draw on a formal equality framework. There are still many de jure inequalities in divorce settlements and the ownership and inheritance of property. The Committee routinely calls for the same rights to inherit property and equally divide joint property.⁶¹ However, in the last series of Concluding Observations the Committee also uses the disadvantage element of transformative equality to understand the social and economic consequences of family relationships. This is apparent when noting that in Egypt and Kenya, non-financial contributions, such as unpaid care work, are not properly calculated in the division of matrimonial property.⁶² Similarly, in Norway the Committee is concerned that the 'current law on property distribution upon divorce...does not adequately address gender-based economic disparities between spouses resulting from traditional work and family life patterns' and that matrimonial property division does not accurately capture the complexity of gender and

⁵⁷ 'Sixth and Seventh CO: Ethiopia' (n 31) [38].

⁵⁸ 'Seventh CO: Canada' (n 22) [38].

⁵⁹ Working Group (n 49) [14].

⁶⁰ The Committee, 'General recommendation No. 29: Economic consequences of marriage, family relations and their dissolution' (2013) CEDAW/C/GC/29 [5].

⁶¹ 'Sixth and Seventh CO: Ethiopia' (n 31) [40]-[41].

⁶² 'Seventh CO: Egypt' (n 51) [50].

pensions.⁶³ To break the cycle of economic disadvantage caused by divorce the Committee urges Norway to amend divorce laws to account for intangible properties, such as pensions, and that all joint property should be divided equally regardless of the spouse's contributions.⁶⁴

Poverty also forces women into early marriage and family relationships⁶⁵ but the Committee is not capturing how the interaction between gender and poverty disadvantages women in this aspect of family life. In Egypt, the Committee notes that there are a high number of early marriages for poor girls to wealthy men in neighbouring countries.⁶⁶ However, it only recommends preventing and combating this negative phenomenon through prosecution and awareness-raising of the negative implications of early marriages.⁶⁷ There is no recommendation to remedy the root cause of girl's early marriage: poverty.

(ii) *The Recognition Element*

The recognition element of transformative equality promotes respect and dignity and removes stigma, humiliation, prejudice, stereotypes and oppression. Negative cultural stereotypes on the role and value of women are contributing to women's poverty. For example, the low value assigned to women's work perpetuates women's unequal pay for work of equal value. In Chapter 1, I argued that CEDAW's mandate to modify gender-based socio-cultural norms was one of the important reasons for choosing to first understand the interaction between gender and poverty in CEDAW as opposed to ICESCR. The evidence from this analysis further justifies this choice. In practice the

⁶³ 'Eighth CO: Norway' (n 34) [37].

⁶⁴ *ibid* [38].

⁶⁵ Girls Not Brides 'What is the Impact of Child Marriage: Poverty' <<http://www.girlsnotbrides.org/themes/poverty/>>.

⁶⁶ 'Seventh CO: Egypt' (n 51) [28].

⁶⁷ *ibid*.

Committee demonstrates a sophisticated appreciation of how traditional attitudes play a crucial role in contributing and maintaining gender-based poverty.

a. Poverty as an Independent Problem

When discussing poverty independent of any of the provisions of CEDAW, the Committee is very clear that women are disproportionately affected by poverty and have called for targeted measures to alleviate gender-based poverty. As will be described below the Committee appreciates the interaction between poverty, gender-based recognition harms and many of the provisions of CEDAW. What is under-developed by the Committee is how the interaction of poverty and gender create unique recognition harms.

The Committee is keenly aware that poverty tracks onto other identity groups and that this makes these women more vulnerable. In Argentina, rural women are described as living in a state of extreme poverty and marginalisation.⁶⁸ In relation to Canada, the Committee highlights that certain identity groups live in deep and persistent poverty: for elderly women living alone, female lone parents, aboriginal women, older women, women of colour, immigrant women and women with disabilities.⁶⁹ In Mexico, the Committee is concerned that the rural and indigenous women are particularly vulnerable to poverty and recommended eradication strategies pay special attention to them.⁷⁰ In Turkey, the Committee is concerned about the situation of various disadvantaged groups of women might be more vulnerable to poverty: including ‘Kurdish women and women of ethnic

⁶⁸‘Sixth CO: Argentina’ (n 14) [41].

⁶⁹ ‘Fifth CO: Canada’ (n 27) [357].

⁷⁰ ‘Sixth CO: Mexico’ (n 30) [434].

and minority communities, migrant women and women asylum-seekers, elderly women, as well as women with disabilities.⁷¹

Understanding how the interaction between different recognition harms makes women particularly vulnerable to poverty is an important step. It is necessary to go further. Cultural attitudes and negative stereotypes impact on women regardless of their socio-economic position. However, for women who live in poverty, there are a unique set of recognition harms and to date the Committee has not fully explored the stigmas attached to gender-based poverty. The poor are stereotyped as lazy, undisciplined, undeserving, scheming, cheating and as parasites on limited State resources.⁷² Women who are poor face additionally recognition harms. They are portrayed as promiscuous and as unloving and uncaring mothers.⁷³ The effect of this can be seen in the decision of *da Silva Pimentel Teixeira v Brazil*.⁷⁴ Teixeira died during childbirth. The Committee concludes that her death was due to severe delays in accessing care and inadequate medical treatment which was caused by the failure of Brazil to provide appropriate maternal health services.⁷⁵ The Committee concludes, and Brazil acknowledges, that the fact that Teixeira was Afro-Brazilian and poor contributed to her death.⁷⁶ However, the Committee does not investigate how negative stereotypes of poor Afro-Brazilian women affected the individual treatment she received or the location, funding and staffing of maternal health facilities in areas where poor women live nor provide remedies to address these prejudices. The Committee only notes that Teixeira was a poor Afro-

⁷¹ 'Sixth CO: Turkey' (n 46) [38].

⁷² Gwen Brodsky et al, 'Gosselin v Canada' (2006) 18 Can J of W and the L 189, 193.

⁷³ Janet Mosher, 'Intimate Intrusions: Welfare Regulations and Women's Personal Lives' in Shelley Gavigan and Dorothy Chunn (eds) *The Legal Tender of Gender: Welfare, Law and the Regulations of Women's Poverty* (Hart, 2010).

⁷⁴ (2011) CEDAW/C/49/D/17/2008.

⁷⁵ *ibid* [7.6].

⁷⁶ *ibid* [7.7].

Brazilian woman but seems uncertain how this factor plays into the inequality and discrimination in maternal health care. The transformative equality framework offers a useful diagnostic and remedial tool to incorporate how attitudes on poverty limit women's human rights.

b. Cultural Attitudes and Stereotypes

While having a limited understanding of the unique subset of recognition harms operating against women in poverty, the Committee does have a good understanding of how cultural attitudes and stereotypes more broadly contribute to women's poverty. This is largely been done through Article 5(a), the requirement to modify cultural stereotypes and attitudes. Article 5(a) of CEDAW is not premised upon equality or non-discrimination. Notwithstanding this, the Committee seems implicitly to have used the recognition aspect of the transformative equality when analysing the relationship between gender cultural stereotypes and poverty.

The Committee is particular attentive to the interaction between the disadvantage and recognition elements and again this comes from the more recent Concluding Observations. In relation to Bangladesh, Egypt, Ethiopia and the Philippines, the Committee observes that 'patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men...are reflected in their disadvantageous and unequal status in many areas, including employment, decision-making, marriage and family relations and the persistence of violence against women.'⁷⁷ Similarly, in respect of Norway, the Committee notes that stereotypical attitudes are 'reflected in the low proportion of women in positions in the public sector...which remains well below 20 per cent.'⁷⁸ Consequentially women in Norway are forced into lower paid part time work.⁷⁹

⁷⁷ 'Seventh CO: Bangladesh' (n 46) [17]; 'Seventh CO: Egypt' (n 51) [21], 'Sixth and Seventh CO: Ethiopia' (n 31) [18]; 'Sixth CO: Philippines' (n 32) [17].

⁷⁸ The Committee, 'Seventh Concluding Observations: Norway' (2007) CEDAW/NOR/CO/7 [17]; The Committee 'Fifth and Sixth Concluding Observations: Norway' (2003) CEDAW/A/58/38 part 1 (2003) [411].

With respect to recommendations, the Committee again implicitly draws on the recognition dimension of the transformative equality framework. While at times the recommendations are vague (States were simply asked to ‘continue to accelerate efforts to eliminate discriminatory and stereotypical attitudes’⁸⁰), the Committee is also perceptive as to how poverty reduction programmes can entrench recognition harms. Early in the Committee’s reporting history, it notes when reviewing Bangladesh’s report that ‘it appeared that policies were directed more towards improving the welfare of women and towards women in connection with children than to the development of equality of women as individuals.’⁸¹ When Argentina restructured their economic and social programs after the collapse of the economy in the early 2000s, the Committee notes that the structure of these benefits actually reinforced discriminatory gender roles. Under these new programs women are ‘mainly beneficiaries of these measures rather than being equal participants and actors in their design and implementation.’⁸² The Committee is concerned that these approaches would perpetuate stereotypical views of the role of women and men rather than effectively support women’s empowerment.⁸³

c. Prostitution

The Committee avoids any discussion on how the recognition element causes and contributes to prostitution. How prostitution should be perceived and recognised is a matter of serious debate

⁷⁹ ‘Seventh CO: Norway’ (n 78) [17].

⁸⁰ ‘Seventh CO: Bangladesh’ (n 46) [18].

⁸¹ ‘First CO: Bangladesh’ (n 15) [511].

⁸²The Committee ‘Follow-up Report to the Fifth Concluding Observations: Argentina’ (2004) CEDAW/A/59/38 part II [372].

⁸³ *ibid.*

among feminist scholars.⁸⁴ Article 6 transcends this debate as it only requires States to eliminate exploitative prostitution. Therefore, my comments on the Committee and prostitution are confined only to situations of exploitative prostitution. Prominent scholars have argued that in certain conditions prostitution ‘can only credibly be explained as devaluing qua women disrespecting women’s humanity.’⁸⁵ Victims of trafficking are similarly dehumanized and treated without dignity. Yet on the basis of the Concluding Observations reviewed, the Committee is strangely silent as to socio-cultural attitudes that demean and objectify women and girls in prostitution and human trafficking. For example, while the Committee urges a holistic approach to prostitution and trafficking in the Philippines, its recommendations are primarily centred on economic empowerment.⁸⁶ This falls short of a true appreciation of how poverty and gender norms combine to make women more vulnerable to exploitative prostitution and trafficking.

d. Economic and Social Rights

By contrast, the Committee exhibits a good understanding of how cultural norms negatively impact education and how this contributes to gendered poverty. The Committee consistently recommends that the State remedy traditional attitudes that prevent girls from going to school. The Committee recommends that Egypt take steps to address traditional attitudes that result in gender segregation in students’ choice of education including using temporary special measures to ‘offer incentives for young women to enter traditionally male dominated fields of study.’⁸⁷ In respect of Kenya, the

⁸⁴ Barbara Havelkova, ‘Using Gender Equality Analysis to Improve the Well Being of Prostitutes’ (2011) 18(1) *Cardozo J of L & Gender* 55.

⁸⁵ Michelle Madden Dempsey and Jonathan Herring, ‘Why Sexual Penetration Requires Justification’ (2007) 27 *OJLS* 467, 485.

⁸⁶ ‘Sixth CO: Philippines’ (n 32) [19]-[20].

⁸⁷ ‘Seventh CO: Egypt’ (n 51) [32].

Committee is concerned ‘that gender stereotypes may have an impact on women opting for traditional social occupations and on their limited comparative advantage in the labour market.’⁸⁸ States are called to take steps to address these attitudes, encourage women to study in non-traditional fields and to ‘eradicate gender stereotypes from both official and unofficial curricula.’⁸⁹ Cultural norms also result in girls not enrolling or dropping out of school as families prioritize the education of boys and States are called to address these factors.⁹⁰ These are further good examples of the Committee’s implicit understanding of the interaction between the recognition and disadvantage element of transformative equality.

Recognition harms also underpin women’s low position in the labour market. Under the right conditions, employment can contribute redress recognition harms and can shift the balance of power in both the private and public spheres. In some respects, the Committee is attune to how recognition harms impact gender-based poverty in the context of employment while in relation to other recognition harms the Committee’s reasoning is under-developed. The Committee is largely using the recognition element of transformative equality to assess how stereotypes underpin the gender segregation of the labour market. The Committee identifies job segregation as a factor contributing to the persistent gender wage gap.⁹¹ Job segregation directly relates to traditional attitudes on which gender should perform which occupations. The Committee repeatedly calls on States to take efforts to increase the number of women in non-traditional trades and professions⁹² and to provide gender sensitivity training to employers to challenge stereotypes and encourage them

⁸⁸ ‘Seventh CO: Kenya’ (n 23) [32].

⁸⁹ *ibid* [32]; ‘Sixth CO: Argentina’ (n 14) [34].

⁹⁰ ‘Sixth CO: Turkey’ (n 46) [30].

⁹¹ ‘Fifth and Sixth CO: Norway’ (n 78) [397].

⁹² ‘Seventh CO: Canada’ (n 22) [38].

to hire women.⁹³ The implicit hope is that the Committee's recommendations will contribute to recognizing women as intelligent and capable and will improve their material opportunities in the labour market.

On the other hand, the Committee is not consistently discussing how recognition harms underpin unequal pay for work of equal value. The work traditionally assigned to women in the formal labour market is underpaid because the skill, effort and responsibility required for these jobs are not recognised. In relation to Norway, Romania and Kenya the Committee encourages the State to narrow and close the wage gap between women and men by applying gender neutral job evaluation schemes.⁹⁴ This is an important step at challenging gender cultural norms on merit and ensuring that the skill, effort and responsibility women expend in the labour force is properly recognised and valued. In relation to other States, the Committee's recommendations do not touch upon this aspect of equal pay for work of equal value. In Argentina, Canada and Egypt the Committee only recommends the State either accelerate effective equal pay.⁹⁵

In a similar vein, the Committee is not substantially addressing how to improve the recognition and value of unpaid care work. The Committee does recommend that Canada provide further information on the valuation and qualification of women's unpaid work.⁹⁶ This recommendation is not followed up in more recent reports and is an isolated example. In comparison, both the Working Group and the UN Special Rapporteur on extreme poverty and human rights have conducted an in-depth analysis on women and unpaid work. Due to cultural

⁹³ 'Fifth CO: Jordan' (n 37) [38].

⁹⁴ 'Sixth CO: Romania' (n 33) [29]; 'Seventh CO: Kenya' (n 23) [34]; 'Fifth and Sixth CO: Norway' (n 78) [397].

⁹⁵ 'Sixth CO: Argentina' (n 14) [36]; 'Fifth CO: Canada' (n 27) [376]; 'Seventh CO: Egypt' (n 51) [34].

⁹⁶ 'Third and Fourth CO: Canada' (n 21) [337].

assumptions on the roles of women, ‘whether or not [women] are in paid employment, they spend between twice to four times the amount of hours on care functions than do men.’⁹⁷ This ‘is highly reflective and determinative of power relations between women and men.’⁹⁸ The Special Rapporteur notes ‘that gender stereotypes, which construe women as second class citizens whose place is in the home, cause and perpetuate this unequal distribution of work, rendering women’s equal enjoyment of rights impossible.’⁹⁹ This restricts the amount of time women have to invest in paid work which restricts their economic empowerment. Not only do cultural attitudes force women to perform this work, unpaid care work is also perceived as unskilled and less valuable to society and this ‘renders many women socially and financially dependent on men...’¹⁰⁰

Both the Working Group and the Special Rapporteur make a series of detailed recommendations including addressing socio-cultural attitudes that dictate that unpaid care work should be performed by women. The Working Group advocates the importance of recognising unpaid care work without ‘reinforcing care work as women’s sole responsibility.’¹⁰¹ For example ‘any financial support to carers should be paid to the primary caregiver regardless of sex...social assistance programmes must be designed taking into account the intense unpaid care responsibilities of women living in poverty. Thus, collecting payments or meeting co-responsibilities must not significantly increase the already heavy workloads of women.’¹⁰² The Working Group suggests that there be a

⁹⁷ Working Group (n 49) [90].

⁹⁸ *ibid* [13].

⁹⁹ *ibid*.

¹⁰⁰ UN Special Rapporteur on extreme poverty and human rights ‘Unpaid work and women’ (n 53) [12].

¹⁰¹ *ibid* [71]; see Working Group (n 49) [92]-[98].

¹⁰² *ibid* [86].

redistribution of care work between men and women.¹⁰³ This involves addressing attitudes on the nature and value of care work. By contrast, even though the preamble of CEDAW calls on State parties to modify attitudes on role of men and women in care work, the Committee is not addressing the relationship between poverty, unpaid work and women in any level of detail. While expressing concern that recognition and material disadvantage impact employment, there is no specific mention of the impact of the cultural attitudes surrounding unpaid care work. There is nothing close to the UN Special Rapporteur's and Working Group's level of specificity in recommendations. This is highly problematic as the Committee overlooks an important contributing factor to gender-based poverty.

Although the Committee has demonstrated a sophisticated appreciation of how recognition harms contribute to the negative economic consequences for women in family relations (Article 16) in the General Recommendations, this understanding is not evident in the Concluding Observations¹⁰⁴ The role of custom in respect of divorce, widowhood or inheritance and its impact on women's poverty cannot be understated.¹⁰⁵ In Ethiopia, the Committee notes that sons 'inherit land because it is assumed that daughters will move to the homes of their husbands, that the family of a deceased husband often claims the land from his widow [and] that women frequently lose their property to their husbands upon divorce.'¹⁰⁶ However, in the recommendation, the Committee only encourages Ethiopia to protect women from property-grabbing and to effectively enforce equal rights of women to inherit property. The Committee's recommendations are an important first step

¹⁰³ *ibid* [96].

¹⁰⁴ See General Recommendation No. 29 (n 60) [18], [37].

¹⁰⁵ World Bank 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014) Chapter 5: Control over land and housing.

¹⁰⁶ 'Sixth and Seventh CO: Ethiopia' (n 31) [40].

but they lack the specificity required to offer meaningful guidance. There is no recommendation to address the socio-cultural norms that underpin assumptions that a woman's property will be subsumed within her spouse's or that upon death property should revert back to the husband's family.

(iii) *The Structural Element*

The structural element of transformative equality challenges oppressive institutional structures and subverts traditional gender divisions while at the same time protecting women's special needs. Similar to both the disadvantage and recognition elements, in certain instances the Committee forcefully challenges and recommends the modification of gender-based structures which contribute to women's poverty and at other times this element of transformative equality is under-developed by the Committee.

a. Poverty as an Independent Problem

It is recognised that the design of social assistance programs and poverty eradication policies can empower women or further entrench their unequal status.¹⁰⁷ One of the strongest examples of the Committee's engagement with this issue comes from Canada. The Canadian federal government provides funds to the provinces to ensure social assistance programmes for women. The current legislation transfers these funds without any conditions. There is no federal accountability to ensure minimum levels of assistance. Without this supervision, the provinces have cut social assistance rates which have had a negative impact on women who rely on social assistance for an adequate standard

¹⁰⁷ UN Special Rapporteur on extreme poverty and human rights, 'Impact of austerity measures on the enjoyment of human rights' (2013) A/64/279 [58]-[68].

of living.¹⁰⁸ The Committee recommends that Canada ‘establish minimum standards for the provision of funding to social assistance programmes...and a monitoring mechanism to ensure accountability...’¹⁰⁹ Another method for effecting structural change is by including a gender perspective to open up sites of power for women to hopefully change entrenched patriarchal structures.¹¹⁰ The Committee uses this approach to gender-based poverty and structural inequality. This can be seen in the examples above from Canada and Kenya where the Committee encourages a gender perspective in the design of poverty reduction programmes.¹¹¹ Argentina is also recommended to incorporate a gender perspective into the design and implementation of income transfer programmes aimed at poverty reduction.¹¹² While the recommendation could be more detailed, explaining exactly how to include a gendered perspective into the State’s programmes, it is hoped that including a gender perspective in the design of poverty reduction programmes will ensure the structure of these programmes will empower women rather than re-entrench gender inequalities.

However what is missing is a more detailed gender equality assessment on the structure of the State’s poverty policies. Poverty alleviation programs that are based on the breadwinner model¹¹³ or that only provide resources to one member of the family unit ‘can exacerbate potential

¹⁰⁸ See Feminist Alliance for International Action ‘A Failing Grade on Women’s Equality: Canada’s Human Rights Record on Women’ (2008) [8] <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_42_8224_E.pdf>.

¹⁰⁹ ‘Seventh CO: Canada’ (n 22) [14].

¹¹⁰ Ruth Rubio Marin, ‘A New European Parity-Democracy Sex Equality Model and Why it Won’t Fly in the United States’ (2012) 60 Am J of Comp Law 99, 101-03.

¹¹¹ ‘Fifth CO: Canada’ (n 27) [358]; ‘Seventh CO: Kenya’ (n 23) [36].

¹¹² ‘Sixth CO: Argentina’ (n 14) [19]-[20].

¹¹³ UN Special Rapporteur on extreme poverty and human rights, ‘Conditional Cash Transfer Programmes’ (n 13) [69].

vulnerability to abuse or economic deprivation.’¹¹⁴ The conditional cash transfer programmes, as explained above, provide resources on certain criteria or pre-requisites.¹¹⁵ There is one argument that these programs provide women with independence and shift the power balance in the home because women are given greater control over the household’s resources.¹¹⁶ However, these programs ‘may create an unnecessary burden on women while perpetuating traditional notions of gender roles within the family.’¹¹⁷ These types of conditions can increase women’s time poverty which limits the amount of time they have to invest in training and employment opportunities.¹¹⁸ Moreover, as explained above, these programmes can exacerbate recognition harms. Yet, in the Concluding Observations the Committee does not sufficiently engage with the structure of any poverty eradication policies or make recommendations on how these programs can be used to empower women.

b. Prostitution and Civil and Political Rights

In relation to prostitution and civil and political rights there is no analysis of how legislation on prostitution and human trafficking can re-victimise women and girls or how the pre-requisites for citizenship or public office can contribute to gender-based poverty. On the other hand, in *Zhen Zhen v The Netherlands*, the dissent advocates that immigration officials must exercise due diligence when presented with evidence that the individual had been trafficked and inform her of her human rights

¹¹⁴ *Falkiner v. Ontario (Minister of Community and Social Services, Income Maintenance Branch)* [2002] O.J. No. 1771 (Ontario Court of Appeal).

¹¹⁵ UN Special Rapporteur on extreme poverty and human rights, ‘Conditional Cash Transfer Programmes’ (n 13) [70].

¹¹⁶ *ibid* [68].

¹¹⁷ *ibid* [71].

¹¹⁸ UN Special Rapporteur on the right to food, ‘Women’s rights and the right to food’ (2013) A/HRC/22/50 [2], [41]-[42].

and the availability of special protection schemes.¹¹⁹ This is crucial to ensure women who have been already been exploited are not re-victimized by the State.¹²⁰ Unfortunately, this is an isolated example.

c. Economic and Social Rights

The Committee is highly attuned to how the structure of labour market perpetuates gender-based poverty. There are multiple and reinforcing way that the structure of employment contributes to gender-based poverty and the Committee consistently draws this to the attention of the State. For example, the type of work that women traditionally and disproportionately perform, as domestic workers, part-timers workers or in the informal labour is regularly excluded from legal protection making women vulnerable to abuse and exploitation.¹²¹ The criteria used for hiring and promotions do not capture the breadth and depth of women's qualifications which is reflected in women's unequal pay.¹²² Inadequate maternity leave and benefits and the lack of affordable child care facilities are significant obstacles to women's full participation in employment.¹²³ As an example, the dissent in *Nguyen v The Netherlands* found that an anti-accumulation clause in the legislation which prevented women who were both self-employed and worked part-time from receiving maternity benefits that

¹¹⁹ Individual opinion by Committee members Mary Shanthi Dairiam, Violeta Neubauer and Silvia Pimentel (dissenting) (2009) CEDAW/C/42/D/15/2007.

¹²⁰ Kristin Finklea, 'Juvenile Victims of Domestic Sex Trafficking: Juvenile Justice Issues' (Congressional Research Services, 2014).

¹²¹ 'Seventh CO: Egypt' (n 51) [33]. See Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia in Judy Fudge and Kendra Strauss (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, 2013).

¹²² The Committee, 'First Concluding Observations: Argentina' (1988) CEDAW/A/43/38 [394].

¹²³ The Committee, 'Second Concluding Observations: Canada' (1990) CEDAW/A/45/38 [415].

matched the amount of hours they worked is a structural inequality because women are disproportionately employed in part time work and within the family business.¹²⁴

The Committee is a strong advocate for re-structuring the labour market. The Committee consistently recommends that States improve working conditions in the private and informal sector,¹²⁵ implement a social protection scheme to cover the informal sector,¹²⁶ effectively enforce equal pay,¹²⁷ implement sanction and labour inspections,¹²⁸ provide gender sensitivity training to employers to dismantle stereotypes and encourage them to hire women¹²⁹ and regulate the conditions of domestic workers.¹³⁰ The Committee proposes equally sophisticated recommendations in relation to women, motherhood and employment. States are encouraged to promote paternity leave, to develop child care facilities, to challenge employment structures to enable women to balance work and family¹³¹ and to take steps to reduce women's double burden of employment and unpaid care work.¹³² It is interesting to note that the majority of these recommendations come from the more recent Concluding Observations.

There are a few examples of the Committee challenging the structures of family relationships (Article 16). In Norway, women living in de facto co-habitation relationships have no economic

¹²⁴ Individual opinion of Committee members, Ms Naela Mohamed Gabr, Ms Hanna Beate Schopp-Schilling and Ms Heisoo Shin (dissenting) CEDAW/C/D/36/3/2004.

¹²⁵ 'Fifth CO: Canada' (n 27) [374].

¹²⁶ The Committee 'Seventh and Eighth Concluding Observation: Mexico' (2012) CEDAW/C/MEX/CO/7-8 [29].

¹²⁷ 'Seventh CO: Canada' (n 22) [37].

¹²⁸ 'Sixth CO: Mexico' (n 30) [31].

¹²⁹ 'Fifth CO: Jordan' (n 37) [38].

¹³⁰ 'Sixth and Seventh CO: Ethiopia' (n 31) [33].

¹³¹ 'Sixth CO: Argentina' (n 14) [36]. Note this is still does not address the socio-cultural norms that require women to perform the bulk of care work.

¹³² 'Fifth and Sixth CO: Norway' (n 78) [430].

rights or legal protection when these relationships dissolve. These women are vulnerable to poverty because structural barriers deny them their economic and property rights in de facto relationships.¹³³ The Committee advocates that Norway ‘adopt legal measures necessary to guarantee women living in de facto relationships economic protection equal to married women, in the form of recognizing their right to property accumulated during the relationship.’¹³⁴ This recommendation challenges the legal structure of marriage to ensure that women in positions of economic vulnerability are protected from falling into poverty on the breakdown of their relationships. In the individual decisions there are two examples of the Committee addressing the structural inequalities in family law, although one of the examples is a dissenting opinion. The dissent of *B.J. v Germany* noted that delays in finalizing the divorce proceedings had a disproportionate negative economic affect on women.¹³⁵ The individual in this case had ‘devoted her whole adult life to unpaid work in the family.’¹³⁶ She now had an uncertain financial future and required spousal maintenance. The domestic court’s inability to speedily resolve these issues created a precarious situation for divorced women. The dissent recommends that the State have effective legal remedies to protect women from slipping into poverty because of divorce.¹³⁷ The majority dismissed the case because it occurring before the coming into force of the OP-CEDAW. In *Kell v Canada*, a majority of the Committee found that the public housing authorities’ failure to notify Kell that her common law partner had illegally taken her name off the registry of their communal home was in violation of

¹³³ See the dissent of Justice Abella in *Québec (Attorney General) v. A*, [2013] 1 SCR 61.

¹³⁴ ‘Eighth CO: Norway’ (n 34) [38(c)].

¹³⁵(2004) CEDAW/C/36/D/1/2003.

¹³⁶ *ibid* at Individual opinion of Committee members Krisztina Morvai and Meriem Belmihoub-Zerdani (dissenting).

¹³⁷ *ibid*.

CEDAW.¹³⁸ Unfortunately, the Committee makes no recommendations on how to improve the structure of property registration to ensure other women do not lose their property rights.

d. Access to Justice

By Article 15, the State is required to ensure equality before the law, equality in the ability to enter into contractual relationships and that women are treated equally at all stages of a court process. The Committee draws few connections between the structure of the justice system and gender-based poverty. In Canada, the Committee notes that due to cuts in the legal aid system low income women are being denied access to justice. The Committee draws on both the structural and disadvantage element of transformative equality by recommending Canada ensure vulnerable women have access to legal representation and remedies, particularly in the areas of family and poverty law.¹³⁹ Similarly, in Kenya, women are unable to bring discrimination claims in courts due to the costs of filing an action and illiteracy.¹⁴⁰ The Committee draws on the structural element by requiring Kenya to ‘speedily adopt national legal aid...and...institutionalize legal aid throughout the country.’¹⁴¹ Although, in the Kenya Concluding Observations there is no specific requirement to target low income women as there was in Canada.

¹³⁸ (2012) CEDAW/C/51/D/19/2008 [10.1]-[10.11].

¹³⁹ ‘Seventh CO: Canada’ (n 22) [21]-[22].

¹⁴⁰ ‘Seventh CO: Kenya’ (n 23) [13].

¹⁴¹ *ibid* [14].

(iv) *The Participation Element*

a. Poverty as an Independent Problem

In relation to poverty reduction programmes the Committee is a strong advocate for women's participation and recommends that any solution to women's poverty requires the participation of women. For example, Kenya is encouraged to 'ensure the participation of women in the development programmes...aimed at alleviating and reducing poverty among women.'¹⁴² Argentina is urged to 'include and involve women in the process of economic, financial, political and social reconstruction.'¹⁴³ As a further example, which also emphasises the recognition dimension, the Committee recommends that Mexico include 'women's participation not only as beneficiaries but also as agents of change in the development process.'¹⁴⁴

b. Civil and Political Rights

In the General Recommendation on women's participation in public life the Committee identifies poverty as a barrier to greater participation.¹⁴⁵ Yet in the Concluding Observations and Individual Communications, the Committee has only a limited understanding of how poverty is an obstacle to women's civil and political rights. In Ethiopia, in 2009, Committee is concerned that limited financial resources impede women's participation in public life (Article 7) and recommends that the State allocate a higher budget for women's candidates.¹⁴⁶ In Jordan, the Committee recommends free-day care so that neither care-work nor the cost of childcare prevents women from being able to

¹⁴² *ibid* [36].

¹⁴³ 'Fourth and Fifth CO: Argentina' (n 24) [368].

¹⁴⁴The Committee, 'Fifth Concluding Observations: Mexico' (2002) CEDAW/A/57/38 part III [434].

¹⁴⁵ The Committee, 'General Recommendation No. 23: participation in public life' (1997) CEDAW/C/GC/23 [45(c)].

¹⁴⁶ 'Sixth and Seventh CO: Ethiopia' (n 31) [26]-[27].

become involved in political life.¹⁴⁷ On the other hand, in Mexico the Committee identifies indigenous women as disproportionately poor but when recommending the State increase the participation of indigenous women in public life made no reference to financial barriers.¹⁴⁸

c. Economic and Social Rights

Participation in employment and improving women's position in the labour market necessarily draws on the participation element of transformative equality. The Committee routinely calls upon States to ensure women participate in the design of rural development programmes (Article 14). This will be explained below in greater detail under the interaction between the four dimensions of transformative equality. For other substantive economic and social provisions, the Committee is not developing the participation dimension. In respect of education, the Committee is not requiring States to ensure the participation of women and girls. For example, there are no requirements that the States consult with women, girls or parents in understanding why girls drop-out of school, the design and placement of schools, school curriculum, safety or infrastructure or how best to structure financial incentives to ensure girls complete their education.

(v) *The Interaction Between the Four Dimensions of Transformative Equality*

The four elements of transformative equality when placed together can effectively ensure that poverty reduction programmes incorporate and remedy all aspects of gender-based poverty and do not re-trench inequalities. As mentioned above, the Committee uses all four elements in relation to employment. The Committee recommends that States take temporary special measures to overcome women's exclusion from public sector employment, to enforce equal pay, to address gender

¹⁴⁷ 'Fifth CO: Jordan' (n 37) [32].

¹⁴⁸ 'Sixth CO: Mexico' (n 30) [22]-[23], [34].

stereotypes that result in gender job segregation, to regulate and protect women in the informal economy, and to implement strategies to ensure women and men can balance work and family commitments. However, the Committee is not consistently drawing upon the interaction between all four dimensions to incorporate and remedy gender-based poverty. This subsection compares and contrasts where the Committee uses the transformative equality framework to recommend sophisticated remedies (Article 14-rural women) and where they have not paid sufficient attention to poverty, equality and human rights (Article 12-health).

a. Rural Women

The Committee's treatment of rural women is another good example of using all four elements of transformative equality. Article 14 of CEDAW requires States to ensure to rural women the right to participate in planning, to health care, to benefit for social security, to obtain training and education, to organise co-operatives, to participate in community activities, to access agricultural credit, equal treatment in land reforms and to enjoy an adequate living conditions, particularly in relation to housing, sanitation, electricity, water, transport and communications.

In Chapter 2, I argued that one of the reasons for not including an explicit substantive provision on poverty was because at the time of drafting poverty was seen only as an issue affecting rural women of the global South. As a consequence, crucial elements necessary to remedy poverty were only guaranteed to rural women. The legacy of this original conception is seen in two ways: first, there is no connection drawn between poverty and rural women in Canada and Norway, the developed countries. Second, the Committee openly identifies poverty as the main obstacle for rural women but only in developing countries. For example, in relation to Jordan, the Committee notes

the ‘disadvantaged positions of women in rural and remote areas who are characterized by poverty.’¹⁴⁹

The Committee makes sophisticated use of the transformative equality framework to incorporate and remedy gender-based poverty for rural women. The Committee is aware that rural women are disproportionately poor,¹⁵⁰ that only a small portion of rural women own land,¹⁵¹ and that a lack of services such as clean drinking water and adequate sanitation exposes women to violence and prevents them from going to school.¹⁵² Again, the Committee demonstrates its understanding of the interaction between the elements of transformative equality, as it routinely notes that negative cultural attitudes limit women’s ability to own and inherit land.¹⁵³ The structural element of transformative equality is also used to highlight the obstacles poor rural women face. Rural women are disproportionately illiterate, which reduces women’s ability to own land.¹⁵⁴ Similarly, only allowing one name on a land certificate reduces the chance of women being land owners.¹⁵⁵ Lastly, the participation element is used to draw to the State’s attention that women are routinely excluded from the design of development policies.¹⁵⁶

Transformative equality is also used to remedy gender-based poverty for rural women. Mexico is encouraged to use targeted temporary special measures with regard to land, property and

¹⁴⁹ ‘Fifth CO: Jordan’ (n 37) [41].

¹⁵⁰ ‘Sixth CO: Romania’ (n 33) [30].

¹⁵¹ ‘Sixth and Seventh CO: Ethiopia’ (n 31) [36].

¹⁵² *ibid.*

¹⁵³ ‘Seventh CO: Kenya’ (n 23) [41].

¹⁵⁴ Tim Hanstad et al, ‘Land and Livelihoods Making Land Rights Real for India’s Rural Poor’ (UN Food and Agricultural Organisation, 2004) Chapter 3.4

¹⁵⁵ The World Bank, ‘Rural Land Certification in Ethiopia Empowers Women’
<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:22836986~pagePK:210058~piPK:210062~theSitePK:336868,00.html>>

¹⁵⁶ *ibid.*

basic social services.¹⁵⁷ Similarly, both Ethiopia and Argentina are encouraged to provide training and credit facilities for women farmers.¹⁵⁸ Jordan is urged to address negative attitudes that impact rural women's ability to own land. Drawing together the recognition and structural dimensions of transformative equality, the Committee recommends that Turkey adopt gender sensitive development strategies for rural development.¹⁵⁹ To change patriarchal land structures Kenya is urged to increase women's access to fertile land and income-generating projects and to 'establish a clear legislative framework to protect women's rights to inheritance and ownership of land.'¹⁶⁰ Argentina and Kenya are both called upon to strengthen and encourage rural women's participation in decision making processes.¹⁶¹

b. Health

In comparison, the Committee is not using the transformative equality framework to assess how gender-based poverty negatively impacts women's access to health care (Article 12).

With respect to both incorporating and remedying gender-based poverty into access to health care the Committee is general and vague. The Committee notes that women have limited access to health services and that there are unacceptable high rates of maternal mortality. It recommends States improve access and reduce maternal mortality.¹⁶² There is no explicit connection drawn between maternal mortality and gender-based poverty. This is problematic because in rural areas or

¹⁵⁷ 'Sixth CO: Mexico' (n 30) [35].

¹⁵⁸ 'Sixth and Seventh CO: Ethiopia' (n 31) [37(b)]; 'Sixth CO: Argentina' (n 14) [42].

¹⁵⁹ 'Sixth CO: Turkey' (n 46) [37].

¹⁶⁰ 'Seventh CO: Kenya' (n 23) [42].

¹⁶¹ *ibid*; 'Sixth CO: Argentina' (n 14) [42].

¹⁶² 'Seventh CO: Canada' (n 22) [41]-[42]; 'Sixth and Seventh CO: Ethiopia' (n 31) [32(a)].

women belonging to ethnic minorities or indigenous populations are at a greater risk of maternal mortality.¹⁶³ This is also exemplified in the case of *Teixeira* who died in childbirth and was a poor, rural Afro-Brazilian woman. For women in poverty, the costs of drugs, medical services and transportation to centres and hospital are significant obstacles to accessing health services.¹⁶⁴ Yet the Committee provides no recommendations on these obstacles. The only specific reference to the costs associated with health care is in relation to contraception and the Committee advocates that this be provided to women free of charge.¹⁶⁵

A transformative equality framework requires the Committee to assess whether the State's health care system addresses the needs of disadvantaged, poor and vulnerable women. This requires an understanding of how women in poverty interact with the national health system.¹⁶⁶ To assess if the distribution of maternal health care is equitable, the Committee can examine how the national health policies are designed to address these issues. The recognition aspect requires recommendations that remedy negative stereotypes about poverty that affect the location, funding and staffing of health care services for women who live in poverty. It also needs to investigate how perceptions of women and household poverty may mean that family resources are not used to ensure women and girl's health.¹⁶⁷ The structural element of transformative equality can draw to the State's attention the costs of accessing health care, and the quality of hospitals, medicines and medical personnel and assess if the State's health care budget meets the needs of women in poverty. Finally, the participation aspect can be used to recommend that State consult with all relevant

¹⁶³ UN Special Rapporteur on the right to health, 'The right to highest standard of health: reduction of maternal mortality' (2006) A/61/338 [10], [28(b)].

¹⁶⁴ *ibid* [10]-[29].

¹⁶⁵ 'First, Second and Third CO: Romania' (n 19) [181].

¹⁶⁶ See *Teixeira* (n 74) [17(b)]. See Rebecca J. Cook, 'Human Rights and Maternal Health: Exploring the Effectiveness of the *Alyne* Decision' (2013) 41(1) J of L, Medicine & Ethics 103.

¹⁶⁷ 'Sixth and Seventh Periodic Reports State Parties: Ethiopia' (2009) CEDAW/C/ETH/6-7 [140].

stakeholders. Incorporating women's voices in the structure of health policies will also ensure that there are responsive to women's actual needs and contribute to more effective implementation.

IV. Evaluative Discussion

There has been an evolution in the Committee's engagement with gender-based poverty. In the initial reporting rounds, the State would use gender-based poverty as an excuse for not fulfilling women's human rights. The Committee never commented on the validity of this justification or recommend the State take measures to remedy women's poverty. There has been a marked change from this initial silence. There is ample evidence that the Committee is concerned and encourages States to remedy gender-based poverty.

Using the transformative equality framework to analyse the Concluding Observations and Individual Communications demonstrates how far the Committee is incorporating gender-based poverty into CEDAW. First, in respect of the disadvantage dimension the Committee independent of any of the articulated provisions in CEDAW consistently expresses concern that women are disproportionately disadvantaged by poverty. It recommends State use temporary special measures and gives priority to women in any poverty reduction strategies. Similarly, the Committee understands how poverty can be an obstacle to accessing education but this understanding has not translated into detailed remedies on how to remove these obstacles. In relation to employment the Committee repeatedly highlights how part time work, gender job segregation, unregulated domestic and informal work disadvantages women. In family law the Committee identifies how traditional conceptions on contributions to the family resources results in women being economically disadvantaged.

The Committee also routinely highlights how negative cultural stereotypes mean women predominate in traditionally female areas of education and that these attitudes impact on women's

disadvantage in employment, decision-making in public and private life. However, it does not understand the unique set of recognition harms experienced by women who live in poverty. Public and private actors often perceive women in poverty as moral failures, as lazy, undisciplined and promiscuous. There is no evidence that the Committee engages or recommends that States address these pernicious stereotypes. In a similar vein, there is no appreciation for how socio-cultural norms that dictate women should perform the bulk of unpaid care work can disadvantage them in education and employment.

The Committee is inconsistent in understanding and remedying structures that perpetuate gender-based poverty. On the positive side, the Committee advocates that States regulate domestic and informal workers and protect women from the negative economic consequences of the breakdown of de facto co-habitation relationships. States are encouraged to include a gender perspective in the design of poverty reduction strategies. However, the Committee falls short on how the structure of social assistance schemes can essentialise women or retrench gendered norms and limiting women's agency. The Committee is similarly inconsistent in advocating for women's participation to ameliorate poverty. As mentioned, women are to participate in the design of poverty alleviation strategies but the Committee makes no recommendation on the participation of women in education.

One of the strengths of the transformative equality framework is the ability to capture the interaction between the dimensions. The Committee best captures and uses all four dimensions of transformative equality in relation to rural women. Rural women are disproportionately poor and lack access to land, water and support services. Women's rural poverty is caused by their exclusion from drafting rural development policies, by negative attitudes to women's land ownership, their illiteracy and the structure of land registration systems that only allow one name on the land certificate. The Committee draws on all four elements of transformative equality to remedy rural

gender-based poverty. States are recommended to use temporary special measures to train women's farmers, to improve cultural attitudes on women owning land, protect women's inheritance and ownership and encourage women's participation in all aspects of rural life. On the other hand, the Committee does not highlight how women in poverty experience denials of health care. There is no analysis of how poverty disadvantages women in accessing health care, how structures and attitudes on poverty affect the quality, funding and location of health care services or an encouragement to include women in the design of health care policies.

The over-arching conclusion from this analysis is that while the Committee engages with gender-based poverty and implicitly taken steps to incorporate gender-based poverty as an issue of gender equality and non-discrimination there is no consistency in this incorporation. At times the Committee demonstrates a sophisticated understanding of the relationship of a certain dimension of transformative equality and gendered poverty in respect of certain provisions. The problem is that this understanding is not sustained across all four dimensions in relation to each substantive provision in CEDAW. For example, the Committee has not used equality to incorporate gender-based poverty into civil and political rights. Moreover, the connection between certain substantive provisions, gender-based poverty, equality and non-discrimination comes out more prominently in respect of certain States, such as Argentina, Ethiopia, Kenya and Canada and not in others, such as Romania, Turkey and Jordan.

V. Conclusion

This chapter has demonstrated that notwithstanding CEDAW's silence as to poverty, the Committee through an evolutionary interpretation of equality and non-discrimination is incorporating the role of gender-based poverty in obstructing women's human rights in the Concluding Observations and Individual Communications. While this is not binding authority for

my proposed interpretation of CEDAW, this chapter synthesises the work the Committee has already done on gender-based poverty. The Committee's interpretation of CEDAW does have significant practical importance. This chapter also illuminates the gaps in the Committee's reasoning process. The next chapter seeks to identify the reason for these gaps so as to assist in determining how to fully include gender-based poverty in the work of the Committee.

CHAPTER 6

THE ROLE OF THE PERIODIC REPORTING PROCESS

I. Introduction

The second part of my thesis explores how my proposed interpretation of CEDAW can be included in the various activities of the Committee. In the previous chapter I investigated how the Committee currently incorporates gender-based poverty into the Concluding Observations and Individual Communications. The Committee has implicitly been interpreting equality and non-discrimination to incorporate the harms of gender-based poverty into CEDAW and been proposing remedies for these unique human rights violations. There are several problems with the Committee's current approach to gender-based poverty. First, it has not been consistently interpreting equality and non-discrimination to incorporate gender-based poverty, thereby missing key aspects of gender-based poverty. Second, the Committee does not appreciate how gender-based poverty is an obstacle to all of the provisions in CEDAW. It makes no connection between for example, poverty and the right to participate in public life (Article 7). As a further layer of inconsistency, in respect of some States the Committee engages in a sustained discussion on gender-based poverty while for others it is practically silent. The differences in the structure and content of gender-based poverty in the Concluding Observations may be based on different aspects of gender-based poverty that are particularly problematic in that country or there may be political reasons for treating high or low income countries differently. While recognising these potential explanations, this chapter analyses one specific factor, the periodic reporting process, to explain the inconsistencies in the Concluding Observations

States are obligated to report on measures they have adopted to implement CEDAW and the Committee is evaluates this progress.¹ The Committee has used this mandate to craft a sophisticated review system that includes the State report, submissions from CSOs and other specialised UN agencies and written and oral dialogue sessions with the State to evaluate the progress each State party has made in eliminating discrimination against women. The hypothesis in this chapter is that the multi-layered periodic reporting process contributes to the inconsistencies in incorporating gender-based poverty in the Concluding Observations.² The chapter is both descriptive and normative. It analyses the publically available material from the periodic reporting process so as to identify where in the process gender-based poverty issues are being raised and included into the Concluding Observations. The chapter then shifts to propose solutions to ensure that the reporting process enables the Committee to systematically incorporating gender-based poverty as an issue of gender equality and non-discrimination in the Concluding Observations. In previous chapters, I have made a normative case for why the Committee should demonstrate an analytically precise engagement with gender-based poverty. Here I seek to substantiate this normative claim in relation to the Committee's involvement with gender-based poverty within the equality and non-discrimination framework in one of the Committee's key activities: the Concluding Observations. In the last two chapters I will consider the same question in relation to the content and structure of a General Recommendation on women and poverty.

This chapter begins by analysing in greater detail the Concluding Observations from a sample of States where the Committee to varying degrees engages with gender-based poverty. This reveals that the Committee is inconsistent on the aspects of gender-based poverty it chooses to

¹ Articles 17-19 of CEDAW.

² The inconsistencies in the Individual Communications are not investigated. The submissions of the parties are not available making it impossible to analyse what contributes to the Committee incorporating gender-based poverty into their decision.

focuses on and how it structures the analysis on gender-based poverty. The second section examines the material placed before the Committee when they draft the Concluding Observations. The purpose of this is two-fold: to identify the factors within the periodic reporting process that result in the Committee giving significant attention to gender-based poverty and the factors within the reporting process that affects how it structures its concerns and recommendation on gender-based poverty. This analysis demonstrates that the State report and CSO submissions are highly influential. Although there are various places in the periodic reporting process where the Committee can ask questions, there is little evidence that it takes a more probing approach to gender-based poverty when the State has not raised this issue. The final section draws these findings together to propose reforms to the State reporting guidelines and canvasses how to engage CSOs with gender-based poverty. This is a crucial step to ensure the Committee comprehensively interprets equality and non-discrimination to incorporate the harms of gender-based poverty. This analysis also highlights the importance of drafting a General Recommendation on woman and poverty to not only to ensure consistency in the reporting process but also to draw together and expand upon the Committee's current understanding of gender-based poverty.

II. The Mandate of the Committee

Before analysing the material submitted for the periodic reporting process, it is important to examine the Committee's mandate to consider gendered poverty in the Concluding Observations. Chapter 5 demonstrated that the Committee had been incorporating gender-based poverty into Concluding Observations. Here I propose modifications to the periodic reporting process to ensure that gender-based poverty is comprehensively included in the Concluding Observations. It is necessary to pause and consider if the Committee has a mandate under the text of the treaty to

consider gender-based poverty before making a normative case for how the Committee can comprehensively include gender-based poverty in one of its primary activities.

The Committee was established to consider the progress made in implementing CEDAW and is tasked with considering the State reports.³ This is a very broad mandate. While there is some recent scholarship on how the Committee has developed this mandate through the General Recommendations, Concluding Observations and Individual Communications, there is very little analysis on the subject matter jurisdiction of the Committee.⁴ Byrnes explains that ‘the Committee faces the challenging tasks of assessing whether the steps a State Party has taken (or its failure to act) are consistent with its Convention obligations.’⁵ This implies that if there are obstacles to the implementation of CEDAW the Committee has the mandate to consider this obstacle. In Chapter 1, I demonstrated that gender-based poverty is a pressing obstacle to the realisation of the obligations in CEDAW. Thus, the Committee does have a mandate to evaluate how States are making progress in implementing CEDAW in light of gender-based poverty.

III. Gender-Based Poverty in the Concluding Observations

In the previous chapter I concluded that the Committee is inconsistent in how it currently approaches the problem of gender-based poverty. This chapter investigates if the periodic reporting process contributes to this and how the process can be calibrated so as to ensure a more consistent approach. To effectively do this, it is necessary to examine in greater detail precisely how the

³ Article 17 and 20 of CEDAW.

⁴ See Andrew Byrnes ‘The Convention and the Committee: Reflections on their role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform’ (CSW, 2010); Simone Cusack and Alexandra Timmer ‘Gender Stereotyping in Rape Cases: The CEDAW Committee’s Decision in *Vertido v The Philippines*’ (2011) 11:2 Human Rights L Rev 329.

⁵ Andrew Byrnes, ‘The Committee on the Elimination of Discrimination Against Women’ in Anne Hellum and Henriette Singding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 49.

Committee structures its concerns and recommendations on gender-based poverty in the Concluding Observations. This forms the basis for the analysis in the proceeding sections.

Similar to Chapters 4 and 5, this raises a methodological challenge. There is an unworkable volume of primary material. To analyse the material in sufficient depth, even using the twelve States that were used previously is problematic. To solve this problem, I further refine the sample of States used in the previous chapters. I examine the material from the latest reporting period from two States where poverty is frequently referred to: Canada and Ethiopia and two where there are very few references: Jordan and Turkey. Below I explain why these four States are good examples of the Committee's engagement or lack thereof with gender-based poverty. Even though this is a smaller sample size than previous chapters, it does allow for a more in-depth assessment of the material which in turn reveals unseen trends in the Committee's reasoning process.

Canada is a good choice for further study for two reasons. First, in the Canadian Concluding Observations the Committee makes implicit reference to poverty in relation to the substantive provisions of CEDAW. Examples include the gender pay gap (Article 11-employment) and equal distribution of property on divorce under (Article 16-family life). Second, gender-based poverty is also discussed without reference to any of the provisions of CEDAW.⁶ Instead the Committee frames poverty as an independent problem. For example, early in the Concluding Observations the Committee expresses concern that there is no federal accountability mechanism to 'ensure minimum standards across the country for the provision of...social assistance programmes for women.'⁷ There is no provision in CEDAW that requires the State to ensure the minimum standards for social assistance programs.⁸ The Committee further notes that the cuts to the social assistance schemes

⁶ The Committee 'Seventh Concluding Observations: Canada' (2008) CEDAW/C/CAN/CO/7 [37], [47].

⁷ *ibid* [13].

⁸ Article 14(2)(c) of CEDAW only requires that rural women benefit directly from social security programmes.

have a negative impact on vulnerable women (single mothers, aboriginal women, immigrant, ethnic, elderly and disabled women) who rely on social assistance for an adequate standard of living.⁹ It elaborates on this in greater detail with respect to aboriginal women: aboriginal women in Canada ‘live in impoverished conditions, which include high rates of poverty, poor health, inadequate housing [and] lack of access to clean water.’¹⁰ Under the heading ‘Employment and Economic Empowerment’ the Committee again discusses poverty as a problem without making any connection to Article 11 (employment). The Committee notes that ‘poverty is widespread among women’ and that in Canada there is a lack of affordable childcare and housing for low-income women.¹¹ The Committee also expresses concern that cuts to legal aid, particularly in British Columbia, mean low-income women are denied access to justice.¹² There are no references to poverty in relation to health care, participation in public life, prostitution, trafficking or rural women.

Similar to Canada, there is a sustained discussion on gender-based poverty in the Ethiopian Concluding Observations. It is a good foil to Canada because when the Committee discusses poverty in Ethiopia it takes a comprehensive approach. It begins by congratulating Ethiopia on focusing their national poverty reduction programmes on the needs of women and on providing financial incentives for parents to send their daughters to school.¹³ In the analytical section of the Concluding Observations, the Committee raises the issue of gender-based poverty in relation to many of the provisions of the treaty. Under Article 6 (trafficking and exploitation of prostitution), the Committee is concerned that the State had taken ‘limited measures to address poverty as the

⁹Seventh CO: Canada’ (n 6) [13].

¹⁰ *ibid* [43].

¹¹ *ibid* [39].

¹² *ibid* [21].

¹³ The Committee, ‘Sixth and Seventh Concluding Observations: Ethiopia’ (2011) CEDAW/C/ETH/CO/6-7 [6], [8].

root cause of trafficking.¹⁴ It also observes that poor girls have limited access to school due to ‘the economic and socio-cultural barriers, such as indirect costs of schooling’ (Article 10).¹⁵ Under employment (Article 11), the Committee notes that women are engaged in unpaid family work, segregated in low paying jobs often without access to social protection and have limited access to land, credit and information.¹⁶ The Committee is also concerned that ‘rural women depend on men for economic support, that only 19 per cent of women own land and that the number of women borrowers from microfinance institutions is decreasing...that the majority of the rural population has no sustainable access to safe drinking water...forcing many women and girls to walk long distances to collect water...preventing girls from attending school’ (Article 14).¹⁷ The Committee is worried that foreign companies are leasing vast areas of arable land which displaces the rural population and ‘further contributes to women’s food insecurity and the feminisation of poverty.’¹⁸ Finally, the Committee notes that women often don’t inherit land because it is assumed they will move to their husband’s home and that upon widowhood or divorce a woman loses any rights in property (Article 16).¹⁹ There is no reference to social assistance schemes, housing programmes or legal aid, issues that are prominent in the Canadian Concluding Observations.

In both Jordan and Turkey there is no sustained engagement with poverty. References to gender-based poverty are in passing and tend focus on either rural or women with intersectional identities. In Jordan, the Committee notes that rural women are disproportionately poor, lack access

¹⁴ *ibid* [24].

¹⁵ *ibid* [30].

¹⁶ *ibid* [32].

¹⁷ *ibid* [36].

¹⁸ *ibid*.

¹⁹ *ibid* [40].

to health and social services and are often prevented from inheriting land due to discriminatory socio-cultural attitudes.²⁰ Similarly, the Committee is concerned that migrant women workers are routinely exploited.²¹ It also notes that there is a persistent gender pay gap²² and that education and health services are denied to children of Jordanian women who are married to foreigners.²³ These are isolated examples. There is no discussion of gender-based poverty as an independent wrong as in the Canadian example and gender-based poverty is not consistently included as in Ethiopia. The Committee's approach to gender-based poverty in Turkey is similar to that in Jordan. There is no sustained discussion of gender-based poverty. The Committee notes that women's economic dependence contributed to their poor health in Turkey²⁴ and that disadvantaged women (Kurdish, ethnic, minority, migrant, elderly and disabled women) are more vulnerable to poverty.²⁵ The Committee does note the high unemployment rate of women, the existence of discriminatory hiring processes, the wide gender pay gap and unpaid family workers, who are disproportionately women and are not entitled to social security.²⁶ The remainder of the Concluding Observations makes no reference to gender-based poverty.

These four States exemplify the two opposing ends of the spectrum in regards to the how the Committee incorporates gender-based poverty into CEDAW. In Jordan and Turkey there is very limited reference to gender-based poverty. In both Concluding Observations poverty is overtly

²⁰ The Committee, 'Fifth Concluding Observations: Jordan' (2012) CEDAW/C/JOR/CO/5 [47].

²¹ *ibid* [43].

²² *ibid* [37].

²³*ibid* [33].

²⁴ The Committee, 'Sixth Concluding Observations: Turkey' (2010) CEDAW/C/TUR/CO/6 [34].

²⁵ *ibid* [38].

²⁶ *ibid* [32].

referred to only in relation to intersectional identities. By contrast, in Canada and Ethiopia there is a concentrated focus on gender-based poverty. However, the Committee takes a very different approach to gender-based poverty in each of these Concluding Observations. In Canada, gender-based poverty is discussed without any reference to the other provisions of CEDAW. On the other hand, in Ethiopia, gender-based poverty is comprehensively included in the Concluding Observations and there are multiple discussions on how gender-based poverty is an obstacle to women's human rights. Moreover, in the Ethiopian Concluding Observations the Committee's discussion is anchored in the text of CEDAW. The aspects of gender-based poverty the Committee chooses to focus on are different. In Canada the Committee focuses on social assistance rates, housing programmes, childcare and legal aid while in Ethiopia, the Committee discusses prostitution, food and water insecurity, access to land and education.

The more detailed assessment of these Concluding Observations reveals that the Committee not only engages with poverty to a different degree between different States but also that there are differences in the content and structure of this engagement. The next section analyses the material that was before the Committee when drafting the Concluding Observations for Canada, Ethiopia, Jordan and Turkey to explain these differences.

IV. Material Relied Upon in the Reporting Process

The overall inconsistencies in the Concluding Observations indicate that there may be one or more factors which influence the degree to which the Committee engages with gender-based poverty.

There are many possible explanations for these differences. However, this section only analyses the material from the submissions and sources involved in the periodic reporting process to identify how this process contributes to the inclusion of gender-based poverty into the Concluding Observations. First, I provide a brief description of the working methods of the Committee. Second,

to assess whether the determinative factor within the periodic reporting process is the State report, submissions from the CSOs and UN agencies or the questions of the Committee, I analyse the material submitted from the latest periodic review from Canada, Ethiopia, Jordan and Turkey. This assessment reveals that the key factor in the reporting process in ensuring poverty is incorporated into the Concluding Observations is the State report and CSO submissions. Not only are these two sources essential for ensuring the Committee includes gender-based poverty in the Concluding Observations, they also shape the content and structure of the Committee's discussion on gender-based poverty. Although the Committee can ask questions to gather more information, the evidence indicates that generally the Committee does not substantially engage with poverty when it is not raised by either the State report or CSOs.

Before turning to the analysis, it is necessary to explain the methodology of this chapter. It relies exclusively on material that is publically available: the State report, CSO submissions, the Committee's list of questions, the State Reply and the Summary Records from the oral dialogue session. This is not to deny the importance and influence of individual Committee members having when drafting Concluding Observations. For example, in the early days of the Committee, the member from the USSR wanted to use the periodic reporting process to showcase the gains for women under socialist systems.²⁷ As a result of her vision early Concluding Observations for all States were devoid of serious criticism. There is evidence that current Committee members champion certain issues. Committee members are involved in discussions on the post-2015 development agenda, femicide in Latin America and HIV/AIDS in the Caribbean.²⁸ Individual Committee members can have an important role in ensuring that specific issues of gender equality such as gender-based poverty are incorporated into CEDAW and raised in the periodic reporting

²⁷ Elizabeth Evatt, 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002-2003) 34 *George Washington Intl L Rev* 515, 524.

²⁸ The Committee, 'Summary Record: 1215th meeting' (2014) CEDAW/C/SR.1215.

process. However, it is outside of the scope of this thesis to assess how the individual Committee members may influence if gender-based poverty is included and which aspects of gender-based poverty are discussed in the Concluding Observations. The conclusions from this chapter are drawn only on the basis of the publically available material.

(i) *The Working Methods of the Committee*

By Article 18 of CEDAW each State party is obligated to submit a report every four years detailing how they have taken measures to comply with CEDAW. Article 17 provides that a Committee of ‘twenty-three experts of high moral standing and competence’ in gender equality and non-discrimination shall monitor the progress made in implementing CEDAW. It has complete discretion as to its procedures.²⁹ The Committee has translated these obligations into a multi-layered periodic review process. This section briefly explains the working methods of the Committee.

The first element in the process is the State report. The purpose of the State report is to ‘obtain a complete picture’ of the situation of women in the State.³⁰ Alongside the CEDAW specific report, the State should submit the common core document. This document ‘should contain information of a general and factual nature relating to the implementation of the treaties to which the reporting State is party and which may be of relevance to all or several treaty bodies.’³¹ The OHCHR and specific treaty bodies have created a harmonised set of reporting guidelines for both the common core document and treaty specific State reports.

In order to enhance the effectiveness of the reporting process and improve the constructive dialogue between the State and the Committee, ‘the Committee designates from among its members

²⁹ Article 19 of CEDAW.

³⁰ OHCHR, ‘Compilation of Guidelines on the Form and Content of Report to be Submitted by State Parties to the International Human Rights Treaties, Report of the Secretary General’ (2009) HRI/GEN/2/Rev.6 [3].

³¹ *ibid* [27].

a country rapporteur for the report of each State party.³² The country rapporteur provides a briefing note explaining the prominent issues of gender equality in the State. This focuses on the main areas of concern and does not necessarily provide an article-by-article analysis of the State's progress in implementing CEDAW.³³ The briefing note draws on information from the UN country team in place in the State under review.³⁴ The briefing note is not publicly available. The template for the briefing note follows the structure of CEDAW. There is one explicit reference to gender-based poverty in the template. Under Article 13, economic and social life, the template asks whether 'development and anti-poverty strategies integrate a gender perspective and address specific needs of women'; what types of measures are in place to ensure women can access various forms of credit and to explain the discrimination women face in accessing social benefits and pensions.³⁵ The country rapporteur also assists the pre-session working group.³⁶ This sub-group of the Committee reviews the State report. The pre-session working group 'draws up short lists of issues and questions...each list contains no more than 30 clear and direct questions that focus on major areas of concern with regard to the implementation of the Convention.'³⁷ The list of issues is meant to pose questions on pressing issues of gender equality and is not a comprehensive review of the State report. The State provides a written response to these questions.

³² *ibid* [5].

³³ The Committee, 'Report of the Committee on the Elimination of Discrimination Against Women: 49th, 50th and 51st Session' (2012) A/67/38, 37.

³⁴ *ibid*.

³⁵ The Committee, 'Report of the Committee on the Elimination of Discrimination against Women: 52nd, 53rd, and 54th Session—Annex II' (2013) A/68/38.

³⁶ *ibid*.

³⁷ The Committee, 'Overview of the Current Working Methods of the Committee on CEDAW' (2004) CEDAW/C/2004/1/4/Add.1 [6].

To ensure the Committee has a complete understanding of the on-the-ground situation, CSOs are encouraged to submit country-specific information to the pre-session working group.³⁸ The CSOs can submit a written report or provide information in person before the pre-session working group. Although there is no official recognition of CSOs in CEDAW, there is now an established practice that the official State reports are supplemented by submissions from CSOs. The current working methods of the Committee openly encourage submissions from CSOs.³⁹ The latest Annual Report from the Committee indicates that there are informal meetings between the Committee and prominent CSOs.⁴⁰ Their reports serve as a counter-weight to the State's natural bias when reporting on its own activities.⁴¹ Given that the Committee has no fact-finding ability, CSO reports have been described as an essential element to obtain an 'accurate picture of the human rights situation.'⁴² Treaty bodies have explained that they could not 'function effectively if they were to disregard information that emanated from reliable and official sources.'⁴³

Unlike CSOs, there is formal recognition of UN agencies in the reporting process. By Article 22 of CEDAW other UN agencies are given the opportunity to contribute to the work of the Committee. The latest working methods of the Committee also encourages specialised UN agencies to make submissions to the Committee. The working methods do not provide any examples, but in

³⁸ *ibid* [30].

³⁹ *ibid*.

⁴⁰ 'Report on the 52nd, 53rd and 54th Session' (n 35) [9].

⁴¹ Joanna Whiteman 'Lessons from Supervisory Mechanisms in International Regional Law' (2013) 26(3) *J of Refugee Studies* 360.

⁴² Laura Theytaz-Bergman 'State reporting and the role of non-government organisation' in Anne Bayesky (ed) *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International Publishers, 2000) cited in Felice Gaer, 'Implementing international human rights norms: UN human rights treaty bodies and NGOs' (2002) 2(3) *J of Hum Rts* 339, 348.

⁴³ Cecilia Medina, past Chair of the Human Rights Committee 'UN Press Release (26 March 2001) as cited in Gaer (n 42) 340.

the material examined below both the ILO and UNESCO have made official submissions to the pre-session working group. Unlike CSOs, specialised UN agencies can also submit material during closed sessions of the Committee.⁴⁴ There is evidence that there are routine discussions between the Committee members and other UN agencies. For example, the Committee met with an UN expert on Indigenous Peoples and Minorities and as mentioned in Chapter 3 there is a working group that consists of members of the CEDAW Committee and the HRC.⁴⁵

Before the dialogue session, the State is given a chance to submit written replies to the list of issues. There is then an oral discussion between State representatives and the Committee. The working methods continually emphasise that it is meant to be a constructive and focused interaction. The session will try ‘to focus on issues identified by the pre-session working group’⁴⁶ because only issues ‘raised during the constructive dialogue are included in the Concluding Observations.’⁴⁷ The dialogue session is recorded in the Summary Records of the Committee. With all this information the Committee in closed session drafts the Concluding Observation.

The State reporting process is multi-faceted and the Committee draws on numerous sources so as to understand how the State has implemented CEDAW. This means there are numerous instances where gender-based poverty can be fed into the reporting process. Below I examine the publically available material, the State report, submissions from CSOs and UN agencies, the list of issues generated by the pre-session working group, State reply and Summary Records from the latest

⁴⁴ The Committee, ‘Report on the Committee on the Elimination of Discrimination Against Women: 55th Session’ (2013) A/69/38, Decision 55/VII.

⁴⁵ ‘Report 52nd, 53rd and 54th Session’ (n 35) [11]-[12].

⁴⁶ ‘Overview of Working Methods’ (n 37) [12].

⁴⁷ *ibid* [18].

periodic reviews for Canada, Ethiopia, Jordan and Turkey to identify which element results in poverty being included in the Concluding Observations.

(ii) *Common Core Document*

The initial step in the periodic reporting process is the common core document. The evidence indicates that the common core document is not an influential factor. The Ethiopian common core document contains a lot of information on the de facto situation of low-income women but the Canadian document contains very few references to women in poverty. Nevertheless, the Committee engaged with gender-based poverty to a similar degree in both Canada and Ethiopia.

The Ethiopian common core document explains the two key programs aimed at reducing poverty among women: Ethiopian Women's Development Fund (EWDF) and the Plan for Accelerated and Sustainable Development to End Poverty (PASDEP). The EWDF works to 'enable women...to organise income generating activities with the view to alleviating their economical and social problems.'⁴⁸ Women are also central to the goals of the PASDEP. The document explains that 'the Government has moved decisively to advance the agenda on the gender dimensions of poverty...which forms the core of the gender strategy under PASEDP.'⁴⁹ This program focuses on increasing the participation of girls and women in education, the labour market and political process and improving women's access to land, credit and other productive resources.⁵⁰ The common core document also provides statistical information on the real total per capita household consumption

⁴⁸ 'Core Document Forming Part of the Reports of State Parties: Ethiopia' (2008) HRI/CORE/ETH/2008 [200].

⁴⁹ *ibid* [207].

⁵⁰ *ibid* [205]-[06].

expenditure,⁵¹ the national average of calories consumed,⁵² the proportion of people below the poverty line⁵³ and the food poverty line.⁵⁴ This information is not disaggregated for gender.⁵⁵

The common core documents of the three remaining States provide little information on gender-based poverty. The Canadian document only provides information on the gender pay gap, the number of families below the poverty line and the rates of inflation but the statistical information is all from the early 1990s.⁵⁶ The Jordanian document contains no specific information on gender-based poverty⁵⁷ and the Turkish document briefly explains that poverty reduction programmes are aimed at improving the conditions of several disadvantaged groups including women.⁵⁸

(iii) The State Report

The State report is highly influential not only in the Committee deciding to engage with gender-based poverty but also in how it structures the Concluding Observations on gender-based poverty. Both Canada and Ethiopia openly engage with poverty and the manner in which they do so is directly reflected in the Concluding Observations. On the other hand, neither Jordan nor Turkey

⁵¹ *ibid* Annex II [2].

⁵² *ibid* Annex II [3].

⁵³ *ibid* Annex II [7].

⁵⁴ *ibid* Annex II [11].

⁵⁵ *ibid* Annex II [7]-[13], [22]-[23].

⁵⁶ 'Core Document Form Part of the Reports of State Parties: Canada' (1998) HRI/CORE/1/Add.91.

⁵⁷ 'Core Document Form Part of the Reports of State Parties: Jordan' (1994) HRI/CORE/1/Add.18/Rev. 1.

⁵⁸ 'Core Document Forming Part of the Report of State Parties: Turkey' (2007) HRI/CORE/TUR/2007 [199]-[200].

substantially addresses how poverty is an obstacle to women's human rights and this silence is reflected in the Concluding Observations for both of these States.

There is a certain degree of similarity between the two State reports where the Committee engaged with gender-based poverty in the Concluding Observations. The introductory paragraphs of both State reports highlight the situation of women in poverty. In the general overview, the Canadian report provides information on the number of women who live below the low income measure.⁵⁹ It also provides information on women's participation in the standard and non-standard labour market and the amount of funding for affordable childcare and women entrepreneurs.⁶⁰ Ethiopia also discusses measures to reduce poverty very early in the report. At paragraph 3, the Ethiopian government explains "The National Poverty Reduction Strategy adopted by the Government was framed in such a way that accords due recognition to women's legitimate share in the country's overall development."⁶¹ The report describes these programmes as accounting for women's peculiar needs and aims to improve girls' education, to provide water and to raise the standard of basic health care for women.⁶²

Although both Canada and Ethiopia directly address the issue of gender-based poverty, the reports do so in a very different manner. The Canadian report uses headings and sub-headings to draw attention to the steps they are taking to address the particular needs of low-income women. Under the heading of 'Article 13: Economic and Social Life' the first sub-heading is 'Measures to Fight Poverty' and another is 'Women's Access to Housing.' Under 'Article 11: Employment', each province reports on measures to ensure affordable childcare and under 'Article 2: Anti-

⁵⁹ 'Sixth and Seventh Periodic Reports State Parties: Canada' (2008) CEDAW/C/CAN/7 [13]-[14].

⁶⁰ *ibid* [104]-[06].

⁶¹ 'Sixth and Seventh Periodic Reports State Parties: Ethiopia' (2009) CEDAW/C/ETH/6-7 [3].

⁶² *ibid*.

Discrimination Measures' each province reports on legal aid. With the report disaggregated by each jurisdiction in Canada there are 15 separate instances where measures to combat poverty, access to housing, legal aid and affordable child-care are directly reported on. The Canadian State report also discusses poverty reduction measures in relation to other provisions of CEDAW. Various provinces report under Article 11 (employment) on the efforts to reduce the gender pay gap⁶³, to raise minimum wage⁶⁴ and to implement loans and support programmes for women entrepreneurs⁶⁵ and farmers.⁶⁶ Nevertheless the report is not always a critical analysis of how poverty is an obstacle to women's human rights. It tends to explain programmes that exist, the budgetary allocation for these programmes and statistics showing a reduction in poverty.⁶⁷ While the State report is a valuable source of information, the lack of critical perspective emphasises the importance of engaging with CSOs.

The Ethiopian State report also candidly discusses the specific needs of women in poverty and the measures taken to eliminate gender-based poverty. Unlike Canada, Ethiopia admits that poverty is a serious and continuing obstacle for women and the report is closer to a critical assessment of the de facto situation. There are no specific sub-headings like in the Canadian report that focus on poverty. Rather, Ethiopia approaches the problem of gender-based poverty more comprehensively. The State makes reference to the situation of women in poverty in relation to most of the substantive obligations in CEDAW. For example, Ethiopia directly connects women's poverty to their poor health. The report explains that the long distance from health facilities, the lack of

⁶³ 'Canada State Report' (n 59) [31] and Appendix 4.

⁶⁴ See *ibid* [365], [417] Appendix 2 and Appendix 4.

⁶⁵ *ibid* [106].

⁶⁶ *ibid* [132]-[34], [480]-[83] and [527]-[28].

⁶⁷ *ibid* [370]-[72].

financial resources to pay for transport and health care services and women's heavy workloads limits their ability to access to health care.⁶⁸ Poverty and women's low economic status are also the causes of Ethiopia's high maternal mortality. Low income households do not invest resources in obtaining skilled maternity and child-birth care.⁶⁹ Ethiopia explains the measures taken to address these problems: emergency health care, family planning services, prenatal, delivery and post-natal services are provided free of charge.⁷⁰ The report also emphasises that women are unable to access financial credit because of their inability to provide sufficient collateral to obtain a loan and institutional stereotypes against lending to women.⁷¹ Ethiopia again explains the programs they have implemented to remedy these structural barriers and negative attitudes.⁷² Lastly, Ethiopia notes how rural women are over-worked and that their labours were not recognised and they do not benefit from their work.⁷³ The State explains how they are developing technologies to reduce the burden of household work on women.

It is easy to detect the influence of the State report in the Concluding Observations for both Canada and Ethiopia. Similar to the Canadian State report, the Committee discusses legal aid funding at the beginning of the Concluding Observations, the Committee's concerns on affordable childcare are incorporated into their discussion on employment, and poverty and housing issues are concurrently discussed under the heading 'Employment and Economic Empowerment.'⁷⁴ The same

⁶⁸ 'Ethiopia State Report' (n 61) [131].

⁶⁹ *ibid* [140].

⁷⁰ *ibid* [134].

⁷¹ *ibid* [157].

⁷² *ibid* [160]-[61].

⁷³ *ibid* [167].

⁷⁴ See 'Seventh CO: Canada' (n 6).

can be seen in respect of Ethiopia. The Committee appears to be following the lead of the State report, for similar to the report the Concluding Observations discusses gender-based poverty comprehensively. The Committee, as explained above, makes references to poverty in relation to education, rural women and access to economic resources. However, there is not perfect symmetry between the State report and the Concluding Observations. For example, the Canadian State report does not explain how federal funds for social assistance are provided to the provinces without restrictions whereas the Concluding Observations does. Similarly, the Ethiopian State report makes no reference to poverty and prostitution but the Concluding Observations do draw a connection between the two and the Ethiopian Concluding Observations do not refer to poverty as a contributing factor to maternal mortality where as the Ethiopian State report does. This means while the State report appears to be highly influential, it is not the only factor influencing whether the Committee discusses gender-based poverty in the Concluding Observations.

The same level of focus and detail in identifying gender-based poverty as an obstacle to human rights is not evident in the State report for Jordan and Turkey. References to poverty in the State report are frequently in passing. There is no focused assessment as in Canada and Ethiopia. As a possible consequence of this, when the report refers to poverty it does not always explain what measures are being taken to reduce poverty. For example, the report notes that Turkish women cannot access health programmes because they do not have sufficient levels of economic independence.⁷⁵ However, the State is not working towards economically empowering women; rather it is creating programmes to bring health services into the home.⁷⁶ In comparison, in Ethiopia and Canada when the State discusses poverty it consistently reports on the measures it is taking to

⁷⁵ 'Sixth Periodic Report of State Parties: Turkey' (2008) CEDAW/C/TUR/6 [63].

⁷⁶ *ibid.*

reduce poverty. For example, in Ethiopia the State provides extensive details on the programmes in place to ensure high quality and affordable maternal health care.⁷⁷ In a similar vein, while Jordan is creating economic opportunities to get women out of low paying jobs, the report acknowledges that they have very little information on women in the informal labour market due in part to their exclusion from social insurance schemes.⁷⁸ In response to this problem, Jordan is only taking measures to collect information on women's role in the informal labour market and there is no reference to extending social insurance schemes to non-standard employment.⁷⁹ There is one exception to this trend. The Turkish State report identifies poverty as an obstacle to the enjoyment of education⁸⁰ and larger conditional cash transfers are given to families with girls than with boys to ensure girls stay in school.⁸¹ The passing references in the State report are mirrored in the Concluding Observations which also only makes brief references to poverty. This is further evidence that the State report is highly influential. This is paradoxical as it acts as a disincentive for States to report on poverty to avoid criticism from the Committee on gender-based poverty. This demonstrates the importance for the Committee to ask questions and interrogate the State on gender-based poverty. The evidence, discussed below, indicates the Committee needs to be more consistent and ask more explicit questions on gender-based poverty even if the State does not report on gender-based poverty.

⁷⁷ 'Ethiopia State Report' (n 61) [135], [142]-[49].

⁷⁸'Fifth Periodic Report of State Parties: Jordan' (2010) CEDAW/C/JOR/5 [160].

⁷⁹ *ibid.*

⁸⁰ *ibid* [35].

⁸¹ *ibid* [18].

(iv) *CSOs Submissions*

The CSO submissions also play a vital role in bringing gender-based poverty to the forefront. The Canadian CSO submissions are almost exclusively focused on poverty and unlike the State report these submissions are highly critical of the State's response to gender-based poverty. The CSO submissions from the remaining three States also discuss gender-based poverty but not to the same extent as Canada. However, even in the limited instances where these other reports do discuss gender-based poverty the CSOs observations tend to be incorporated into the Concluding Observations. This testifies to the importance of CSOs in the periodic reporting process.

A substantial number of the Canadian CSOs report on how Canada is failing to reduce poverty among women. Out of the 15 reports submitted to the Committee, 11 reports explicitly discuss the situation of Canadian women in poverty. They repeatedly emphasize that the Canadian State report masks how vulnerable women (single mothers, Aboriginal women, older, disabled, minorities and migrant women) are disproportionately poor.⁸² They highlight that the new eligibility restrictions and cuts to benefit levels mean that many women live below the poverty line.⁸³ The various CSOs also comment on women's poor access to housing, the lack of legal aid for poverty law and the lack of social benefits for women in non-standard employment.⁸⁴ Many of the concerns of the Canadian CSOs are included in the Concluding Observations. For example, the Committee discusses how certain women are more vulnerable to poverty and expresses concern about cuts to

⁸²See Feminist Alliance for International Action, 'A Failing Grade on Women's Equality: Canada's Human Rights Record on Women' (2008) [8] <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_42_8224_E.pdf>.

⁸³ *ibid* [11].

⁸⁴ The Poverty and Human Rights Centre, 'Inaction and Non-compliance: British Columbia's Approach to Women's Inequality' 18, 33, 35, 49-59 <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_42_8236_E.pdf>.

social assistance programmes.⁸⁵ Even more specifically, the Feminist Alliance for International Action argues that the reduction in social assistance was due to the removal of federal over-sight in how funds for social programs were spent.⁸⁶ In the Concluding Observations the Committee pays specific attention to the issue and recommends that Canada ‘establish minimum standards for the provision of funding to social assistance.’⁸⁷ The Poverty and Human Rights Centre reports on how British Columbia has drastically cut funding to legal aid. The Committee in the Concluding Observations expresses concerns on the funding of legal aid in British Columbia, without mentioning any of the other provinces in Canada.

The CSOs from Ethiopia, Jordan and Turkey do not focus on poverty to the same degree as Canada, but there are references to poverty in their submissions. To varying degrees these are influential. In relation to Ethiopia, the African Rights Monitor points out that only paid workers in Ethiopia are eligible for pensions and that more women than men are unemployed so more women are ‘without social security of any kind.’⁸⁸ The CSOs note that women’s unequal access to land and livestock causes them to be poor;⁸⁹ that there is a shortage of clean drinking water and the burden of finding and collecting clean water falls on women;⁹⁰ that women’s low status in the home means

⁸⁵ ‘Seventh CO: Canada’ (n 6) [32].

⁸⁶ Feminist Alliance for International Action (n 82) [20].

⁸⁷ ‘Seventh CO: Canada’ (n 6) [14]-[15].

⁸⁸ African Rights Monitor, ‘Submission of the African Rights Monitor to the Committee on the Elimination of Discrimination Against Women’ 28
<http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ETH/INT_CEDAW_NGO_ETH_49_8757_E.pdf>.

⁸⁹ Minority Rights Group International, ‘Submission to the 49th Session on CEDAW’ 9
<http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ETH/INT_CEDAW_NGO_ETH_49_8759_E.pdf>.

⁹⁰ African Rights Monitor (n 88) 35.

intra-household allocation of resources favours men;⁹¹ and that men abduct girls when the man's family cannot afford to pay the girl's bride price.⁹² Interestingly, some of the CSOs concerns are incorporated into the Concluding Observations while others are not. For example, the shortage of drinking water, unequal access to land and exclusion from social security protection are all discussed by the Committee. However, the connection between poverty and forced early marriage is not made in the Concluding Observations. The Committee only recommends that Ethiopia 'use innovative measures to strengthen understanding of [women's] equal rights to freely choose a spouse and enter marriage.'⁹³ There is also no mention in the Concluding Observations on improving gender stereotypes that affect the intra-household allocation of resources.

There is a similar pattern with respect to the Turkey and Jordan. The Turkish CSOs point out that micro-credit schemes 'fall short of challenging formal paid wage...as the male domain.'⁹⁴ They call for increasing social security to cover temporary agricultural workers, home and wage worker women.⁹⁵ One report notes that the Turkish government used budget constraints and IMF targets as justifications to 'narrow the scope of social services.'⁹⁶ The Concluding Observations for Turkey do not mention budget cutbacks but do recommend that Turkey ensure women in the informal labour market have access to social services. Lastly, the Jordanian CSOs highlight how non-Jordanian men who marry Jordanian women and any children of the union are excluded from

⁹¹Minority Rights Group International (n 89) 7.

⁹² *ibid* 9.

⁹³ 'Sixth and Seventh CO: Ethiopia' (n 13) [19].

⁹⁴ 'The Executive Committee for NGO Forum on CEDAW-Turkey Women's Platform on the Turkish Penal Code, 'Shadow Report' 14
<http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/TUR/INT_CEDAW_NGO_TUR_46_10193_E.pdf>.

⁹⁵*ibid* 17.

⁹⁶*ibid* 15.

social security, that rural women do not access the loan schemes in place because they do not have sufficient collateral and that cultural norms often require women and girls to waive their share of any inheritance.⁹⁷ The Jordanian Concluding Observations include recommendations on all of these aspects of gender-based poverty.

(v) *List of Issues*

The list of issues is the first chance for the Committee to engage with the State and transcend any gaps in the State report or CSO submissions by asking questions on gender-based poverty. In relation to Canada, Ethiopia and Jordan, the pre-session working group uses the list of issues to gather more information on women in poverty. Again this is most prominent in Canada and Ethiopia. With respect to Turkey, the list of issues repeatedly identifies gender-based poverty as an obstacle but then the working group does not ask any follow-up questions on how the State is addressing this obstacle. Moreover, the aspects of gender-based poverty that the Committee chooses to ask further questions about are those that have been raised by the State or CSOs. This indicates that the Committee is highly responsive to material submitted to it.

The list of issues for Canada has several questions on gender-based poverty. The pre-session working group requests further information on the mechanisms for the implementation of equal pay;⁹⁸ asks whether Canada has done a gender impact assessment of the anti-poverty programmes and what measures it has taken to combat poverty among women, particularly vulnerable women.⁹⁹

⁹⁷ Arab Women's Organisation, 'Shadow Report' <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/JOR/INT_CEDAW_NGO_JOR_51_9260_E.pdf>.

⁹⁸ 'List of issues: Canada' (2008) CEDAW/C/CAN/Q/7 [17].

⁹⁹ *ibid* [22].

It also makes similar gender specific requests in relation to assisted housing.¹⁰⁰ Canada is asked to provide information on the funding of legal aid programs,¹⁰¹ on how social support services for victims of gender-based violence ensure an adequate standard of living¹⁰² and how ‘development programmes have provided a sustained and adequate income with social benefits to aboriginal women.’¹⁰³ All of these aspects of gender-based poverty feature prominently in the State report and the CSO submissions. Interestingly, the list of issues also demonstrates that the pre-session working group draws on two other sources of information outside of the material submitted. The pre-session working group requests that Canada provide information on how it has taken steps to implement the UN Special Rapporteur on adequate housing’s recommendations to Canada¹⁰⁴ and details on how Canada has followed the recommendations from the Concluding Observations of CESCR in relation to single-mothers and housing.¹⁰⁵

In respect of Ethiopia, the pre-session working group asks for examples on financial incentives for the family to encourage girls to stay in school,¹⁰⁶ information on the level of women’s wages,¹⁰⁷ information on any social protection for women’s informal and unpaid work,¹⁰⁸ measures taken to protect girls from economic exploitation,¹⁰⁹ efforts taken to ensure affordable access to

¹⁰⁰ *ibid* [23].

¹⁰¹ *ibid* [2].

¹⁰² *ibid* [6].

¹⁰³ *ibid* [19].

¹⁰⁴ *ibid* [23].

¹⁰⁵ *ibid* [29].

¹⁰⁶ ‘List of Issues: Ethiopia’ (2010) CEDAW/C/ETH/Q/ 6-7 [17(e)].

¹⁰⁷ *ibid* [18].

¹⁰⁸ *ibid* [19].

¹⁰⁹ *ibid* [20].

contraceptives,¹¹⁰ safe drinking water and sanitation,¹¹¹ steps taken to reduce risks when women collect water¹¹² and information on measures to ensure women equally inherit and control productive resources.¹¹³ Education and health are discussed at length in the State report while informal work and ownership and control of resources are raised by the CSOs.

It is also possible to detect the influence of the CSOs in the list of issues for Jordan. The pre-session working group asks Jordan what it is doing to expand rural support systems to include women, what measures it is taking to ensure women's access to land, including addressing cultural restrictions on land ownerships and inheritance and the status of informal credit systems which is an issue raised by the Arab Women's Organisations (AWO).¹¹⁴ The working group asks what measures the State has taken to 'combat exploitative working conditions of women and girls employed as domestic workers.'¹¹⁵ This issue is also discussed by the AWO. There are no questions on poverty outside what has been raised in either the State report or CSOs.

The list of issues for Turkey does not ask specific questions on gender-based poverty. This is surprising given that the working group repeatedly identifies gender-based poverty as an obstacle to human rights. The list of issues notes that in the State report Turkey explained there was a preference for families to educate boys rather than girls due to economic reasons. The working group does not follow through and ask what Turkey is doing to address how poverty negatively impacts girls' education. They only ask what steps are being taken to eliminate stereotypical attitudes

¹¹⁰ *ibid* [23].

¹¹¹ *ibid* [26].

¹¹² *ibid*.

¹¹³ *ibid* [28].

¹¹⁴ List of Issues: Jordan' (2010) CEDAW/C/JOR/Q/5 [16].

¹¹⁵ *ibid* [14].

in textbooks and the measures taken to promote the importance of girls' education.¹¹⁶ The list of issues also notes that in the State report Turkey identifies women's economic dependence as a factor limiting women's access to health care. However, the Committee does not ask what Turkey is doing to ensure women are economically independent. Instead, Turkey is only requested to provide information on measures taken to eliminate discrimination in accessing health care.¹¹⁷

(vi) *State Reply*

The reply to the list of issues only provides a minimal amount of new information. The reply mostly reiterates information that is in the original State report.¹¹⁸ The Canadian reply spends ten out of seventy-seven pages discussing measures to fight poverty and ensures women's access to housing.¹¹⁹ The reply provides additional statistics on the gender pay gap and the development of enforcement mechanisms for equal pay,¹²⁰ further statistical information on low income women,¹²¹ explanation on tax benefits,¹²² a description of targeted employment programs¹²³ and additional details on low income housing programs developed in the various provinces.¹²⁴ In regards to Turkey, the reply predominantly focuses on gender-based violence and trafficking. However, the reply reiterates that

¹¹⁶ 'List of Issues: Turkey' (2009) CEDAW/C/TUR/Q/6 [21].

¹¹⁷ *ibid* [25].

¹¹⁸ There was no reply from the Ethiopia from the list of issues.

¹¹⁹ 'Responses to the list of issues: Canada' CEDAW/C/CAN/Q/7/Add.1 (2008) 47-57.

¹²⁰ *ibid* 8, 42-49.

¹²¹ *ibid* 50.

¹²² *ibid* 42, 53.

¹²³ *ibid* 42, 52-53.

¹²⁴ *ibid* 55-57.

conditional cash-transfer programs exist to ensure to girls' go to school¹²⁵ and that micro-credit schemes are in place for low income individuals, women in particular.¹²⁶ It also explains that rural development programs which aim at reducing poverty prioritise the needs of women. Similarly, the Jordanian State reply also re-emphasises that it is working towards equal pay, that it is expanding the coverage of social security and that there are regulations to protect migrant workers.¹²⁷ There is one paragraph explaining poverty reduction programs but this is not gender-based.¹²⁸

(vii) *UN Agencies*

Out of the four States in this analysis, the ILO and UNESCO only make submissions for Canada and Jordan. These agencies make limited reference to gender-based poverty. For both States, UNESCO provides information on education enrolment rates.¹²⁹ For Canada, the ILO provides the further information on the gender pay gap.¹³⁰ In relation to Jordan, the ILO provides information on equal pay, on occupational segregation resulting in women working in low paid jobs, how garment and domestic workers who are predominantly women are excluded from minimum wage regulations and restrictions on the freedom of movement for domestic workers.¹³¹ The Jordanian Concluding

¹²⁵Responses to the list of issues: Turkey' (2010) CEDAW/C/TUR/Q/6/Add.1.

¹²⁶ibid.

¹²⁷ 'Responses to the list of issues: Jordan' (2010) CEDAW/C/JOR/Q/5/Add.1 [71]-[72], [80]-[82].

¹²⁸ ibid [79].

¹²⁹ 'Reports by specialized agencies on the implementation of the Convention: UNESCO' (2012) CEDAW/C/51/2 and 'Reports by specialized agencies on the implementation of the Convention: UNESCO' (2008) CEDAW/C/2008/III/3/Add.1.

¹³⁰ 'Reports by specialized agencies on the implementation of the Convention: ILO' (2008) CEDAW/C/2008/III/3/Add.2.

¹³¹ 'Reports by specialized agencies on the implementation of the Convention: ILO' (2012) CEDAW/C/51/3 [56]-[74].

Observations do refer to some of the issues mentioned by the ILO, namely the equal pay, gender job segregation and the situation of migrant workers.

(viii) Summary Records

The Summary Records are a summary of the constructive dialogue session between the State and the Committee. In the Summary Records the State and Committee discuss in more detail aspects of gender-based poverty that have been emphasised in the State report, CSO submissions and the pre-session working group. For example, the Turkish State representative goes into further detail on the steps the State is taking to improve poor girl's access to education.¹³² In the session for Canada, Committee members ask questions on the federal oversight of provincial social assistance schemes,¹³³ the vulnerability of aboriginal women to poverty¹³⁴, how social assistance empowers victims of domestic violence and how the rates of social assistance meet the housing, food and health needs of women.¹³⁵ These are all issues raised in the State report and CSOs submissions and ultimately included in the Concluding Observations. Similarly, in the Ethiopian session, the Committee asks if the State's income-generating activities is yielding any results,¹³⁶ the status of social security for informal workers,¹³⁷ if there is more current information on poverty among rural

¹³² The Committee, 'Summary Record: 937th meeting' (2010) CEDAW/C/SR.937 [6], [23].

¹³³ The Committee, 'Summary Record: 854(A) meeting' (2008) CEDAW/C/SR.854(A) [27].

¹³⁴ *ibid* [37].

¹³⁵ *ibid* [19].

¹³⁶ *ibid* [18].

¹³⁷ The Committee, 'Summary Record: 985th meeting' (2011) CEDAW/C/SR. 985 [50].

women,¹³⁸ and actions Ethiopia is taking to increase access to safe drinking water.¹³⁹ Again, all of these issues are raised before the oral dialogue session.

In a few instances individual Committee members do ask questions on gender-based poverty that are not addressed in either the State report or the CSO submissions. In Ethiopian session, the Committee raises questions on foreign companies leasing lands,¹⁴⁰ and draws a connection between trafficking and economic insecurity.¹⁴¹ In the session for Jordan, one of the Committee members requests ‘further information on the extent of early marriage among low income and rural families and how it affected school dropout rates.’¹⁴² The Committee asks if women could access credit and open a bank account.¹⁴³ The State representative clarifies that women do not need men’s consent to open a bank account.

(ix) Conclusions

The above analysis demonstrates that the most influential factor in the reporting process in ensuring that gender-based poverty is included in the Concluding Observations is the State report. This is true both in terms of the aspects of gender-based poverty that the Committee discusses and how it incorporates gender-based poverty. The Canadian and Ethiopian Concluding Observations focus on very different elements of gender-based poverty. For Canada the Committee emphasises social

¹³⁸ *ibid* [19].

¹³⁹ *ibid* [20].

¹⁴⁰ *ibid* [50].

¹⁴¹ *ibid* [31].

¹⁴² The Committee, ‘Summary Record: 1034th meeting’ (2012) CEDAW/C/SR.1034 [11].

¹⁴³ *ibid* [17].

assistance programmes, housing and legal aid while in Ethiopia the Committee focuses on how poverty impacts education and rural women. These differences can be explained by the different focus on gender-based poverty in the State report. Similarly, the Canadian State report discusses poverty without reference to the actual provisions of CEDAW and the Concluding Observations mirror this understanding. Ethiopia integrates poverty into the discussions on the substantive obligations of CEDAW and the Committee does the same. The influence of the State report can also be detected in respect of Jordan and Turkey. Neither the State report and in consequence nor the Concluding Observations substantively discuss gender-based poverty.

As to the remaining factors in the periodic reporting process, while the State report appears to be the determinative factor, the Committee is also influenced by the CSO submissions. These submissions both further address aspects of gender-based poverty raised by the State and new issues that are not included in the State report. There are numerous instances where the Committee directly incorporates the concerns of the CSOs on gender-based poverty into the Concluding Observations. This applies for all four States in this analysis. There is no evidence that the pre-session working group asks questions about poverty when it is not first raised by either the State or CSO. For example, the Ethiopian and Jordanian State report or CSOs do not comment on how levels of social assistance were sufficient to ensure an adequate standard of living and the list of issues do not ask any questions pertaining to this aspect of gender-based poverty. By contrast, this issue is raised by Canadian CSOs and the list of issues does ask Canada for further information on social assistance. The Committee has the possibility to go further and hold States accountability for issues they have not reported on but there is limited evidence of them doing this in relation to gender-based poverty. One example where the Committee transcends the information provided to it is from Ethiopia. The Committee asks questions on foreign companies who are expropriating land which is contributing to the feminisation of poverty. This issue is not raised by the State, CSOs, the

pre-session working group or UN agencies but by an individual Committee member. This is included in the Concluding Observations. However, this is an isolated example. The available evidence indicates that the Committee is responsive to the material submitted to it. The State reply tends to reiterate information already supplied in the original State report. The UN agencies do not supplement these other sources with specific information on gender-based poverty.

While it is possible to trace the impetus or source for many of the aspects of gender-based poverty included in the Concluding Observations, analysing the publically available material does not explain every reference to gender-based poverty. The Canadian Concluding Observations also support this hypothesis. The Committee requested Canada provide information on how it has implemented the recommendations of the UN Special Rapporteur on housing. These recommendations are not formally submitted to the Committee. This implies that one of the members of the Committee has done further research into Canada. The personalities and interests of individual Committee members, as the example of Ethiopia demonstrates, do potentially play an important role in shaping the Concluding Observations. This is an area ripe for further study, but it is outside the scope of the thesis to assess how individual members influence the Concluding Observations.

In conclusion, the essential factor in ensuring that gender-based poverty is discussed by the Committee in the Concluding Observations is the State report, followed closely by CSO submissions. This result is paradoxical. The more the State acknowledges gender-based poverty the more the Committee does. If the State ignores gender-based poverty the Committee does not bring it to their attention. This is problematic: if the State does not report on gender-based poverty this could indicate they are taking no steps to remedy women's poverty. The Committee's silence on gender-based poverty in the Concluding Observations only further marginalises women in poverty.

There are a various methods for raising the Committee’s awareness on gender-based poverty to ensure a more consistent and comprehensive approach. This analysis demonstrates the importance of engaging with the State and CSOs. The next section explores how to ensure that the State and the CSOs report on gender-based poverty in the hope that gender-based poverty will more consistently and comprehensively be included in the Concluding Observations.

V. Reforming the Periodic Reporting Process

A key entry point for including gender-based poverty in the final concerns and recommendations of the Committee is the State report and the CSO submissions. The final section of this chapter investigates how these actors can be prompted to provide information on women in poverty. This section first examines in greater detail the guidelines for preparing the State report. Drawing on common core document guidelines and a comparative analysis with the ICESCR guidelines, I propose modest reforms to the CEDAW guidelines to ensure a consistent approach to gender-based poverty in the Concluding Observations. This section also demonstrates the need for a General Recommendation on women and poverty. A General Recommendation signifies to the State that the Committee perceives gender-based poverty as a pressing issue of gender equality and it is hoped a General Recommendation would persuade the State to report on gender-based poverty. Engaging CSOs is more challenging as there are no equivalent reporting guidelines for CSOs. I argue that a General Recommendation also has the potential to encourage CSOs to provide the Committee with further information on gender-based poverty. The content and structure of a General Recommendation on women and poverty is explored in the next two chapters. This section focuses only on reforms to the reporting guidelines. It must be acknowledged that the proposed reforms are not a guarantee that the State will report on gender-based poverty. However, this is an essential first

step in bringing poverty firmly within the CEDAW framework. A further important caveat, focusing on reforming the periodic reporting process in this section does not alleviate the need for the Committee to be responsive to how poverty impacts women's human rights. However, it is outside the scope of this thesis to investigate how to engage individual Committee members.

(i) *Analysis of the Reporting Guidelines*

This subsection examines how the current guidelines are structured so as to ensure that the State includes information on gender-based poverty in the State report and concludes the current guidelines are too vague. The Committee in conjunction with the other UN human rights treaty bodies and the OHCHR have created the harmonised guidelines on how to prepare both the State report and common core document. First, I examine the CEDAW specific guidelines and then turn to the common core guidelines. The CEDAW specific guidelines do not contain very precise guidance for what the State should include in their report. More importantly, there are no direct information requests on the situation of women in poverty. The State is only requested to provide information on the implementation of recommendations in the Committee's last Concluding Observations; an analytical and result-oriented examination of steps taken to implement CEDAW; and information on emerging obstacles to women's human rights.¹⁴⁴ States are encouraged to provide information analyzing any trends that exist over time in eliminating discrimination against women to different groups of women.¹⁴⁵ In Chapter 4 I argued that the CEDAW is an evolutionary treaty that is responsive to new or newly recognised obstacles to women's human rights. The reporting guidelines provide further evidence that the Committee interprets CEDAW as a dynamic

¹⁴⁴ 'Compilation of Guidelines' (n 30) Chapter 5, [E.3 (a)], [E.3(c)].

¹⁴⁵ *ibid* Chapter 5 [E.4], [E.5].

human rights instrument. In the reporting guidelines States are asked to take into account any General Recommendations adopted by the Committee.¹⁴⁶ The Committee uses the General Recommendations to encourage States to report on various aspects of gender equality. In the Working Methods the Committee explains that the General Recommendations ‘outline matters which the Committee wishes to see addressed in the report of State parties and seek to provide detailed guidance to States parties on their obligations under the Convention and the steps they are required for compliance.’¹⁴⁷ This highlights the need for a General Recommendation on women and poverty.

There are two instances where the CEDAW guidelines require more detailed information. The first example is relatively hidden. There is a footnote in the CEDAW guidelines. The footnote elaborates that the State report should include information on specific issues of gender equality such as the impact of customary and religious law and the existence of gender budgeting. The fact that this important information is requested in a footnote could result in it being overlooked by the State. Even more problematic, there is no reference to gender-based poverty. The second example is that the State should provide information on the implementation of the Beijing Platform and the gender elements of the MDGs. The Beijing Platform was the action plan that came out of the Fourth World Conference on Women held in Beijing, China in 1995. The Platform for Action identifies key areas where States needs to work to promote women’s human rights. There are several areas of concern that would require States to report on gender-based poverty: ‘the persistent and increasing burden of poverty on women’ and ‘inequality in economic structures and policies, in all forms of

¹⁴⁶ *ibid* Chapter 5 [C.2].

¹⁴⁷ ‘Overview of the Working Methods’ (n 37) [27].

productive activities and in access to resources.’¹⁴⁸ It is unfortunate that rather than explicitly asking for this information the guidelines direct the State representative to a secondary source.

States are also requested to provide information on the ‘integration of a gender perspective...in all efforts aimed at the achievement’ of the MDGs.¹⁴⁹ These goals are designed to improve the lives of the world’s poorest people. The Committee’s recommendation to include information on the gender elements of the MDGs is not as precise as it seemingly appears because the gender elements of the MDGs are unclear. The goals with the most overt reference to gender equality are not comprehensive obligations to remedy gender-based poverty. Goal 3 is to promote gender equality and empower women but it has primarily focused on education, participation in the labour force and legislative bodies.¹⁵⁰ The goal with the clearest implication for poverty, Goal 1 (to eradicate extreme poverty and hunger) is predominantly framed in gender neutral terms. There is no specific obligation in the MDGs to understand and remedy the gender-based nature of poverty.¹⁵¹ It is not clear if the CEDAW specific guidelines require the State to place a gender lens over each MDG and provide information on how it has taken steps to eradicate extreme poverty and hunger for women or if they are only to report on the obvious gender related MDGs. A further problem is that the MDGs only apply to the developing world. There is no obligation on developed countries to report on how they have taken steps to reduce gender-based poverty. Moreover, the Committee does not appear to be following its own advice. There are a few questions on the MDGs in the

¹⁴⁸ ‘The United Nations Fourth World Conference on Women: Platform for Action’ <<http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm#concern>>.

¹⁴⁹ ‘Seventh CO: Ethiopia’ (n 13) [47].

¹⁵⁰ ‘Millennium Development Report: 2013’ <<http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf>>.

¹⁵¹ *ibid.*

Summary Records¹⁵², but States and CSOs are not referring to the implementation of the Beijing Platform or the MDGs in their written submission. Therefore, it is insufficient to rely on these guidelines to find out about women in poverty.

In comparison, the common core document guidelines are calibrated to gather information on poverty; particularly as most of the data in the document is to be disaggregated for sex.¹⁵³ The common core guidelines indicate that ‘States should provide information on specific measures adopted to reduce economic, social and geographical disparities...to prevent discrimination...against the persons belonging to the most disadvantaged groups.’¹⁵⁴ In a similar vein, the ‘State should provide accurate information on the standard of living of the different segments of the population.’¹⁵⁵ Appendix 3 provides a list of indicators to illustrate the standard of living within the State. These indicators should be disaggregated for sex: the proportion of population below the national poverty line, proportion of population below the minimum level of dietary consumption, in relation to the distribution of income or household consumption to expenditure, enrolment in education, unemployment rates, employment by major sectors of economic activity, including the breakdown between the formal and informal sectors and social expenditures (eg. food, housing, health, education, social protection etc) as a proportion of total public expenditure and gross domestic product.

While the common core document asks the State to provide information on poverty, the CEDAW specific guidelines have not been fully designed to gather information on the conditions of

¹⁵² ‘Summary Record 985th meeting’ (n 137) [7].

¹⁵³ ‘Compilation of Guidelines’ (n 30) Appendix 3.

¹⁵⁴ *ibid* [55].

¹⁵⁵ *ibid* [35].

women who live in poverty. Even the more specific requirements, to report on the implementation of the Beijing Platform or the MDGs fall short of direct guidance to report on gender-based poverty. Moreover, this request requires the State representatives to do research to find out what precisely the Beijing Platform and MDGs require of them. This runs the risk that the State representative drafting the report may overlook these reporting requirements on gender-based poverty. Additionally, having to go to other sources to identify that poverty is an area of critical concern for women, means the CEDAW guidelines miss an opportunity to make an unambiguous statement that the commitment to combat gender inequality entails a commitment to report on gender-based poverty. Finally in practice, the Committee does not truly appear to be using these international standards to gather information on gender-based poverty.

(ii) Reforming the CEDAW Reporting Guidelines

The Committee should consider re-drafting the CEDAW guidelines to highlight areas of concern, such as gender-based poverty. The current situation relies too heavily on States to identify existing and emerging obstacles to women's human rights. This acts as a disincentive for States to report on gender-based poverty. They can avoid criticisms on gender-based poverty by simply not including this information in the report. This is problematic. First, it can contribute to the invisibility of gender-based poverty. Second, while it is important that the Concluding Observations are tailored to pressing issues of gender equality in each State, it is also necessary to have consistency to ensure that all States are uniformly accountable for the implementation of CEDAW. The periodic reporting guidelines that request the State provide information on gender-based poverty can ensure the State's attention is directed towards women in poverty and ensure consistency in the Concluding Observations. The information in the common core document is a good starting part and the

Committee should be relying on this source more than it currently appears to be doing. There are a variety of ways that the guidelines could be reformed so as to capture gender-based poverty. The ICESCR guidelines serve as a best practice model. I briefly outline these guidelines and then offer some proposed reforms to the CEDAW guidelines.

The ICESCR guidelines ask for detailed information under each substantive provision of the treaty and they pay specific attention to the situation of people in poverty. For example under Article 11 of ICESCR, the right an adequate standard of living the State is required to indicate if there is a national poverty line and on what basis this line is calculated. If the State does not have a poverty line, it should indicate the mechanisms they use for monitoring and measuring poverty.¹⁵⁶ The State is required to provide information on any national action plans to combat poverty, how these programs fully integrate economic, social and cultural rights and how they are targeted to the most disadvantaged groups.¹⁵⁷ On the right to water, the State must provide information on measures taken to ensure ‘adequate and affordable access to water...for everyone’¹⁵⁸ and ‘the percentage of households without access to sufficient and safe water...disaggregated by region and urban/rural population and the measures taken to improve the situation.’¹⁵⁹ As a further example, under Article 6 and 7 on the right to work and working conditions the State is requested to provide information on the employment programs in place to achieve full and productive employment, the impact of measures to facilitate re-employment of women and long-term unemployment workers,

¹⁵⁶ ‘Compilation Guidelines’ (n 30) Chapter 2 [42]-[43].

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid* [48].

¹⁵⁹ *ibid.*

information on the applicability of minimum wages and its ability to provide an adequate standard of living.¹⁶⁰

The CEDAW guidelines should be reformed so that the State is encouraged to provide information on gender-based poverty. Similar to ICESCR, the guidelines should provide specific guidance for each provision of CEDAW. This is important to ensure that gender-based poverty is comprehensively incorporated into the CEDAW framework. The guidelines should first, make a very clear and direct request for information on what the State is doing to reduce gender-based poverty. The guidelines should ask that the report include information on poverty reduction strategies in the State and how they take account of poor women's unique needs. If the guidelines are reformed using the substantive provisions of CEDAW as a framework, the most logical place to situate the over-arching request on gender-based poverty is under Article 13 (economic and social life). Second, gender-based poverty is a cross-cutting problem and as argued in Chapter 4 poverty should not be collapsed into one obligation in CEDAW. This means all of the guidelines need to be used to capture information on gender-based poverty. Similar to the ICESCR guidelines, the CEDAW guidelines can require that for each provision the State report on disadvantaged and vulnerable women and this should include women in poverty.¹⁶¹ This will ensure that the guidelines layer-in concerns on gender-based poverty. For example, under Article 5 on cultural attitudes and stereotypes, the guidelines should ask the State what steps it has taken to address negative stereotypes that contribute to gender-based poverty. The guidelines should request information on the attendance and completion rate of low income girls at all levels of school and steps taken to reduce costs associated with attending schools and ensuring girls and women in poverty are able to access education (Article 10). In relation to equal access to health care, guidelines should ask the

¹⁶⁰ *ibid* [15]-[32].

¹⁶¹ *ibid*.

State to provide information on the costs of health care services, and especially the accessibility of maternal health care with a particular attention to rural women in poverty. Under the heading of employment the State could be asked to provide information on unpaid care work, the structure of social security and the informal labour market. These are a few examples. In Chapter 8 and in the Annex, I contextualise the obligations in CEDAW to account for gender-based poverty in greater detail. While the level of specificity in the CEDAW reporting guidelines is no guarantee that States will provide this information, it can be an important prompt to ensure the Committee has requisite information on how women in poverty experience human rights violations. This also ensures that including gender-based poverty the Concluding Observations is not dependent on the State or CSOs. It also importantly ensures that the standards used to evaluate the implementation of CEDAW are consistent for all States. Reforming the guidelines to directly refer to poverty also sends an important message that gender-based poverty is an issue of gender equality and human rights in CEDAW.

(iii) CSOs

There is no formalised process where the Committee interacts with CSOs. There are no equivalent guidelines for CSOs. The CSOs have complete discretion to provide shadow reports on issues of gender equality they regard as important. Their reports are often focused on one specific issue and the CSO may not have the capacity or resources to provide the Committee with critical information on gender-based poverty. The best route to engage CSOs on gender-based poverty is for the Committee to make a clear statement that it considers gender-based poverty a pressing issue of gender equality and human rights. The most effective way to indicate this is through a General

Recommendation. The next two chapters investigate how to draft an authoritative General Recommendation on women and poverty.

VI. Conclusion

It is imperative that the CEDAW Committee comprehensively include gender-based poverty in its work. The analysis in Chapter 5 demonstrated that while there is an evolution in the Committee's understanding of gender-based poverty, it has not yet comprehensively or consistently interpreted gender equality and non-discrimination to incorporate the harms of gender-based poverty into CEDAW. This chapter examined the publically available material to pin-point which stages in the periodic reporting process are key to ensuring gender-based poverty is included in the Concluding Observations. While there are numerous points where gender-based poverty can be addressed in the reporting process, it is crucial that the State report and CSO submissions provide information and raise concerns on gender-based poverty. It is essential that the reporting guidelines are reformed so as to encourage the State to provide the Committee with the necessary information on women in poverty. However, this is only a first step. To signify to the State the importance of using CEDAW to combat gender-based poverty, to engage CSOs and to internalise the importance of gender-based poverty in the collective consciousness of the Committee it is necessary to have a General Recommendation on women and poverty. The remaining Chapters in this thesis explore the structure and content of a General Recommendation on gender-based poverty.

CHAPTER 7

EVOLUTIONARY GENERAL RECOMMENDATIONS

I. Introduction

While reforming the State reporting guidelines, as advocated in Chapter 6, is an important step, it needs to be complemented with a detailed General Recommendation on gender-based poverty. This signifies to the State, and just as importantly to CSOs the necessity of using human rights to combat gender-based poverty. Moreover, experience has also shown that drafting a General Recommendation on an aspect of gender equality ensures that the Committee consistently approaches that aspect with analytical rigour. After the General Recommendation on violence against women¹ and older women² the Committee consistently addresses these aspects of gender equality, in the Concluding Observations.³ The General Recommendation is a unique opportunity for an in-depth discussion on poverty in CEDAW. It can ensure that the theory on gender-based poverty, equality and non-discrimination developed in the first part of the thesis is successfully integrated into the Committee's practice. If a General Recommendation is to successfully encourage States and CSOs to approach gender-based poverty as a human rights issue it needs to be an authoritative interpretation and not a 'scattered collection of statements' on poverty.⁴ To achieve this

¹ (1992) CEDAW/C/GC/19.

² (2010) CEDAW/C/GC/27.

³ The Committee, 'Sixth Concluding Observations: Argentina' (2010) CEDAW/C/CO/6, [23]-[24], [43]; the Committee 'Seventh Concluding Observations: Bangladesh' (2011) CEDAW/C/BGD/CO/7 [19]-[20], [37].

⁴ Philip Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law' in L Boisson de Chazournes and V. Gowland Debbas (eds). *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff, 2001) 764.

goal, the content of the General Recommendation on gender-based poverty needs to have a solid theoretical and intellectual basis. The first part of this thesis provides this basis. To be a persuasive and authoritative interpretation, it is also necessary to appreciate the purposes, style and structure of General Recommendations. This chapter focus on these aspects of a General Recommendation, particularly focusing on General Recommendations that have contributed to the evolution of international human rights law. The aim of this analysis is to ensure a General Recommendation on women and poverty is integrated into the work of the Committee and ultimately adopted by the wider community.⁵

Before proceeding to propose a General Recommendation on women and poverty, this chapter examines best practices for drafting an authoritative evolutionary General Recommendation. The first section examines the purposes of General Recommendations and concludes that these are multi-purposed. General Recommendations are meant to develop the open-textured human rights standards and commitments in CEDAW, to share best practices for eliminating discrimination against women and provide directions on how to prepare the State report. The second section analyses General Recommendations and Comments that elaborate obligations that are not explicitly articulated in CEDAW and ICESCR: General Recommendations No. 19 and 27 from the CEDAW Committee on gender-based violence and discrimination against older women respectively, and General Comment No. 15 from CESCR on the right to water. From the analysis I conclude that a General Recommendation on women and poverty should have four elements: first, it should have a strong introduction that justifies the need for a General Recommendation on gender-based poverty and situates itself in the larger evolution of human rights law in relation to women and poverty; second, it should explain the legal basis for the interpretation of gender-based poverty into CEDAW; and third, it needs to re-contextualise the rights in CEDAW in light of gender-based

⁵ Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 139-41.

poverty and give examples of best practices and guidance to State parties on preparing the State report. Chapter 8 uses this map to propose the content and structure of a General Recommendation on women and poverty.

II. The Purpose of General Recommendations

Philip Alston argues that General Comments and Recommendations are ‘one of...the most significant and influential tools available to...human rights treaties bodies.’⁶ CEDAW only makes passing reference to General Recommendations. Article 21 provides that the Committee ‘may make suggestions and general recommendations based on the examination of reports and information received from the State Parties.’ Byrnes notes that the CEDAW Committee has ‘drawn on this power to develop a substantial body of interpretive material on specific articles of [CEDAW] as well as cross-cutting themes (such as violence against women...)⁷ On the other hand, Cook and Undurraga describe General Recommendation No. 24 on women and health⁸ as a ‘basic guide to the application of Article 12 [health].’⁹ The CEDAW Committee has not weighed in on the meaning of General Recommendations. Nevertheless, it is easy to see an evolution in their form and content. In the late 1980s General Recommendations ‘were relatively short and tended to address technical...aspects of state party reports.’¹⁰ Byrnes argues that due to Cold War politics, highlighted in Chapter 2, ‘conservative approaches tended to prevail over attempts to take expansive or

⁶ Alston (n 4) 763.

⁷ Andrew Byrnes, ‘The Committee on the Elimination of Discrimination Against Women’ in Anne Hellum and Henriette Singding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 39.

⁸ (1999) CEDAW/C/GC/24.

⁹ Rebecca Cook and Veronica Unduggara, ‘Article 12’ in Marsh Freeman, Christine Chinkin, Beate Rudolf (eds) *The UN Convention on the Elimination of Discrimination Against Women: A Commentary* (OUP, 2012) 312.

¹⁰ Keller and Grover (n 5) 124. See the Committee, ‘General Recommendation No. 2 (sixth session, 1987)’ (1987) CEDAW/C/GC/2.

innovative approaches.¹¹ The General Recommendations now engage with the obligations in CEDAW. This indicates a shift from the early mechanical recommendations, but there is still no clear delineation on the current purpose of General Recommendations in relation to CEDAW. Academic study has primarily focused on the HRC. Given the similarity between the HRC and the CEDAW Committee, it is useful to examine this literature in more detail. Using the HRC as a comparative model, this section concludes that the General Recommendations from the CEDAW Committee are multi-purposed: they are to provide a legal analysis, share best practices and provide guidance on preparing the State report.

The HRC similar to the CEDAW Committee has a vague mandate in relation to General Comments. Article 40(4) of the ICCPR holds that the Committee ‘shall transmit...such general comments as it may consider appropriate to State parties.’ The HRC has broadly interpreted this mandate and used it to create multi-purposed General Comments. It explains that General Comments can address ‘the obligation to submit reports; the obligation to guarantee the rights in the Covenant; questions related to the application and content of individual articles of the Covenant; and suggestions concerning co-operation between State parties.’¹² The principles are open-ended and ‘left room for many different kinds of General Comments.’¹³ The HRC has further explained that General Comments are intended to share best practices developed by States ‘in order to promote [the] implementation of the [ICCPR]; to draw to their attention insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate activities of

¹¹ Andrew Byrnes, ‘The Convention and the Committee: Reflections on their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform’ (CSW, 2010) 4.

¹² UN Doc. CCPR/C/SR.260 (1980) [1].

¹³ Keller and Grover (n 5) 123.

States and international organisations in the promotion and protection of human rights.¹⁴ There is empirical evidence that these statements have not provided uniform guidance on the role of General Comments. Keller and Grover's recent interviews with past and present members of the HRC elicited eight different purposes, ranging from interpretive analysis of the rights in the ICCPR to providing support to CSOs in preparing shadow reports.¹⁵ This all indicates that General Comments are multi-purposed.

The academic assessment also supports a multi-purposed understanding of General Comments. In his historical evaluation of General Comments, Alston identifies four purposes: (i) to deepen the understanding of open-textured human rights norms; (ii) to strengthen the influence of international human rights commitments; (iii) to consolidate the Committee's learning and insights from reviewing State reports; and (iv) to provide guidance to State parties.¹⁶ Keller and Grover in their more recent analysis of the HRC's General Comments build upon the work of Alston. They synthesize not only his view but also the varied perspectives of the HRC members they interviewed to conclude that there are three meta-functions for a General Comment: legal analytical, policy recommendation and practice direction. The legal analytical function enables the HRC to interpret the content of vaguely articulated rights and to develop legal tests for determining a violation.¹⁷ To achieve this function the General Comment needs to be theoretically and analytical rigorous. The second purpose they propose is a policy recommendation function. State parties have discretion under the ICCPR, ICESCR and CEDAW on how to implement their obligations.¹⁸ However, the

¹⁴ 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (1989) CCPR/C/21/Rev.1.

¹⁵ *ibid* 143.

¹⁶ Alston (n 5) 763-64.

¹⁷ Keller and Grover (n 5) 124, 126.

General Comment is meant to tap into the Committee's expertise from reviewing State reports by sharing best practices, identifying barriers to the enjoyment of rights and providing information on how rights violations may be prevented.¹⁹ The final purpose Keller and Grover identify is practice directions. The General Comment is used to 'indicate the information it would like state parties to include in their periodic report.'²⁰ While the reporting guidelines also serve this function, the General Comment offers an opportunity to discuss in-depth what should be included in the State report and is an important mechanism to encourage CSOs to submit shadow reports on the specific human rights issue. For the purposes of structuring a General Recommendation on women and poverty, I adopt Keller and Grover's categorisation with two modifications. First, in practice it is challenging to keep the three sections distinction. For example, to illustrate its legal argument CESCR draws on its policy recommendations. Similarly, the CEDAW Committee and CESCR do not treat policy recommendations and practice directions as conceptually distinct. Both often make policy recommendations and implicitly seem to be calling on States to report on their recommendations. Therefore, for this analysis the policy recommendations and practice direction sections are collapsed into: 'reporting requirements.' Second, for an evolutionary General Recommendation there is a need for a comprehensive introduction which is explained below.

III. Evolutionary General Recommendations

With a basic understanding of the function of General Recommendations in place, the next step is to investigate in greater detail General Recommendations and Comments that have contributed to

¹⁸ See Brigit Schlutter, 'Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 302-08 on the Human Right Committee's approach to deference to States on implementing international human rights standards.

¹⁹ Keller and Grover (n 5) 125.

²⁰ *ibid.* 126.

the evolutionary development of international human rights treaties. These General Recommendations and Comments reflect changing realities and ensure the ongoing relevance of human rights treaties. This section examines three General Recommendations and Comments that are evolutionary: the CEDAW Committee's General Recommendation No. 19 on violence against women; General Recommendation No. 27 on older women and the protection of their human rights; and CESCR's General Comment No. 15 on the right to water.²¹ The General Recommendation on violence against women and the General Comment on the right to water are two examples of the relevant Committee interpreting the treaty in question to include substantive provisions that are not explicitly in the text. The General Comment on the right to water is from 2002 and the General Recommendation on violence against women is from 1992. As noted by Byrnes, there is a well recognised evolution in the style of General Recommendations, and the Recommendation on violence against women is in an older style.²² To have an understanding of the CEDAW Committee's current approach, this section also examines General Recommendation No. 27 from 2010 on older women. Similar to water in ICESCR and violence in CEDAW, there is no reference to intersectional discrimination in CEDAW, so this is also a good example of the Committee's approach to evolutionary interpretation. A General Recommendation on women and poverty will similarly be breaking new ground. In Chapters 3 and 4, I looked in detail at the interpretative methods employed in General Recommendation No. 19 and General Comment No. 15. At this stage, I am examining these sources not for their interpretative techniques but rather to map out the structure and content of these evolutionary General Recommendations and Comments, while still recognising that a General Recommendation on poverty has unique issues to address. Each treaty body's work on water, intersectional discrimination and gender-based violence is

²¹ (2002) E/C.12/2002/11.

²²Byrnes, 'The Convention as a Catalyst' (n 11) 7.

perceived as an authoritative interpretation of CEDAW and ICESCR and therefore they serve as ideal models for a General Recommendation on women and poverty.²³ Below I use Keller and Grover's modified model to analyse and compare these past evolutionary General Recommendations and Comments to develop an ideal structure for a General Recommendation on women and poverty which is explored in detail in Chapter 8.

(i) *Introduction*

There is one aspect of the evolutionary General Recommendations that is not captured by Keller and Grover's model: the introductory paragraphs. The opening paragraphs of these three evolutionary General Recommendations and Comments accomplish two important tasks: they justify the need for a detailed discussion on the subject matter in question and demonstrate that the General Recommendation or Comment is part of an evolutionary trend in international law. First, when explaining the problem, violence against women, discrimination against older women or a lack of water, the General Recommendation or Comment is explaining why this human rights issue is worthy of in-depth analysis. Second, by situating the General Recommendation or Comment as part of a series of binding and non-binding international commitments on the human rights issue in question, it is demonstrating that the interpretation of CEDAW or ICESCR is not a radical interpretation but consistent with the development of international human rights law. I examine these points in turn below.

First, the earlier General Recommendation on violence against women and the later General Recommendation on older women and the General Comment on the right to water use slightly different methods for explaining the necessity of discussing in detail the specific human rights issue

²³ State reports to CEDAW routinely include information on gender-based violence (fn 3). In the latest reporting round to CESCR a majority of the States included information on water. See the State reports submitted for the 52nd Session of CESCR <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=820&Lang=en>.

in question. The General Recommendation on violence against women begins with a strong and compelling statement that gender-based violence is ‘a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.’²⁴ There is no information provided in the opening paragraphs on how women experience violence or its prevalence. The later General Recommendations and Comments do not open with a similarly powerful opening sentence but they do provide more background information. The General Recommendation on older women acknowledges that older women experience multiple forms of discrimination and places the rights of older women in context. Due to increased living standards and developments in health care, people are living longer. The General Recommendation explains why aging is gendered: women tend to live longer than men. The ‘number of older women living in less developed regions will increase by 600 million within the period 2010 to 2050.’²⁵ Moreover, the discrimination older women have endured throughout their lives makes aging a unique experience that requires States to pay particular attention to older women’s human rights. The introductory paragraph concludes by addressing the recognition harms associated with older women. It explains that older women are diverse and possess a range of ‘experiences, knowledge, abilities and skills’ and that they can make unique contributions.²⁶ Similarly, the first paragraph in the General Comment on a right to water notes the importance of water. Water is ‘indispensable for leading a life of human dignity [and] a prerequisite for the realisation of other human rights.’²⁷ It then observes that billions of people lack water which contributes to water-based diseases. While this is less contextual information than in the General Recommendation on older women, it does provide some

²⁴ ‘General Recommendation No. 19’ (n 1) [1].

²⁵ ‘General Recommendation No. 27’ (n 2) [6].

²⁶ *ibid* [8].

²⁷ ‘General Comment No. 15’ (n 21) [1].

information on the denial of the right to water. As a further justification, all three evolutionary General Recommendations and Comments observe that the State is not attentive enough to the issue in question when preparing the State report.²⁸

Second, the General Recommendations and Comment examine the developments in international law on the issue in question. This serves two objects: it complements the first purpose of the introductory paragraphs by further illustrating the importance of the matter; and justifies the need for a General Recommendation on this issue. Furthermore by referring to other international law documents, the treaty body is situating itself as part of an evolutionary trend in international law. This means the General Recommendation or Comment is not a radical outlier but is contributing to the development and internal coherency of international law.²⁹ The two treaty bodies examine two sources to situate the evolutionary development on the issue in question: the treaty bodies' own work on the subject matter; and the work of other international bodies. For example, the General Recommendation No. 19 on violence against women refers to the previous General Recommendation on violence³⁰ and notes that at past sessions the Committee decided to study 'violence towards women and the sexual harassment and exploitation of women.'³¹ The General Recommendation also explains that the Committee has been using the periodic reporting process to remedy gender-based violence.³² Similarly, in the General Recommendation on older women the Committee references General Recommendation No. 25 on temporary special measures. It notes that in the previous General Recommendation, it recognised age as a 'ground on which women may

²⁸ *ibid*; 'General Recommendation No. 19' (n 1) [4], 'General Recommendation No. 27' (n 2) [1].

²⁹ Schlutter (n 15) 270.

³⁰ The Committee, 'General Recommendation No. 12: violence against women' (1989) CEDAW/C/GC/12.

³¹ 'General Recommendation No. 19' (n 1) [2]-[3].

³² *ibid* [5].

suffer from multiple forms of discrimination.³³ The CESCR follows the same pattern: it refers to its own consideration of water in the periodic reporting process and notes that States have been asked to include information on water in the reporting guidelines.³⁴

To further demonstrate that the evolutionary General Recommendation or Comment is the next step, the Committee or CESCR might reference various international documents. Although the General Recommendation on violence against women does not refer to other international law documents on gender-based violence, the more recent General Recommendations and Comments cite other international commitments that refer to older women or water. In relation to water the General Comment first refers to binding legal commitments: Article 14(2)(h) of CEDAW (rights to water for rural women), Article 24(2) of Convention on the Rights of the Child (rights to clean water for children to combat disease and malnutrition) and the Geneva Conventions on the treatment of prisoners of war and civilians. Furthermore, it refers to non-binding commitments: the Mar Del Plata Action Plan from the UN Water Conference, the Dublin Statement on Water and Sustainable Development and Resolution 2002/6 of the UN Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realisation of the right to drinking water.³⁵ Similarly, the General Recommendation on older women refers to non-binding sources: the Vienna International Plan of Action on Ageing, the Beijing Declaration, UN General Assembly resolution on Principles for Older Persons, the Madrid International Plan of Action for Ageing, CESCR General Comment No 6 on the rights of older persons and CESCR General Comment No. 19 on the right to social security.³⁶ It is interesting to note that both treaty bodies cite non-binding legal commitments. This

³³ ‘General Recommendation No. 27’ (n 2) [2].

³⁴ ‘General Comment No. 15’ (n 21) [1], [5].

³⁵ ‘General Comment No. 15’ (n 21) [4].

³⁶ ‘General Recommendation No. 27’ (n 2) [3].

suggests that the CEDAW Committee and CESCR perceive these to be persuasive sources of authority. While the CEDAW Committee or CESCR's perception is by no means definitive, it does reinforce the arguments made in Part I that in practical terms non-binding international human rights sources do have substantive weight.

(ii) *Legal Analytical*

Under Keller and Grover's model, the legal analytical section explains the legal basis for the treaty bodies' interpretation of their respective Convention, the normative content of the right in question and the scope of the State's obligations. The interpretative methodology used in these General Recommendations and the General Comment was investigated in Chapters 3 and 4; therefore, this section briefly summarises these techniques. Both the General Recommendation on violence against women and the General Comment on water implicitly use the VCLT framework: treaties are to be interpreted in their ordinary meaning in light of the context and object and purpose of the treaty. Violence against women is interpreted into CEDAW because the definition of discrimination in Article 1 of CEDAW implicitly includes violence. The Committee notes that gender-based violence is included in Article 1 when violence 'is directed against a woman because she is a woman or that affect women disproportionately.'³⁷ Whenever an experience is gendered it falls within Article 1 of CEDAW. The General Recommendation also uses Article 2 (core obligations) and Article 3 (full advancement and development) to explain that CEDAW is an evolutionary document. It holds that these two provisions 'establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations' in CEDAW.³⁸ There is also reference to the object and purpose of the treaty. CEDAW is meant to eliminate *all* forms of discrimination, even forms that are

³⁷ 'General Recommendation No. 19' (n 1) [6].

³⁸ *ibid* [10].

not explicitly referred to in the treaty, such as gender-based violence.³⁹ Importantly, the obligation to address gender-based violence is comprehensively interpreted into CEDAW: ‘gender-based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence.’⁴⁰ Similarly, CESCR argues that a right to water is included in both Article 11(1) of ICESCR (an adequate standard of living) and Article 12(1) (health).⁴¹ It then examines the context of the treaty to justify interpreting water into Articles 11 and 12 of ICESCR. It notes that water is required to enjoy many other Covenant rights such as food and enjoying cultural practices.⁴² By contrast, with respect to older women, the Committee does not explain the legal basis for discussing older women in the CEDAW framework in the General Recommendation. The only implicit legal basis offered is that older women experience violations of their human rights.⁴³ As argued in Chapter 4, this suggests that the Committee is using the object and purpose of CEDAW to explain the legal basis for protecting older women’s human rights: to eliminate discrimination and achieve gender equality so that *all* women, including older women, can enjoy their human rights,

The General Recommendations and Comment then proceed to identify the nature and scope of the State’s obligation in relation to violence, older women and water. Previously, gender-based violence was seen as a private matter and the State only had limited obligations to address it.⁴⁴ As discussed in Chapter 4, at the time of drafting there was still confusion on the appropriate

³⁹ *ibid* [6].

⁴⁰ *ibid*.

⁴¹ ‘General Comment No. 15’ (n 21) [3].

⁴² *ibid* [7]-[9].

⁴³ ‘General Recommendation No. 27’ (n 2) [14].

⁴⁴ Secretariat of the United Nations, ‘Ending Violence Against Women: from Words to Action’ <www.un.org/womenwatch/daw/public/VAW_Study/VAWstudyE.pdf>

conception of violence against women: was it an issue of criminal law or gender equality?⁴⁵ The General Recommendation addresses this controversy and re-conceives domestic violence from an abhorrent individual act to an issue of gender equality. The General Recommendation stresses the importance of modifying traditional attitudes which regard women as subordinate to men.⁴⁶ Reconceptualising violence as an issue of gender equality also means violence perpetrated by the State and private individuals violates CEDAW.⁴⁷ Article 2(e) of CEDAW requires the State to ‘eliminate discrimination against women by any person, organisation or enterprise.’ The General Recommendation clarifies that due to Article 2(e) the State ‘may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.’⁴⁸ For older women, the CEDAW Committee examines in detail the unique human rights violations older women experience. This expands upon the contextual background information from a legal analytical perspective. It explains the specific causes of discrimination for older women: a perception that older women are no longer useful in productive and reproductive roles, a lifetime of gender inequality that becomes exacerbated in old age, unfair resource allocations, maltreatment, neglect and limited access to basic services.⁴⁹ This means older women may suffer from inadequate housing, isolation, income security and lack of access to health care.

CESCR also interprets the normative content of the right to water and the nature of the State’s obligations in the legal analytical section of the General Comment. The CESCR employs its availability, accessibility, adequacy and quality framework to explain the parameters of a right to

⁴⁵ Christine Chinkin, ‘Article 5’ in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN Convention on the Elimination of all Forms of Discrimination Against Women: A Commentary* (OUP, 2012).

⁴⁶ ‘General Recommendation No. 19’ (n 1) [11].

⁴⁷ *ibid* [8]-[9].

⁴⁸ *ibid* [9].

⁴⁹ ‘General Recommendation No. 27’ (n 2) [9]-[10].

water in ICESCR. The availability of water should not be reduced to volume and litres but rather ‘water should be treated as a social and cultural good.’⁵⁰ Each individual must have a sufficient and clean supply of water for personal and domestic use that is both physically and economically accessible.⁵¹ The State is to respect, protect and fulfil the right to water. This entails a series of obligations: from prohibitions against polluting water to providing income supplements.⁵² Unlike CEDAW, the rights in ICESCR are to be progressively realised,⁵³ the General Comment sets out a minimum core set of obligations which are not subject to progressive realisation.⁵⁴ The State is required to ensure a minimal amount of water for personal use; to prevent water-based diseases; to ensure the right on a non-discriminatory basis; and to ensure an equitable distribution of water services. The State is further obligated to ensure water services are easy, affordable and safe to access. The remaining core obligations focus on implementation: to adopt a national water strategy and to monitor the realisation of the right to water. In addition, the State has an immediate, constant and continuing obligation to ‘move as expeditiously and effectively as possible towards the full realisation of the right to water.’⁵⁵ These steps must be concrete, deliberate and targeted. CESCR also explains in detail how various identity groups are denied their right to water. For example, women are excluded from decision making processes on water resources and bearing the burden of collecting water.⁵⁶

⁵⁰ ‘General Comment No. 15’ (n 21) [11].

⁵¹ *ibid* [12].

⁵² *ibid* [16(a)].

⁵³ Article 2(1) of ICESCR.

⁵⁴ ‘General Comment No. 15’ (n 21) [37].

⁵⁵ *ibid* [18].

⁵⁶ *ibid* [16(a)].

(iii) *Reporting Requirements*

Under Keller and Grover's model, the General Recommendation or Comment then shares best practices for States to pursue (policy recommendations) and provide guidance on preparing the State report (practice directions). The analysis below demonstrates how these two sections are intertwined; therefore I modify their model and use as an umbrella term 'reporting requirements' to refer to policy recommendations and practice directions. This section is very specific to the human rights issue in question. It is difficult to extrapolate the principles behind these reporting requirements that could be used in a General Recommendation on women and poverty. Therefore, these two sections briefly highlight a few examples so as to understand the tone and structure of the reporting requirements in the General Recommendations and Comments. The CEDAW Committee uses the text of CEDAW as a framework to explain how each substantive provision can be interpreted to take account of the specific aspect of gender equality. However, in comparison to the General Comment on the right to water, the Committee's directions are not as detailed. The CESCR does a better job of explicitly articulating reporting requirements to address systemic and structural violations of the right to water. A General Recommendation on women and poverty should follow the lead of CESCR and discuss this aspect in greater depth.

In the General Recommendation on violence against women, the Committee has a section with a sub-heading 'Specific Recommendations'. This sub-section seamlessly integrates both policy recommendations and practice directions. However, it is not always as specific as would be desired. For example, the first recommendation is for State parties to take 'appropriate and effective measures to overcome all forms of gender-based violence...'⁵⁷ The Committee proceeds to provide further examples of steps States can take to eliminate violence against women, such as: ensuring that laws against violence protect women and respect their integrity; providing gender sensitive training

⁵⁷ 'General Recommendation No. 19' (n 1) [24(a)].

to law enforcement officers; and introduce education and public information to eliminate prejudices that hinder women's equality.⁵⁸ In this sub-section it repeatedly says 'State parties in their report should....' and provides a series of directions such as: to provide information on and modify the attitudes on violence against women and information on sexual harassment and steps taken to eliminate it.⁵⁹

The General Recommendation on older women provides limited examples on reporting requirements on eliminating discrimination against older women. The Committee starts with a series of over-arching recommendations: State parties need to recognise the value of older women in society;⁶⁰ they 'need to take account of the multidimensional nature of discrimination against women and ensure that the principle of gender equality applies throughout women's life cycle.'⁶¹ They also provide more specific recommendations such as preventing forced early retirement, creating non-contributory pension schemes and social benefits for older women who do child care work.⁶² There are not explicit reporting requirements. Presumably States should report on pension schemes, gender geriatric health care services and recreational services to combat older women's social isolation since the General Recommendation identifies these as specific rights violations for older women.

In comparison, the CESCR provides a more thorough assessment of reporting requirements for ensuring the right to water. First, it draws on the arguments on the normative content of the right to water, particularly on the minimum core made in legal analytical, to give examples of best

⁵⁸ *ibid* [24(b)]-[24(f)].

⁵⁹ *ibid* [24(e)], [24(j)].

⁶⁰ 'General Recommendation No. 27' (n 2) [30].

⁶¹ *ibid* [31].

⁶² *ibid* [41]-[44].

practices States should pursue.⁶³ Again, this is further evidence that the three classifications in Keller and Grover's model are porous. Second, CESCR also provides guidance on how to set up effective mechanisms to successfully implement the right to water under the heading 'Implementation at the National Level.' Legislation and national water plans should be based on human rights principles, have time based targets, indicators and benchmarks, be made in a participatory and transparent process, be monitored and periodically reviewed and have remedies for violations of the right to water.⁶⁴ This framework provides meaningfully guidance for States in translating the open-textured right to water into workable laws and policies. It also helpfully provides guidance to CSOs on how to evaluate the State's implementation of the right to water. There are no specific reporting directions. However, similar to the General Recommendation on older women, it can be deduced what information should be included in the State report. States must provide information on the steps they have to take to ensure the core obligations and progressively realise the right to water.⁶⁵ States should also include information on legislation and national water policies. The General Comment explicitly states that the information provided in the State report forms the basis for a dialogue or scoping session with Committee of the indicators and benchmarks.⁶⁶

IV. Conclusions

A General Recommendation on women and poverty is evolutionary. It would be the first General Comment or Recommendation from any of the UN human rights treaty bodies that focuses exclusively on poverty. To ensure that the Committee's interpretation of gender-based poverty is perceived by States, CSOs and the academic community as persuasive and authoritative, the General

⁶³ 'General Comment No. 15' (n 21) [37].

⁶⁴ *ibid* [45]-[59].

⁶⁵ *ibid* [39]-[44].

⁶⁶*ibid* [54].

Recommendation needs to be intellectually rigorous. Keller and Grover's modified model helps achieve this aim. Their model first needs to be modified to include an introduction that explains the need for the General Recommendation or Comment and situates it within the development of an international trend. Second, the legal analytical section explains the interpretative techniques, addresses conceptual controversies around the evolutionary interpretation and the precise scope of the State's obligations. The CEDAW Committee does not consistently approach the legal basis of the General Recommendation in as much detail as would be necessary to ensure an authoritative interpretation. The General Recommendation on women and poverty needs to follow the example of the General Recommendation on violence against women and the General Comment on water and provide a detailed explanation of the legal basis for interpreting gender-based poverty into CEDAW.

The policy recommendations and practice directions aspect are closely inter-twined in the General Recommendations. For ease of analysis they will be referred to as reporting requirements in the proposed General Recommendation on women and poverty. In the General Recommendation on violence against women, the Committee provides a list of recommendations and directions while in the General Recommendation on older women the Committee uses the substantive provisions of CEDAW as a framework for providing examples of violations and it is possible to extract best practices and further guidance for the State report. At times, in both General Recommendations the Committee's policy recommendations are generic. In contrast, CESCR addresses broader issues of accountability and implementation of the right to water at the domestic level. The CEDAW Committee should provide more specific recommendations to States and address how the State's institutions can be used to ensure de facto realisation of the rights in CEDAW. The next chapter follows in the footsteps of these evolutionary General Recommendations while drawing on the

thesis to propose the ideal content and structure of a General Recommendation on women and poverty.

CHAPTER 8

ENVISIONING GENDER-BASED POVERTY IN CEDAW

I. Introduction

The last chapter draws together arguments made in the thesis to map a General Recommendation on women in poverty. The first part of the thesis made a normative argument that interpreting gender equality and non-discrimination to incorporate the harms of gender-based poverty is the best method for including gender-based poverty in CEDAW. The second part of the thesis demonstrated that the Committee has been working towards the interpretation of CEDAW proposed in Part I and using it to propose remedies so that women in poverty are able to enjoy their human rights. It is argued in this chapter that to ensure a more coherent and consistent approach the Committee needs to release a General Recommendation on women and poverty. A General Recommendation is also an important tool to prompt both the State and CSOs to report on gender-based poverty which the analysis in Chapter 6 showed is crucial in ensuring gender-based poverty is discussed by the Committee in the Concluding Observations. A General Recommendation is an important contribution to the development of international human rights law that not only influences the Committee, State and CSOs but also can be used at the domestic level to advocate for a human rights-based approach to gender-based poverty. As discussed in Chapter 3, this proposed interpretation of CEDAW is not a binding legal interpretation.¹ However, as Alston and Goodman note a high quality General Recommendation which contains persuasive legal reasoning may become influential and taken up by judges, lawyers, academics and human rights groups and have de

¹ Geir Ulfstein, 'Individual Communications' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 74.

facto legal significance.² To work towards achieving this aim, in this chapter, I use the structure developed in Chapter 7 on evolutionary General Recommendations and Comments to propose a General Recommendation on women and poverty. The chapter begins with an introduction which justifies a General Recommendation on women and poverty, explains the legal basis for including gender-based poverty in CEDAW and canvasses reporting requirements. As an evolutionary General Recommendation, it also addresses the wider conceptual shift and controversies of understanding poverty as an issue of gender equality and human rights.

There are a number of factors that need to be addressed to situate the goals and methodology of this chapter. First, while General Recommendations are more discursive than the reporting guidelines, their length in practice is limited to only ten to twenty pages. Moreover, they are used by various stakeholders. This means a General Recommendation cannot use technical legal jargon; it needs to use language that is accessible. This chapter does not operate under these constraints and can thoroughly investigate, using legal language, the intellectual basis for a General Recommendation on women and poverty. This chapter acts as an academic commentary to the actual proposed text of a General Recommendation in the Annex. Second, a General Recommendation needs to provide meaningful guidance on how to ensure that women in poverty are able to enjoy their human rights. At the same time the States have the discretion and ‘the flexibility to design the most effective measures’ to fulfil its CEDAW obligations.³ A General Recommendation on women and poverty needs to strike a delicate balance between offering specific recommendations without undermining the State’s discretion to develop measures that fit their unique national context. This is an important tension to keep at the forefront in this chapter. Third,

² Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (OUP, 2013) 728.

³ Andrew Byrnes, ‘Article 2’ in Marsh Freeman, Christine Chinkin, Beate Rudolf (eds) *The UN Convention on the Elimination of Discrimination Against Women: A Commentary* (OUP, 2012) 77. See the Committee, ‘General Recommendation No. 28: on the core obligations’ (2010) CEDAW/C/GC/28 [24], [28], [37].

an authoritative General Recommendation needs to have a true appreciation of how women in poverty experience human rights violations. Consultation with relevant stakeholders is important. For the purpose of this thesis, I cannot conduct the necessary consultations. To overcome this obstacle, this chapter draws on publicly available material such as the work of UN Special Rapporteurs, the World Bank and the MDGs. I use this material to make suggestions on how the three broad sections of an evolutionary General Recommendation—introduction, legal analytical and reporting requirements—can be used to create a persuasive and authoritative General Recommendation on women and poverty. This forms the foundation for the draft General Recommendation in the Annex.

II. Introductory Paragraphs

The introductory paragraphs of a General Recommendation on women and poverty are meant to achieve two aims. First, it explains why it is important to analyse gender-based poverty and second, it demonstrates how a General Recommendation on women and poverty is part of the evolution in international human rights law. Below are recommendations on how best to achieve these goals.

The opening sentence should be a strong statement on the gender-based nature of poverty and it should establish that gender-based poverty is conceptualised as a form of inequality and discrimination. Using the opening sentence in the General Recommendation on violence against women as a model, the first sentence in the General Recommendation on women and poverty should read: “gender-based poverty is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on the basis of equality.” This is a clear statement that poverty is not an issue of charity or development but an obstacle to human rights that belongs within the CEDAW framework. The Committee should proceed to directly state that the purpose of the

General Recommendation is to explore the relationship between gender-based poverty and the articles of CEDAW, to outline the content of the State's obligation with regard to gender-based poverty, to share best practices for States and provide guidance on how to include gender-based poverty in the State report.

From this strong opening the Committee needs to justify a General Recommendation on women and poverty. There are three bases for justification: (i) the gender-based nature of poverty and the depth of the problem, (ii) the human rights violations that are inherent and contribute to gender-based poverty and (iii) the evolution in international human rights law. First, similar to the General Recommendation on older women, the General Recommendation on women and poverty should explain the gender-based nature of poverty. Poverty is a pervasive problem that affects both men and women.⁴ The General Recommendation needs to stress that it is examining the gender-based aspects of poverty because CEDAW is an asymmetrical treaty regime.⁵ Throughout the world women are disproportionately living in poverty.⁶ Women are poor because they are women. Gender norms, cultural attitudes and stereotypes condemn millions of women to lives of poverty, indignity, drudgery, hopelessness and despair. These norms affect the gender-based division of labour in both the private and public sphere. In the home, women perform a disproportionate amount of unpaid care work and it limits the time women are able to invest in education and decent employment. The gender-based division of labour in the home means 'millions of women still find that poverty is their

⁴ 'The Millennium Development Report: 2014' 8-16
<<http://www.un.org/millenniumgoals/2014%20MDG%20report/MDG%202014%20English%20web.pdf>>

⁵ The Committee, 'General Recommendation No. 25: on temporary special measures' (2004) CEDAW/C/GC/25 [5].

⁶ Working Group on Discrimination Against Women in Law and Practice, 'Discrimination against women in economic and social life, with a focus on economic crisis' (2014) A/C/26/39 [8].

reward for a lifetime spent caring.⁷ Social attitudes on the role and value of women also contribute to women's poverty in the labour market. Women's work is perceived as unskilled and less valuable which results in a persistent gender wage pay gap. In both developing and developed countries women earn less than men.⁸ As a result women can become socially and financially dependent on men.⁹ For example, in Northern Africa, Southern and Western Asia women's access to paid employment is under 20 per cent.¹⁰ The majority of women work in informal employment. In this type of employment women 'usually lack adequate social protection; suffer low incomes and arduous working conditions.'¹¹ Gender norms also contribute to gender-based poverty in education, health and access to productive resources. For example, only 2 out of 130 States have achieved parity in all levels of education.¹² In the developing world women are less likely to own and control productive resources¹³ and are less likely to be given an opportunity to participate in decisions on large household purchases.¹⁴ Macroeconomic policies can limit the possibilities for redressing women's socio-economic disadvantage and intensify gender power imbalances. Macroeconomic policies 'that aim at "stabilization"—usually through reducing public spending or meeting low inflation targets—

⁷ UN Special Rapporteur on extreme poverty and human rights, 'Unpaid care work, poverty and women's human rights' (2013) A/68/293 [6].

⁸ Working Group (n 6) [45].

⁹ UN Special Rapporteur on extreme poverty and human rights, 'Unpaid care work' (n 7) [12].

¹⁰ 'The Millennium Development Report: 2013' 20 < <http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf>>.

¹¹ 'The Millennium Development Report: 2014' (n 4) 10

¹² 'The Millennium Development Report: 2013' (n 10) 19.

¹³ World Bank, 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014)

¹⁴ 'The Millennium Development Report: 2013' (n 10) 23.

tend to reduce employment opportunities.¹⁵ This can lead to a reassertion of patriarchal norms and practices. For example, ‘demands on unpaid care work may intensify during times of economic stress increasing the burden of women.’¹⁶ All these factors combine to increase the risk of poverty across the life cycle for women and girls. Explaining the highly gender-based nature of poverty makes a strong case for the need for a General Recommendation on women and poverty.

The last justification links gender-based poverty to a denial of the rights and obligations in CEDAW. It can begin by acknowledging that besides a concern about women in poverty in the preamble, there is no explicit obligation for States to remedy the gender-based nature of poverty. However, the General Recommendation should state that women in poverty are denied the opportunity for full development and advancement (Article 3) and the enjoyment of their human rights and fundamental freedoms (Article 1). This makes the connection between gender-based poverty and the legal provisions in CEDAW. Drawing on the insights of the UN Special Rapporteur on extreme poverty and human rights, the Committee should clarify that women who live in poverty experience multiple and reinforcing violations of their political, civil, social, economic and cultural rights.¹⁷ This means gender-based poverty may breach specific provisions of CEDAW, regardless of whether those provisions expressly mention poverty. This provides the final link to justify a General Recommendation on women and poverty.

Finally, the introduction can refer to the larger trends in the Committee’s own work and in the international sphere in addressing gender-based poverty. The purpose of this is to demonstrate that the General Recommendation on women and poverty is not a radical interpretation of

¹⁵ UN Women, ‘Progress of the World’s Women 2015-2016: Transforming Economies and Realising Rights’ (UN Women, 2015) 195.

¹⁶ *ibid* 194.

¹⁷ UN Special Rapporteur on extreme poverty and human rights, ‘Final draft of guiding principles on extreme poverty and human rights’ (2012) A/HRC/C/21/39 [2]-[3].

CEDAW but part of the evolution in international human rights law. The General Recommendation can refer to the work the Committee has done in drawing a connection between gender-based poverty, equality, non-discrimination and human rights in the State reporting process, as examined in Chapter 5. The Committee has referred to gender-based poverty in previous General Recommendations: on women's unpaid work,¹⁸ women's unremunerated domestic activities¹⁹ and the economic consequences of divorce and widowhood.²⁰ All of these substantially, albeit implicitly, touch on gender-based poverty. A General Recommendation on women and poverty synthesizes these past Recommendations and insights from the Concluding Observations and explicitly discusses the impact of poverty on the rights and obligations in CEDAW. Similarly, the General Recommendation can cite a variety of international documents, both legally binding and non-binding, that highlight the relationship between poverty and human rights. The key binding legal commitments are the right to an adequate standard of living in ICESCR (Article 11), the Convention on the Rights of the Child (Article 27)²¹ and Convention on the Rights of Persons with Disabilities (Article 28).²² There is also a series of ILO Conventions that it can refer to: Conventions No. 100 (equal remuneration), 111 (discrimination in employment and occupation) 156 (workers with family responsibilities), 183 (maternity protection) and 189 (domestic workers). The Committee can also cite a variety of non-binding commitments which—as explained in Chapter 7—are used as authoritative commitments by the UN human rights treaty bodies when drafting evolutionary

¹⁸ The Committee, 'General Recommendation No. 16: unpaid women workers in rural and urban family enterprises' (1991) CEDAW/C/GC/16.

¹⁹ The Committee, 'General Recommendation No. 17: measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product' (1991) CEDAW/C/GC/17.

²⁰ The Committee, 'General Recommendation No. 29: economic consequences of marriage, family relations and their dissolution' (2013) CEDAW/C/GC/29.

²¹ 1577 UNTS 3 (entered into force 2 September 1990).

²²(2007) A/RES/61/106.

General Recommendations and Comments: the MDGs, the Beijing Declaration, the Guiding Principles on extreme poverty and human rights developed by the UN Special Rapporteur on extreme poverty and human rights²³ and CESCR's statement on the Substantive Issues Arising in the Implementation of ICESCR: Poverty and ICESCR.²⁴

The introduction can conclude by noting that the States have only been intermittently reporting on poverty, as examined in Chapter 6. The Committee can note that State parties in their periodic reports are not paying sufficient attention to the connection between gender inequality, discrimination and poverty. The General Recommendation therefore acts as a detailed guide as to the State's obligations towards women in poverty.

III. Legal Analytical

The purpose of this section is to explain the legal basis for including poverty within CEDAW. To ensure an authoritative General Recommendation, like the General Recommendation on violence against women²⁵ and the General Comment on the right to water²⁶, the Committee needs to candidly engage with the interpretation of CEDAW and provide justifications to support its interpretation. This should be done by first explaining that CEDAW is an evolutionary treaty and then by implicitly employing a VCLT interpretative framework. In this section I draw from the arguments made in the Part I that equality and non-discrimination should be interpreted to incorporate the harms of gender-based poverty so as to comprehensively bring gender-based poverty into CEDAW. Since

²³ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 17).

²⁴ CESCR, 'Substantive Issues Arising in the Implementation of ICESCR: Poverty and ICESCR' E/C.12/2001/10.

²⁵ The Committee, 'General Recommendation No. 19: on violence against women' (1992) CEDAW/C/GC/19.

²⁶ CESCR, 'General Comment No. 15 the right to water' (2002) E/C.12/2002/11.

these issues were thoroughly canvassed in Part I, this section is a brief summary of these arguments. This section also highlights important legal issues discussed earlier in the thesis: the definition of gender-based poverty, the nature of the State's obligation and gender-based poverty and identity grounds.

Before proceeding to a VCLT approach to interpretation, the General Recommendation should explain that CEDAW is a dynamic treaty. The Committee has emphasised that CEDAW 'anticipates the emergence of new forms of discrimination that had not been identified at the time of its drafting.'²⁷ The General Recommendation should explain that the States intended CEDAW to be interpreted in an evolutionary manner.²⁸ The State's intention can be demonstrated by examining the text of CEDAW.²⁹ The General Recommendation can refer to Articles 1 (the definition of discrimination), 2 (core obligation) and 3 (full advancement and development) of CEDAW which emphasise that the State has an obligation to eliminate *all* forms of discrimination and advance women's development in *all* fields. In the General Recommendation on women and poverty the Committee should reiterate that they are approaching the interpretation of CEDAW from an evolutionary perspective and that the concept of gender equality and non-discrimination in CEDAW are responsive to new and newly recognised challenges to women's human rights.

The next paragraph can chart the evolution in gender-based poverty from a moral obligation to an issue of human rights. The analysis of the *travaux préparatoires* in Chapter 2 demonstrated that the drafters originally connected gender-based poverty to rural life in the developing world. The General Recommendation needs to make a clear statement that while gender-based poverty has historically been seen as an issue of charity or economic development, it is now understood as an

²⁷ 'General Recommendation No. 19' (n 27).

²⁸ See Eirik Bjorge *The Evolutionary Interpretation of Treaties* (OUP, 2014)

²⁹ *ibid* 92.

issue for human rights that affects urban and rural women in both the developed and developing world. Eliminating gender-based poverty is not a moral duty but a legal obligation in CEDAW. To justify this shift in understanding, the Committee can again refer to the work of the UN Special Rapporteur on extreme poverty and human rights: that poverty is a serious and pressing obstacle to the enjoyment of women's human rights.³⁰ This means the State 'has to respect the dignity...of [women] living in poverty and empower them to meaningfully participate in public life...and to hold duty bearers accountable.'³¹ The argument that human rights violations are inherent to gender-based poverty should be illustrated with examples. General Recommendations can be a bit repetitive, so while the actual General Recommendation should use examples to explain how women in poverty experience human rights violations, for this chapter this discussion is saved for the sub-section on reporting requirements.

After clarifying that gender-based poverty is a human rights issue, the General Recommendation can then proceed to explain the legal interpretative techniques that bring gender-based poverty into the CEDAW. Article 31 of the VCLT provides the interpretative framework for treaty interpretation. It requires that CEDAW be interpreted in its ordinary meaning in light of its context and object and purpose of the treaty. While the Committee should employ these legal techniques, it has not been the practice of the Committee to make explicit reference to the VCLT framework.³² This is because General Recommendations are used by a various stakeholders and it needs to remain accessible to those who do not have a legal background. As a starting point, the General Recommendation can begin by explaining the textual basis for interpreting gender-based

³⁰ 'General Recommendation No. 19' (n 75) [62]-[90].

³¹ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 17) [7].

³² Dhrubajyoti Bhattacharya, 'The Perils of Simultaneous Adjudication and Consultation: Using the Optional Protocol to CEDAW to Secure Women's Health' (2009-2010) 31 Women's Rights L Rep 42.

poverty into CEDAW.³³ This necessarily entails a greater discussion on the meaning of both of equality and non-discrimination in CEDAW. The Committee can analyse the different ordinary meanings of equality canvassed in Chapter 4: formal and substantive with a particular focus on transformative equality and direct and indirect discrimination. The General Recommendation then can analyse the remaining the text of CEDAW (the context element of the VCLT framework) to argue that equality and non-discrimination in CEDAW can be interpreted to incorporate the harms of gender-based poverty. The last element of the VCLT framework examines the object and purpose of CEDAW. The General Recommendation should explain that CEDAW cannot ensure women's human rights without including gender-based poverty into CEDAW. For example, it can highlight that the substantive provisions in CEDAW such as education, employment and health, cannot be achieved unless States understand the unique obstacles for women in poverty. Finally, this paragraph should conclude by firmly re-stating and emphasising that by connecting gender-based poverty to gender equality and non-discrimination, it is clear that gender-based poverty may breach specific provisions of CEDAW even if those provisions do not refer to poverty.

Before turning to examine in greater detail specific reporting requirements that should be included in the General Recommendation, it is important to address three issues unique to gender-based poverty: the definition of poverty, the nature of the State's obligation and the relationship between poverty, grounds of discrimination and identity. These issues were canvassed in Part I, so again this just highlights issues that are examined in detail in the General Recommendation in the Annex. First, as discussed in Chapter 1, it is very tempting to conceptualise gender-based poverty as having insufficient resources. A definition of gender-based poverty that only includes redistribution harms is limited. Therefore, to counter-balance the inclination to understand gender-based poverty in terms of resources, the Committee needs to precisely explain it. Gender-based poverty needs to

³³ As Richard Gardiner notes in *Treaty Interpretation* (OUP, 2008) 162 'one has to start somewhere.'

be defined as the redistribution harm of not having access to economic resources coupled with the recognition and participation harms which exclude women from decision making processes, and that devalue women in public and private life. Second, the Committee needs to clarify the precise nature of the State's obligation to relation to gender-based poverty. This was analysed in detail in Chapter 4. As a brief summary, the State is obligated to ensure its laws and programmes are consistent with its commitment to women's human rights, including women who live in poverty. It has to demonstrate to the Committee that its poverty reduction programmes further gender equality and non-discrimination. If the Committee concludes the State's justifications in relation to gender-based poverty are not adequate its role is to recommend a fuller implementation of CEDAW. Third, a General Recommendation on women and poverty raises the possibility of recognising gender-based poverty as a ground of discrimination in CEDAW. In Chapter 4 I argued that unlike ICESCR, CEDAW does not adopt a ground-based approach to intersecting identities. CEDAW and the Committee have adopted a fluid approach that recognises that identity characteristics, experiences and crossing cutting themes that interact with sex and gender are protected under CEDAW. The General Recommendation on women and poverty recognises that gender-based poverty is a part of women's identity and experiences and that it is a cross-cutting obstacle to women's human rights.

IV. Reporting Requirements

After establishing the legal basis for interpreting gender-based poverty into the CEDAW framework, the General Recommendation then should transition to detail reporting requirements, by proposing best practices and providing guidance on preparing the State report. As explained in Chapter 7, at times this section can be simplistic restatements of the obligations in CEDAW. While the Committee has to allow the State discretion to develop laws and policies on gender-based poverty, it

should provide more tailored recommendations than it has in the past. This is key to ensuring that the General Recommendation makes a meaningful contribution to the evolution on gender-based poverty. This section provides some examples of how the rights in CEDAW can be re-conceptualised to account for gender-based poverty alongside specific policy recommendations. Second, conceptualising gender-based poverty as an issue of human rights means the State has an obligation to account to women who live in poverty on the measures it has taken to ensure their human rights. It is essential that the General Recommendation provide guidance on implementation and accountability mechanisms. I take these points in turn below.

(i) *Contextualising CEDAW*

This section should use the substantive provisions of CEDAW as a framework, but it should begin with an important caveat. A General Recommendation on women and poverty can only provide examples of the discrimination and inequality women in poverty face and it is not a comprehensive re-contextualisation of CEDAW. State parties must remain attentive to new forms of discrimination and inequality against women in poverty. This section begins with Article 5 (cultural attitudes and stereotypes) and not with the first four Articles of CEDAW. Article 1 (the definition of discrimination) and Article 3 (full development and advancement) are used in the legal analytical section to explain the legal basis for interpreting equality and non-discrimination to incorporate the harms of gender-based poverty. Article 2 is used in the next subsection to explain the basis in CEDAW for developing accountability mechanisms. Temporary special measures (Article 4) can be succinctly dealt with in the General Recommendation on women and poverty. Drawing on the work the Committee has previously done, the Committee can stress that the State can be required to take

accelerated measures to ensure equality for women in poverty.³⁴ The General Recommendation can then focus on how the remaining substantive provisions can be used to improve the lives of women in poverty.

The first substantive provision is Article 5 (cultural attitudes and stereotypes). The purpose of this is to 'honour the basic choices women make (or would like to make) about their own lives, and enable them to shape their own identities.'³⁵ The Committee can analyse how poverty negatively affects the ability of women to shape their lives. First, women in poverty are regularly subject to a unique set of pernicious stereotypes: that they are lazy, promiscuous, unfit mothers that leach off the welfare system.³⁶ Second, negative gender stereotypes and attitudes can contribute to gender-based poverty. For example, the work women perform in the labour market is undervalued and as a result low paid.³⁷ Deeply entrenched social attitudes have dictated that women should disproportionately perform unpaid care work.³⁸ Women may have de jure access to property but they may be perceived as selfish or egoistical if they enforce these rights.³⁹ These cultural attitudes trap women in poverty. The President of the World Bank aptly explains how stereotypes operate throughout a woman's life cycle and condemn them to poverty: 'even when women can legally own property, they may not because those who do become outcasts...teachers and parents may direct [girls] away from certain

³⁴ See 'General Recommendation No. 25' (n 5).

³⁵ Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (UPP, 2009) 68.

³⁶ Catherine Albertyn, 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 3 Stellenbosch L Rev 591, 594; Sandra Fredman, 'Women and Poverty: A Human Rights Approach' African Journal of Intl and Comparative Law (forthcoming).

³⁷ Sandra Fredman, 'Engendering Socio-Economic Rights' in Anne Hellum and Henriette Singding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 219.

³⁸ UN Special Rapporteur on extreme poverty and human rights, 'Unpaid care work' (n 7).

³⁹ Ingunn Ikdahl, 'Property and security' articulating women's right to their homes' in Anne Hellum and Henriette Singding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 270.

studies and jobs for which social norms say boys are better suited. Women then enter jobs...with lowers wages...overwhelmingly girls and women also perform the unpaid work of care giving, for which they are often penalised with poverty in old age.⁴⁰ The General Recommendation should call on State parties to address these reinforcing cultural attitudes that contribute to gender-based poverty through public awareness, media and online social media campaigns.

The Committee has been ambivalent on the relationship between exploitative prostitution, trafficking and poverty (Article 6).⁴¹ Chuang notes ‘trafficking is a phenomenon inexorably linked to the socio-economic impact of globalisation, with wealth disparities feeding increased intra-and transnational labour migration as livelihood options decrease in less wealthy countries.’⁴² She makes two important observations. First, that poverty can lead women ‘to make decisions that increase vulnerability to trafficking.’⁴³ Second, it is not only poverty within the State but ‘inequality within and between countries...that further compounds this vulnerability.’⁴⁴ The General Recommendation should firmly accept that poverty is an underlying cause of exploitative prostitution and trafficking.⁴⁵ As such, its recommendations should consistently focus on ensuring prostitutes who have been exploited and victims of trafficking are able to access adequate social benefits and that they are given training and economic opportunities to break cycles of poverty that make them vulnerable to exploitative prostitution and trafficking. It also imperative that the General Recommendation

⁴⁰ World Bank, ‘Voice and Agency (n 13) ix.

⁴¹ See Chapter 5. Article 6 of CEDAW refers to exploitative prostitution. These recommendations only refer to exploitative prostitution and not to sex positive sex workers.

⁴² Janie Chuang, ‘Article 6’ in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2013) 172.

⁴³ *ibid* 194.

⁴⁴ *ibid*.

⁴⁵ Empirical evidence in the UK indicates that austerity cuts have forced women into prostitution Gabriella Swerling, ‘Prostitutes and the recession: How David Cameron’s cuts are affecting British women’ *The Independent*, 30 April 2013. There is similar evidence of this happening in Cambodia, Working Group (n 6) fn 89.

encourage States cooperate to reduce global inequalities that makes women in poverty vulnerable to exploitation. The duty to cooperate is discussed in further detail below. The General Recommendation can also highlight emerging forms of human trafficking. For example, it can explain that ‘recruitment of domestic labour from developing countries to work in developed countries and organised marriages between women from developing countries and foreign nationals’ constitutes new forms of trafficking.⁴⁶ To combat this growing global phenomenon the Committee should recommend legal and social measures to regulate domestic work⁴⁷ and encourage host States to ‘offer assistance to countries of origin to enable them to address inequalities that contribute to trafficking-related vulnerabilities.’⁴⁸

Article 7 and 8 require the State to ensure equality in political and international participation. As shown in Chapter 5, in the periodic reporting process the Committee has not developed this obligation in relation to gender-based poverty. In General Recommendation No. 23, the Committee notes that poverty is a barrier to voting and being eligible for political office.⁴⁹ There are two elements of participation that are key in relation to GBP. First, drawing on both the structural and participative element of transformative equality, it is crucial to increase the number of women at all levels of decision making at international and national economic, financial and trade institutions.⁵⁰ Parity in participation can open up ‘sites of economic and social (public) power traditionally inhabited by men only.’⁵¹ Once women are empowered through participation the aspiration is that

⁴⁶ ‘General Recommendation No. 19’ (n 27) [14].

⁴⁷ ILO Convention No. 189 (2011) Concerning decent work for domestic workers.

⁴⁸Chuang, (n 42) 195.

⁴⁹ The Committee, ‘General Recommendation No. 23: on participation in political and public life’ (1997) CEDAW/C/GC/23 [45(c)].

⁵⁰ Working Group (n 6) [127].

they will begin to change deeply entrenched patriarchal structures and ensure these institutions do not perpetuate gender-based poverty.⁵² Second, poverty is also a serious obstacle to participation in the formation and implementation of government policy (Article 7(b)). States should be reminded that they have an obligation to meaningfully consult and to ensure the participation of women in poverty in the design, implementation and evaluation of decisions that affect them. This promotes not only social cohesion and empowerment but ‘ensures public policies are designed to meet the expressed needs’ of women in poverty.⁵³ Political participation also happens in the informal sphere. Informal spaces provide important ‘opportunities for coalition-building, the transfer of knowledge...and allow for women’s movements to more effectively promote gender equality goals.’⁵⁴ The informal sphere includes internet campaigns on blogs, Facebook and Twitter. Digital literacy is essential to effectively participate in these new forums of political activism. Women in poverty may not have the financial resources to gain this knowledge or access new technologies. Thus, the State needs to create programs that address these needs.

Nationality can be extremely important in obtaining access to social benefits (Article 9).⁵⁵ Statelessness in women and girls is heightened in times of conflict because they do not enjoy the

⁵¹Ruth Rubio Marin, ‘A new European Parity-Democracy Sex Equality Model and Why it Won’t Fly in the United States’ (2012) 60 *Am J of Comp Law* 107-12.

⁵² *ibid.*

⁵³ UN Special Rapporteur on extreme poverty and human rights, ‘Guidelines Principles’ (n 17) [37].

⁵⁴ Meghan Alexandra Dersnah ‘Global Report for Working Group on the issue of discrimination against women in law and in practice (2014) <<http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Discriminationinpublicandpoliticallife.aspx>>.

⁵⁵ The Committee, ‘Fifth Concluding Observations: Jordan’ (2012) CEDAW/C/JOR/5 [33]. The Committee, ‘General Recommendation No. 32: on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (2014) CEDAW/C/GC/32 [54].

protection of citizenship ‘including consular assistance and also because many are undocumented.’⁵⁶ This can mean girls and women are denied access to health care, education, accommodation, food, clothing, social services, sources of livelihood and the State should ensure throughout the asylum procedure and integration process that women have access to these goods and services.⁵⁷ It is essential that the State set up registration systems that are accessible to women recognising that poor women may often lack official identity documents.⁵⁸ Furthermore, the State’s naturalisation laws must be sensitive to gender-based poverty. For example, language requirements may disadvantage women because of their limited access to formal education or ‘economic self-sufficiency [criteria] may be more difficult for women to meet.’⁵⁹ This can trap women in statelessness which in turn leads them to become economically dependent on men and vulnerable to increased risk of exploitation.⁶⁰ The State laws and policies on nationality should take account of the unique needs of women in poverty. This is a crucial component of transformative gender equality; it is necessary to reform structures and institutions, such as asylum procedures, so that they account for the experiences of women in poverty.

Education is a key component in breaking cycles of gender-based poverty (Article 10). The UN Special Rapporteur on education observes that poverty contributes to gender inequality in education.⁶¹ Schools may have fees or indirect costs (uniforms, food or textbooks) that make

⁵⁶ The Committee, ‘General Recommendation No. 30 women in conflict prevention, conflict and post-conflict situations’ (2014) CEDAW/C/GC/30 [60].

⁵⁷ ‘General Recommendation No. 32’ (n 55) [33], [48].

⁵⁸ *ibid* [56]-[57].

⁵⁹ *ibid* [55].

⁶⁰ *ibid*.

⁶¹ UN Special rapporteur on education, ‘Girls’ right to education’ (2006) E/CN.4/2006/45 [57].

education unattainable for girls in poverty.⁶² Girls in poverty are less likely to complete primary school⁶³ and in times of financial constraints girls are more likely to drop out of school.⁶⁴ Girls may be pulled out of school to help with ‘domestic responsibilities such as cooking, fetching water and firewood and childcare.’⁶⁵ When girls in poverty are married young or become pregnant ‘formal education becomes even more distant [and they] have virtually no choices other than domestic work and raising their children.’⁶⁶ There are a number of best practices a General Recommendation on women and poverty can highlight. To address the disadvantage element, at a minimum primary school should be provided free of charge with no indirect costs.⁶⁷ The Committee should recommend that the State ensure that high quality affordable services such as water facilities and child care are readily available so girls are not burdened with this work. The UN Special Rapporteur on the right to food notes ‘school-feeding programmes can make a significant contribution to improving access to education for girls.’⁶⁸ Cash transfers to families that are conditional on keeping girls in school⁶⁹ or ‘stipends to girls who agree to delay marriage until they complete secondary education’ could also be effective.⁷⁰ Although conditional cash transfers would have to be evaluated to ensure they do not undermine the girl’s agency and reinforce negative stereotypes on gender-

⁶² *ibid* [66].

⁶³ World Bank, ‘Voice and Agency’ (n 13) 11.

⁶⁴ *ibid*.

⁶⁵ Working Group (n 6) [36].

⁶⁶ UN Special Rapporteur on education (n 61) [78].

⁶⁷ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 17) [88(a)].

⁶⁸ UN Special Rapporteur on the right to food, ‘Women’s Rights and the Right to Food’ (2013) A/HRC/22/50 [18].

⁶⁹ *ibid* [15],[17]; World Bank, ‘Voice and Agency’ (n 13) 28.

⁷⁰ Working Group (n 6) [37]. This model was used successfully in Brazil; *ibid*.

based poverty.⁷¹ It is also necessary to address the recognition harms that limit girls receiving an education. Families may believe it is harder for an educated woman to get married and thus she will remain a financial burden to her family.⁷² It is necessary to explain that education is important to ensure a woman is financially independent. This also entails deeper structural changes that ensure high paid decent employment is available for girls upon graduation. All measures to combat gender-based poverty in education should only be undertaken after the participation and consultation with girls and their families.

The Committee consistently addresses important aspects of gender-based poverty under Article 11 (employment) in the Concluding Observations: the gender pay gap, gender job segregation, maternal and paternal leave. There are other aspects of employment that need to be examined in relation to gender-based poverty. The General Recommendation should draw on the structural element of transformative equality to ensure that the labour market is structured to empower women in poverty rather than perpetuate gender-based poverty. The General Recommendation should also advocate a reduction and reconstruction of informal work. Informal work is predominantly low paid, done in dangerous conditions and often exploitative and disproportionately performed by women.⁷³ The Committee should advocate the creation of more opportunities for women in the formal labour market and at the same time extending legal regulation to the informal market.⁷⁴ Similarly, Article 11 needs to address the disproportionate amount of unpaid care work that women perform. This should be in conjunction with Article 5 (cultural attitudes and

⁷¹ Fredman, 'Women and Poverty' (n 36).

⁷² The Department of International Development (UK), 'Improving the lives of girls and women in the world's poorest countries' <<https://www.gov.uk/government/policies/improving-the-lives-of-girls-and-women-in-the-worlds-poorest-countries/supporting-pages/helping-to-end-early-and-forced-marriage>>.

⁷³ Working Group (n 6) [90]-[91].

⁷⁴ *ibid* [56]-[57].

stereotypes) and the recommendations to modify the recognition harms that require women to perform unpaid work. The Working Group on Discrimination Against Women in Law and Practice advocates that care work should be *recognised* in the macro-economy, *reduced* through the provision of publically funded care services and *redistributed* by sharing care work equally among men and women.⁷⁵ The General Recommendation should make a similar structural policy recommendation.

Accessible, affordable, high quality health care is need by both men and women in poverty. The General Recommendation has to focus specifically on the gender-based aspects of health in light of gender-based poverty (Article 12). The UN Special Rapporteur on the right to health notes that women in poverty are particularly at risk of maternal mortality.⁷⁶ Only ‘half of pregnant women in developing regions receive the recommended minimum of four antenatal care visits.’⁷⁷ The Committee should recommend that the State ensure women in poverty, particularly poor rural women, are able to access high quality and affordable maternal health care services. This entails ensuring adequate transport systems between rural communities and health centres. The evidence from the Concluding Observations is that poor families do not invest limited resources in maternal health because of women’s low socio-economic status in the home.⁷⁸ Therefore, it is also important to recommend that States remedy socio-cultural attitudes on the value and importance of protecting women’s health.

Article 13 requires States to ensure gender equality in economic and social life. In the Concluding Observations the Committee has used this obligation to refer to disadvantaged groups

⁷⁵ *ibid* [92]-[96].

⁷⁶ UN Special Rapporteur on the right to health, ‘The right to highest standard of health: reduction of maternal mortality’ (2006) A/61/338 [10], [28(b)].

⁷⁷ ‘Millennium Development Report: 2013’ (n 10) 28.

⁷⁸ ‘Sixth and Seventh Periodic Reports State Parties: Ethiopia’ (2009) CEDAW/C/ETH/6-7 [140].

such as women in poverty⁷⁹ and to equal access to financial credit.⁸⁰ This provision is under developed but there is great potential to use it to include many aspects of gender-based poverty.⁸¹ The precise scope of these obligations depends on the understanding of “economic” and “social.” It is outside the scope of this chapter to fully analyse the meaning of these terms. However, in the Concluding Observations the Committee has referred to both housing and social assistance. Therefore, I will examine these two aspects of gender-based poverty in the General Recommendation on women and poverty. In relation to housing, Farha notes that due to inadequate income support programs women in poverty may be unable to access decent affordable housing.⁸² The gender pay gap can often result in women not being able to access credit or meet mortgage requirements. The Committee should recommend that the State’s housing policy takes account of the unique needs of women in poverty. In a similar vein, social assistance schemes must meet the needs of women in poverty. Women are often in low-paid temporary, part-time or casual employment and have interrupted work histories.⁸³ Women cannot take advantage of social security schemes that are connected to formal employment. The General Recommendation needs to stress the importance of having non-contributory social assistance schemes; that is schemes ‘where benefits are received by those in a situation of need.’⁸⁴ Social assistance schemes should not re-enforce gender power imbalances. The Committee should recommend that benefits under these schemes must not be connected to women’s relationships ‘with male earning members or as part of

⁷⁹ The Committee, ‘Seventh Concluding Observations: Canada’ (2008) CEDAW/C/CAN/CO/7 [39]; the Committee ‘Sixth Concluding Observations: Argentina’ (2010) CEDAW/C/ARG/CO/7 [33].

⁸⁰ The Committee, ‘Seventh Concluding Observations: Kenya’ (2011) CEDAW/C/KEN/CO/7 [35].

⁸¹ Beate Rudolf, ‘Article 13’ in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 336.

⁸² Leilani Farha, ‘Is There a Woman in the House - Re/conceiving the Human Right to Housing’ (2002) 14(1) *Can J of W and the L* 118, 121.

⁸³ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 17) [85].

⁸⁴ CESCR, ‘General Comment No. 19 The right to social security’ (2009) E/C.12/GC/19 [4(b)].

the family household.⁸⁵ It is also important that social assistance rates account for the ‘fact that women...often have sole responsibility for the care of children.’⁸⁶ This means that any conditions attached to social assistance schemes should not add to women in poverty’s workload. The care responsibilities also mean that women’s resources are used to support children and the elderly. Social assistance rates for women must take account of these additional needs. Following in the path of the UN Special Rapporteur on extreme poverty and human rights, the Committee should stress that social assistance level should be at a ‘minimum essential levels’ so women in poverty can enjoy their human rights.⁸⁷

Furthermore, under Article 13 the General Recommendation should draw attention the effects of austerity measures on women. As one example, UN Women observes that “‘savings” made from cutting back on government funding of public services often increase the demands [on women] on unpaid care and domestic work’⁸⁸ Stimulus measures may target industries and occupations that are primarily male dominated and overlook traditionally female dominated jobs.⁸⁹ The Committee needs to emphasise that in times of economic crisis and austerity it is crucial that recovery measures do not further entrench gender-based poverty. It can also draw on the findings of the UN Special Rapporteur and UN Women and recommend that women meaningfully participate in the design and implementation of all economic and social policies. Moreover, States need to ‘put in place social protection policies that act as “stabilizers” to reduce macroeconomic policies while also contributing

⁸⁵ Beth Goldblatt, ‘The Right to Social Security—Addressing Women’s Poverty and Disadvantage’ (2009) 25(3) SAJHR 442, 458.

⁸⁶ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 17) [85].

⁸⁷ *ibid* [86(a)].

⁸⁸ UN Women (n 15) 201.

⁸⁹ UN Special Rapporteur on extreme poverty and human rights, ‘Human rights based approach to recovery from global economic and financial crises’ (2011) A/HRC/17/34 [77].

to substantive [gender] equality⁹⁰ and there should be investment in education and skill development for women and ‘in sectors women where make up a considerable proportion of the labour force.’⁹¹

The Committee has done a good job at using all four dimensions of transformative equality to understand and remedy gender-based poverty in the Concluding Observations for rural women (Article 14). It has a sophisticated understanding that rural women are disproportionately poor and calls on the State to ensure women are able to own, use and benefit from the land by reforming the formal legal system, customary law and socio-cultural norms.⁹² It also consistently urges the State to ensure rural women are active participants in the development and implementation of land policies.⁹³ The Committee should draw on and synthesise the insights it has made in the Concluding Observations to make similar recommendations drawing on all elements of transformative equality in the General Recommendation.

Article 15 (equality in law) is also underdeveloped. The Committee is currently working on a General Recommendation on access to justice and is situating this discussion in Article 2 (core obligations) and 15 of CEDAW.⁹⁴ In a General Recommendation on women and poverty, the Committee should highlight how women in poverty interact with the justice system. This includes creating and maintaining a legal aid system that allows women in poverty to access the courts particularly in areas of poverty and family law; for example, in accessing social assistance review

⁹⁰ UN Women (n 15) 217.

⁹¹ UN Special Rapporteur on extreme poverty and human rights, ‘Global Economic and Financial Crises’ (n 89) [79].

⁹² ‘Seventh CO: Kenya’ (n 78) [41].

⁹³ *ibid.*

⁹⁴ The Committee, ‘Access to Justice—Concept Note for Half Day General Discussion’ <<http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf>>.

boards. The Committee should recommend that court procedures be reviewed to ensure they are streamlined and user friendly.

In relation to family law (Article 16) the Committee has done a significant amount of work to ensure that on the death of a spouse or the breakdown of a relationship women do not slip into poverty.⁹⁵ A General Recommendation on women and poverty can draw on this previous work such as reforming customary law to ensure women can inherit and own property equally. There is one additionally important aspect that the Committee needs to address and that is Article 16(b): ‘the same right to freely choose a spouse and to enter into marriage only with their free and full consent.’ The Committee has addressed early forced marriage of young girls in the Concluding Observations but their current recommendations do not address the systemic reasons for child marriage.⁹⁶ Girls who live in poverty are twice as more likely to be married before they are 18 years old.⁹⁷ A comprehensive approach to forced marriage needs to focus on combating child and household poverty. Again, this could be done through conditional cash transfers that require a girl to attend school on a regular basis and through the creation of decent economic opportunities for the family so girls are not viewed as an economic burden.

The General Recommendation should highlight the relationship between violence and poverty. The World Bank notes that ‘beyond damage to health, violence reduces women’s economic opportunities.’⁹⁸ Violence needs to be understood as a significant contributor to gender-based poverty. Women who experience domestic violence have ‘higher work absenteeism, lower

⁹⁵ ‘General Recommendation No. 29’ (n 20).

⁹⁶ The Committee and CCRC, ‘General Recommendation No. 31: on harmful practices’ (2014) CEDAW/C/GC/31 [21].

⁹⁷ ‘Girls Not Brides: What is the Impact of Child Marriage: Poverty’ <<http://www.girlsnotbrides.org/themes/poverty/>>.

⁹⁸ World Bank, ‘Voice and Agency’ (n 13) 65.

productivity and lower earnings.⁹⁹ Women can then become trapped in dependent relationships with abusive partners. If girls face violence at or on the way to school they may be less likely to complete their studies, thereby reducing their ability to compete in the labour market and break intergenerational cycles of poverty.¹⁰⁰ The Committee should remind State parties that a commitment to end violence against women necessarily entails reducing gender-based poverty. The State could be required to ensure access to domestic violence shelters and use a variety of safety techniques (lighting, patrol guards, etc.) to ensure girls are not assaulted on the way to school.

(ii) *Accountability Mechanisms*

Re-conceiving the obligations in CEDAW to account for the experiences of gender-based poverty is the crucial first step. It is equally important to address the implications of using human rights to understand and remedy gender-based poverty. Unlike seeing poverty as an issue of charity or development, regarding poverty as an issue of human rights means there are legally enforceable obligations on the State. The OHCHR maintains that the cornerstone of a rights-based approach to poverty is accountability.¹⁰¹ The General Recommendation should investigate this aspect of locating gender-based poverty in CEDAW. There are different accountability models.¹⁰² Given the

⁹⁹ *ibid.*

¹⁰⁰ UNIFEM, 'The Facts: Violence Against Women and the Millennium Development Goals' <[http://www.unwomen.org/~media/H\\$eadquarters/Media/Publications/UNIFEM/EVAWkit_02_VAWandMDGs_en.pdf](http://www.unwomen.org/~media/H$eadquarters/Media/Publications/UNIFEM/EVAWkit_02_VAWandMDGs_en.pdf)>

¹⁰¹ OHCHR, 'Who Will be Accountable: Human Rights and the Post-2015 Development Agenda' HR/PUB/13/1 (2014) ix.

¹⁰² See the World Bank-Social Development Department, 'Demand for Good Governance in the World Bank: Conceptual Evolution, Frameworks and Activities' <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1193949504055/DFGG_WB_Conceptual_Evolution.pdf>.

relationship between the OHCHR and the Committee and the desire for harmonisation across UN human rights bodies, the OHCHR's model of accountability and examples from within the UN structure will be used in this section to develop implementation strategies for the General Recommendation on women and poverty.

Before discussing the parameters of accountability, it is necessary to examine the legal basis in CEDAW. Article 2 of CEDAW contains the State's core obligations. It requires the State to 'condemn discrimination against women in all its forms' while Article 2(b) requires the State 'to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women' and Article 2(e) obliges the State 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.' The Committee has explained that Article 2 requires the State to protect women against discrimination and that 'this protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies where appropriate.'¹⁰³ Article 2(e) requires the State to ensure 'that women are able to make complaints about violations of their rights under the Convention and have access to effective remedies; ensure Government accountability domestically and establish national human rights institutions or other machineries.'¹⁰⁴ The Committee notes that for this 'accountability function to work effectively, appropriate mechanisms and institutions must be in place.'¹⁰⁵ The text of CEDAW mandates that the State be held accountable. It is an essential component to ensure that gender equality and women's human rights are not devoid of normative value.

¹⁰³ 'General Recommendation No. 28' (n 4) [24].

¹⁰⁴ *ibid* [36].

¹⁰⁵ *ibid* [40].

While there is a legal basis for discussing accountability in CEDAW, the Committee speaks in very broad terms of accountability. The OHCHR lays down the necessary framework and the Guiding Principles of the UN Special Rapporteur on extreme poverty and human rights and the CESCR General Comment on the right to water provides a useful model to draw on for developing accountability mechanisms in relation to gender-based poverty in CEDAW.

The OHCHR has examined the relationship between human rights and accountability. Accountability is the ‘relationship... between duty bearers to right holders.’¹⁰⁶ Those in power have to ‘take responsibility for their actions, to answer for them by explaining and justifying them to those affected.’¹⁰⁷ The State has to justify its actions against the human rights standards in international treaties like CEDAW. When the State exceeds the boundaries of its powers there need to be effective enforcement mechanisms. The OHCHR’s model has three constituent elements: responsibility, answerability and enforceability. The responsibility dimension sets out the ‘specific obligations which inform [State] conduct.’¹⁰⁸ The State is responsible for the outcomes to achieve human rights and it is to fulfil both positive and negative obligations of these rights.¹⁰⁹ Equally, it is responsible for the standards of service, for the pace of progress and for ensuring services are delivered equally and without discrimination.¹¹⁰ The answerability dimension ‘refers to the capacity to demand that those in authority give reasoned justification for their behaviour.’¹¹¹ Answerability can come in a variety of forms: courts, administrative hearings, national human rights institutions,

¹⁰⁶ OHCHR ‘Post-2015 Development Agenda’ (n 101) 10.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*13.

¹¹⁰ *ibid.*

¹¹¹ *ibid.* 14.

consultation, community based and online interaction and activism. The final dimension is enforceability. This ensures that there is an effective remedy when the State violates its human rights obligations. Accountability applies across the whole life cycle of a law or policy: planning, budgeting, implementation, monitoring and evaluation.¹¹² The accountability mechanisms themselves are to be fair and transparent.

The OHCHR's three dimensions are useful in crafting accountability recommendations in the General Recommendation on women and poverty. The responsibility dimension requires the State to have a specific plan to reduce gender-based poverty. The General Recommendation needs to be a strong advocate that each State should have a gender-based poverty reduction strategy (GPRS). Relying on current economic policies is not sufficient. There should be a specific and tailored strategy that explains the laws, policies and programmes it is using to remedy gender-based poverty.¹¹³ The substantive content of the plan can draw on the policy recommendations and best practice examples explained above, but the General Recommendation should also encourage States to use innovative methods that are consistent with gender equality to tackle gender-based poverty. The Committee should stress that the GPRS needs to address all aspects of gender-based poverty: economic disadvantage, prejudicial socio-cultural norms and exclusion harms and applies to all areas of public and private life. The General Recommendation should clarify that the State is responsible for the delivery of high quality, affordable and accessible good and services to women who live in poverty even if services are contracted out to private parties.¹¹⁴ This is because Article 2(e) of CEDAW means that the State has a responsibility to protect women in poverty 'against abuses

¹¹² *ibid.*

¹¹³ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' (n 17) [50].

¹¹⁴ *ibid* [48].

committed by private service providers.¹¹⁵ The Committee should also recommend that the GPRS needs to be arrived at in a fair and transparent manner. The General Recommendation should stress that participation is an integral part of ensuring an effective GPRS.

To fulfil the answerability dimension the State needs to identify who is responsible for each element of the GPRS. The strategy should identify the appropriate forum women can turn to require the State to justify its laws and policies on gender-based poverty. The answerability dimension should be tailored to the needs of gender-based poverty. This means forums of accountability cannot be cost prohibitive. They need to be de facto accessible. The General Recommendation should make clear this can require the State to provide high quality legal assistance and to respect, protect and support the work of CSOs that assist women in poverty.¹¹⁶ The final dimension, enforceability is ‘not solely concerned with punishment.’¹¹⁷ While it includes reparations, remedies should also ‘promote positive structural and institutional change.’¹¹⁸

There is one further implementation element that should be highlighted in the General Recommendation: the duty for States to co-operate and provide international assistance. There is a growing awareness that poverty and gender-based poverty are not captured by a traditional State centred lens.¹¹⁹ Raday observes that global neo-liberalism ‘has exacerbated inequality globally, between countries and within countries...these extreme inequalities are often born disproportionately

¹¹⁵ *ibid* [61].

¹¹⁶ For example, Ethiopia prohibited civil society organisations that were more than 10% funded from foreign sources. This would be prohibited under CEDAW as it can limit women’s access to justice. See the Committee, ‘Sixth and Seventh Concluding Observations: Ethiopia’ (2011) CEDAW/C/ETH/CO/6-7.

¹¹⁷ OHCHR, ‘Post-2015 Development Agenda’ (n 101) 15.

¹¹⁸ *ibid*.

¹¹⁹ Nancy Fraser, ‘Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalising World’ (2011) 22 Stellenbosch L Rev 452. See also Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, 2007).

by women.¹²⁰ To compete in a global economy due to entrenched patriarchal norms women are increasingly being pushed into the precarious ‘informal work sector without regulated rights.’ Women ‘constitute the majority of workers in highly exploitative export processing zones which are a creation of global capitalism.’¹²¹ Transnational corporations’ labour practices,¹²² international lending policies and debit agreements between States are all important factors in perpetuating gender-based poverty.¹²³ As an example and as discussed in Chapter 6, the Committee is concerned that in Ethiopia foreign companies are ‘displacing local communities and further contributing to women’s food insecurity and the feminization of poverty.’¹²⁴ This highlights how gender-based poverty can transcend national boundaries which mean the solutions also need to transcend State borders. While the relationship between developed States, developing State, international organisation, transnational corporations and gender-based poverty is only just beginning to be uncovered and understood, one potential solution that is being developed by UN is the international duty to cooperate. Below I assess how the various UN bodies have developed this duty and then canvass the legal basis for a duty to cooperate in CEDAW, concluding that a General Recommendation should tentatively contribute to developing the duty to cooperate.

It is illuminating first to examine how other UN actors are developing the duty to cooperate. The two prominent non-binding sources advocating cooperation among states are the UN Special Rapporteur on extreme poverty and human rights and the MDGs. The UN Special Rapporteur calls on all relevant States to ‘provide international assistance and cooperation’ based on Article 55 and 56

¹²⁰ Frances Raday, ‘Gender and Democratic Citizenship: The Impact of CEDAW’ (2012) 10(2) ICON 512, 528.

¹²¹ *ibid.*

¹²² Working Group (n 6) [70]-[71].

¹²³ UN Special Rapporteur on extreme poverty and human rights, ‘Global Economy and Financial Crises’ (n 88) [98].

¹²⁴ ‘Sixth and Seventh CO: Ethiopia’ (n 116) [36].

of the UN Charter.¹²⁵ Article 55 and 56 require States to work in cooperation to achieve economic and social rights. She explains that this means States must avoid conduct that will impair the human rights of ‘persons living in poverty beyond their borders.’¹²⁶ The State should consider taking steps to ‘create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment taxation, finance, environmental protection and development cooperation.’¹²⁷ Similarly, Goal 8 of the MDGs asks developed States to address ‘the special needs of least developed countries’ and is described by Alston as aiming towards ‘a global partnership for development.’¹²⁸ This goal has been criticised as being amorphous. Unlike the other goals, there are no benchmarks or indicators to measure the success of the global partnership. Darrow points out that ‘this bald omission prevents [the goal] from offering any basis to hold richer countries and donor organisation to account for poverty in low income countries.’¹²⁹ This reflects a larger concern that developed States will be obligated to ‘distribute large quantities of aid to other governments.’¹³⁰ States are reluctant to take on these obligations. This suggests that the duty to cooperate has not fully crystallised into a legal obligation. Alston observed in 2005 that ‘no UN body...has accepted the proposition that any given country is obligated to provide specific assistance to any other country.’¹³¹ Rather he characterises the duty to cooperate as a ‘generic one that attaches to the undifferentiated international community.’¹³²

¹²⁵ UN Special Rapporteur on extreme poverty and human rights, ‘Guiding Principles’ (n 17) [91].

¹²⁶ *ibid* [91].

¹²⁷ *ibid* [96].

¹²⁸ Philip Alston, ‘Ships in the Night: The Current State of Human Rights and Development Debate Seen Through the Lens of Millennium Development Goals’ (2005) 27 *Hum Rts Q* 755, 756.

¹²⁹ Mac Darrow, ‘The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda’ (2012) 15 *Yale Hum Rts and Dev L J* 55, 70.

¹³⁰ Alston (n 128) 776.

CESCR has been developing the duty to cooperate from a legally binding perspective. Article 2(1) of ICESCR obliges States ‘to take steps, individually and through international assistance and co-operation...to achieving progressively the full realisation of rights in [ICESCR].’ Article 23 explains that international assistance includes ‘the furnishing of technical assistance.’ CESCR has used these obligations to recommend in various General Comments that international organisations ensure their policies are consistent with the recommendations made by CESCR. For example, CESCR recommends that UN agencies, the World Bank and IMF ‘take into account the right to water in their lending policies, credit agreement, structural adjustment programmes and other development projects.’¹³³ CESCR also calls on developed States: ‘depending on the availability of resources, States should facilitate realisation of the right to water in other countries, for example through the provisions of water resources, financial and technical assistance and provide necessary aid.’¹³⁴ CESCR characterises this as a special responsibility. It does not explain any legal basis in ICESCR for this obligation. Byrnes observes that CESCR and other UN human rights treaty bodies in the Concluding Observations are recommending that gender impact be taken into account in designing, delivering and accepting development assistance, that human rights obligations be taken into account in negotiations with international financial institutions, that States ensure international trade liberalisation agreement do not have an adverse impact on human rights and States as

¹³¹ *ibid* 777.

¹³² *ibid*.

¹³³ ‘General Comment No. 15’ (n 26) [60].

¹³⁴ *ibid* [34].

members of international organisation should take steps to ensure the institution take into account human rights in all their activities.¹³⁵

There is nothing similar to Articles 2(1) and 23 of ICESCR in CEDAW. There is no reference to international cooperation or assistance. Article 24 of CEDAW only requires States ‘to adopt all necessary measures at the national level.’ This might suggest that there is no duty to cooperate in CEDAW. On the other hand, the chapeau of Article 2 (core obligations) requires States to pursue ‘by all appropriate means and without delay a policy of eliminating discrimination against women.’ The Committee explains that “without delay” requires that ‘when a State party is facing resource constraints or needs expertise to facilitate the implementation of [CEDAW], it may be incumbent upon it to seek international cooperation in order to overcome these difficulties.’¹³⁶ It notes that there is an ‘urgent need to ensure that globalisation, policies and plans of action that facilitate international trade...are gender sensitive and improve the quality of life of women.’¹³⁷ Similarly in General Recommendation No. 26 on migrant women, the Committee recommends that sending, receiving and transmitting States ‘enter into bilateral or regional agreements or memorandum of understanding protecting the rights of women migrant workers.’¹³⁸ More recently, in the context of statelessness and asylum, the Committee holds that the State ‘should cooperate with all UN agencies, in particular the UNHCR...[and] they should collaborate with [CSOs] supporting women asylum seekers and refugees.’¹³⁹ However, the Committee does not explain the legal basis for these recommendations. In the Individual Communications the Committee has also been analysing the

¹³⁵ Andrew Byrnes, ‘Article 2’ in Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 96.

¹³⁶ ‘General Recommendation No. 28’ (n 4) [29].

¹³⁷ The Committee, ‘Procedural Decision of the Committee on the Elimination of Discrimination against Women, Gender and Sustainable Development (2002) UN Doc A/57/38 (Part I) [424].

¹³⁸ The Committee, ‘General Recommendation No. 26: on women migrant workers’ (2008) CEDAW/C/GC/26 [27(a)].

¹³⁹ ‘General Recommendation No. 32’ (n 52) [41].

extraterritorial reach of CEDAW. In this forum the Committee is expanding on the State's duty to protect. In *MNN v Denmark* the Committee held under Article 2(d) of CEDAW (prohibiting the State from committing discrimination against women) the State cannot return refugee and asylum seeking women back to countries where they face a foreseeable and serious risk of gender-based violence regardless of the fact that the actual act of violence happens outside of the territory of the sending State.¹⁴⁰ The prohibition on the State committing discrimination under Article 2(d) entails a positive obligation to protect women from foreseeable and serious risks of gender-based violence 'irrespective of whether such consequences take place outside the territorial boundaries of the sending party.'¹⁴¹

While there is evidence that the Committee interprets CEDAW to include an obligation upon States to seek help when required and to protect women from actions outside of the State's territory, the parameters of these duty are not clearly demarcated. What precisely does 'international cooperation' entail? Does the requesting State need to seek assistance from the UN, the World Bank, the ILO or the IMF? Should resource poor States look to wealthy States in the developed world? Is there an obligation on the international organisations or developed State to respond to this request? Academic scholarship, the Committee and other UN human rights treaty bodies are just beginning to understand and develop the duty to cooperate.¹⁴² As mentioned in Chapter 1, part of the challenge is that the international human rights system was not initially designed to monitor human rights problems that transcend geographic borders.

¹⁴⁰ CEDAW/C/55/D/33/2011 [8.10].

¹⁴¹ *ibid.*

¹⁴² See Malcolm Langford et al 'Introduction: An Emerging Field' in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* Malcolm Langford et al (eds) (CUP, 2013).

The Committee has no authority to review the actions of international organisations that can contribute to gender-based poverty. It does have authority to review State action. However, from the perspective of the State, the Committee needs to be cautious as States are reluctant to accept an obligation to provide support to other States or protect women from all harms that happen outside of the State's borders. If the General Recommendation makes a strong recommendation on a duty to cooperate or the duty to protect it risks alienating State parties and losing both its authoritativeness and persuasiveness. At the same time, it is important to recognise that gender-based poverty is an inter-connected global phenomenon. To strike the correct balance, the General Recommendation should first reiterate its position: that if States are facing resource constraints in reducing gender-based poverty they should request international financial and technical assistance. The General Recommendation should explain that this is based on the obligation to eliminate gender discrimination without due delay in Article 2 of CEDAW. In tandem the obligation for the State to refrain from committing acts of discrimination (Article 2(d)) and the State's obligation to ensure that non-state actors do not discriminate against women (Article 2(e)) provide the legal basis for further developing CEDAW to address the global nature of gender-based poverty. The State should be encouraged to ensure that their international policies, loan conditions and trade agreements do not exacerbate gender-based poverty. The State should be encouraged under its duty to protect to encourage transnational corporations to respect the rights of women. The General Recommendation can also stress that as members of international organisations and financial institutions States should use their position and influence to ensure the decisions and activities of these institutions do not entrench gender-based poverty. Neither the UN human right treaty bodies nor academic scholarship has recognised an obligation for States to provide technical or economic resources.¹⁴³ However, drawing on the work of the CESCR and Byrnes, if a State does provide

¹⁴³ Magdalena Sepulveda, "The Obligations of "International Assistance and Cooperation" under the International

development aid, it must ensure that it empowers women in poverty. States should co-operate and collaborate with international and domestic actors on reducing gender-based poverty. This is a tentative approach to the duty to cooperate and applying the duty to protect beyond the boundaries of the State but it will ensure the General Recommendation on women and poverty is perceived as an authoritative interpretation of CEDAW while at the same time respond to an important aspect of gender-based poverty.

(iii) Guidance on the State Report

The last paragraphs of the General Recommendation should give clear advice on how the State should prepare the periodic State report. The State reporting guidelines are concise and even if reformed as proposed in Chapter 6, would not fully elaborate on how to include gender-based poverty in the State reports. Interestingly the reporting guidelines request that States take into account the Committee's General Recommendations in preparing the State report. Moreover, CSOs are an important source of information on women in poverty and they are unlikely to consult the guidelines in preparing shadow reports. Thus, in multiple ways guidance in the General Recommendation can beneficially feed into the periodic reporting process. There are a series of directions the General Recommendation should contain. This section proposes a few recommendations that the General Recommendation can include on preparing the State report.

First, for the Committee to meaningful assess how the State has fulfilled its CEDAW obligations it is necessary to have disaggregated data on the situation of women in poverty. The Committee repeatedly and continually calls on States to provide this data. While States have not

always responded to this call, it is still important for the Committee to highlight the importance of understanding the de facto situation of women in poverty. Second, the General Recommendation should provide guidance on how the State report should be structured to include gender-based poverty. In relation to gender-based violence, the Committee routinely discusses violence under a separate sub-heading and integrates a discussion on violence into the other substantive provisions in the treaty.¹⁴⁴ The General Recommendation on women and poverty can recommend a similar approach. It should encourage the State report to give specific attention to the issue of gender-based poverty. This can include specific quantitative and qualitative information on gender-based poverty: social assistance rates, the structure and accessibility of benefits, the gender-based implications of conditional cash transfers and information on the design, structure and funding of specific gender-based poverty reduction programmes the State is pursuing. This discussion should be anchored in Article 13 (economic and social life). At the same time, the Committee should emphasise that interpreting equality and non-discrimination to incorporate the harms of gender-based poverty means gender-based poverty is comprehensively interpreted into the CEDAW framework.¹⁴⁵ When preparing the report on each substantive provision the State should provide information on the de jure and de facto conditions of women in poverty.

V. Conclusions

A General Recommendation on women and poverty can make a significant contribution to the evolution of gender-based poverty and poverty as a human rights issue. It is essential that the

¹⁴⁴ 'General Recommendation No. 19' (n 27) [29]-[30], [33], [43].

¹⁴⁵ Debbie Budlender and Guy Hewitt, 'Engendering Budgets: A Practitioners' Guide to Understanding and Implementing Gender-Responsive Budgets' (Commonwealth Secretariat, 2003) 12

General Recommendation have a firm theoretical basis and that it makes a persuasive argument that gender-based poverty is an obstacle to the obligations in CEDAW. This is best accomplished by justifying the need for a General Recommendation, explaining the legal basis for this interpretation of CEDAW, providing meaningful recommendations that are responsive to the complexity of gender-based poverty and providing practice directions for the State report. It is hoped that a persuasive and authoritative General Recommendation would ensure that the Committee consistently and coherently addresses gender-based poverty in the Concluding Observations and Individual Communications. This would ensure CEDAW is uniformly implemented. It is further hoped that a General Recommendation would prompt CSOs to report on gender-based poverty in the reporting process and inspire domestic activism on gender-based poverty. Finally, a General Recommendation on women and poverty will hopefully encourage the State to report on gender-based poverty in the periodic reporting process. Furthermore it is hoped that it will prompt transformative change and that all relevant actors will begin to take measures from a human rights perspective to ameliorate gender-based poverty.

CONCLUSION

The central concern of this thesis is that poverty is a gender-based experience and an obstacle to human rights. Human rights need to be responsive to this newly recognised challenge. The UN human rights forum is the ideal place to examine how human rights can be calibrated to account for gender-based poverty because it has a proven-track record of being a pioneer in the evolution of human rights.¹ Prominent actors at the UN have been developing the relationship between women, poverty and human rights. This thesis contributes to that development by situating gender-based poverty and human rights in binding international legal commitments.

Arguable there are nine UN human rights treaties in which one might explore the role of human rights in ameliorating gender-based poverty. In Chapter 1, I argued that the nature of gender-based poverty clarified which international human rights treaty should be at the forefront of this exploration. Women's poverty is more complex than lack of income. Gendered social norms and cultural attitudes that are based on the inferiority of women or on the stereotyped roles of women and men cause and contribute to women's poverty. Gendered norms and stereotypes limit women's access to education, health care, employment and economic resources. This limits women's ability to construct and enjoy a meaningful life and to fully participate in all areas of life. For this thesis gender-based poverty was defined as the combination of limited access to economic resources and the recognition and participation that devalue and exclude women. Given that poverty for women is linked to negative gendered norms, the logical locus in which to explore the relationship between women, poverty and human rights is CEDAW. CEDAW, alone out of the UN human rights

¹ See Chapter 7.

treaties, has an exclusive mandate to understand and remedy the gendered violations of human rights and is specifically tasked with improving negative socio-cultural attitudes.² The treaty is designed to ensure all women enjoy their human rights³ and the Committee has been a strong advocate for protecting women from discrimination and achieving equality in all areas of life from violence against women to refugee status and statelessness.⁴ Bearing in mind the overall commitment of the CEDAW to eliminating discrimination and achieving substantive equality so women can enjoy their human rights and the association between poverty and women's effective enjoyment of rights made out in Chapter 1, this thesis has examined the ways in which gender-based poverty might be addressed through the framework of CEDAW.

Although CEDAW is the logical choice to develop the relationship between gender-based poverty and human rights, there is a gap in CEDAW. There is no specific obligation in CEDAW requiring States to respect, protect and fulfill the human rights of women in poverty. The thesis focused on addressing and remedying this gap by asking two research questions: (i) how can CEDAW be interpreted so as to enrich the substantive obligations already in the treaty so that States are legally obligated to take all appropriate measures to respect, protect and fulfill the human rights of women in poverty? And (ii) how can this interpretation be successfully integrated into the work of the Committee? Chapter 1 proposed that the best method to ensure gender-based poverty is incorporated into CEDAW is through an evolutionary interpretation of equality and non-discrimination. The first part of this thesis explored the viability of this hypothesis. In answering the

² Article 5 of CEDAW.

³ See Articles 1 and 3 of CEDAW.

⁴ See the analysis in Chapter 4 on the Committee's approach to intersectional identities and the Committee, 'General Recommendation No. 28: core obligations' (2010) CEDAW/C/GC/28 [18]. See also the Committee, 'General Recommendation No. 19: violence against women' (1992) CEDAW/C/GC/19 and the Committee, 'General Recommendation No. 32: on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (2014) CEDAW/C/GC/32

first research question I used the interpretative framework for public international law, Article 31(1) of the VCLT, that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ In Part I, I also drew on the General Recommendations, Concluding Observations and Individual Communications of the Committee because of their great practical importance in interpreting CEDAW.⁵ This was further supplemented by a comparative analysis of similarly situated UN human rights treaty and Charter based bodies.

After I mapped the problems with the status quo in Chapter 1 and before I turned to analysis the text of CEDAW, Chapters 2 and 3 provided necessary contextual information on the nature and structure of CEDAW and of possible interpretative models that could be used to bring gender-based poverty within the CEDAW framework. In Chapter 2, I investigated the reasons why the drafters did not include an obligation on gender-based poverty in CEDAW. While the drafters made many proposals that implicitly referred to gender-based poverty, there were several reasons why no express provision on gender-based poverty was included in the text of CEDAW. At the time of drafting, poverty was not understood as an issue of human rights or gender equality. Furthermore, the tensions of the Cold War and its ideological battles over economic systems made it impossible to discuss poverty. These reasons are no longer relevant. However, the drafting documents also revealed that States were deeply concerned about the cost associated with using rights to achieve gender equality. This concern was addressed in Chapter 4.

Chapter 3 described the interpretative methodology that was used in Chapter 4. In Chapter 3 the interpretative framework was used to analyse how UN treaty and Charter-based bodies have understood the connection between women, poverty and human rights. The treaty-based bodies

⁵ Simone Cusack and Lisa Pusey, ‘CEDAW and the rights to equality and non-discrimination’ (2013) 14 Melbourne J of Int’l L 54.

have generally intended to interpret a specific right in a way that would account for poverty and CESCR has recognised socio-economic status as a ground of discrimination. On the other hand, the Charter-based bodies have argued that a comprehensive approach to poverty is more appropriate. These different approaches to poverty and gender-based poverty illuminated the different models on how to interpret CEDAW that were canvassed in Chapter 4.

In Chapter 4 I analysed the text of CEDAW to ascertain whether gender-based poverty could be incorporated into the treaty. I argued against following in the footsteps of CESCR or HRC. Gender-based poverty is a complex problem and interpreting one specific right to encompass all of its harms is an overly limited approach. Nor did I argue that CEDAW should follow the lead of CESCR and establish poverty as a ground of discrimination. CEDAW's approach to intersectional discrimination is not grounds-based but is fluid. If women experience discrimination inherently linked to other identity characteristics or experiences, then it is protected under CEDAW.⁶ I argued that since poverty is a part of the spectrum of women's experiences it too is incorporated under CEDAW. The main argument in Chapter 4 was that, using the VCLT framework, both equality and non-discrimination can be interpreted in a manner that comprehensively incorporates the harms of gender-based poverty into CEDAW. Given the close relationship drawn in the text of CEDAW between equality and non-discrimination, I argued that an approach that uses both norms was the most logical. I used the academic literature to demonstrate that there are multiple *ordinary meanings* of equality and non-discrimination and that to varying degrees, all of these meanings can incorporate the harms of gender-based poverty. Situating these norms in the *context* of CEDAW, I demonstrated that there are different models of equality and non-discrimination in the text: formal equality, equality of results, equality of opportunity, transformative equality and direct and indirect discrimination. Using an Article 31(3)(b) approach "context" also includes subsequent practice. By

⁶ 'General Recommendation No. 28' (n 3) [18].

analysing the Summary Records of the dialogue session between the State and the Committee and the Follow-Up Report to the Concluding Observations, I demonstrated that as a matter of practice States are interpreting CEDAW to incorporate gender-based poverty. Lastly, CEDAW's *object and purpose*, the fulfilment of women's human rights requires gender discrimination and inequality to be interpreted dynamically in order to incorporate the harms of gender-based poverty. I concluded that non-discrimination and equality in CEDAW offered the best interpretative route to comprehensively incorporate gender-based poverty into the treaty.

Chapter 4 then proceeded to canvass how this interpretation of CEDAW might affect the State's obligations. Unlike ICESCR, under CEDAW there is no obligation on the State to protect a minimum core or progressively realise the human rights of women in poverty. The commitments to gender equality and non-discrimination are of an immediate nature. This means the State must ensure that its law, policies and programmes in relation to women in poverty are immediately consistent with the principles of gender equality and non-discrimination. For example, the obligation to respect requires the State to immediately remove de jure barriers to women in poverty's human rights. The State is required to protect and fulfill women in poverty's human rights through legislation that regulates the conduct of private parties and through designing, implementing and funding a variety of gender-based poverty reduction programmes. The Committee would then evaluate these programmes against an equality and non-discrimination framework developed in the first part of Chapter 4. I argued that if the Committee concludes the State's choices and justifications in relation to gender-based poverty fall short of the equality and non-discrimination standards its task is to strongly recommend a greater implementation of CEDAW.

In Part II of the thesis I investigated how my proposed interpretation of CEDAW could be fully integrated into the work and activities of the Committee. The first step in this analysis was

Chapter 5 which examined how the Committee currently approaches gender-based poverty in the Concluding Observations and Individual Communications. This analysis demonstrated two trends. First, the Committee has been working towards fully applying my proposed interpretation of CEDAW in relation to gender-based poverty. Although as was argued in Chapter 3 this was not binding authority for interpreting CEDAW it does lend further legitimacy to my proposed interpretation in Part I. Second, Chapter 5 illuminated the gaps and inconsistencies in the Committee's reasoning with respect to gender-based poverty. There were three elements of inconsistency. First, the Committee did not consistently interpret equality and non-discrimination to incorporate all aspects of gender-based poverty. This was most evident in relation to the recognition and structural harms of unpaid care work. Second, the Committee did not assess how each substantive provision in CEDAW can be used to incorporate gender-based poverty. Third, the Committee did not uniformly review the State's implementation of CEDAW in respect to gender-based poverty. In some States the Committee engaged with poverty while in others it did not.

The reasons for these inconsistencies were evaluated in Chapter 6. In this Chapter I analysed the publicly available material to diagnose at what stages in the periodic reporting process gender-based poverty was being successfully raised so that it is subsequently included in the Concluding Observations. The key components were the State report and CSO submissions. When these two sources provided information to the Committee on gender-based poverty it tended to be included in the Concluding Observations. This revealed that the Committee is highly responsive to the material submitted to it, to such an extent that the aspects of gender-based poverty that were included in the Concluding Observations mirrored the information submitted in the State report and CSO submissions. The thesis then made normative arguments on how to ensure the Committee approaches gender-based poverty in a more uniform, consistent and comprehensive manner. In

Chapter 6 I argued that it was crucial that the State reporting guidelines be modified so as to encourage States to report on gender-based poverty.

However, reforming the State reporting guidelines was only one step. To engage the CSOs, to send a stronger and clearer signal to the States on the importance of using CEDAW to tackle gender-based poverty, and to ensure that the Committee consistently addresses gender-based poverty it is was argued that it is essential to have a General Recommendation on women and poverty. Chapter 7 analysed three evolutionary General Recommendations and Comments so as to understand how to structure a General Recommendation on women and poverty. I argued that an authoritative General Recommendation needed to (i) explain why a General Recommendation on women and poverty was required and to situate it within the evolution of international human rights law; (ii) explain the legal basis for the Committee's interpretation; and (iii) detail policy recommendations and provide directions to the State on reporting on gender-based poverty. In Chapter 8 I used this structure to map out a General Recommendation on women and poverty. Drawing on the approach of CESCR, the General Recommendation should also importantly discussed national implementation and accountability mechanisms as these are key features in a human rights based approach to poverty. Chapter 8 acted as an academic commentary explaining in detail the legal basis for the General Recommendation. A draft General Recommendation on women and poverty is included in the Annex of this thesis.

In this thesis I have demonstrated how gender-based poverty can be included in CEDAW by an evolutionary interpretation of equality and non-discrimination and argued that a General Recommendation on women and poverty would be the key tool to ensuring that the Committee includes gender-based poverty in the Concluding Observations and Individual Communications. There is still much work to be done. For example, the analysis in Chapter 6 showed glimpses of the

role that individual Committee members can have in championing certain aspects of gender equality. This role is worthy of further exploration and study. While the research in this thesis has demonstrated with precision how gender-based poverty can be included in CEDAW, the next task becomes to ensure that gender-based poverty is on the agenda for the Committee. The Committee should be encouraged to use its voice and powers of advocacy to spark a global dialogue on gender-based poverty that involves States, CSOs, other UN human rights treaty and Charter bodies, international organisations like the World Bank, ILO and IMF and most importantly women who every day experience poverty. It is hoped that all of these actors working together can develop best practices on using human rights to ensure that women in poverty can develop, advance, participate and enjoy a meaningful life. This thesis aims to provide the necessary theoretical and analytical background to begin such a dialogue.

ANNEX

This is a draft general recommendation. It is based on the arguments made in the thesis and draws together the suggestions made in Chapter 8. However, it is just a starting point. General Recommendations are the result of a participative drafting process. They are drafted by the Committee, which consists of 23 experts on gender equality. Furthermore, there are written and oral consultations with State parties, UN entities and specialised agencies, UN and regional human rights mechanisms, CSO and other interested organisations and individual.¹ A final General Recommendation is unlikely to look exactly like my proposed draft General Recommendation. This Annex serves as a useful place to start the larger drafting process.

Draft General Recommendation No. 33 on women and poverty

I. Introduction

1. Gender-based poverty is a form of discrimination that seriously inhibits women's ability to enjoy their rights and freedoms on the basis of equality. Women's poverty is more than insufficient economic resources because poverty is not a gender neutral experience. Women's poverty is the lack of resources coupled with gendered socio-cultural norms that exclude and devalue women. The Committee on the Elimination of Discrimination against Women aims to provide authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure the implementation of their obligations under the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto regarding non-discrimination and gender equality relating to gender-based poverty.

2. The scope and purpose of this General Recommendation must be determined in the context of the overall scope and purpose of the Convention, which is to eliminate all forms of discrimination against women in the recognition, enjoyment or exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, irrespective of their marital status. The objective of this present General Recommendation is to explain the relationship between gender-based poverty and the substantive provisions of the Convention and to outline the State's obligations to respect, protect and fulfil the

¹ For example see the Committee, 'Half day general discussion on girls'/women's right to education' <<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Womensrighttoeducation.aspx>>.

rights under the Convention towards women and girls who live in poverty. The Committee wishes to share best practices it has acquired through reviewing State reports and the Committee's Concluding Observations thereon and Individual Communications under the Optional Protocol. The General Recommendation aims to guide State parties on how to address all aspects of gender-based poverty in the periodic State report.

3. Poverty is a serious and pressing problem that affects both men and women. The Convention is a gender-specific human rights instrument. As such, the Convention provides a gender sensitive interpretation of human rights law and protects women from sex and gender based-discrimination.² In General Recommendation No. 19 on violence against women, General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations and in General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum nationality and statelessness of women the Committee has recognised that these pervasive and cross-cutting global problems are not gender neutral. The present General Recommendation continues this work and explores the gender-based aspects of poverty.

4. Gender both causes and contributes to women's poverty. Throughout the developed and developing world women are disproportionately living in poverty. Gendered social norms and cultural attitudes that are based on the idea of the inferiority women and the superiority of men or on the stereotyped roles of women and men cause and contribute to women's poverty. These gendered norms, attitudes and stereotypes limit women's access to education, health care, employment, and economic resources. Furthermore, it limits their ability to fully participate in public and private life. This perpetuates a vicious cycle of poverty, powerlessness, social exclusion, inequality and discrimination.

5. Women and girls continue to disproportionately perform unpaid care work which restricts the time and energy they have to invest in training, skills, education and decent employment. The work women perform in the formal and informal labour market is perceived as unskilled and less valuable and is consequentially under remunerated. Due to unpaid care work and discrimination in accessing education and training women are often forced into vulnerable employment.³ The undervaluation of women in public life also contributes to women's low socio-economic status within the private sphere. Women may have restricted access to the household's assets and resources. Poor households may be reluctant to invest limited resources in the education or health needs of girls and women. De jure legal barriers and socio-cultural norms often combine together to prevent a woman from owning and controlling productive resources, making decisions on how household purchases and how assets should be used.

² 'General Recommendation No. 28: on core obligations' (2010) CEDAW/C/GC/28 [5].

³ Millennium Development Report: 2014. 'In developing regions, 60 per cent of women were in vulnerable employment in 2013, compared to 54 per cent of men.'

6. There is one reference to poverty in the Convention: ‘concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.’ Articles 1 thru 3 of the Convention establish a comprehensive obligation to eliminate discrimination in all its forms. Women in poverty are denied the opportunity for full development and advancement and the enjoyment and exercise of their human rights and fundamental freedoms. The Committee firmly holds that women who live in poverty experience multiple and reinforcing violations of their political, civil, social, economic and cultural rights. The Convention, as a gender-specific human rights instrument, covers other rights that are not explicitly mentioned therein, but that have an impact on the achievement of equality of women and men.⁴ Gender-based poverty may violate the specific provisions in the Convention, regardless of whether those provisions expressly mention gender-based poverty.

6. The Conventions is a dynamic instrument that contributes and adapts to the development of international law. The present General Recommendation builds upon the work the Committee has done on women and poverty in the Concluding Observations and Individual Communications. It also builds upon earlier General Recommendations including No. 16 on unpaid women workers in rural and urban family enterprises, No 17 on measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product and No. 29 on economic consequences of marriage, family relations and their dissolution.

7. The Committee affirms previous commitments to women in poverty: the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights⁵, in Article 27 on the Convention on the Rights of the Child⁶ and in Article 28 of the Convention on the Rights of Persons with Disabilities⁷; ILO Convention No. 100 on equal remuneration, ILO Convention No. 111 on discrimination in employment and occupation; ILO Convention No. 156 on workers with family responsibilities, ILO Convention No. 183 on maternity protection, ILO Convention No. 189 on domestic workers, the Beijing Declaration, the Millennium Development Goals, the Guiding Principles of the Special Rapporteur on extreme poverty and human rights⁸, the Committee on Economic, Social and Cultural Rights statement on the Substantive Issues arising in the Implementation of the

⁴ ‘General recommendation No. 28 on the core obligations of States’ [7]; General Recommendation No. 19 (1992) CEDAW/C/GC/19.

⁵ 999 UNTS 3 (entered into force 3 January 1976).

⁶ 157 UNTS 3 (entered into force 2 September 1990).

⁷ A/RES/61/106.

⁸ UN Special Rapporteur on extreme poverty and human rights, ‘Final draft of the guiding principles on extreme poverty and human rights’ (2012) A/HRC/21/39.

International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights.⁹

8. The Committee observes that not all reports of State parties adequately reflect the close connection between discrimination against women, gender inequality, poverty and human rights. The General Recommendation provides guidance to State parties on the inclusion of women in poverty in their reports on the implementation of the Convention.

9. The full implementation of the Convention requires States to take measures to eliminate all forms of gender-based poverty. The Committee seeks to ensure that the gender equality and non-discrimination obligations are upheld by State parties to the Convention in respect of women in poverty.

II. Legal Background

10. In General Recommendation No. 19 on violence against women and General Recommendation No. 25 on temporary special measures, the Committee observed that the Convention is an evolutionary instrument that anticipates the emergence of new forms of discrimination that had not been identified at the time of drafting. Article 1 and Article 2 require State parties to eliminate all forms of discrimination, while Article 3 requires State parties to ensure women's development and advancement in all fields of life. The concept of equality and non-discrimination in the Convention are responsive to new and newly recognised challenges, such as gender-based poverty, to women's human rights.

The Definition of Gender-Based Poverty

11. Women's experience of poverty is inherently multi-faceted. It is not merely lack of income or economic resources. Women's economic deprivation is connected to and re-enforced by compromised autonomy, exclusion from social life, political marginalisation, stigma and bodily and psychological insecurity that are rooted in their gender. Gender-based poverty is the unique interaction between gendered socio-cultural norms and inadequate command over economic resources. The gender division of labour, the lack of legal regulation of the informal labour market, the concentration of women in low paying and often precarious jobs, the low valuation of work traditionally assigned to women, unequal pay for work of equal value, gender power imbalances in the home, the disproportionate amount of unpaid care work they perform and the limited access to education, bank loans and land all combine to create a unique experience for poor women.¹⁰ The definition of gender-based poverty must encompass more than income poverty. For this General

⁹ (2001) E/C.12/2001/10.

¹⁰ Gwen Brodsky and Shelagh Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 Can J of W and the L 184.

Recommendation gender-based poverty is defined as the redistribution wrongs of not having access to economic resources coupled with the gendered socio-cultural negative stereotypes and attitudes and participation harms that devalue women and exclude them from public and private life. It is the combination of both material disadvantage and gendered socio-cultural norms that limit the ability of women in poverty to create a meaningful life.

12. Poverty has historically been seen as an issue of charity or economic development and conceptualised as a gender neutral phenomenon. However, it is now recognised it is an issue of human rights and that it is a highly gendered experience that affects women in both the developed and developing world.¹¹ Eliminating gender-based poverty is not only a moral duty it is a legal obligation under CEDAW.¹² Gender-based poverty is a serious and pressing obstacle to women's enjoyment of their human rights. State parties need to take appropriate measures to respect the dignity of women in poverty, empower them to create a meaningful life and to participate fully in public and private life. State parties are to be held accountable for respecting, protecting and fulfilling the rights of women in poverty.

Legal Interpretation

13. The Convention in Article 1 defines discrimination against women. The definition of discrimination prohibits any sex or gender based distinctions that impair or nullify women's enjoyment or exercise of their human rights on the basis of equality. The definition of discrimination includes gender-based poverty; that is poverty which is caused, perpetuated or maintained against a woman because she is a woman.¹³ The concept of 'eliminating discriminating against women' and 'equality' permeates all of the Convention. A dynamic interpretation of 'discrimination against women' and 'equality' comprehensively incorporates the harms of gender-based poverty into the Convention.

14. The goal of the Convention is to eliminate discrimination against women and achieve de jure and de facto gender equality so that women can enjoy and exercise their human rights. The Convention is meant to be responsive to changes in the nature of discrimination against women and gender inequality.¹⁴ Under Article 4(1) of the Convention State parties must be vigilant to women's changing needs.¹⁵ Gender-based poverty is

¹¹ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles' and Sylvia Chant, 'Re-thinking the 'Feminization of Poverty' in relation to Aggregate Gender Indices' (2007) 7:2 J of Hum Dev 201.

¹² UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles'.

¹³ See 'General Recommendation No. 19 on violence against women' for the basis for an expansive interpretation of Article 1 of the Convention.

¹⁴ 'General Recommendation No. 25 on temporary special measures' (2004) CEDAW/C/GC/25 [11].

¹⁵ 'General Recommendation No. 25 on temporary special measures.'

now recognised as an obstacle to achieving women's equality and human rights.¹⁶ Women's unequal share of undervalued care work, their lower levels of education, the inability to seek financial independence, marginalization in home and society and negative prejudices and stereotypes create a vicious cycle of social and economic disempowerment and results in women being unable to exercise and enjoy their human rights.¹⁷ For the Convention to achieve its aims, 'discrimination against women' and 'equality' need to be interpreted to incorporate the interaction between poverty and gender to accurately understand how gender-based poverty acts as an obstacle to women's human rights.

15. The meaning of equality in the Convention is multi-faceted. The Convention is based on both formal and substantive equality. Formal equality requires State parties to remove legal barriers that disadvantage women in poverty. State parties are obligated to remove formal legal obstacles that restrict for example a woman's choice of occupation, that require a husband or father's permission to travel, work or register a business or that prohibit a woman from inheriting land or property.

16. The conception of equality in the Convention goes further than formal equality or equal treatment. The Convention also ensures that women enjoy *de facto* or substantive equality. In General Recommendation No. 28 on the State parties' core obligations the Committee interpreted substantive equality in a comprehensive manner. Equality in the Convention includes equal of opportunity, equality of results and transformative equality. The Committee uses all three models of equality under its conception of substantive equality. Equality of opportunity requires that State parties take measures to ensure that women be empowered by an enabling environment. This includes taking steps to ensure that girls and women are able to benefit from scholarship opportunities.¹⁸ Equality of results requires State parties to ensure that women enjoy equality in equal numbers with men in socially valuable goods: income levels, decision making and political influence. This can require the State to set gender quotas in legislative bodies, the judiciary and the board of public companies.¹⁹

17. The Convention is also based and committed to achieving transformative equality.²⁰ Transformative equality seeks four overlapping aims: breaking cycles of disadvantage; addressing stereotyping, stigma, prejudice, negative cultural attitudes and violence; valuing difference by

¹⁶OHCHR, 'Human Rights and Poverty Reduction: A Conceptual Framework' (2004) HR/PUB/04/1 [15]. UN Special Rapporteur on extreme poverty and human rights 'Guiding Principles' [23].

¹⁷ Sandra Fredman, 'Anti-discrimination laws and work in the developing world: A thematic overview' (Background Paper for World Development Report, 2013).

¹⁸ Article 10 of the Convention.

¹⁹ Article 7 of the Convention.

²⁰ See Article 3, 4 and 5(a) of the Convention.

requiring institutional and structural change and participation.²¹ The disadvantage dimension recognises that women have suffered economic, material and social harm for being women. Achieving equality requires specific and positive measures to address this imbalance.²² The second element requires promoting the dignity and worth of women by addressing stigma, stereotyping, humiliation and violence against women.²³ The structural element seeks to accommodate difference and positively affirm identities by requiring institutions not individuals to change.²⁴ The final dimension, participation, requires the inclusion of women in all public and private decision making processes.²⁵ A transformative equality framework can be used to question whether the design of poverty alleviation programs truly furthers women's substantive equality. While these programmes target economic disadvantage, transformative equality can highlight how the structure of these programs can continue to essentialise women as primary care-givers and stereotype them as uncaring mothers.²⁶ All four dimensions of transformative equality must be used to properly assess whether the law, program or policy actually improves the lives of women in poverty.

18. States parties are obligated under Article 1 and 2 to ensure there is no direct or indirect discrimination against women in poverty in their laws, policies and programmes. The Committee in previous General Recommendations has explained that discrimination against women based on sex and/or gender is often inextricably linked with and compounded by other factors that affect women such as race, ethnicity, religion or belief, health, age, class, caste, gender identity and sexual orientation.²⁷ The Committee has also explained that women experience issues and problems: violence, conflict, statelessness in different ways than men.²⁸ Poverty, both as an identity characteristic and as a cross-cutting experience, is similarly linked with gender as a basis for disadvantaged treatment against women.²⁹ States parties must legally recognise such intersecting forms of discrimination and inequality and their negative impact on the women concerned.

²¹ See Sandra Fredman, *Discrimination Law* 2nd edition (Clarendon, 2011).

²² Article 4(1) of the Convention.

²³ Article 5(a) and 10(c) of the Convention.

²⁴ Article 11(1)(d), 11(2)(c) and 14(2)(c) of the Convention.

²⁵ Article 7, 8 and 14(2)(a) of the Convention.

²⁶ UN Special Rapporteur on extreme poverty and human rights, 'Conditional cash transfer programmes' (2008) A/HRC/11/9 [58]-[60], [66]-[72].

²⁷ General Recommendation No. 28 [5].

²⁸ General Recommendation No. 19, General Recommendation No. 30 and General Recommendation No. 32.

²⁹ *da Silva Pimentel Teixeira v Brazil*, (2011) CEDAW/C/49/D/17/2008.

19. The Committee holds that a commitment to eliminating discrimination and achieving de jure and de facto equality means State parties are obligated to address the unique human rights violations women in poverty experience.

The State's Obligations

20. Under Article 2, State parties must address all of their legal obligations under the Convention to respect, protect and fulfil the human rights of women in poverty. The obligation to respect requires that State parties to refrain from making laws policies, regulations, programmes, administrative procedures and institutional structures that cause and perpetuate gender-based poverty. The State parties are required to immediately review its laws, policies and programmes to ensure they respect the rights of women in poverty. This can include removing prohibitions against night work or certain occupations, removing prohibitions on married or pregnant girls and women from attending school, removing the protection for customary or traditional laws that exclude women from owning and inheriting property and ensuring courts properly account for non-financial contributions in allocating matrimonial property.

21. The obligation to protect requires that State parties protect women in poverty from discrimination and inequality perpetuated by private actors. This can require State parties to enact legislation prohibiting discrimination by private actors; set up organisations that monitor and conduct on-site inspections to ensure equal pay for work of equal value in the private sector and to regulate the informal labour market to ensure women are protected from exploitative working conditions.

22. The obligation to fulfil requires that State parties take various appropriate measures to ensure that women in poverty may enjoy their equal rights. Where appropriate this can include taking temporary special measures in accordance with Article 4(1) and General Recommendation No. 25. The State has an obligation to fulfil women in poverty's human rights through public policies, programmes and frameworks that are aimed at meeting the specific needs of women in poverty. This can include social assistance and education grants, and the provision of low-cost health care and housing.

23. The State is under an immediate obligation to ensure the measures it takes to respect, protect and fulfil women in poverty's human rights further gender equality and eliminates discrimination against women. The obligations in Convention are not subject to progressive realisation.³⁰ The State is under an immediate obligation to ensure that its poverty reduction plans are gender sensitive and further women's de jure and de facto equality. In the periodic reporting process and under the Optional Protocol the Committee will evaluate the State parties law, policies and

³⁰ The Working Group on Discrimination Against Women in Law and Practice 'Discrimination against women in economic and social life, with a focus on economic crisis' (2014) A/C/26/39 [8] observes that the immediate obligation to achieve gender equality means the State should be concerned about 'the division of existing resources, not the development of resources, and therefore the principle of progressive realisation does not apply.' The findings of the Working Group on Discrimination Against Women in Law and Practice has been adopted by the Human Rights Council. See Human Rights Council, 'Elimination of Discrimination Against Women' (2014) A/HRC/RES/26/5.

poverty alleviation programmes to ensure that they are consistent with the State's commitment under the Convention to eliminate discrimination and achieve substantive gender equality.

III. Specific Areas of Concern

24. Both men and women who live in poverty experience discrimination because of poverty. Women in poverty experience poverty differently. The impact of gender on poverty is often based on deep-rooted cultural and social norms. This negatively impacts resource allocation, contributes to power imbalances between men and women in the home and in the public sphere and excludes women from fully participating in all fields of life.

25. The Committee stresses that this General Recommendation only highlights pertinent and specific areas of concern and States parties must be attentive to precisely how women in poverty experience human rights violations.

26. The discrimination experienced by women in poverty is often multi-dimensional, with poverty compounding other forms of discrimination based on race, ethnic origin, disability, sexual orientation, gender identity, migrant status, marital and family status, age and literacy.

27. The full development and advancement of women in poverty can only be achieved by recognising the unique human rights violations they experience. The Committee observes that understanding the way in which women's rights are violated is critical to the identification of those forms of discrimination and inequality and is crucial for creating transformative remedies. However, in many State parties, that gender based poverty is both ignored and tolerated and accepted at the individual, institutional and policy levels. For example, State parties often disregard how national, regional and global macroeconomic policies negatively impact women and increase their vulnerability to economic and social disadvantage.³¹ This General Recommendation calls on State parties to approach gender-based poverty as a human rights issue.

Cultural Attitudes (Article 5)

28. Women who live in poverty are subject to a unique set of pernicious stereotypes. They are often perceived as lazy, promiscuous and unfit mothers that leech off social protection systems. This can make it difficult for women to access social protections that they are legally entitled to. Gender stereotyping, tradition and customary practices can have a harmful impact on women. These can both cause and maintain gender-based poverty. Deeply-rooted social customs often require women to perform the majority of unpaid care work for children and the elderly. In school, women and girls may be discouraged from studying for well paying jobs which are believed better suited to boys and men. If a woman tries to access and enjoy property she legally owns she may be perceived as

³¹The Working Group on Discrimination Against Women in Law and Practice

selfishly acting against the interests of her community. These cultural attitudes trap women in poverty.

Exploitative Prostitution and Trafficking (Article 6)

29. Gender-based poverty is an underlying cause making women vulnerable to exploitative prostitution and trafficking. It is also important to appreciate how global inequalities contribute to gender based poverty. Women in poverty are vulnerable to sex trafficking and sex tourism.³² The recruitment of domestic labour from developing countries and organised marriages between women from developing countries and foreign nationals can, under certain circumstances, also constitute new forms of trafficking.³³

Participation in Public Life (Articles 7 and 8)

30. Women in poverty are routinely denied their ability to participate in public, political and international life. Poverty can be a barrier to voting, particularly if literacy is a requirement to vote and if voting stations are situated long distances from where women in poverty live.³⁴ Poverty is a serious obstacle to participating in the formulation and implementation of government policy. Women in poverty's voices are routinely ignored by State policy makers. The double burden of unpaid care work and subsistence work in the informal or formal labour market mean women often lack the time and energy to meaningfully participate in public life. The lack of digital literacy skills and financial resources means women in poverty are often excluded from online forums of political participation and activism. Women are chronically under-represented in international and national financial and trade institutions. This excludes women from participating in key decisions at both a national and global level which create and maintain gender-based poverty.³⁵

Nationality (Article 9)

31. In General Recommendation No. 32 the Committee explained the gender dimensions of refugee status, asylum, nationality and statelessness of women. Women and girls are often denied access to food, education, health care, accommodation, clothing, social services and sources of livelihood during the asylum and/or integration process. Due to lack of resources and discriminatory social cultural norms, women and girls may not have identification documents which further marginalise them in accessing State administrated social and economic benefits. States' nationality laws often have literacy and economic sufficiency requirements. Women in poverty may be systematically unable to meet these criteria. Furthermore language and income requirements for nationality may result in women being financially dependent on men and increase their risk to exploitation.

³² General Recommendation No. 19.

³³ See General Recommendation No. 19.

³⁴ 'General Recommendation No.23: on participation in public life' (1997) CEDAW/C/GC/23.

³⁵ Working Group on the Discrimination Against Women in Law and Practice.

Education (Article 10)

32. Poverty contributes to gender inequality in education. Schools may have fees or indirect costs, such as transportation, uniforms, lunches or textbooks that make education unattainable for girls and women in poverty.³⁶ While this can affect boys too, families are less likely to invest in a girl's education.³⁷ In times of household austerity, girls and women are more likely than boys to be taken out of school to help with domestic responsibilities.³⁸ Families may believe that it is harder for an educated woman to get married and that she will remain a financial burden to their family. These beliefs can prevent girls and women from receiving a high quality education.

Employment (Article 11)

33. The conditions of employment in both the informal and formal labour market can further entrench women's poverty. Illiteracy, digital illiteracy and innumeracy mean women in poverty do not have the necessary skills to successfully compete in the labour market. The formal labour market may have inadequate maternity and parental leave. Due to child care responsibilities women are segregated into low paid, vulnerable and potentially exploitative employment as part time or casual workers or in the informal labour market. These types of employment are routinely excluded from legal protection. For example, women in these types of employment arrangements cannot take advantage of social security schemes that are connected to full time formal employment. In all States women tend to be paid less than men for the same work or work of equal value.

Access to Health Care (Article 12)

34. Women in poverty are at a significantly higher risk of maternal mortality. They do not receive the necessary pre-natal, delivery and ante-natal health care and services. The disadvantage women in poverty experience are compounded for rural women as they are often long-distances from health centres and do not have the resources to access transportation, particularly emergency transportation.³⁹ Women's low position in the home means families will not use their limited resources to address the health needs of women. This means they are less likely to be able to access high quality reproductive health care.

Economic and Social Life (Article 13)

35. Public housing schemes often do not account for women's inability to access credit or meet mortgage requirements. Non-contributory social protection schemes that are based on the head of household can result in women not having access to financial resources. This contributes to their dependency on men and furthers gendered power imbalances in the home.

³⁶ UN Special Rapporteur on education, 'Girls' right to education' (2006) E/CN.4/2006/45.

³⁷ UN Special Rapporteur on education, 'Girls' right to education [66].

³⁸ Working Group on Discrimination Against Women in Law and Practice.

³⁹ See *Teixeria* and UN Special Rapporteur on the right to health, 'The right to health and the reduction of maternal mortality' (2006) A/61/338.

Social assistance rates need to be cognizant of the fact that women have the financial and time burden of caring for children and the elderly. Schemes that have conditions attached have the potential to limit women's time to engage in economic and socially productive activities, to essentialise women as primary care-givers and further entrench traditional gender roles. Women are disproportionately impacted by economic austerity and recovery measures. This is due in part because women are disproportionately employed in public sector and due to their reliance on public services. In times of financial crisis women's participation in the informal labour market increases and with the reduction in public services women have to perform a greater share of unpaid care work.⁴⁰

Rural Women (Article 14)

36. In the developing world women are less likely to report owning land or a house.⁴¹ Rural women who live in poverty face legal barriers to inheriting, owning, using and benefiting land. Land certificates may preclude joint ownership. In addition, customary and traditional laws and socio-cultural norms also deny rural women access to land.⁴² Women are excluded from planning, developing and implementing rural development programmes. Rural women lack easy access to high quality social services and transportation. For example, women and girls regularly have to walk long distances to collect clean water. Rural women may not be able to enjoy their right to food, water or housing or participate in community activities.

Equality Before the Law (Article 15)

37. The high cost of obtaining legal advice and of filing court documents can negatively impact a woman's ability to access justice. Cuts to legal aid systems only further remove the ability of women to redress legal wrongs. Due to illiteracy, court processes and forms may further limit the ability of women to access accountability and enforcement mechanisms.

Family Life (Article 16)

38. In General Recommendation No. 29 on the economic consequences of marriage, family relations and their dissolution, the Committee canvassed how family life can contribute to gender-based poverty. Some State parties have multiple legal systems which exempt personal status laws from legal or constitutional guarantees of gender equality. During marriage, laws will designate the man as head of the household, limiting the woman's ability to control and manage economic assets she has earned during the relationship and more generally the household's assets. Property distribution upon dissolution of the relationship often favours men regardless of whether laws appears neutral, owing to gendered assumptions relating to the classification of marital property subject to

⁴⁰ Working Group on Discrimination Against Women in Law and Practice.

⁴¹ See World Bank, 'Voice and Agency: Empowering Women and Girls for Shared Prosperity' (World Bank, 2014) Chapter 5 Control over Land and Housing.

⁴² See *Kell v Canada*, (2012) CEDAW/C/51/D/19/2008.

division, insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property and gendered family roles. Women's lack of education and employment skills means they are at further risk of poverty upon dissolution of the relationship. Under statutory and customary laws, women often do not have the right to inherit and administrator marital property on the death of their spouse. Widows can be victims of "property grabbing." In General Recommendation No. 31 on harmful practices it was noted that girls and women are often forced into marriage. Girls under 18 who live in poverty are more likely to enter into early forced marriage. This also means young girls are more likely to become pregnant which limits their ability to gain education, skills and training. Thus, early forced marriage is both causes and contributes to gender-based poverty.

Violence Against Women

39. Violence against women also impacts gender-based poverty. Women who are subjected to domestic violence do not perform as well in the work force.⁴³ This means women often do not have the means to escape from violent partners. Similarly, violence and harassment at the workplace negatively impacts women's employment opportunities. Women who work as domestic workers may be more vulnerable to violence and sexual harassment.⁴⁴ Violence on the way to school or at school from teachers or other students can negatively impact a girl or woman's ability to receive an education. Similarly women in informal settlements who need to go some distance to perform ablutions or collect water are more vulnerable to violence.⁴⁵ Violence against women can trap and encircle women into poverty.

IV. Recommendations

40. State parties must actively condemn gendered social norms, institutions, patterns and relationships that subject women to poverty. State parties should adopt gender sensitive poverty reduction plans, which include using temporary special measures in line with Article 4(1) of the Convention and General Recommendation No. 25 in order to ensure that women in poverty are able to create and enjoy a meaningful life and to participate fully and effectively in political, social, economic, cultural and civil life and any other field in their societies. State parties have an obligation to ensure the full development and advancement of women in poverty.⁴⁶ State parties must be vigilant to the complex and cross-cutting ways that laws and policies, including macroeconomic policies can contribute to gender based poverty and limit women's full development

⁴³ World Bank, 'Voice and Agency'.

⁴⁴ UNIFEM, 'Human Rights Protections Applicable to Women Migrant Workers' (UNIFEM Briefing Paper, 2003) 30.

⁴⁵ UNHCR and Human Rights Centre University of California, 'Safe Heaven: Sheltering Displaced Persons from Sexual and Gender-Based Violence: Case Study Kenya: May 2013' (2013) 22.

⁴⁶ Article 3 of the Convention.

and advancement and take all appropriate measures to ensure human rights and fundamental freedoms.⁴⁷

41. State parties' obligations should take into account the multidimensional nature of discrimination against women in poverty and ensure that the principle of equality and non-discrimination applies to women in poverty. Gender-based poverty and discrimination of women based on sex and gender is inextricably linked with other facts that affect women, such as race, ethnicity, religion or belief, health, status, age, caste, sexual orientation and gender identity.⁴⁸ For example, older women experience sex and gender discrimination throughout their life cycle—stereotyping in education, precarious employment and unpaid care work—and as older women this discrimination culminates in poverty and decreased quality of life, such as limited or reduced pensions. State parties must be attentive to how sex, gender and poverty are inextricably linked to other factors.⁴⁹ States parties are urged to repeal or amend existing laws, regulations and customs that discriminate against women in poverty.

42. In order to support legal reform and policy formulation, State parties are urged to collect, analyse and disseminate data on poverty disaggregated on the basis of sex and gender, so as to have information on the situation of women in poverty, including those living in rural areas. Such data should especially focus on unpaid work. It should also look at access to education, health care, food, water, social protection schemes, housing, employment and social and economic benefits.

Cultural Attitudes (Article 5)

43. State parties have an obligation to eliminate negative stereotypes and modify social and cultural patterns of conduct that are prejudicial and harmful to women in poverty. States are particularly encouraged to address social norms that dictate women perform care-giving. Public awareness, media and online social campaigns should be utilised to explain the value of this work and work that is traditionally assigned to women in the labour force. At the same time men should be encouraged to perform care-giving roles. States are also obligated to address social attitudes that demean and humiliate women who live in poverty.

Exploitative Prostitution and Trafficking (Article 6)

44. Victims of exploitative prostitution and trafficking need to have access to adequate social benefits and accommodation. State parties should provide training and economic opportunities to break cycles of exploitation and poverty. States parties are under an obligation to be aware of new forms of trafficking such as importing domestic labour from the developing world to the developed world.⁵⁰ The Committee recommends

⁴⁷ Working Group on Discrimination Against Women in Law and Practice.

⁴⁸ See General Recommendation No. 28.

⁴⁹ Working Group on Discrimination Against Women.

⁵⁰ General Recommendation No. 19.

that State parties take legal and social measures to regulate domestic work.⁵¹ Host State parties are encouraged to offer assistance to countries of origin to address conditions of poverty that contribute to trafficking.⁵²

Participation in Public Life (Article 7 and 8)

45. In the implementation of the right to vote and to stand for public office, State parties need to be aware of women in poverty's limited time and resources. State parties have an obligation to meaningfully consult with women in poverty in the design, implementation, funding and monitoring of all poverty reduction programmes and any laws or policies that affect women in poverty. State parties are encouraged to provide training and resources so women in poverty can participate in modern forms of political participation and activism. To address global and structural inequalities and ensure macroeconomic policies empower women it is essential to include women at all levels of decision making in international and national financial and trade institutions.⁵³

Nationality (Article 9)

46. State parties are obligated to ensure that during the asylum and integration process women have access to health care, education, accommodation, food, clothing, social services and employment. Registration services for displaced women and girls need to be accessible and recognise that due to the discrimination they experience women may lack official identity documents. Nationality requirements must be reviewed to ensure that they do not indirectly discriminate against women.⁵⁴

Education (Article 10)

47. Primary education should be provided free of charge and reviewed to ensure there are no indirect costs limiting the ability of women and girls to access primary education. State parties have an obligation to ensure high quality and affordable services, such as water facilities and child care are readily available so girls are not burdened with the domestic responsibilities that restrict their access to education. State parties are encouraged to adopt school lunches and feeding programmes to ensure girls and women have adequate nutrition so as to perform well in school.⁵⁵ Education grants that are conditional on a girl attending school should be considered, but State parties must evaluate these programmes to ensure they do not perpetuate negative stereotypes against families in poverty or further contribute to women and girl's time burden or essentialise them as primary care-givers. State parties are obligated to

⁵¹ As an example see ILO Convention No. 189 (2011) Concerning decent work for domestic workers.

⁵² 'General Recommendation No. 26 on migrant women' (2008) CEDAW/C/GC/26.

⁵³ Working Group Against Discrimination in Law and Practice.

⁵⁴ General Recommendation No. 32.

⁵⁵ UN Special Rapporteur on the right to food, 'Countries tackling hunger with a right to food approach' (Briefing Note 01, May 2010) 8 <http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_01_May_2010_EN.pdf> .

redress socio-cultural norms that devalue educating girls and women by public awareness campaigns and ensuring decent employment is available for girls and women upon the completion of education. Furthermore, the State needs to ensure pregnant girls and women are not expelled from school but instead are offered proper support so as to continue their studies.

Employment (Article 11)

48. State parties have an obligation to facilitate the participation of women in poverty in paid decent employment in the formal labour market. State parties should continue to monitor and reduce gender-related pay gaps. States parties are encouraged to require employer to conduct objective gender neutral job evaluation. States parties should adopt a wide variety of methods to combat the gender job segregation of the labour market. At the same time, public awareness campaigns should be targeted towards properly valuing and respecting the work that women have traditionally performed. Maternity leave should be at an adequate level and funded adequately through State or contributory schemes.⁵⁶ Paid care leave should be equally available to both men and women.

49. State parties have an obligation to protect women from exploitation in both the formal and informal labour market. State parties are strongly encouraged to reduce the number of women working in the informal labour market by increasing job opportunities in the formal labour market. To achieve this States can take various measures, including targeted skills training and development to reduce unemployment among women. Legal regulations should be extended to cover informal employment relationships to ensure that women are not vulnerable to exploitation or work in dangerous conditions. Social protections should be extended to those in non-traditional labour arrangements, including part time, informal and casual work and domestic work.

50. The Working Group on Discrimination Against Women in Law and Practice also recognises that women's unequal share of care work limits their employment opportunities. Similar to General Recommendation No. 16 and 17 it recommends that care work should be recognised in the macro-economy. It further recommends that care work be reduced through high quality publically funded care services and that care work be more equally distributed between men and women. The Committee endorses these recommendations and encourages States parties to take similar measures to fulfil its obligations to women in poverty.

Access to Health Care Services (Article 12)

51. States parties are encouraged to review their maternal health policies to ensure they meet the needs of women in poverty. The design, implementation and funding of programmes must pay particular attention to the needs of poor rural women.⁵⁷ Reproductive health services, such as

⁵⁶ ILO Convention No. 183 (2000) Concerning the revision of the Maternity Protection Convention.

⁵⁷ UN Special Rapporteur on the right to health; See also General Recommendation No. 24 on women and health (1999) CEDAW/C/GC/24.

contraception should be physically, socially and financially accessible to all women. State parties are obligated to redress socio-cultural norms that give low priority in both public and private life to women's health needs.

Economic and Social Life (Article 13)

52. State housing policies should take account of the discrimination women face in the employment and ensure mortgage and credit requirements take account of the gender pay gap and do not indirectly discriminate against women.⁵⁸ Non-contributory social protection schemes are crucial to ensure women in poverty are able to enjoy their human rights.⁵⁹ This is particularly true for older women who due to a life time of gender based discrimination may not qualify for pensions based on continuous employment in the formal labour market. State parties are obligated to ensure their social and economic benefits further substantive gender equality. This can include ensuring women are entitled to receive social benefits in their own names and absence any relationship with men. Social assistance conditions and rates must take into account the time and resources women expend in care work. Social assistance rates must be at minimal essential levels so that women in poverty can enjoy their human rights.⁶⁰ Measures in times of economic austerity should not further women's poverty. Any austerity measures should be gender sensitive and States parties should ensure that such measures address asymmetries of power and structural gender inequalities. States should prioritize investment in education and skill development for women and girls and avoid labour market exclusion, loss of social protection floors and reduction of social services.⁶¹

Rural Women (Article 14)

53. States parties are obligated to take measures to ensure that rural women are able to own, use, enjoy and benefit from land ownership. State parties are encouraged to reform formal legal systems, customary and traditional law and socio-cultural norms through the use of temporary special measures to accelerate women's land ownership. State parties should take measures to ensure that rural women are active participants in the development and implementation of land policies. Furthermore, State parties are obligated to take steps to ensure an adequate standard of living for rural women. This includes the provision of accessible and high quality transportation, communication systems, water, housing and electricity.⁶²

⁵⁸Leilani Fahra, 'Is there a woman in the house? Re-conceiving the human right to housing' (2002) 14 Can J of W and the L 118

⁵⁹ See Committee on Economic Social and Cultural Rights, General Comment No. 19 The right to social security (2008) E/C.12/GC/19.

⁶⁰ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles.'

⁶¹ UN Special Rapporteur on extreme poverty and human rights, 'Human Rights Based Approach to Global Economic and Financial Crisis; and Working Group on Discrimination Against Women.

Equality Before the Law (Article 15)

54. To ensure women in poverty are equal before the law, the State parties must create and maintain a high quality legal aid system that meets the needs of women in poverty. State parties are encouraged to review court procedures to ensure they do not limit women in poverty's ability to access justice.

Family Life (Article 16)

55. State parties must recognise in their legal system the equal right of women to own, manage and control assets during the marriage or de facto relationship. Non-financial contributions—household and family care, lost economic opportunities and support of the other spouse's career development—to the relationship must be included in the division of property on the dissolution of the relationship. Post-dissolution spousal payments must take into account women's limited education and employment opportunities.⁶³ Upon death of a spouse or relative, both men and women should be equally entitled to inherit property. Customary laws that prohibit women from inheriting must be reformed and be subject to gender equality guarantees. "Property grabbing" must be prohibited. Furthermore, to prevent early forced marriage, the State party must address both the household and girls' poverty.

Violence Against Women

56. State parties are reminded that a commitment to end violence against women necessarily entails reducing gender-based poverty. State parties need to ensure women are protected from domestic violence and have access to domestic violence shelters.⁶⁴ States parties are obligated to ensure women and girls are able to access education and employment without fear of violence or harassment.

National Implementation

57. In General Recommendation No. 28, the Committee explained that under Article 2 State parties are required to pursue a policy of eliminating discrimination against women that applies to all fields of life and to public and private actors. This is an essential and critical component of the State's legal obligations under the Convention. State parties must immediately assess the situation of women and take concrete steps to formulate and implement a policy to eliminate discrimination and achieve gender equality so that women can enjoy their human rights. State parties must adopt a comprehensive range of measures and build on those measures in light of their effectiveness and new or emerging issues. These measures include constitutional and legislative guarantees, action plans, monitoring and implementation mechanisms and a wide range of accountability forums.

⁶² Article 14(2)(h) of the Convention.

⁶³ See dissent in *B.J. v Germany*, (2004) CEDAW/C/36/D/1/2003.

⁶⁴ *Yildirim v Austria*, (2007) CEDAW/C/D/39/6/2005.

58. The State parties' legal obligation under the Convention means there is a responsibility for the State to have a specific and targeted plan to reduce gender-based poverty. Relying on current economic policies is not sufficient.⁶⁵ There must be in place a specific policy and plan to reduce and remedy the gender-based aspects of poverty. The plan should be based on the principles of accountability and transparency. This plan of action must be: (i) based on human rights laws and principles (ii) cover all aspects of gender-based poverty: economic disadvantage, prejudicial socio-cultural norms, structural and exclusion harms and (iii) have clearly defined objectives and goals. The plan should also establish institutional responsibility for the process; identify resources available to obtain the objectives, allocate resources appropriately according to need and institutional responsibility and establish accountability mechanisms to ensure the implementation of the plan. The State should consider drawing on the recommendations provided above, but is also encouraged to use new and innovative methods to reduce gender-based poverty that are consistent with its legal obligation to eliminate discrimination and realise gender equality. The gender-based poverty reduction plan should only be arrived at after the meaningful participation and consultation of women in poverty. For example, this can require State parties to provide transport to consultation meetings, to provide child-care so women have the time to participate and any other necessary capacity building measures. States parties are encouraged to avail themselves of technical assistance and cooperation of United Nations specialised agencies when formulating the gender-based poverty reduction plan.

59. Women in poverty must be given full and equal access to information concerning the gender-based poverty reduction plan. This is crucial to ensure women are able to hold the State accountable for its obligations under the Convention.

60. The State is responsible for the delivery of high quality, affordable and accessible good and services to women who live in poverty. This means there must be sufficient coordination between different levels and branches of the State. Under Article 2(e) the State remains responsible even if the delivery of goods and services is contracted out to private parties. The State must ensure that private parties do not discriminate against women in poverty.

61. In the gender-based poverty reduction plan State parties need to identify who is responsible for implementing each element of the plan. The plan should identify the appropriate forum women in poverty can access so the State party can publically account for its law, policies, plans and programmes on gender-based poverty. It is important that forums of accountability are not cost prohibitive for women in poverty. This can require the provision of high quality legal assistance. State parties are encouraged to respect, protect and support the work of civil society organisations and human rights organisations that assist women in poverty.

⁶⁵ Working Group on Discrimination Against Women in Law and Practice.

62. When the State parties are found to have violated women in poverty's rights under the Convention, the State is obligated under Article 2(e) to ensure that there are effective and meaningful remedies. This can include reparations but remedies should primarily be aimed at promoting positive institutional and structural change.

63. Gender-based poverty is an inter-connected global problem. If a State party is facing resource constraints in designing, funding, implementing its gender-based poverty reduction plan there is an obligation under the Convention to request international financial and technical assistance.⁶⁶ International assistance requires that all relevant domestic and international actors pursue international policies that reduce gender-based poverty. State parties are encouraged to review their international policies, development assistance, loan conditions, trade agreements, taxation, fiscal, investment and environmental policies to ensure that they do not exacerbate gender-based poverty.⁶⁷ State parties as actors and participants in international organisations should ensure, as far as possible, that the decisions, policies and actions of these organisations empower women in poverty. States parties should encourage transnational corporations to ensure women in poverty enjoy their human rights.

64. In the State report, State parties are encouraged to follow the guidance provided in this General Recommendation. States should give specific attention to gender-based poverty.⁶⁸ Gender-based poverty is comprehensively included in the Convention and States should also provide information on women in poverty and take account of their unique experience under the substantive provisions in the Convention.⁶⁹

⁶⁶ General Recommendation No. 28. [29]. See 'General Recommendation No. 26 on migrant women workers' (2008) CEDAW/C/GC/26.

⁶⁷ UN Special Rapporteur on extreme poverty and human rights, 'Guiding Principles'.

⁶⁸ This should be done under Article 13 of the Convention.

⁶⁹ See the Committee's work on violence against women in the Concluding Observations as an example.

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