

## CEDAW AND WOMEN'S INTERSECTING IDENTITIES: A PIONEERING NEW APPROACH TO INTERSECTIONAL DISCRIMINATION

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CEDAW E A INTERSECÇÃO DE IDENTIDADES DE  
MULHERES: UMA ABORDAGEM PIONEIRA PARA  
A DISCRIMINAÇÃO INTERSECCIONAL

### ABSTRACT

CEDAW IS COMMITTED TO ELIMINATING ALL FORMS OF DISCRIMINATION AND ACHIEVING GENDER EQUALITY SO THAT ALL WOMEN CAN EXERCISE AND ENJOY THEIR HUMAN RIGHTS. THIS ARTICLE ARGUES THAT THIS IMPLICITLY INCLUDES A COMMITMENT TO UNDERSTANDING AND ADDRESSING INTERSECTIONAL DISCRIMINATION. WOMEN EXPERIENCE DISADVANTAGE AND DISCRIMINATION BASED ON THEIR SEX AND GENDER AND THAT IS INEXTRICABLY LINKED TO OTHER IDENTITIES, FACTORS AND EXPERIENCES SUCH AS A RACE AND POVERTY. UNDER CEDAW, IF SEX AND GENDER IS ONE OF THE BASES FOR THE DISCRIMINATION, IT IS NECESSARY TO EXAMINE HOW OTHER IDENTITY AND FACTORS CONTRIBUTE TO GENDER DISCRIMINATION AND INEQUALITY. THE CEDAW COMMITTEE HAS BEEN PIONEERING THIS APPROACH IN THE GENERAL RECOMMENDATIONS, INDIVIDUAL COMMUNICATIONS, INQUIRY PROCEDURE AND CONCLUDING OBSERVATIONS, BUT IT HAS NOT BEEN CONSISTENTLY APPLYING THIS FLUID AND EXPANSIVE APPROACH. THE ARTICLE POSES THREE COMPLEMENTARY SOLUTIONS TO THESE INCONSISTENCIES: A TRANSFORMATIVE EQUALITY ANALYTICAL FRAMEWORK, A GENERAL RECOMMENDATION ON INTERSECTIONALITY AND WORKSHOPS AND TRAINING FOR CEDAW COMMITTEE MEMBERS.

### KEYWORDS

INTERSECTIONALITY; GROUNDS-BASED DISCRIMINATION; CEDAW; GENDER; POVERTY; INTERNATIONAL HUMAN RIGHTS LAW.

### RESUMO

O CEDAW COMPROMETE-SE A ELIMINAR TODAS AS FORMAS DE DISCRIMINAÇÃO E ALCANÇAR A IGUALDADE DE GÊNERO PARA QUE TODAS AS MULHERES POSSAM EXERCER E GOZAR DE SEUS DIREITOS HUMANOS. ESTE ARTIGO ARGUMENTA QUE ISSO INCLUI IMPLICITAMENTE O COMPROMISSO DE COMPREENDER E ABORDAR A DISCRIMINAÇÃO INTERSECCIONAL. AS MULHERES EXPERIMENTAM DESVANTAGEM E DISCRIMINAÇÃO COM BASE NO SEU SEXO E GÊNERO, MAS ISSO TAMBÉM ESTÁ INTRINSECAMENTE LIGADO A OUTRAS IDENTIDADES, FATORES E EXPERIÊNCIAS, TAIS COMO RAÇA E POBREZA. SOB A PERSPECTIVA DO CEDAW, SE SEXO E GÊNERO SÃO UMA DAS BASES PARA A DISCRIMINAÇÃO, É NECESSÁRIO EXAMINAR COMO OUTRAS IDENTIDADES E FATORES CONTRIBUEM PARA A DISCRIMINAÇÃO DE GÊNERO E DESIGUALDADE. O COMITÊ CEDAW TEM SIDO PIONEIRO NESTA ABORDAGEM NAS RECOMENDAÇÕES GERAIS, COMUNICAÇÕES INDIVIDUAIS, INQUÉRITO E OBSERVAÇÕES FINAIS, MAS NÃO TEM CONSISTENTEMENTE APLICADO ESTA ABORDAGEM FLUIDA E EXPANSIVA. O ARTIGO APRESENTA TRÊS SOLUÇÕES COMPLEMENTARES A ESTAS INCONSISTÊNCIAS: UM QUADRO ANALÍTICO DE IGUALDADE TRANSFORMADORA, UMA RECOMENDAÇÃO GERAL SOBRE INTERSECCIONALIDADE E CURSOS E TREINAMENTO PARA OS MEMBROS DO COMITÊ CEDAW.

### PALAVRAS-CHAVE

INTERSECCIONALIDADE; CEDAW; "GROUNDS-BASED DISCRIMINATION"; GÊNERO; POBREZA; DIREITO INTERNACIONAL DOS DIREITOS HUMANOS.

## INTRODUCTION

Intersectionality recognises that individuals can experience discrimination on the basis of multiple and intersecting identities. The Committee for the Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>1</sup> has observed that ethnic minority women, elderly, disabled and migrant women, women in prisons and women and girls on the street are particularly vulnerable to disadvantage and discrimination (CEDAW Committee, Concluding Observations: Turkey; CEDAW Committee, Concluding Observations: Canada; CEDAW Committee, Concluding Observations: Kenya). The discrimination these women face is not 'fully described by simply adding two kinds of discrimination together' (FREDMAN, 2011, p. 140). Rather the intersectional discrimination is cumulative and 'the result is qualitatively different, or synergistic' (Ibid). In many national contexts, discrimination must be based on a recognised status based ground.<sup>2</sup> This approach to discrimination law has been criticised as being unable to capture the nuanced and complex reasons why a woman with an intersectional identity experiences disadvantage (CRENSHAW, 1989). National courts continue to struggle on how to properly evaluate and take account of the qualitatively different intersectional discrimination (IYER, 1993; CONAGHAN, 2007). At the same time, the CEDAW Committee has quietly been transcending these challenges and pioneering a promising approach to protecting women with multiple and intersecting identities against discrimination.

There are no specific provisions in CEDAW recognising women's intersectional identity. Due to this silence, CEDAW has been accused of not protecting intersectional discrimination. Bond argues that CEDAW 'fails to adequately consider interlocking forms of oppression... [CEDAW] provides protection to a monolithic category of women, a category characterised by women who experience only gender discrimination, rather than mutually reinforcing forms of discrimination such as racism, classism, ethnocentrism and heterosexism' (BOND, 2003, p. 95; ROSEMBLUM, 2011; OTTO, 2010 p. 357). On the other hand, Byrnes observes that 'the [CEDAW] Committee in its practice has identified many groups of women to whom the Convention extends protection on the basis of their sex in combination with another status' (BYRNES, 2011, p. 68; RADAY, 2012). While the Committee is in fact addressing women's intersectional discrimination, the legal basis for this remains unclear (CUSACK and PUSEY, 2013 p. 63). Furthermore, there is no clear understanding if the CEDAW Committee has comprehensively and coherently approached intersectional discrimination in the Concluding Observations, Individual Communications or Inquiry Procedure. This article addresses these concerns and has two strands of inquiry. First, how has CEDAW and the CEDAW Committee approached the problem of intersectional discrimination? This article demonstrates that rather than ignoring women's identities, CEDAW and the CEDAW Committee adopt an expansive and fluid approach to intersectional discrimination that is based on achieving gender equality. Rather

than limiting itself to traditional status based grounds, if women experience discrimination in relation to an identity, experience or cross-cutting problem that interacts with and is rooted in their sex and/or gender they are protected under CEDAW. Second, the article then examines how the CEDAW Committee in the Concluding Observations, Individual Communications and Inquiry Procedure applies its understanding of intersectional discrimination. Specifically it uses women, race and poverty as a case study to assess how the Committee is applying its fluid and expansive approach to intersectional discrimination. In applying this new approach, the CEDAW Committee makes repeated references to intersectional discrimination and draws to the states' attention that women of a minority race or ethnicity disproportionately live in poverty. However, at times the CEDAW Committee is inconsistent and inattentive to women's intersectional disadvantage. Understanding intersectionality as a component of equality in CEDAW provides the tools to ensure a more comprehensive approach. A transformative equality framework demonstrates how the CEDAW Committee can fully integrate an intersectional perspective and address the unique needs of racial and ethnic minority women who live in poverty and all women with multiple identities.

This first section briefly examines the discontinuities between intersectional theory and discrimination law, particularly the challenges raised by discrimination law's focus on grounds. The second section investigates how similar UN treaty bodies approach intersectional discrimination. The critique in these two sections is used to demonstrate how CEDAW has moved beyond a grounds-based approach to discrimination and through its unique approach transcended the gap between theory and practice. The third section analyses the text of CEDAW, supplemented by the interpretation of the CEDAW Committee in the General Recommendations, to demonstrate that CEDAW's commitment on eliminating discrimination against *all* women necessarily includes eliminating intersectional discrimination against women. The fourth section explains the methodology used for evaluating how the CEDAW Committee has applied intersectional discrimination. The fifth analyses a sample of Concluding Observations, the Individual Communications and Inquiry Procedure to demonstrate the CEDAW Committee's strengths and weaknesses in applying this fluid approach to intersectional discrimination. While there are differences between international and national discrimination law, the CEDAW Committee's approach to intersectional discrimination can open new channels for thinking how discrimination law can respond to intersectional theory.

## I THE DISCONTINUITY BETWEEN INTERSECTIONALITY THEORY AND DISCRIMINATION LAW

This section briefly sketches the insights derived from intersectional theory and some

of the challenges in incorporating theory into the practice of discrimination law. It is not meant to be a comprehensive review of intersectional discrimination but to situate the assessment of CEDAW within the larger debates and bring into focus the innovative approach of CEDAW and the CEDAW Committee. Individuals inherently have intersectional identities. A white, middle-class, Christian, heterosexual, able-bodied man has multiple identities based on race, gender, religion and sexual orientation. Based on certain characteristics an individual can experience privilege while based on other characteristics the same person can experience disadvantage (ATREY, 2015). A white, middle-class, Christian, heterosexual woman is privileged in respect of her race, religion and sexual orientation but disadvantaged on the grounds of her gender. The disadvantaged treatment is predominantly, albeit it is not necessarily exclusively, attributable to her gender. If a black, middle-class, Christian, heterosexual woman experiences disadvantage, on what basis is she being discriminated against? Is she experiencing disadvantage due exclusively to her race, gender or are both grounds at stake? Crenshaw demonstrates that understanding intersecting and multiple identities are crucial to understanding disadvantage and discrimination. Black women 'can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men' (CRENSHAW, 1989, p. 149). Crenshaw's insight is that black women's disadvantage cannot be understood exclusively as sex discrimination or race discrimination. She observes that 'sometimes Black women experience discrimination as Black women-not the sum of race and sex discrimination, but as Black women.' (Ibid). There is something unique and synergistically different when discrimination involves multiple identity characteristics (FREDMAN, 2011, p. 139).

In many jurisdictions—Canada, US, South Africa, the UK—discrimination law continues to struggle on how to incorporate the insights of intersectionality theory into practice. There are multiple sites, within the legal framework, that impede the full recognition of intersectionality (ATREY, 2015). This section focuses on the key critiques of grounds as CEDAW's fluid and expansive approach developed in the preceding sections addresses many of the discontinuities between intersectionality and grounds. In discrimination law, as formulated in many domestic jurisdictions, grounds serve a gate-keeping function. Only disadvantaged treatment that is 'based on', 'because of', or 'on the grounds of' certain recognized identity characteristics amounts to discrimination in law (GARDNER, 1998, p. 157). Grounds-based approach to discrimination law developed in Canada, South Africa, the UK and the US has been criticized by intersectional theorists as failing to capture and remedy discrimination based on multiple and intersecting identity characteristics. First, the grounds have been conceptualized based on the experience of the privileged members of the groups and are not sensitized to include discrimination against sub-groups that possess multiple identities (CRENSHAW, 1989). Second, under a single ground approach, where

the claim is based on one identity characteristics, the claimant has to forgo basing her claim on all of the characteristics that she believes are crucial to explain the discriminatory treatment she experienced (MACKLEM, 2012, p. 203). A single-axis framework forecloses a sophisticated and nuanced understanding on how the different identity characteristics interact to contribute to the disadvantage treatment. This makes the discrimination disappear (CRENSHAW, 1989; REAUME, 2002) and 'there is a serious risk that [the law] will fail to alleviate oppression...' (BONTHUYS, 2008, p. 29). Third, judicial attempts to move beyond the single ground approach and address multiple identities routinely fall short of an integrated intersectional perspective (CONAGHAN, 2007, p. 323). For example, intersecting discrimination is often approached from an additive or cumulative perspective meaning 'if a claimant wishes to plead more than one ground of discrimination, each claim must be made and proved separately' (Ibidem, p. 323).<sup>3</sup> This misses the complex interaction between identity characteristics. Fourth, discrimination law is based on the recognition of enumerated and analogous grounds. If the claimant believes the cause of their discrimination is a new ground she faces two potential challenges. First, if the list of grounds is closed or exhaustive, she cannot bring an aspect of her identity to the attention of the court. This raises similar challenges to single ground approach as not all elements that contribute to the disadvantaged treatment are examined. Second, if the list of grounds is open and the court can interpret in new grounds, she has to argue for the recognition of this ground. However, there is still no consensus on when new grounds should be recognised (REAUME, 2002, p. 128). Fredman argues the recognition of grounds is largely a matter of politics than legal principle (FREDMAN, 2011, p. 111). Therefore, the claimant has to choose between making a difficult legal argument in the absence of any established legal test or for pragmatic reasons decide not to base her claim on all of the elements of her identity. There have been repeated calls to ensure that discrimination law adopts an intersectional perspective and 'defines complex experiences as closely to their full complexity as possible and that we do not ignore voices at the margin' (GRILLO, 1995, p. 20).

What can CEDAW, which has been criticized for being based on a monolithic woman, contribute to the debates on intersectional discrimination? CEDAW adopts a single ground approach and yet it is praised for addressing women's different identities. This suggests that CEDAW is transcending the discontinuities between intersectional theory and discrimination law. There is under-developed potential in CEDAW to address that intersectional discrimination can serve as an influential model. This article investigates and confirms that CEDAW and the CEDAW Committee is pioneering a new and fluid approach to intersectional discrimination that more successfully integrates theory and practice.

## 2 INTERSECTIONALITY AND OTHER UN TREATIES

The UN has a two pronged approach to protecting human rights. It has two *mainstream* human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>5</sup> that include the principle of non-discrimination and equality and it has *specific status* treaties on race<sup>6</sup>, women, children,<sup>7</sup> disability<sup>8</sup> and migrant status.<sup>9</sup> This part examines how these treaties address intersectional discrimination so as to understand more clearly how CEDAW's approach is unique. The two mainstream treaties, the ICCPR and ICESCR adopt an enumerated and analogous grounds approach to discrimination, similar to that adopted in many national constitutions and human rights instruments. Article 2(1) and Article 2(2) of the ICCPR and ICESCR, respectively hold that 'each state party to the present Covenant undertakes to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 3 of both treaties prohibits discrimination on the basis of sex and Article 26 of the ICCPR creates a freestanding right to equality and non-discrimination on the same grounds as Article 2(1) of the ICCPR. The Committee on Economic, Social and Culture Rights (CESCR) has used 'other status' to interpret new analogous grounds, including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation (CESCR, General Comment No. 20, § 28-35). The Human Rights Committee (HRC) has not interpreted any analogous grounds into the ICCPR.

There is no reference to intersectional discrimination in the text of either the ICCPR or ICESCR, but both CESCR and the HRC have addressed intersectional discrimination in the General Comments. CESCR observes that 'some individual or groups of individual face discrimination on more than one of the prohibited grounds... such cumulative discrimination has a unique and specific impact... and merits particular consideration and remedying' (*idem*). In the context of gender discrimination the HRC notes that 'discrimination against women is often intertwined with discrimination on other grounds... states parties should address the ways in which instances of discrimination on other grounds affect women in a particular way...' (HRC, General Comment No. 28, § 30). This remains an essentially grounds-based approach that examines the interaction between enumerated or analogous status-based grounds.

The UN also has a series of treaties that protect particular identity grounds. Bond argues that the status specific approach to human rights contributes 'to a fractured understanding of the nature of discrimination, failing to recognise it is often an inextricable mixture of factors' (BOND, 2003, p. 93). A careful analysis of the text and General Comments demonstrate that the status specific treaties actually do

address intersectional discrimination and have two different approaches to it. First, similar to the ICCPR and ICESCR, CRC and CMW both refer to the interaction between the specific identity grounds and other traditional status based grounds.<sup>10</sup> Both the CRC and CMW pioneer additional enumerated grounds of discrimination: the CRC refers to disability and the CMW refers to age, economic position, property and marital status. The CRC also protects children in certain experiences and problems: refugee status (Article 22, CRC) and armed conflict (Article 38, CRC). The General Comments from the CMW and CRC Committees have never discussed intersectional discrimination in-depth. However, the CMW observes that women are predominantly domestic workers and states need to address the ‘discriminatory restrictions on women’s migrant status’ (CMW Committee, General Comment No. 1, § 60-61). The CRC General Comments address indigenous (CRC Committee, General Comment No. 11) and disabled children (CRC Committee, General Comment No. 9) and juvenile justice (CRC Committee, General Comment No. 10). For example, it notes that indigenous children experience ‘multiple facets of discrimination’ (General Comment No. 11, § 29) and that ‘street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities’ face discrimination in the juvenile justice system (General Comment No. 10, § 6). Interestingly, the CRC Committee is not limiting intersectional discrimination to status grounds but, examines it through the lens of cross cutting problems.

Second, the text of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Protection of Persons with Disabilities (CPRD) do not have a similar provision on the interaction between the specific status and other grounds of discrimination. However, CRPD does recognise that women and girls with disabilities experience multiple forms of discrimination (Articles 6 and 35, CPRD). There are specific provisions that protect children with disabilities (Article 7, CPRD) and the treaty emphasises the importance of protecting people with disabilities in situations of risk (armed conflict and natural disasters) and humanitarian emergencies (Article 11, CPRD). The CRPD Committee has only released two General Comments, but it does recognise that women with disabilities ‘may be subject to multiple and intersectional forms of discrimination based on gender and disability’ (CPRD Committee, General Comment No. 1, § 35). The CERD Committee also has two General Recommendations that touch on intersectional discrimination: one on the gender related aspects of racial discrimination (CERD Committee, General Comment No. 25) and the relationship between race and citizenship (CERD Committee, General Comment No. 30).

In conclusion, the status specific treaties have been addressing intersectional discrimination. They have made some advances by highlighting how different groups experience multiple or intersectional discrimination. The CRC Committee has been

particularly innovative by discussing discrimination in an experience. With this understanding in place, it is now time to turn to CEDAW and the CEDAW Committee's approach to intersectional discrimination.

### 3 INTERSECTIONAL DISCRIMINATION IN CEDAW

There is no provision in CEDAW that refers to the interaction of sex and gender and other markers of identity. There is no reference to women experiencing discrimination based on race, religion, ethnicity, migrant status, sexual identity, sexual orientation, disability, age or socio-economic status or in violence, armed conflict or the justice system. The preamble refers to poverty, racial discrimination, colonialism and neo-colonialism; however, there are no substantive provisions on these issues in the treaty. CEDAW has been accused of 'failing to capture the diversity of women and the range of their experiences' and not recognising the 'complexity of discriminatory practices directed at intersecting identities' (CHINKIN AND FREEMAN, 2012; BOND, 2003; ROSENBLUM, 2011; OTTO, 2010). This is a misreading of CEDAW. This section demonstrates that although there is no explicit reference to intersectional discrimination, the text of CEDAW is alive to the different lived experiences of all women.

Article 1 of CEDAW, which defines discrimination protects two identity grounds: sex and marital status: 'the term "discrimination against women" shall mean any distinction...made on the *basis of sex* which has the effect or purpose of impairing...the recognition 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' (emphasis added). The text of CEDAW does not engage with the meaning of sex or women. *Prima facie* CEDAW only protects sex-based discrimination. However, the CEDAW Committee in General Recommendation No. 28 on the state's core obligations holds that CEDAW covers gender-based discrimination against women. This is an important development. As sex only refers to the biological differences between men and women while gender 'refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences in hierarchical relationships between women and men in the distribution of power and rights favouring men and disadvantaging women' (CEDAW Committee, General Recommendation No. 28, § 5). Both types of distinctions that impair women's human rights are included in the definition of discrimination in Article 1 of CEDAW. The text of CEDAW does not directly discuss the meaning of marital status. However, the CEDAW Committee holds that 'state parties are obligated to address the sex and gender-based discriminatory aspects of all various forms of family and family relationship' and, more specifically, 'where they are recognised, whether as a *de facto* union, registered partnership

or marriage the state party should ensure protection of economic rights of the women in those relationships' (CEDAW Committee, General Recommendation No. 29, § 18, 24). This implicitly acknowledges women's intersectional discrimination as the Committee discusses marital status it is the context of socio-economic status. This demonstrates a deep appreciation for how gender-based norms surrounding marital status interact with socio-economic disadvantage. As it will be discussed below, the CEDAW Committee, similar to the CRC Committee understands that intersectional discrimination is not confined to status-based grounds but also to cross cutting problems women experience such as the dissolution of family relationships.

There are several other identity grounds that are specifically protected in CEDAW. Article 4(2) and Article 11(2) offers specific protection to women based on pregnancy and motherhood. Article 9 prohibits discrimination based on nationality and Article 14 protects rural women and guarantees them the right to participate and benefit from rural development and access to health care, transportation, housing, social security, electricity, water, communications and sanitation. CEDAW does not go as far as the ICESCR, ICCPR, CRC or CMW, but there still is an appreciation in the text for women's different identities.

Although there is no fully developed concept of intersectionality in CEDAW, a deeper textual analysis reveals that there is an implicit commitment to address all forms of oppression and disadvantage women experience, including intersectional discrimination. CEDAW has chosen one specific ground: women and rather than adopting a grounds based approach and looking at the intersection between different enumerated and analogous grounds the treaty adopts a fluid and expansive conception of women that allows an appreciation of the various combinations and permutations of discrimination that women experience. A purposive reading of CEDAW is the key to unlocking the treaty's commitment to remedying intersectional discrimination. The aim of CEDAW is to eliminate discrimination and achieve equality so that women can enjoy and exercise their human rights and fundamental freedom in all fields of life (Article 1, CEDAW; CEDAW Committee, General Recommendation No. 28, § 4). CEDAW's commitment to condemn discrimination against women in *all its forms* (Article 2, CEDAW) provides a firm textual basis requiring the state to appreciate and account for all the identities, experiences and factors that contribute to gender discrimination and inequality. The Committee has held that these provisions 'establish a comprehensive obligation to eliminate discrimination in all its forms' (CEDAW Committee, General Recommendation No. 19, § 10). This inherently includes intersectional discrimination as it is a unique form of discrimination. If women experience discrimination that is rooted in their sex and/or gender and this intersects with other aspects of their identity or experiences and results in a denial of human rights it is can and should be addressed through CEDAW. To achieve the aims of CEDAW, eliminating discrimination and achieving gender equality requires an appreciation of

the unique and multiple forms of discrimination that result in the disadvantaged treatment. Raday explains that intersectional is 'an off-shoot of the core right to equality' (RADAY, 2012, p. 516).

An example helps to illustrate the implicit commitment to intersectional discrimination. Article 12 requires state parties to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care.' To eliminate discrimination and achieve gender equality in health care or any other field of life it is necessary to appreciate the unique and multiple causes of discrimination. This is demonstrated by re-examining the facts of *Teixeira*.<sup>11</sup> She was a poor, rural Afro-descendant Brazilian woman who died due to severe delays in receiving medical treatment during childbirth. To understand the disadvantage and the inequality in accessing health care, it is necessary to appreciate how Teixeira's gender interacts with other aspects of her identity: race, geographic location and socio-economic status. Only examining *Teixeira* through gender is a limited approach because the evidence demonstrates that socio-economic status is crucial in understanding maternal mortality. The UN Special Rapporteur on the right to health notes that women in poverty are particularly at risk of maternal mortality (UNSR on the right to health, 2006, § 10, 28(b)) and the UN Millennium Development Report from 2014 found that the 'maternal mortality ratio in the developing region [...] was fourteen times higher than that of developed regions' (2014, p. 29). It is not solely Teixeira's gender but also her race, her poverty and the fact that she lived in rural Brazil that explain why her rights to accessing health care were so grossly undermined. The in-depth analysis of *Teixeira* in the final section reveals that the CEDAW Committee has not fully adopted and integrated the intersectional perspective that is implicit in CEDAW when deciding individual communications. If CEDAW and the CEDAW Committee are to realise its goals of achieving gender equality and securing women's human rights it is crucial to fully understand the complex and interlocking factors that result in gender inequality and violations of women's human rights.

Unlike in the Individual Communications, in the General Recommendations the CEDAW Committee is interpreting the treaty to ensure an expansive and fluid approach to intersectional discrimination. The CEDAW Committee's interpretation is not legally binding. However, there is increasing recognition that the work of the CEDAW Committee is an authoritative interpretation and it is 'undoubtedly true that [treaty bodies] have considerable legal weight' (CRAVEN, 1995, p. 9).<sup>12</sup> The CEDAW Committee has 'contributed through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women and the instruments for combating such discrimination' (CEDAW Committee, General Recommendation No. 25, § 3).

There is great value in understanding how the CEDAW Committee has approached intersectional discrimination.

The CEDAW Committee in its work makes limited reference to intersectional discrimination, but when it does it also adopts the expansive and fluid approach to intersectionality consistent with the interpretation proposed above. In General Recommendation No. 25 on temporary special measures the CEDAW Committee observes that ‘certain groups of women, in addition to suffering discrimination directed against them as women, may also suffer from *multiple forms of discrimination*, based on additional grounds as race, ethnic or religious identity, disability, age, class, caste or other factors’ (CEDAW Committee, General Recommendation No. 25, § 12). This is consistent with the approach of the ICCPR and ICESCR in describing intersectional discrimination. However, in General Recommendation No 28 on state’s obligations, the CEDAW Committee holds that ‘the discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race ethnicity, religion or belief, health, status, age, class, caste, sexual orientation and gender identity’ (CEDAW Committee, General Recommendation No. 28, § 18). This is a strong statement and goes much further than the other UN treaty bodies that only refer to multiple and intersecting forms of discrimination. It recognises that ‘categories of discrimination cannot be reduced to watertight compartments.’<sup>13</sup> The CEDAW Committee is holding that it is impossible to argue that only sex or gender is the basis for the discriminatory treatment. All aspects of a woman’s identity are highly relevant when assessing sex and gender discrimination. Under this interpretation so long as sex or gender is one of the bases for the disadvantage treatment it is permissible and necessary to examine how other identity characteristics are linked together to explain the disadvantaged treatment. The CEDAW Committee is arguing that if women interact with different identities then CEDAW can and should be responding to these new and unique forms of discrimination.

As highlighted above in relation to the dissolution of family relationship and socio-economic status, the CEDAW Committee is not limiting itself to the traditional grounds based approach to intersectional discrimination. When women experience discrimination that is rooted in their gender and interacts with other identities, experiences or cross-cutting problem this falls within CEDAW’s commitment to eliminate all forms of discrimination against women. This addresses one of the leading critiques of grounds in relation to intersectionality. The conception of women in CEDAW is not based on a privileged sub-set of women but encompasses all of their identities. If women experience in relation to certain identities or experiences: migrant status (CEDAW Committee, General Recommendation No. 26), statelessness (CEDAW Committee, General Recommendation No. 32) or age (CEDAW Committee, General Recommendation No. 27) they are protected under CEDAW. Furthermore, if women experience discrimination in relation to certain cross-cutting problems that

interact with their gender and the substantive obligations in CEDAW, such as the breakdown of family relationships, violence (CEDAW Committee, General Recommendation No. 19), armed conflict (CEDAW Committee, General Recommendation No. 30), access to justice (CEDAW Committee, General Recommendation No. 32) or poverty they are protected under CEDAW. In a similar vein, in the General Recommendation No. 27 on older women 'the discrimination experienced by older women is often multidimensional, with the age compounding other forms of discrimination based on gender' *inter alia*, poverty levels, migrant status, marital or family status, minority ethnic or indigenous groups. (CEDAW Committee, General Recommendation No. 27, § 13). This explanation of intersectional discrimination is interesting because alongside referring to established enumerated and analogous grounds, it also refers to literacy, migrant status and poverty. Reference to poverty is particularly interesting because there is still debate, notwithstanding the recognition by CESCR, if poverty or socio-economic status should be recognised as a ground of discrimination (FREDMAN, 2011a, p. 581-87). Including poverty in a list of other grounds may implicitly be advocating that poverty should be recognised as a ground or it may be side-stepping the debate and recognising that like literacy, armed conflict or the breakdown of family relationships poverty is an experience and contributing factor to discrimination. It also implies that under CEDAW there is no need to make complex legal arguments for the recognition of new grounds to ensure that all aspects of an individual's identity are included in the discrimination. The fluid, expansive and integrated approach to intersectionality inherently examines all identity characteristics, experience and problems that contribute to women's disadvantage.

In conclusion, the text of CEDAW and the CEDAW Committee have developed a sophisticated understanding of intersectional discrimination. Sex and gender discrimination is not isolated and fractured off from other forms of discrimination. Rather CEDAW and the CEDAW Committee in the General Recommendations approach from an integrated perspective the harm of intersectional discrimination that is based on eliminating discrimination and achieving equality. Moreover, there is an important recognition that disadvantage is not limited to status-based grounds. Encompassing the identities and experiences under the umbrella of sex and gender is an exciting approach as it holds the potential for CEDAW and the CEDAW Committee to develop a nuanced appreciation of intersectionality.

#### 4 METHODOLOGY FOR ANALYSING THE CONCLUDING OBSERVATIONS

The article now transitions to examine how the CEDAW Committee has used the expansive and fluid understanding of intersectional discrimination developed in the General Recommendations and applied it in the Concluding Observations, Individual

Communications and Inquiry Procedure to address and make recommendations on women, race and poverty. This part explains the role and function of the Concluding Observations, Individual Communications and Inquiry Procedure, the methodology for selecting which Concluding Observations to study in great detail and the evaluative framework for analysing the material.

Under the Optional Protocol to CEDAW (OP-CEDAW), the individual can file an Individual Communication, which is an individualised claim that the state party has violated its obligations under CEDAW.<sup>14</sup> The Committee evaluates written submissions from the individual and the state party and releases a decision evaluating the merits of the claim and provides specific and general recommendations. Article 8 of the OP-CEDAW permits the Committee to initiate an inquiry procedure to investigate grave or systemic violations of CEDAW. By Article 18 of CEDAW when a state party becomes a signatory to CEDAW, it must report every four years on how it has implemented the treaty. The Committee reviews the state report, submission from the civil society organisations, and conducts an oral question and answer session with state representatives. It then releases Concluding Observations that highlights the positive aspects, areas of concern and provide recommendations on how the state can best implement CEDAW and achieve gender equality.

As of May 2015, there are 19 Individual Communications on their merits and two Inquiry Procedures all of which are used in the analysis below. Since there are over 1200 Concluding Observations, for this study I have selected thirteen states using four criteria: (i) regular and sustained reporting to the Committee (ii) the UNDP Gender Inequality Index (iii) World Bank gross national income and (iv) geographic region. This ensures the analysis is objective and has geographic breadth as gender and racial poverty is a global problem and it includes states at different stages of development.

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 <sup>15</sup> |
| 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        |
| BRAZIL      | 79   | UPPER MIDDLE INCOME | LATIN AMERICA & CARIBBEAN  |
| JORDAN      | 99   | UPPER MIDDLE INCOME | MIDDLE EAST & NORTH AFRICA |
| KENYA       | 111  | LOW INCOME          | SUB-SAHARAN AFRICA         |
| EGYPT       | 126  | LOWER MIDDLE INCOME | MIDDLE EAST & NORTH AFRICA |
| BANGLADESH  | 130  | LOW INCOME          | SOUTH ASIA                 |
| ETHIOPIA    | 173 HUMAN<br>DEVELOPMENT<br>INDEX—GII NOT<br>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, six 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, three 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 four criteria and the thirteen states selected ensure an objective and comprehensive understanding of how the state has understood the intersection between women, race and poverty in relation to CEDAW.

It is also essential to have an analytical framework to properly understand how the CEDAW Committee has addressed intersectional discrimination in the Individual Communications, Inquiry Procedure and Concluding Observations. CEDAW aims to eliminate discrimination and achieve gender equality so that women can enjoy and exercise their human rights. The mandate to address intersectional discrimination in CEDAW is linked to the commitment to achieve gender equality. Since gender equality is a fundamental aim of CEDAW, it offers an ideal framework to assess if the CEDAW Committee is using intersectional discrimination to achieve the goals of the treaty.

This presents a further challenge. Although the CEDAW Committee has explained that the treaty is premised on both formal and substantive equality (CEDAW Committee, General Recommendation No. 25, § 7; CUSACK AND PUSEY, 2013, p. 63; BYRNES, 2013), it has never consistently or coherently explained what it means by

substantive equality. Byrnes describes the CEDAW's Committee's approach to equality as fluid (IBID, p. 64). At times, it indicates equality requires: differential treatment (CEDAW Committee, General Recommendation No. 28, § 16); an equal start; 'an enabling environment to achieve equality of results' (CEDAW Committee, General Recommendation No. 25, § 8); 'strategies for overcoming underrepresentation of women and a redistribution of resources and power between men and women' (Ibid); 'the ability to develop personal ability... [to] make choices without the limitation set by stereotypes, rigid gender roles and prejudices' (CEDAW Committee, General Recommendation No. 28, § 22); and most powerfully the 'real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns' (CEDAW Committee, General Recommendation No. 25, § 9). Byrnes convincingly argues that transformative equality is the objective 'which is embodied in the text and spirit of the Convention' (BYRNES, 2013, p. 56).

There is no accepted definition of transformative equality but there is an emerging consensus. Cusack and Pusey argue for a two pronged approach to transformative equality: first, the transformation of 'institutions, systems and structures that cause or perpetuate discrimination and inequality' and second 'the modification or transformations of harmful, norms, prejudices and stereotypes' (CUSACK AND PUSEY, 2013, p. 64). Byrnes explains that 'transformative equality denote[s] a change of fundamental and far-reaching nature' (BYRNES, 2013, p. 56) While Fredman argues transformative equality pursues four-overlapping aims: breaking the cycle of disadvantage, promoting respect for dignity and worth, accommodating difference by achieving structural change and promote political and social inclusion and participation (FREDMAN, 2011, p. 25) Fredman's definition of transformative equality is ideally suited to evaluating laws, policies and programmes, because it offers an easy to apply yet sophisticated framework in which to assess the nuances of gender inequality (idem). In assessing how the CEDAW Committee has applied its understanding of intersectional discrimination, Fredman's transformative equality is used as an evaluative framework.

Before turning to the Individual Communications, Inquiry Procedure and Concluding Observations, it is necessary to investigate, in further detail, Fredman's definition of transformative equality. The first element is to redress disadvantage. This recognises that disadvantage tracks onto identity characteristics. To break this imbalance requires specific and positive measures (ibidem, p. 27-8). The second element addresses recognition harms such as: harassment, prejudice, stereotypes, stigmas, negative cultural attitudes, indignity and humiliation (ibidem, p. 29). Third, with respect to structural change, rather than requiring individual conformity, this dimension questions and requires institutions and structures to change. For example, the formal labour market is based on male working hours. This has excluded women with

child care responsibilities from the workforce. Equality demands that the formal labour market change to account for different life experiences. The fourth element, the participation dimension requires inclusion of women in all public, private, political and social decision making processes. Placing these four elements together highlights the connection between different types of gender equality harms. For example, it demonstrates how poverty reduction programmes which are based on a head of the household model while seemingly addressing women's disadvantage can continue to marginalise women and perpetuate gendered relationships of dependency (CEDAW Committee, Concluding Observations: UK, § 62-3).

## 5 APPLYING INTERSECTIONAL DISCRIMINATION IN CEDAW

There is overwhelming evidence that the CEDAW Committee is applying the fluid and expansive concept of intersectional discrimination that it is pioneering in the General Recommendations in the Concluding Observations, Inquiry Procedure and Individual Communications. This section uses the relationship between women, race and poverty as a case study to analyse the CEDAW Committee's application of this new approach to intersectionality. This is particularly intriguing because although there is only one reference to both race and poverty in the preamble of CEDAW, the CEDAW Committee is interpreting equality and non-discrimination in CEDAW to draw out the connection between women, poverty, race, equality and non-discrimination. At the same time, the transformative equality framework reveals areas where the CEDAW Committee can further develop and apply intersectional discrimination.

The strongest example of the CEDAW Committee's approach to women, race and poverty comes from the Inquiry Procedure into missing and murdered aboriginal women in Canada. It uses very strong language to explain intersectional discrimination: 'Aboriginal women face intersectional discrimination stemming from factors... which are *inextricably intertwined*' (CEDAW Committee, Report of Inquiry, § 204). The CEDAW Committee specifically analyses how gender, race and socio-economic status contribute to violence against Aboriginal women. The CEDAW Committee draws strongly on the disadvantage element to analyse intersectional discrimination. It observes that for poor, rural Aboriginal women 'hitchhiking is a common practice' which 'increases the risk of Aboriginal women to abduction and being a murder victim' (ibidem, § 106). Aboriginal women live in inadequate housing, lack education and employment opportunities. The CEDAW Committee is concerned that this 'increase women's vulnerability to violence, as a lack of access to such resources reduces the choices of women prevents them from escaping violence' (ibidem, § 112). The CEDAW Committee draws on all elements of the transformative equality framework to propose recommendations. To redress disadvantage, Canada must improve the socio-economic conditions affecting Aboriginal women (ibidem, § 216).

Canada had submitted evidence of the poverty reduction plans it has in place but the CEDAW Committee calls the state to task by observing that the measures it is taking to reduce socio-economic disadvantage are not focused on the specific needs of Aboriginal women (*ibidem*, § 118). To address the recognition harms, the CEDAW Committee recommends that police officers take seriously reports of missing Aboriginal women and treat persons making the report with respect and dignity (*ibidem*, § 216) and significantly strengthen awareness-raising on Aboriginal culture for police and justice officials (*idem*). Drawing on the structural element, the CEDAW Committee encourages Canada to provide sufficient funding for legal aid, make legal aid available to Aboriginal women, if necessary free of charge so as to improve the relationship between Aboriginal women and the justice system, and to conduct a national inquiry to root out the systemic causes of discrimination and violence against Aboriginal women (*idem*). Finally, the Committee recommends that Canada continue to work with Aboriginal women's representatives (*idem*). This represents both a nuanced understanding of how intersectional discrimination contributes to women's poverty, violence against women and how transformative equality can be used to remedy this unique form of harm.

In the Concluding Observations there is also specific attention to the relationship between women, race and poverty. The CEDAW Committee is particularly aware about how poverty tracks onto other identities. It implicitly uses the transformative equality framework, specifically drawing on the disadvantage element. Again in Canada, the CEDAW Committee points out that Aboriginal women live in impoverished conditions 'which include high rates of poverty, poor health, inadequate housing, lack of access to clean water... have higher rates of unemployment and face a greater pay gap...' (CEDAW Committee, Concluding Observations: Canada, § 43). Again using the disadvantage element of transformative equality, the CEDAW Committee recommends that Canada develop a specific and integrated plan and take effective and proactive measures for addressing the needs of Aboriginal women (*ibidem*, § 44). Furthermore, it is concerned that cuts to social assistance rates '[have] a negative impact on vulnerable groups of women such as aboriginal women, Afro-Canadian women [and] immigrant women, who rely on social assistance for an adequate standard of living' and recommends that the state ensure 'that funding decisions meet the needs of the most vulnerable groups of women and do not result in discrimination against women' (*ibidem*, § 13-14). When reviewing the state report for Turkey, the CEDAW Committee notes that disadvantaged women—Kurdish, ethnic minority, migrant, elderly and disabled women—are more vulnerable to poverty (CEDAW Committee, Concluding Observations: Turkey, § 38). Similarly, in Romania, Roma women are disproportionately poor (CEDAW Committee, Concluding Observations: Romanian, § 26). Finally, in Argentina, the CEDAW Committee again uses the disadvantage element to draw to the state's attention to

the fact that rural indigenous women live in extreme poverty, that they are marginalised and lack access to health care, education, credit facilities and community services (CEDAW Committee, Concluding Observations: Argentina, § 40). There is evidence that the CEDAW Committee is also using the structural element in relation to Brazil. Domestic workers in Brazil are principally women of African descent and are 'generally excluded from the protection of labour law and are vulnerable to exploitation by their employers' (CEDAW Committee, Concluding Observations: Brazil, § 27). The CEDAW Committee recommends that Brazil protect domestic workers against exploitation and extend legal protection to domestic workers (*ibidem*, § 28).

There are also several examples of the CEDAW Committee drawing together multiple aspects of transformative equality to address intersectional discrimination in the context of women, race and poverty. In Mexico, the CEDAW Committee uses the disadvantage element to express concern at the high levels of poverty, illiteracy and multiple forms of discrimination against indigenous rural women and recommends that poverty eradication strategies pay special attention to this group of women (CEDAW Committee, Concluding Observations: Mexico (2012), § 434). It further draws on the participation element to recommend Mexico that rural indigenous women be included 'into the development process both as beneficiaries and as protagonists' (CEDAW Committee, Concluding Observations: Mexico, § 403). This is very important for ensuring the empowerment of women with intersectional identities. There is also evidence of the CEDAW Committee drawing on the disadvantage and recognition elements in relation to the gender pay gap in Brazil. In Brazil, the CEDAW Committee observes that 'the wage gap between men and women fluctuates between 17% and 40% depending on the race, ethnicity and education of women' and expressed concern that 'stereotypes related to gender and race contribute of Afro-descendent and indigenous women into lower quality jobs' (CEDAW Committee, Concluding Observations: Brazil (2012) § 26). It is the negative cultural attitudes and stereotypes on gender and race (recognition element) that contribute to women's economic disadvantage (disadvantage element). The recommendations also draw on both elements. Brazil is encouraged to close the gender pay gap to remedy the economic disadvantage and to 'adopt effective measures, including temporary special measures to eliminate occupational segregation based on stereotypes relating to gender, race and ethnicity' (*ibidem*, § 27(b)).

While this is a positive development, an in-depth analysis of women, poverty and race in the Concluding Observations and Individual Communications reveals that there are a number of inconsistencies in how the CEDAW Committee applies intersectional discrimination. First, there are inconsistencies in relation to which states the CEDAW Committee discusses the relationship between gender, race and poverty. There is no explicit mention of this form of intersectional discrimination

in the Concluding Observations for Bangladesh, Norway, Jordan or Ethiopia. The CEDAW Committee is not always consistent in how it addresses intersectionality in relation to one, individual state. In the sixth reporting round for Brazil, the CEDAW Committee expresses concern about Afro-Brazil domestic workers, but does not refer to this issue in the seventh reporting round. Second, related to this inconsistency, at times the CEDAW Committee overlooks the intersectional aspects of sex and gender discrimination. As one example, in Jordan and Egypt the CEDAW Committee advocates for the extension of legal protection to domestic workers, but there is no reference to the race or ethnicity of domestic workers (CEDAW Committee, Concluding Observations: Jordan, § 44; CEDAW Committee, Concluding Observations: Egypt, § 35). This is problematic. The International Labour Organisation estimates that in the Middle East the ‘vast majority of domestic workers are migrants’ (ILO, 2013, p. 32). In Jordan alone there are an estimated 70,000 to 98,000 migrant domestic workers (FRANTZ, 2014, p. 10) and the abuse and exploitation was so severe that for a period of time The Philippines banned migration to Jordan (JUREIDINI, 2009, p. 77). Third, even when the CEDAW Committee expresses concern on women’s intersectional discrimination, it does not consistently follow this up with a tailored recommendation. For example, while the Concluding Observations from Argentina note that indigenous rural women live in extreme poverty, the concerns and recommendations on the state’s poverty reduction programmes are solely on the basis of gender and do not incorporate an intersectional perspective (CEDAW Committee, Concluding Observations: Argentina, § 18). Research has shown that the state report and civil society organization submissions to the CEDAW Committee in the periodic reporting process are influential in ensuring an issue is included in the Concluding Observations (CAMPBELL, 2014). To ensure a more consistent approach to intersectional discrimination it is necessary for the state to provide this information. A possible way to encourage the relevant actors to include data and information on the situation of women with multiple identities in their submissions to the CEDAW Committee is through first, a General Recommendation that specifically examines the relationship between CEDAW and intersectionality and second, by reforming the state reporting guidelines on the periodic report to specifically ask for the state to address this issue. This would be a step towards ensuring that the relevant information is before the CEDAW Committee and hopefully improve its consistency in addressing intersectionality. At the same time, it is also important to acknowledge that there is a chronic problem with states not providing data on intersectionality and the CEDAW Committee routinely calls for disaggregated data on the situation of women (CEDAW, General Recommendation No. 9). Collecting data on women with multiple identities can be both costly and time consuming. There are two ways this limitation can be overcome. First, the Individual Communications procedure does not require data as these decisions are only examining the intersectional

discrimination of one woman. This forum is an opportunity for the CEDAW Committee to delve into the intersectional aspects of the communication. Second, irrespective of the lack of data, the CEDAW Committee can be more attentive to intersectional aspects of women's disadvantage by continually inquiring of the state its approach to this unique form of discrimination in the constructive dialogue session of the periodic reporting process.

There is one further critique of the CEDAW Committee's current approach to intersectionality. While the CEDAW Committee uses all of the elements of transformative equality to address intersectional discrimination, it is strongest in relation to the disadvantage element of transformative equality. It has yet to employ consistently the remaining elements of the framework to address intersectional discrimination. The CEDAW Committee's decision in *Teixeira*, the facts which were used in Section I to explain CEDAW's implicit commitment to intersectional discrimination, illustrates the limits of the CEDAW Committee's current approach and the potential of transformative equality framework and intersectional discrimination.

Teixeira was a rural, Afro-Brazilian woman who lived in poverty. A few days before giving birth, she attended a local health centre complaining of severe nausea and abdominal pain. Two days later, she delivered a stillborn foetus. She underwent surgery to remove the placenta 14 hours after delivery, but her condition worsened. The health centre contacted both public and private hospitals with superior facilities to treat her. One private hospital had space but it refused to send its only ambulance to transport her. Teixeira 'waited in critical conditions for eight hours to be transported to the hospital.'<sup>16</sup> At the hospital she was left largely unattended in the hallway for 21 hours until she passed away. She died due to a digestive haemorrhage, which was the result of the delivery of a stillborn foetus. Her mother filed an individual communication and the CEDAW Committee concluded that Teixeira was discriminated against because she was 'of African descent and on the basis of her socio-economic background.'<sup>17</sup> The Committee is correct to take account of Teixeira's unique experience, but it seems unsure of the consequences of this finding. In the substantive decision there is no detailed assessment of how her multiple identities contributed to her death and there is no reference to intersectional discrimination in the CEDAW Committee's recommendation.

Fredman's transformative equality framework demonstrates how the Committee can meaningfully assess how Teixeira's intersectional identity resulted in the denial of gender equality and her human rights. The disadvantage element can demonstrate that women living in poverty, in rural areas and women belonging to ethnic minorities or indigenous populations are among those particularly at risk of maternal mortality (UNSR on the right to health, 2006). These insights can be used to evaluate whether Brazil's policies are targeted towards the needs of disadvantaged women and can be used to create meaningful recommendation such as low cost speedy access

to emergency obstetric health services. The recognition element requires the CEDAW Committee to investigate if the hospital personnel treated her differently due to her race and poverty and can require Brazil to ensure that hospital staff receives training to ameliorate these negative and prejudicial attitudes. Drawing both the recognition and structural elements together, the CEDAW Committee can question how negative stereotypes affect the location, funding, quality and staffing of maternal health facilities where ethnic, indigenous or poor women live. The participation element requires women's participation in the development of maternal health policies. In their submission to the CEDAW Committee Brazil does mention that the policies included women's participation, it would be helpful to remind Brazil that participation includes voices that are routinely marginalised: the poor, indigenous and rural women.<sup>18</sup>

## CONCLUSIONS

CEDAW is committed to eliminating all forms of discrimination and achieving gender equality so that *all* women can exercise and enjoy their human rights. This implicitly includes a commitment to understanding and addressing intersectional discrimination. Women experience disadvantage and discrimination based on their sex and gender and that is inextricably linked to other identities, factors and experiences such as a race and poverty. Under CEDAW, if sex and gender is one of the bases for the discrimination, it is necessary to examine how other identity and factors contribute to the discrimination. This transcends the discontinuities between intersectionality theory and practice. It moves intersectionality beyond a ground-based approach and approaches multiple identities from a fluid, expansive and integrated perspective. The CEDAW Committee has been pioneering this approach in the General Recommendations, Individual Communications, Inquiry Procedure and Concluding Observations, but it has not been consistently applying it.

There are three complementary solutions to these inconsistencies. The legal basis for intersectional discrimination in CEDAW is equality. The equality framework, particularly transformative equality, is a powerful analytical tool to ensure the CEDAW Committee fully incorporates an intersectional perspective. As mentioned above, the second is to release a General Recommendation on intersectionality that draws significantly on race and poverty. A General Recommendation is an important tool to signal to state parties, other relevant stakeholders and the CEDAW Committee on the importance of reporting and taking action on addressing intersectional discrimination. There are other creative solutions. Third, there are seminars, workshops and training that the CEDAW Committee could hold to ensure its attention is directed towards intersectional discrimination. There needs to be a shift in the mindset of the treaty bodies to recognise. The legal basis and tools are in place to use CEDAW

as a platform for constructive dialogue sessions with state parties on developing best practices to eliminate intersectional discrimination.

National and regional human rights instruments are usually framed differently than CEDAW. The individual can usually choose various grounds on which to base their claim for discrimination while under CEDAW the text of CEDAW has chosen one specific ground: sex and gender. Using a specific ground CEDAW implicitly ensures a rich understanding of the complex and interlocking ways women experience discrimination and this ensures intersectional discrimination is addressed in the treaty. The textual difference between other human rights instruments and CEDAW is important but CEDAW's fluid and expansive approach can serve as springboard to new and creative thinking on the relationship between grounds and intersectional discrimination at both the domestic and international level.

#### NOTES

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- 1 1249 UNTS 13.
- 2 *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 10.
- 3 See for example, *Bahl v Law Society*, [2004] EWCA 1070 (English Court of Appeal).
- 4 999 UNTS 171.
- 5 993 UNTS 3.
- 6 Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.
- 7 Convention on the Rights of the Child, 1577 UNTS 3.
- 8 Convention on the Rights of Persons with Disabilities, A/RES/61/106 (CRC).
- 9 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 2220 UNTS 3 (CMW).
- 10 Article 2(1) of CRC; Article 1 of CMW.

- 11 *Da Silva Pimentel Teixeira v Brazil*, (2011) CEDAW/C/49/D/17/2008.
- 12 See also *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 693.
- 13 *Egan v Canada*, [1995] 2 SCR 513, 561-4 (dissenting judgment of Justice L'Heureux-Dube).
- 14 2131 UNTS 83.
- 15 These are my own classifications because they are high income neither Norway nor Canada are geographically classified by the World Bank.
- 16 *Teixeira*, § 2.8.
- 17 *Ibidem*, § 7.7.
- 18 *Ibidem*, § 4.12.

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