3 A feminist approach to *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*

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1 A feminist approach

Providing a critique of international human rights law through a feminist lens presents a particular challenge: feminist scholarship and activism is rich in its complexity and diversity and does not represent a single unified approach. While feminists have a shared interest in addressing gender-based discrimination and injustice, purporting to offer a defining feminist perspective is simply not an achievable goal, and it is to be expected that many feminists would approach the task in hand rather differently. Feminist method offers a toolkit rather than a roadmap. It is nonetheless right that feminist perspectives are included in any discussion of international human rights research methods, not least because of the sustained depth of contemporary feminist engagement with international law and human rights. Feminists pose questions about the ways in which gender operates in legal systems (often in terms of the exclusion of women and their experiences) and also raise questions about the role of the law in sustaining – and its capacity to challenge – patriarchal norms and values. Feminists are increasingly at the forefront of critical international legal scholarship. Inspired by the ground-breaking work of MacKinnon in *Towards a Feminist Theory of the State*[1] and Chinkin, Wright and Charlesworth in their 1991 article 'Feminist Approaches to International Law',[2] the task of laying bare the patriarchal structures upon which the discipline is founded, and its consequent blind spots, has been taken up enthusiastically by various international scholars.[3]

1 C. A. MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989).

2 H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613. Two authors of that article followed it with a monograph: H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

3 D. Dallmeyer, *Reconceiving Reality: Women and International Law* (American Society of International Law 1993); H. Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' (1993) 25 *Studies in Transnational Legal Policy* 1; K. Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293; G. Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509; A. Orford, 'Feminism, Imperialism and the Mission of International Law'

While feminist scholarship has certainly come to greater prominence over the past three decades, the challenges that feminists face in making an impact on international human rights law's norms and structures are nonetheless considerable. Feminist critiques bring the very structure of international law's methods and values into question. Decision-making in international law traditionally prioritises abstract logic and hard (treaty) law, thereby reducing the potential importance of conciliation, negotiation, soft law and equity.[4] Traditional scholarship in international law also has the State as its key focal point – raising questions about, for instance, the power of the State, the sovereignty of States, and the use of force by States. Thus, many issues of importance to those marginalised by the State, including women, fall into the blind spots of international law's gaze. It is the work of feminist method to demonstrate and seek to explain the existence of those blind spots. As Hilary Charlesworth has so eloquently written: 'Feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis'.[5] Writing elsewhere, she asks, for instance, why there is 'a whole series of treaties obsessed with straddling stocks, when the use of breast milk substitutes, which is a major health issue for women in Africa, remains subject to voluntary WHO codes?'[6]

To this end, simply affirming the equal rights of men and women, as the Universal Declaration of Human Rights does, is, for many, insufficient. Much feminist work, such as that of Sandra Fredman, is associated with shifting the human rights discourse of equality towards a substantive, rather than formal, notion of equality: 'Ultimately, like treatment can only be judged against the treatment accorded to a similarly

(2002) 71 *Nordic Journal of International Law* 275; B. C. Meyersfeld, 'Reconceptualizing Domestic Violence in International Law' (2003–2004) 67 *Albany Law Review* 371; D. Buss and A. Manji (eds) *International Law: Modern Feminist Approaches* (Hart 2005); D. Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in A. Orford (ed), *International Law and Its Others* (Cambridge University Press 2006); C. A. MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006); A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2007); D. Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11; M. Fineman and E. Zinsstag, *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (Intersentia 2013); S. Kuovo and Z. Pearson (eds), *Feminist Perspectives on International Law: Between Resistance and Compliance?* (Hart 2011); G. Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge 2012).

4 Charlesworth & Chinkin, *The Boundaries of International Law* (n 2) 62–71. For example, see R. Buchanan and R. Johnson, 'The "Unforgiven" Sources of International Law: Nation Building, Violence and Gender in the West(ern)' in Buss and ManjiInternational Law, *International Law* (n 3) 131.

5 H. Charlesworth, 'Feminist Method in International Law' (1999) 93 *American Journal of International Law* 379.

6 H. Charlesworth, 'The Hidden Gender of International Law' (2002) 16 *Temple International and Comparative Law Journal* 93, 97.

situated comparator, who, far from being universal, is clothed with the attributes of the dominant gender, culture, religion, ethnicity, or sexuality'.[7] Feminists, then, are engaged in conversations about power, inequality and social justice, conversations that frequently problematise the construction of identities and difference. To this end, much of contemporary feminist human rights scholarship is essentially an exercise in critique, imagination and activism that draws heavily on extra-legal research and insights. This can be summed up as 'telling the story differently'.[8]

Feminisms' imaginative efforts are, however, often grounded in the stark realities of women's lives. In the words of Gayle Binion, 'if one works from the life experience most common to women, the principles of human rights that would emerge would not necessarily reflect the universe of such rights as they are commonly understood by liberal nation states'.[9] Many feminists, as Binion points out, start from 'real human experience' rather than 'grand reasoning', rendering feminist theorising '*self-consciously limited, tentative*, and *provisional*'.[10] Starting from that position, feminists may use deconstruction *in order to* highlight (gendered) hierarchies and challenge (women's) exclusion. By starting from the ground up, feminist method can thus reveal 'a distorted picture of patterns of human rights abuses'[11] in which the experience of women is overlooked. Charlesworth describes this process as 'searching for silences' in international law.[12] In its pursuit of change and foregrounding of women's experiences, the distinctiveness of much feminist scholarship of international human rights law lies in its overt partiality and the challenge this presents to the apparent neutrality and universality of human rights law's normative principles.

Thus, feminists have called human rights to account for the role they play in entrenching structural inequality and turning a blind eye to injustice. Charlotte Bunch identifies four ways in which international human rights law creates hierarchy and facilitates this exclusion: violations of women's rights are trivialised; they are placed outside the realm of State responsibility and attributed to the cultural, or religious spheres; they are deemed 'not human rights'; and violations are normalised to such an extent that change is seen to be impossible.[13] As Johanna Bond notes, feminists have used legal method to respond to this exclusion by, for instance, critiquing formal equality, challenging the hierarchy of

7 S. Fredman, 'Susbtantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712, 719.

8 R. Hunter, 'An Account of Feminist Judging' in R. Hunter, C. McGlynn and E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010) 36-37.

9 G. Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly*, 509.

10 ibid 512.

11 A. Byrnes, 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation: Some Current Issues' (1988–1989) *Australian Yearbook of International Law* 205, 211.

12 Charlesworth, 'Feminist Method' (n 5) 381–383.

13 C. Bunch, 'Women's Rights are Human Rights: Toward a Re-vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486.

civil and political rights over economic social and cultural rights, and expanding state responsibility to the private sphere.[14]

If feminists are engaged in telling the story of international human rights differently, that raises the question of who is listening to their accounts. It is certainly important to acknowledge that some feminists, particularly influenced by the seminal work of Carol Smart,[15] adopt a highly ambivalent, if not critical, approach when it comes to the institutionalisation of legal rights. Some have expressed doubt about the capacity of human rights, framed as individualistic entitlements and hence antithetic to feminist approaches that emphasise co-operation, to bring about meaningful change.[16] Certainly, women's rights and human rights movements at times have different and conflicting goals.[17] Still others argue that in the Anthropocene age in which we face environmental devastation, focusing on the *human* in our analysis and political struggles is too limited.[18] In practice, however, most feminists working in international human rights law adopt a pragmatic stance in which they juggle an insider-outsider position. In the words of Karen Engle:

> The literature and movement surrounding women's human rights has possibly challenged the human rights core more than any other literature or movement. At the same time, it has become one of the core's staunchest defenders. Even as every author identifies and conveys difficulties with the discourse, they all make it somehow work for them. The core is shaken but it remains.[19]

Despite the tensions inherent in its engagement with law and rights, feminist method is remarkable in its capacity to continue to find new ways of thinking about international human rights law. To this end, feminist method has been particularly enriched by embracing, as many contemporary feminists do, Kimberlé Crenshaw's insights on intersectionality. Crenshaw's work insists on the significance of difference in women's experience (for her, in the context of violence): '… this

14 J. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71.

15 C. Smart, *Feminism and the Power of Law* (Routledge 1989).

16 MacKinnon, *Towards a Feminist Theory* (n 1); H. B. Holmes and S. R. Peterson, 'Rights Over One's Body: A Women-Affirming Health Care Policy' (1981) 3 *Human Rights Quarterly* 71, 73.

17 For instance, in *Case of Platform Ärzte für das Leben v Austria* (judgment of 21 June 1988, Series A No. 139, 13 EHRR 204), in the context of anti-abortion demonstrators' complaint that the State had not adequately protected their rights to protest and express their disapproval of abortion in the face of counter-protests, the Court accepted that the State had certain positive obligations to protect those demonstrators.

18 R. Braidotti, 'Four Theses on Posthuman Feminism' in R Grusin (ed), *Anthropocene Feminism* (University of Minnesota Press 2017).

19 K. Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517, 610.

elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities'.[20] Intersectionality is a dynamic method, 'an operative approach to law, society, and their symbiotic relation, by a distinctive way into reality that captures not just the static outcomes of the problems it brings into view but its dynamics and lines of force as well'.[21] Adopting women as a monolithic category is no longer viewed as adequate by many feminist theorists. Bond, for instance, has proposed a form of qualified universalism, in which rights apply to all but violations are recognised as being experienced uniquely by different groups.[22] As Mackinnon has noted, the transformative potential of intersectionality is considerable: '… capturing the synergistic relation between inequalities as grounded in the lived experience of hierarchy is changing not only what people think about inequality but the way they think'.[23]

In this chapter, I focus on a decision of the Committee on the Elimination of Discrimination against Women ('the Committee'), the monitoring body of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').[24] CEDAW focuses solely on the specific disadvantage and suffering faced by women and has been described as the 'definitive international legal instrument requiring respect for and observance of the human rights of women'.[25] Adopted by the General Assembly in December 1979, CEDAW entered into force on 3 September 1981 and currently has 189 States Parties. Its ambitious aims are to eliminate discrimination and establish gender equality through challenging structural gendered power relations. Discrimination is defined under Article 1 of the Convention as:

> … 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 the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, cultural, civil or any other field.

The Convention also addresses forms of discrimination that are constructed around biological differences, including discrimination against pregnant women.

20 K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (July 1991) 43 *Stanford Law Review* 1241, 1242.

21 C. A. Mackinnon, 'Intersectionality as Method: A Note' (Summer 2012) 38(4) *Signs* 1019, 1023–4.

22 Bond, 'International Intersectionality' (n 14) 76.

23 MacKinnon (n 21) 1028.

24 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

25 R. J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643.

Initially, there was no mechanism through which individuals could complain to the Committee about the violation of their rights under CEDAW, leading Theodor Meron to describe its status as 'second-class'.[26] Instead, a reporting procedure and an inter-State complaints mechanism were relied upon to secure States' compliance with their treaty obligations. Although in many respects a dynamic instrument, the lack of individual complaints mechanism under CEDAW greatly curtailed the Committee's capacity to shape international law, notwithstanding the occasional yet important contributions made in this respect by its General Recommendations. The Optional Protocol providing for an individual complaints mechanism was finally adopted by the General Assembly on 6 October 1999 and entered into force on 22 December 2000, and it currently has 109 States Parties. The Optional Protocol was the result of delicate negotiation.[27] Parties agree to recognise the competence of the Committee to consider complaints alleging violations of the Convention's rights. Compromises reached during the drafting process also resulted in States not being bound to remedy violations, but rather to give 'due consideration' to the Committee's views and recommendations. However, this was ameliorated somewhat by Article 7(5), which authorises CEDAW to adopt follow-up procedures in respect of communications. The case-law of the Committee has built up relatively slowly: as of January 2019, there have been 50 communications declared inadmissible or discontinued and 33 communications upon which the Committee has reached a decision (in five of which it deemed there to have been no violation of the Convention).[28] In this contribution, I offer a feminist critique of the Committee's 2011 decision in *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*,[29] a case that concerned the death of a pregnant Afro-Brazilian woman resulting from fatally inadequate obstetric health care.

While a number of international human rights treaties and instruments assert the principle of sex/gender equality, it was only with the adoption of CEDAW that a 'bill of rights for women' became part of the canon of international human rights law. It adopts a far-reaching understanding of discrimination, and requires States to take measures to 'modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women' (Article 2(f)). Riane Eisler has

26 T. Meron, 'Enhancing the Effectiveness of the Prohibition of Discrimination against Women' (1990) 84 *American Journal of International Law* 213.

27 A. Byrnes and J. Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?' (1996) 21 *Brooklyn Journal of International Law* 679; F. Gómez Isa, 'The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights' (2003) 20 *Arizona Journal of International and Comparative Law* 291; J. Connors, 'Optional Protocol' in M. Freeman, C. Chinkin and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012) 607.

28 As of January 2019, there are 56 further pending cases. Data obtained from OHCHR's *Statistical Survey on Individual Complaints*, available at <www.ohchr.org/en/hrbodies/cedaw/pages/jurisprudence.aspx> accessed 2 February 2019.

29 Communication No. 17/2008, CEDAW/C/49/D/17/2008 (27 Sept. 2011).

argued that CEDAW 'constitutes the hitherto missing link for the construction of an internally consistent theory of human rights that expressly rejects the traditional exclusion of "women's rights" from the purview of international human rights activities'.[30] Why then, one might ask, was it decided to adopt, for the purposes of introducing a feminist critique, a decision of the only international human rights monitoring body composed almost entirely of women, charged with protecting and shaping international women's rights? First, the work of the Women's Committee is crucially important, and certainly worthy of far greater attention that it has thus far received.[31] The *Alyne da Silva Pimentel* case raises desperately important and urgent questions; in the words of a women's rights organisation that submitted an amicus brief: 'Maternal mortality is one of the main causes of women's premature death and disability in developing countries and indicates multiple violations of women's human rights'.[32] Drawing on WHO data, the intervening organisation put the risk of a maternal mortality at 1 in 290 in Latin America,[33] which amounts to thousands of women dying needlessly each year in the region. Poverty and race play a crucial and devastating role: maternal death claims the lives of seven times more black women in Brazil than white women.[34] Second, the case raises important questions about the content of international human rights norms concerning non-discrimination and reproductive rights:

> International law, for the most part, has been made by men, for men – historically, politically, structurally, and normatively. The idea that reproductive rights are women's human rights is very recent. The extent to which state have recognized these rights, albeit rhetorically, is remarkable. That the resultant consensus is not on a par with freedom from torture is not. Nor is the gap between the law as written and the law as applied.[35]

30 R. Eisler, 'Human Rights: Toward an Integrated Theory of Action' (1987) 9 *Human Rights Quarterly* 287, 305.

31 Although, see A. Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of All Forms of Discrimination against Women' (1989) 14 *Yale Journal of International Law* 1; E. Evatt, 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002) 34 *George Washington International Law Review* 515; H. B. Schöpp-Schilling (ed), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (The Feminist Press 2007); M. A. Freeman, C. Chinkin, and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012); M. Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018).

32 Latin-American and Caribbean Committee for the Defense of Women's Rights (CLADEM), *Amicus Curiae: Case: Alyne da Silva Pimentel* (2008) 6. Available at: <http://opcedaw.files.wordpress.com/2012/01/alyne-da-silva-v-brazil-cladem-amicus-curiae-brief.pdf> accessed 30 January 2019.

33 ibid 7.

34 ibid 12.

35 B. Stark, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' (2011) 18 *Duke Journal of Gender, Law and Policy* 261, 290.

Finally, the Women's Committee is an institution that holds so much promise for addressing gender-based injustice, and feminists have (rightly) been demanding of it. It is one of the truisms of feminist engagement with law that much of our work is spent on enhancing self-awareness and developing reflexive practice[36]; in that light, the decision to focus on a supervisory body monitoring women's rights may appear less surprising.

2 Alyne da Silva Pimentel Teixeira (deceased) v Brazil

The application to the Women's Committee in *Alyne da Silva Pimentel* was communicated in November 2007 by a mother ('the author') on behalf of her Afro-descendant Brazilian daughter ('the victim') who had died in the late stages of pregnancy. In turn, the author – arguing a violation by Brazil of the right to life and health under Article 2 and 12 of the Convention – was represented by two NGOs, the Center for Reproductive Rights and *Advocacia Cidadã pelos Direitos Humanos.*[37] The victim had presented herself at a private health centre, contracted with the publically funded health system, when six months pregnant and suffering from severe nausea and abdominal pain; her symptoms were misdiagnosed and she was sent home. She returned to the medical centre two days later to request further examination, by which time there was no detectable foetal heartbeat. Following complications arising from the medically induced delivery of her stillborn foetus, the provision of the necessary emergency hospital care was further, and fatally, delayed. The suitably equipped public hospital, two hours away, refused to make available its only ambulance to transport her there. When she was finally transferred to specialist care, without medical records, Ms da Silva Pimentel was left waiting on a hospital trolley in a hallway for 21 hours until she died, three days after the induced delivery.

To the Committee, the victim's mother argued that Articles 2 and 12 of the Convention, taken together, create obligations of immediate effect in the field of health care in so far as they concern the right to life. Article 12 provides:

> States Parties shall 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 services, including those related to family planning … States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the postnatal

36 See, for instance, B. Ackerly and J. True, 'Reflexivity in Practice: Power and Ethics in Feminist Research on International Relations' (2008) 10 *International Studies Review* 693; K. V L. England 'Getting Personal: Reflexivity, Positionality, and Feminist Research' (1994) 46 *The Professional Geographer* 80.

37 For a detailed discussion of this case, see R. J. Cook and B. Morris Dickens, 'Upholding Pregnant Women's Right to Life' (2012) 117 *International Journal of Gynecology and Obstetrics* 90.

> period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Measured against WHO indicators, the author argued, there was clear data to show that Brazil was failing to meet its due diligence obligation with regards to the accessibility and quality of emergency obstetric care. In simple terms, Alyne da Silva Pimentel was a victim of systematic failure: Brazil had 'failed to put into place a system that ensures effective judicial action and protection in the context of reproductive health violations'.[38] The *amicus curiae* brief submitted to the Committee by the Latin-American and Caribbean Committee for the Defense of Women's Rights ('CLADEM') argued that the victim's case exemplified the appalling lack of maternal care received by economically disadvantaged women in Brazil, a category encompassing a disproportionate number of Afro-descendant women.[39]

The State, in response, acknowledging Brazil's high maternal mortality rate, argued that the failure was not one of discrimination against women; rather, it was in the provision of 'deficient and low-quality service provision to the population' and to 'errors in the mechanisms used to contract private health services'.[40] The State went on to further argue that the victim's death was in fact not a maternal mortality and had actually been classified as a digestive haemorrhage. Finally, the State referred to data that demonstrated its commitment to reducing maternal mortality: Ms da Silva Pimentel, it argued, was a victim of professional negligence rather than structural discrimination; specific medical care was not denied in this instance because of an absence of relevant public policies to reduce maternal mortality.

The Committee adopted views on the communication at a meeting held on 25 July 2011. Its first task was one of categorisation; namely, to identify if there was a gendered dimension to the death of Ms da Silva Pimentel. The Committee swiftly recognised the facts revealed a maternal mortality. Further, it held the State directly responsible for the failings in this case even though the treatment had been outsourced to a private institution. Identifying a continuing due diligence obligation to monitor and regulate private healthcare provision,[41] it found that the State was 'directly responsible for the action of private institutions when it outsources its medical services'.[42] Finally, the Committee addressed the important question of whether Alyne da Silva Pimentel's death resulted from negligence or systematic discrimination: it held that policies alone were insufficient and must be 'action- and result-oriented'.[43] While defining the

38 *Alyne da Silva Pimentel* (n 29).
39 CLADEM, *Amicus Curiae* (n 32).
40 *Alyne da Silva Pimentel* (n 29) [4.7].
41 ibid [7.5].
42 ibid.
43 ibid [7.6].

extent of States' obligations in relation to healthcare rights is notoriously problematic, the Committee's focus on discrimination equipped it with a useful analytical tool in approaching this task.[44] Although Brazil had in place a National Pact for the Reduction of Maternal and Neonatal Mortality Policies, the Committee stressed that policies need to be result- and action-orientated. It concluded that, 'it is the duty of States parties to ensure women's right to safe motherhood and emergency obstetric services, and to allocate to these services the maximum extent of available resources'.[45] Drawing on its General Recommendation 28, the Committee also found that Brazil had discriminated against the author on the basis of 'her status as a woman of African descent and her socio-economic background'.[46] In short, this was a preventable death. Finally, domestic judicial remedies were demonstrably insufficient.

Ultimately, the Committee accepted the author's arguments and found Brazil's lack of appropriate maternal health services violated Articles 12 (in relation to access to health), 2(c) (in relation to access to justice), and 2(e) (in relation to the State's due diligence obligation to regulate private health service providers), in conjunction with Article 1 of CEDAW. In so doing, it became the first international human rights treaty body to hold a State to account for preventable maternal mortality.[47] Together with recommending reparations to the victim's mother, the Committee enjoined Brazil to: ensure access to affordable and adequate obstetric care; provide appropriate training for health workers, especially on women's reproductive health rights; have in place adequate remedies and sanctions where health care rights are not met; monitor the provision of private health care; implement the National Pact for the Reduction of Maternal Mortality at state and municipal levels. As per its usual practice, the Committee also directed the State to distribute its views and recommendations in the *Alyne da Silva Pimentel* case widely.

3 A feminist reading of *Alyne da Silva Pimentel v Brazil*

I turn now to consider the case of Alyne da Silva Pimentel through a feminist lens. I focus in particular on a number of feminist techniques that the Committee used, or might have used, that challenge the dominant doctrinal method of approaching human rights. In particular, I examine the way in which, through contextualisation, the Committee reframed the events surrounding Ms Pimentel's death, shifting the narrative of maternal mortality from tragedy to injustice. I go on to examine the extent to which the Committee was able to challenge sex/gender binaries in its views. Cases such as this have consequences that result from social, political and cultural

44 ibid.
45 ibid [7.3].
46 ibid [7.7].
47 J. Templeton Dunn, K. Lesyna and A. Zaret, 'The Role of Human Rights Litigation in Improving Access to Reproductive Health Care and Achieving Reductions in Maternal Mortality' (2017) 17 *BMC Pregnancy and Childbirth* 367.

constructions of biological difference. I discuss this decision alongside other decisions from international human rights bodies relating to reproductive rights and argue that discrimination stemming from constructions of biological function and difference merits more careful treatment by the Committee. I go on to consider the ways in which the Committee challenges international (human rights) law norms concerning access to health care in its decisions, arguing that this is perhaps the most notable achievement in feminist terms. However, there are costs to this: I raise the question of whether the Committee's challenges to fundamental norms – the core of international law, as it were – place its normative leaps in a peripheral position, dooming its decision in *Alyne da Silva Pimentel* to have only limited effect on the discipline. Finally, I turn to the question of institutional efficacy. If a primary concern of feminist methodology is with result, then it is incumbent to ask demanding questions about the impact of the Committee's views in this case.

a Reframing the story

One of the major contributions of feminist engagement with international human rights law is its insistence on challenging the dominant (patriarchal) discourses that permeate the discipline by telling the story – with a focus on inequality, power dynamics, and injustice – differently. In the *Alyne da Silva Pimentel* case, the Committee was engaged in an exercise of locating maternal deaths within a human rights framework. This was no mean task; it is, as Rebecca Cook has noted, the first decision from an international human rights treaty body that addresses the question of how human rights apply to pregnant women.[48] The Committee determined that failure to provide adequate and accessible emergency obstetric care to women is a prohibited form of discrimination. Achieving that outcome required an empathic imaginative leap: the decision shifted the narrative of maternal mortality from unavoidable tragedy towards questions of preventability and social injustice. In short, 'the Committee laid the necessary normative foundation for the legal application of human rights to improve access to maternity care, and to the eventual further reduction in maternal mortality'.[49]

This normative shift involved the Committee in a process of recognising the contribution that poverty and race, as well as gender, make to high levels of avoidable maternal deaths. In the words of the Center for Reproductive Rights, the 'root causes of maternal deaths in Brazil are socioeconomic and gender-based disparities in access to quality health care'.[50] Telling the stories of individual women in that light is an important part of reframing discussion of maternal deaths:

48 R. J. Cook, 'Human Rights and Maternal Health: Exploring the Effectiveness of the Alyne Decision' (Spring 2013) 41 *The Journal of Law, Medicine and Ethics* 103, 108.

49 ibid 109.

50 Center for Reproductive Rights, (2014), *Alyne v Brazil Factsheet*. Available at: <www.reproductiverights.org/sites/crr.civicactions.net/files/documents/LAC_Alyne_Factsheet_0.pdf> accessed 2 February 2019.

> The individual stories of these women, mothers, sisters, and wives call out for a health system and broader social and political structure where women's health is important, women's lives are valued, and life, rather than death, is the inevitable consequence of pregnancy and childbirth.[51]

Women's rights are often mobilised through collective activism and organised movements and thus what is at stake both encompasses and transcends the individual situation. Cook rightly lauds this aspect of the Committee's decision:

> The Committee's focus was on an individual victim, but it never lost sight of the multiple ways in which the health system failed her. A striking dimension of the decision is the repeated shift of focus from the individual victim to vulnerable populations, from individual perpetrators of human rights violations to institutional and systemic factors that contributed to health inequalities leading to Alyne's death.[52]

Similarly, in Niamh Reilly's view, human rights 'must be understood as continually contested and (re)constituted through concrete, bottom-up struggles in local-global nexuses where the universal and the particular meet'.[53] CEDAW's individual complaints procedure locates the Committee ideally in a space that vacillates between the particular and the universal, the global and the local, the periphery and the centre.[54]

Central to the process of contextualisation was the participation of non-governmental organisations. Through their prominent roles as *amicus curiae* and as representatives of the victim and the author, this decision demonstrates CEDAW's openness to NGO participation in its proceedings (arguably, there is in CEDAW's proceedings less emphasis on formal sources of international law and attention to the formal subjects of international law). The involvement of human rights organisations meant that the considerable resources needed to contextualise the victim's death and challenge to the government's narrative about the nature of Alyne's death could be mustered. In their *amicus* brief, for instance, CLADEM argued that government statistics under-report maternal deaths in Brazil by about 50%[55]: consequently, despite the government's stated view that the victim's death was not related to her pregnancy and was a 'digestive hemorrhage', the Committee accepted that this account belied the data and ignored the obvious. In CLADEM's *amicus* brief, Alyne da Silva Pimentel's case is described as 'emblematic, … [it] exemplifies the current flaws

51 Templeton Dunn *et al*, 'The Role of Human Rights Litigation' (n 47) 80.

52 Cook 'Human Rights and Maternal Health' (n 48) 110.

53 N. Reilly, *Women's Human Rights: Seeking Gender Justice in a Globalizing Age* (Polity Press 2009) 37–38.

54 L. Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25 *European Journal of International Law* 561.

55 CLADEM, *Amicus Curiae* (n 32) 4.

in the Brazilian health care system and is representative of the systemic violations of women's right to life and health in Brazil'.[56]

Intersectional analysis also formed an important part of the Committee's reframing of the death of Alyne. Given the manner in which the UN human rights treaty body system compartmentalises forms of discrimination,[57] the acknowledgement by the Women's Committee in its General Recommendation 28 that women may experience multiple forms of discrimination is both remarkable and important:

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. 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 and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.[58]

Race, poverty, geographical location, as well as gender, certainly shaped the fatally inadequate health care that Alyne received.[59] In the words of Alicia Yamin *et al*, the CEDAW committee recognised that 'Alyne's death was emblematic of patterns in the Brazilian health system, which in turn reflect intersecting issues of discrimination based on both gender and race in Brazilian society'.[60] However, despite highlighting patterns of discrimination, arguably the Committee did both too little and too much in its analysis of intersectional discrimination.

Adopting intersectional analysis meant that the discrimination experienced by Alyne da Silva Pimentel could not be written as a one-off event: addressing the intersection of multiple discriminations points to structural causes. While Templeton Dunn *et al* report that, despite a reduction in maternal deaths in Brazil, 'stark health disparities exist between populations', they go on to argue that

56 ibid 16.

57 The international human rights treaty system is comprised of nine core instrument. These include treaties that separately aim to eliminate discrimination against women and discrimination on the grounds of race, as well as treaties that aim to protect children's rights, migrant workers' rights and the rights of persons with disabilities.

58 CEDAW Committee General Recommendation 28 (16 December 2010) CEDAW/C/GC/28 [18].

59 See, for instance, *Report of the Working Group of Experts on People of African Descent on its fourteenth session: Addendum: Mission to Brazil*, 23 September 2014, A/HRC/27/68/Add.1.

60 A. E. Yamin, B. Galli and S. Valonguiero, 'Implementing International Human Rights Recommendations to Improve Obstetric Care in Brazil' (2018) 143 *International Journal of Gynecology and Obstetrics* 114, 115.

CEDAW's 'attention to realties such as these paved the way for further actions and dialogues addressing socioeconomic discrimination and the interaction between race, sex, and economics'.[61] The Committee's analysis was certainly a step forward from its approach in *A.S. v Hungary*,[62] a communication concerning a woman involuntarily sterilised during an emergency procedure to deliver a foetus and in which several articles of CEDAW were found to be violated by the Committee, yet almost no significance was placed on the author's belonging to the Roma community (a community subjected to oppression and marginalisation). However, more could have been done in the *Alyne da Silva Pimentel* case by the Committee: its analysis of the power dynamics and axes of discrimination that led directly to her avoidable death appears somewhat superficial, and race in particular remains something of an under-developed area of analysis. Templeton Dunn and colleagues are much starker in their analysis of the facts:

> In Brazil, the hospital did not send an ambulance to pick Alyne because a Brazilian woman of African descent's life was not considered important enough to warrant the use of the hospital's only ambulance. After Alyne was finally transported to the hospital, she was left hemorrhaging and abandoned in the hallway for hours until she died as she was not considered worthy of priority in treatment.[63]

In light of recent political events in Brazil, in which the far-right candidate Jair Bolsonaro won the Presidential election, such clarity of analysis, in which race is recognised as an important indicator of women's treatment and experiences, seems particularly imperative.

More fundamentally, however, feminists have begun to engage with questions of the limits of intersectionality and in particular its emancipatory potential in legal contexts: the Committee's presentation of Alyne is tangibly weighed down by the various axes of discrimination she is said to bear. In effect, the victim's story becomes drowned out in a tidal wave of injustice. Consequently, little remains of her individuality. As Pok Yin Chow argues: 'The difficulty lies in how one can capture the ambivalence of lived experience in analysing legal issues'.[64] She goes on to write:

> While an anti-categorical analysis may over-emphasize the individual thus potentially diminishing the wider effects of structural discourses, the

61 Templeton Dunn *et al*, 'The Role of Human Rights Litigation' (n 47) 74.

62 *A.S. v Hungary*, Communication No. 4/2004, 29 August 2006, CEDAW/C/36/D/4/2004.

63 Templeton Dunn *et al*, 'The Role of Human Rights Litigation' (n 47) 80.

64 P. Y. S. Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 *Human Rights Law Review* 453, 456.

> drawback of an inter-categorical analysis is its opposite, that is, it is very difficult to understand the daily experiences of women through a top-down approach.[65]

In short, the Women's Committee approach might be viewed as entrenching Alyne as a victim without agency, presenting her life experiences and death as an inevitable outcome of irresistible structural forces. Feminist accounts of international human rights often demand the foregrounding of dignity and agency: it is an uncomfortable fact that the woman on whose behalf the case was brought had her unique experience side-lined. What space is left in CEDAW's imaginative realm for strong, active, empowered Afro-Brazilian women? Certainly, achieving the appropriate balance between the individual and structural discourse is challenging; but arguably that the CEDAW Committee could pay greater attention to the question of how this balance might be achieved. Meghan Campbell, whose work focuses on poverty and equality, for instance, emphasises the importance of autonomy to any feminist analysis, arguing that the State 'must demonstrate that its policies treat women in poverty as empowered and autonomous agents and that staff are sensitive to the lives of women in poverty'.[66]

b Reproductive rights and autonomy

Alyne da Silva Pimentel challenged CEDAW to carefully untangle how functions associated with biological difference (such as maternity) become enmeshed in socially constructed patterns of discrimination. Barbara Stark has argued:

> When women seek 'formal' equality, when they demand the same rights as men to freedom of speech, for example, they can rely on well-developed equality jurisprudence. When women assert reproductive rights, they are in less well-chartered territory.[67]

The Committee framed the issue of maternal care as one of sex-specificity: the 'sex-specific role that women perform through reproduction underscores that states' failure to accommodate sex-specific healthcare is a form of discrimination against women that they are obligated to remedy'.[68] Stark makes the broad argument that the Convention 'bars the reproduction of gender, which, as a matter of law, requires the assurance of women's reproductive rights'.[69] The opportunity to talk about women's bodies and the social construction of

65 ibid 459.
66 Campbell, *Women, Poverty, Equality* (n 31) 129.
67 Stark, 'The Women's Convention' (n 35) 264.
68 Cook, 'Human Rights and Maternal Health' (n 48) 109.
69 Stark, 'The Women's Convention' (n 35) 263.

reproduction was not fully grasped by the Committee. There is much more work yet to be done on how functions and experiences attributed to sex (or binary, biological difference) can be located within an equality framework.

Article 16(1)(e) of CEDAW, for instance, requires states to guarantee to women the right to decide on the number and spacing of their children and to have access to the information required to exercise this right. Nonetheless, as Stark argues, women continue to be denied agency over their bodies:

> [the] denial of reproductive rights reproduces gender because it takes control of their own reproductive capacity away from women, relegating them to a sexual division of labor based on biological difference. It puts their bodies at the service of men or the state.[70]

The CEDAW Committee has made the connection between poor access to information and reproductive choices and an increased risk of maternal mortality.[71] However, although reproductive rights are widely recognised as fundamental rights,[72] international supervision of States' abortion laws, for instance, has nonetheless tended to pay considerable deference to State sovereignty.

The approach of international human rights law and international human rights bodies to assert women's autonomy with regards to reproductive rights, particularly the right to access abortion, is marked by ambivalence. Article 16(1)(e) of CEDAW recognises rights concerning reproductive choices and the right to access family planning services – but makes no specific reference to the right to abortion. The CEDAW Committee has found laws criminalising abortions to be discriminatory, because they erect 'barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures'.[73] However, Charles Ngwena argues that the Committee's language:

> … sends an ambivalent message about the status of abortion as a fundamental right, and has the unintended effect of casting the liberalization of abor-

70 ibid 281.

71 O. Afulukwe-Eruchalu, 'Accountability for Non-Fulfilment of Human Rights Obligations: A Key Strategy for Reducing Maternal Mortality and Disability in Sub-Saharan Africa' in C. Ngwena and E. Durojaye (eds), *Strengthening the Protection of Sexual and Reproductive Health Rights in the African Region through Human Rights* (Pretoria University Law Press 2014) 126.

72 See, for instance, C. Zampas and J. M. Gher, 'Abortion as a Human Rights – International and Regional Standards' (2008) 8 *Human Rights Law Review* 249; J. M. Joachim, *Agenda Setting, the UN, and NGOs: Gender Violence and Reproductive Rights* (Georgetown University Press 2007).

73 CEDAW Committee General Recommendation 24 (1999) UN Doc A/54/38/Rev.1 [14].

> tion as a mere option that can be voluntarily purchased by the state. It reinforces the idea that regulation of abortion is something that is peculiarly in the state's margin of appreciation.[74]

Ngwena's view seems to be supported by the Committee's views on individual communications and in its inquiry reports. *L.C. v Peru*, for instance, could hardly have presented more desperate facts: the victim became pregnant at 13 as a result of abuse, and subsequently became paralysed following a suicide attempt; termination of the pregnancy was refused and spinal surgery was delayed due to the risk the procedure posed to the foetus. In its views, the Committee emphasised CEDAW's requirement to provide therapeutic abortions in pregnancies resulting from rape and sexual and abuse.[75] In its *Report of the Inquiry Concerning the United Kingdom*, adopted on 6 March 2018, the Committee found the State Party to be in violation of a number of the Convention's provisions due to the severely restricted access to abortion in Northern Ireland.[76] The Committee interpreted its views in the *Alyne Da Silva Pimentel* case as asserting the principle that '[o]ptimal health for pregnant women cannot be attained if access to abortion is denied when it is the safest option to address threats to their physical or mental health'.[77] This narrow approach to reproductive rights seems clearer still from the views expressed later in the same report:

> The Committee interprets articles 12 and 16, as clarified by its general recommendation No. 24 and general recommendation No. 28, read with articles 2 and 5, to require States parties to legalize abortion, at least in cases of rape, incest, threats to the life and/or physical or mental health of the woman, or severe fetal impairment.[78]

The limitations of such determinations with regards to fulfilling women's physical and reproductive autonomy are clear.

Such limited assertions of women's reproductive rights in international human rights law are not restricted to the CEDAW Committee. The Human Rights

74 C. G. Ngwena, 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 791.

75 *L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009 (17 October 2011). For a full discussion of the implications of the CEDAW Committee's decision in this and the *Alyne da Silva Pimentel* case, see E. Kismödi, J. Bueno de Mesquita, X. A. Ibañez, R. Khosla and L. Sepúlveda, 'Human Rights Accountability for Maternal Death and Failure to Provide Safe, Legal Abortion: the Significance of Two Ground-Breaking CEDAW Decisions' (2012) 20 *Reproductive Health Matters* 31.

76 *Report on the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, (6 March 2018), CEDAW/C/OP.8/GBR/1.

77 ibid [57].

78 ibid [60].

Committee held in *K.L. v Peru*[79] that the rights of a 17-year-old girl, pregnant with an anencephalic foetus with no chance of significant survival beyond birth, had been violated by the refusal to perform the requested abortion; but the Committee's reasoning was that her rights were violated because she was denied the therapeutic abortion that *domestic law provided for* (not, for instance, because international law protects reproductive freedoms). This in turn is echoed in the European Court of Human Rights' approach – while in a series of recent cases the Court has increased its supervision of Member States' abortion laws,[80] and while it has consistently rejected challenges to the liberalisation of abortion laws,[81] that Court has nonetheless granted States considerable freedom to regulate abortions. In *A., B. and C. v Ireland*, the Court held with regards to Ireland's – extremely restrictive, in European terms – abortion laws: 'the acute sensitivity of the moral and ethical issues raised by the question of abortion' meant that a 'broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck'[82] between popular opinion on abortion and women's rights to bodily autonomy. In short, there are important, pressing questions about women's bodies, reproductive freedom and autonomy that the Committee might have engaged with in *Alyne da Silva Pimentel*, yet did not do so.

79 *K.L. v Peru* (1153/2003), CCPR/C85/D/1153/2003 (2005); 13 IHRR 355 (2006). More recently, see the Human Rights Committee's views in *Mellet v Ireland*, (2324/2013) CCPR/C/116/D/2324/2013, 31 March 2016, in which it found that denying access to abortion in situations where the foetus has been diagnosed with serious impairments amounted to cruel, inhuman or degrading treatment and to unlawful discrimination in so far as 'the differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances' (para 7.11). See also *Whelan v Ireland*, (2425/2014) CCPR/C/119/D/2425/2014, 17 March 2017.

In its recent General Comment 36 (2018) on the Right to Life (CCPR/C/GC/36), the Committee reaffirmed States right to regulate terminations of pregnancies, yet reiterated that

> States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable.
>
> (para. 8)

80 Without going so far as to assert a 'right to abortion', the Court has found a violation with respect to the application of restrictive abortion laws in: *Tysiac v Poland*, no. 5410/03, ECHR 2007-I; *A., B. and C. v Ireland*, [GC], no. 25579/05 ECHR 2010; *R.R. v Poland*, no. 27617/04, ECHR 2011; *P and S v Poland*, no. 57375/08, 30 October 2012.

81 See, for instance, *Boso v Italy* (dec.), no. 50490/99, ECHR 2002-VII; *Vo v France* [GC], no. 53924/00, ECHR 2004-VIII. For a similar approach by the Inter-American Commission on Human Rights, see Case 2141, *Baby Boy*, 25/OEA/ser.L/V./II.54. Doc (rev 1) (1981).

82 *A., B. and C. v Ireland* (n 80) [233].

c Challenging international human rights norms

Feminist methodology had a practical application in this case with respect to challenging the public/private divide, particularly in terms of attributing State responsibility under international human rights law for the acts of non-State actors. In this decision, the Committee gave short shrift to the Government's argument that they could not be held responsible for the negligence of a private healthcare provider. The significance of this is, as indicated earlier, wider that might appear from a cursory read of the decision. Dismantling the public/private divide has been a central part of the feminist critique of international human rights law. As Celina Romany argues:

> The dichotomization of the public and private spheres cripples women's citizenship. It inhibits the authoritative speech and dialogue that derive from self-determination and thus impairs the successful participation of women in democratic life.[83]

If women are framed by international human rights as 'outsiders' – or, to adopt Romany's term, 'aliens'[84] – then the Committee can be understood to have made efforts to carve a space for their claims. The most well-know – and effective – cases relating to sexuality and international human rights, for instance, have concerned men's challenges to restrictions on their sexual expression. The European Court of Human Rights case of *Dudgeon v the United Kingdom*,[85] in which discriminatory criminalisation of sexual acts between men was found to violate the Convention's right to privacy, has been followed by numerous cases successfully challenging similar legislation.[86] Feminist engagement with international human rights law takes the question of sexual (and reproductive) rights in a rather different direction:[87] the concern here is with the State's *positive obligations* regarding sexuality and reproduction.

One possible criticism of the Committee's decision, then, is that it perhaps could have said more about women's sexual and reproductive rights, given the opportunity this case presented to do so. Feminists are attuned to the exclusions that arise from the normative boundaries of international human rights law – the value-laden nature of which are often obscured by the formality and

83 C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87, 101.

84 ibid.

85 *Dudgeon v the United Kingdom*, 22 October 1981, Series A no. 45.

86 For a full discussion, see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) and R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press 1995). A similar decision followed from the Human Rights Committee in Toonen v Australia, Communication No. 488/1992, CCPR/C/50/D/488/1992 (1994).

87 See, for instance, D. Otto, 'Between Pleasure and Danger: Lesbian Human Rights' (2014) 6 *European Human Rights Law Review* 618.

technocratic language of the discipline. However, here we encounter a fundamental challenge that feminists engaging with international law face and that the Committee has not adequately discussed: how can feminists both tell the story of international law differently (as I have suggested they sometimes must), and still be taken seriously by the mainstream? In its views the Committee faces something of a conundrum: if it remains too formalistic in its approach it becomes more constrained in its decisions; however, each step away from the core that it takes renders it more likely to appear as a challenge to that core and therefore more vulnerable to being side-lined.

d Focusing on efficacy

One of the key features of feminist method is its insistence on practical efficacy: much feminist work takes place beyond purely theoretical terrain. To this end, feminist analysis would seek to ask what difference the decision made, both on an individual and structural level. An important observation made by Cook is that the Committee's recommendations were very broad, 'making it difficult to know what specifically Brazil must do to meet its obligations'.[88] Campbell has also argued that the Committee left crucial matters of detail with regards to implementation of the decision in the hands of the State.[89] In this case, the Committee really went no further in terms of specificity than the Committee on Economic, Social and Cultural Rights had already done in its recommendation to the Brazilian State in 2009.[90] Templeton Dunn *et al* report that implementing the decision has been a lengthy and somewhat fraught and imperfect process, although the communication is nonetheless viewed by those authors as a useful political tool that 'brought public awareness within Brazil about the pervasive discrimination within the health system and provided leverage for [Civil Society Organisations] to call on the Brazilian government to finally implement the broader health system changes recommended by the CEDAW Committee'.[91] The data is clear; the need to eliminate barriers to women accessing greater, quality obstetric resources unarguable. To this end, the Committee,

88 Cook 'Human Rights and Maternal Health' (n 48) 111.

89 Campbell, *Women, Poverty, Equality* (n 31) 128–131.

90 CESCR Concluding Observations: Brazil, 2009 [28], E/C.12/BRA/CO/2.

91 Templeton Dunn *et al*, 'The Role of Human Rights Litigation' (n 47) 75.
See also the Center for Reproductive Rights, *Interim Report for the Fifty-Seven (57th) Session of the CEDAW Committee, on the Concluding Observations of the CEDAW Committee to the Brazilian State During its Fifty-First (51st) Session* (24 January 2014). Available at: <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BRA/INT_CEDAW_NGS_BRA_16194_E.pdf> accessed 2 February 2019.
The mother of Alyne was finally awarded compensation in late 2014. See: Center for Reproductive Rights, 'Brazil Takes Step to Implement Historic United Nations Ruling in Maternal Death Case' (3 November 2014), Available at: <www.reproductiverights.org/press-room/Brazil-Takes-Step-to-Implement-Historic-United-Nations-Ruling-in-Maternal-Death-Case%20> accessed 2 February 2019.

in making its recommendations, might have drawn more on feminist insights on *why* a situation in which thousands of women dying is not deemed worthy of a serious response from the government. Fredman's analysis, for instance, which incorporates addressing stigma and enhancing participation among its dimensions, certainly indicates one way in which the Committee could have provided more clarity in its recommendations about what steps might be needed to achieve substantive equality in this context.[92]

According to Yamin *et al*, the Brazilian Government has, since adopting the Pact on the Reduction of Maternal Mortality and morbidity, introduced a wide array of laws and strategies to reduce maternal mortality.[93] Nevertheless, those authors identify a number of unresolved issues that have hindered the process of translating the Committee's views into meaningful change. They note in particular that 'narrow biomedical strategies and model of care' are entrenched,[94] and 'social determinants of health' neglected.[95] One might conclude from this that the Committee's analysis – which did little to question the medical model of understanding maternal mortality (if anything, reinforcing it by focusing in its Recommendations on enhanced medical provision) – was incomplete and failed to identify and interrogate structures and power dynamics that lead to marginalisation and discrimination and that played a central role in that the death of Alyne. In short, providing more and better health care alone is not sufficient; the social barriers that disempower women and prevent them from accessing the necessary care needed to be addressed in the Recommendations.

e Concluding observations

Examining the case of *Alyne da Silva Pimentel* raises a number of important questions about the interrelationship between feminist method and international human rights law. The Committee's views, in a number of important ways, drew on feminist method. Particularly noteworthy is the way in which it adopted an intersectional approach to contextualise the death of Alyne da Silva Pimentel and expounded State's obligations with respect to maternal health care. The Committee could, however, have been clearer in its approach to women's autonomy, particular with respect to reproductive rights. It could also have placed greater emphasis on the non-medical aspects of the injustice that led to Alyne's death. International human rights law has not yet provided an effective response to discrimination that is rooted in social constructions of biological difference, particularly with respect to sexuality, reproduction and maternity.

92 Fredman, 'Substantive Equality Revisited' (n 7).
93 Yamin *et al*, 'Implementing International Human Rights' (n 60) 3.
94 ibid 4.
95 ibid 5.

Feminists tend to position themselves as critical friends of the discipline. To this end, feminists from the global south would certainly draw attention to the geographical disparity in CEDAW's case docket. The majority of individual applications are now being submitted against Council of Europe States. Yet, when it comes to violations, non-European States become more prominent. From a feminist perspective, this demands consideration of how the Committee can operate better and how (and if) feminists might use CEDAW in a way that does not entrench existing global power structures. As a reflexive form of analysis, feminist perspectives on international human rights law would tend to direct us to ask questions about CEDAW's own procedures: although the victim was dead, placing her at the centre of our thoughts prompts us to enquire how her story was handled by this institution; what degree of sensitivity and respect did she receive at the Committee's hands?; how much space did the Committee give her voice? Using a feminist lens to closely consider a case that has all the hallmarks of being favourable to women's rights reveals the costs and drawbacks – as well as the benefits – of engaging with human rights for feminist ends.

> In this sense, feminist explorations can be likened to an archaeological dig. There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level.[96]

The limitations that feminists face in their struggles may be an inevitable consequence of international human rights law's account of itself as rational and consistent. Karen Engle asks 'whether the periphery could ever become a part of the core without both the periphery and the core losing their appearance of coherency'.[97] Despite being able to identify ways in which the Committee might have adopted a more transformative approach to reproductive rights in this case, it is apparent that solving the feminist 'insider/outsider' dilemma is far from straightforward.

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96 Charlesworth, 'Feminist Method' (n 5) 381.

97 Engle, 'International Human Rights' (n 19) 531.

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