

International Human Rights Law and Intersectional Discrimination

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Introduction

Through traveling to other people's "worlds" we discover that there are "worlds" in which those who are victims of arrogant perception are really subjects, lively beings, constructors of vision even though in the mainstream construction they are animated only by the arrogant perceiver and are pliable, foldable, file away-able, classifiable.²

International human rights monitoring mechanisms have traditionally relied upon a "single-axis" approach to enforce legal provisions prohibiting discrimination.³ The focus of these bodies has been on discrete, mutually exclusive grounds of discrimination as they are recognised in human rights instruments, such as the Universal Declaration of Human Rights, which prohibits distinctions based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴ The remedies provided by international human rights mechanisms in individual cases, as well as their policy recommendations, have tended to reinforce this singular conception of discrimination, which, in turn, entrenches normative and institutional fragmentation and discursive hierarchies through which experiences of discrimination will be identified and redressed through international human rights law.⁵ This article employs an analysis based on selected approaches to intersectional discrimination as an action-oriented method to examine the state of current practice within international human rights mechanisms.⁶

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- 1 The authors would like to thank the Swiss Network for International Studies which, from 2013 to 2015, supported the larger research project, "The Intersectionality of Human Rights Violations and Multiple Forms of Discrimination", within which this article was developed. More information about the project is available at: <http://www.unifr.ch/iiedh/fr/recherche/ethique-politique-dh/snis>. The views expressed in the article remain those of the authors.
 - 2 Lugones, M., quoted in Kapur, R., "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International Post-Colonial Feminist Legal Politics", *Harvard Human Rights Journal*, Vol. 15, 2002, p. 1.
 - 3 May, V. M., *Pursuing Intersectionality. Unsettling Dominant Imaginaries*, Routledge, 2015, p. 82.
 - 4 Universal Declaration of Human Rights, Article 2.
 - 5 See above, note 3.
 - 6 Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 4, 1989, pp. 139–167; Crenshaw, K., "Mapping the Margins: Intersectionality, Identity Politics, and

The article focuses on the jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) as well as several recent interpretive comments and cases by other human rights treaty monitoring bodies. The discussion begins with an overview of several theories of intersectional discrimination and explores the advantages as well as the drawbacks of intersectionality as an observational and reform-driven methodology for analysing and implementing guarantees of substantive equality through international human rights law. In its following sections, the article applies intersectional methodologies to the practice of the CEDAW Committee, the Committee on the Elimination of Racial Discrimination (CERD Committee), the Committee on the Rights of the Child (CRC Committee), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of Persons with Disabilities (CRPD Committee).

1. Intersectionality Theory and International Human Rights Law

Intersectionality is what occurs when a woman from a minority group (...) tries to navigate the main crossing in the city (...) The main highway is "racism road". One cross street can be Colonialism, then Patriarchy Street (...) She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, triple, multiple, a many layered blanket of oppression.⁷

Intersectionality is both a method of observation and an action-oriented form of practice that aims to uncover and redress the workings of privilege and oppression that often remain hidden from view in the classical single-axis analyses of discrimination and inequality used by most international human rights monitoring mechanisms.⁸

Theories about intersectionality have a long history within critical race feminism and in post-colonial studies.⁹ During the 1990s, a number of scholars working within these different

Violence against Women of Color", *Stanford Law Review*, Vol. 43, 1991, pp. 1241–1299; Hill Collins, P., et al, "Symposium on West and Fenstermaker's 'Doing Difference'", in Fenstermaker, S. and West, C. (eds.), *Doing Gender, Doing Difference*, Routledge, 2002; and Kapur, R., "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International Post-Colonial Feminist Legal Politics", *Harvard Human Rights Journal*, Vol. 15, 2002.

7 Crenshaw, K., according to a report of the 2001 World Conference against Racism as cited in Yuval-Davis, N., "Intersectionality and Feminist Politics", *European Journal of Women's Studies*, Vol. 13, 2006, p. 196.

8 See above, note 3.

9 See, for example, note 6, Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color"; see above, note 6, Kapur; Bulbeck, C., *Re-orienting western feminisms: women's diversity in a postcolonial world*, Cambridge University Press, 1998; Padilla, L. M., "Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue", *Fordham Law Review*, Vol. 66, 1997, p. 843; Lenard Hutchinson, D., "Identity Crisis: 'Intersectionality', 'Multidimensionality', and the Development of an Adequate Theory of Subordination", *Michigan Journal of Race and Law*, Vol. 6, 2001, p. 285; and Grillo, T., "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House", *Berkeley Women's Law Journal*, Vol. 10, 1995, p. 16.

traditions advanced models of intersectionality as a counterweight to the dominant essentialist conception of inequality which put forward fixed, homogenous groups as categories within national and international anti-discrimination law and policies.¹⁰ The intersectional, anti-essentialist critique argues that people cannot be defined by singular, unchanging attributes, but rather that identities are constantly being shaped and remade as a result of multiple characteristics and experiences.¹¹ As Virginia May notes, “[i]ntersectionality highlights how lived identities, structural systems, sites of marginalisation, forms of power and modes of resistance ‘intersect’ in dynamic, shifting, ways.”¹²

In rejecting the notion that individual grounds of discrimination can be easily separated from one another in terms of both their cause and effect, intersectional theories rely on a matrix framework that recognises the intricately entwined functions of both identities and power.¹³ Intersectional approaches differ from cumulative or multiple conceptions of discrimination which add together a number of grounds of discrimination – ethnic origin + gender + social class + disability + age – as discrete, sequential and severable identity factors.¹⁴ Intersectional approaches recognise that the unique forms of discrimination that occur at the intersection between several systems of oppression should be observed using new analytical tools and remedied through specific measures that may go beyond those typically provided in cases of discrimination on the basis of a single ground.¹⁵ An intersectional analysis considers intra-group differences as important as those between groups and asserts that it is possible for individuals and groups to be simultaneously oppressed and privileged.¹⁶

10 See above, note 6, Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics”; see above, note 6, Kapur; and Bulbeck, C., *Re-orienting western feminisms: women’s diversity in a postcolonial world*, Cambridge University Press, 1998.

11 Lenard Hutchinson, D., “Identity Crisis: ‘Intersectionality’, ‘Multidimensionality’, and the Development of an Adequate Theory of Subordination”, *Michigan Journal of Race and Law*, Vol. 6, 2001; and Grillo, T., “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House”, *Berkeley Women’s Law Journal*, Vol. 10, 1995.

12 See above, note 3.

13 Hill Collins, P., “Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought”, *Social Problems*, Vol. 33, 1986; and Satterthwaite, M., “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers”, *Yale Human Rights and Development Law Journal*, Vol. 8, 2005, p. 1.

14 Andersen, M. L. and Hill Collins, P., *Race, Class and Gender: An Anthology*, Wadsworth Publishing, 2015.

15 Fredman, S., “Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights”, in Boerefijn, I., et al (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(l) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Intersentia, 2003, p. 15.

16 See above, note 3.

There is apparent consensus in academic circles and, increasingly, amongst human rights practitioners, concerning the fundamental limitations of the single-axis approach to discrimination.¹⁷ However, disagreement arises in relation to the extent to which intersectionality-based methods are capable of providing concrete responses to the challenges imposed by taking into account a multiplicity of experiences of inequality and oppression.¹⁸

For some scholars, intersectionality forms:

*[A] project of limitless scope and limited promise (...) It ensures that the focus of intellectual, political and legal energy is directed towards infinite elaboration of inequality subgroups, engendering a slow but steady march towards conceptual fragmentation and, ultimately, dissolution.*¹⁹

In this view, the application of intersectional methods is doomed to achieve the opposite outcome of its stated purpose. These scholars have raised the spectre of the “infinite regress problem” whereby intersectionality leads to the disaggregation of sub-group identity categories to the point that the subjects of analysis are reversed, with the individual remaining the standing unit, while the group disappears.²⁰

These critics assert that when the individual or the subgroup remains the subject of analysis, it becomes impossible to design policies, strategies or legislative instruments that would advance the interests of a larger group.²¹ This line of reasoning further implies that, even within a given system of oppression, certain subgroups have a more privileged position when compared with others.²² Thus, oppressed subgroups may assume positions of dominance with respect to other subgroups. The “relativism problem” describes every individual as a potential oppressor, thereby rendering the normative framework on anti-discrimination and equality meaningless.²³

In a scenario where every subgroup experiences some form of oppression, and makes claims for its own priority in strategies to redress discrimination, it has been asserted that intersec-

17 *Ibid.*

18 Conaghan, J., “Intersectionality and the Feminist Project in Law”, in Cooper, D. (ed.), *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond*, Routledge Cavendish, 2008.

19 *Ibid.*

20 Ehrenreich, N., “Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems”, *University of Missouri-Kansas City Law Review*, Vol. 71, 2002, p. 267.

21 *Ibid.*, pp. 266–267.

22 Roseberry, L., “Multiple Discrimination” in Sargeant, M. (ed.), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective*, Cambridge University Press, 2011, p. 28.

23 See above, note 20, p. 271.

tionality does not deliver on its egalitarian promise.²⁴ These critiques argue that without a mechanism for measuring degrees of inequality, intersectional practice locks individuals and subgroups into a never-ending “battle of oppressions”.²⁵

Another argument invoked to refute the advantages of the practical application of an intersectionality framework centres on the claim that intersectionality is an instrument that should be limited to mapping and identifying those groups that deserve greater attention in policies and laws to redress inequalities. According to Conaghan,

*[T]he primary concern of intersectionality analysis is with how law represents women’s experiences. Indeed, much of the work on intersectionality can be understood as a critique of the “map” of gender inequality offered by law and legal feminism, accompanied by calls for a better representation, a richer topography of women’s lives.*²⁶

This assessment positions intersectional approaches to anti-discrimination as observational aids rather than as practical tools capable of radically changing the formulation and implementation of policies, programmes and laws to address intersectional forms of oppression.²⁷

Lastly, human rights practitioners have also expressed concern regarding the added-value of an intersectionality approach in connection with the issue of remedies.²⁸ Several of these authors view the application of intersectional methods as offering a false promise to complainants due to the fact that they have not, as yet, resulted in specific reparations that meaningfully address the root causes of inequality and power imbalances.²⁹

Such critics have further maintained that an intersectional analysis is difficult to implement given the institutional segregation, absence of capacity and the lack of cross-referencing among the different human rights mechanisms. These practical difficulties, it is argued, may lead to an *ad hoc* application of intersectional analysis, thereby creating the risk of interpretive inconsistency and the multiplication of different approaches to the same problem.³⁰

24 See above, note 3.

25 See above, note 20, p. 269.

26 See above, note 18.

27 Tomlinson, B., “Colonizing Intersectionality: Replicating racial hierarchy in feminist academic arguments”, *Social Identities: Journal for the Study of Race, Nation and Culture*, Vol. 19, 2013, pp. 254–272.

28 Davis, A.N., “Intersectionality and International Law: Recognizing Complex Identities on the Global Stage”, *Harvard Human Rights Journal*, Vol. 28, 2015, pp. 205–242.

29 See above, note 3.

30 Bond, J.E., “International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s Human Rights Violations”, *Emory Law Journal*, Vol. 52, 2003, p. 74.

While these criticisms of intersectionality as a method for promoting social change are not entirely unfounded, we argue that the difficulties identified can be overcome and that intersectional approaches can and should be used by international human rights institutions to more effectively implement and monitor guarantees of substantive equality. Taken to their logical conclusion, intersectional methods of analysis demand a thorough and radical rethinking of the manner in which human rights institutions operate. The following sections map the first, tentative steps by international human rights mechanisms towards an engagement with intersectionality as a method. Progress is not necessarily going to be linear as the application of intersectionality in practice is a radical, transformative project. As Virginia May asserts:

*Intersectionality is a form of resistant knowledge developed to unsettle conventional mindsets, challenge oppressive power, think through the full architecture of structural inequalities and asymmetrical life opportunities, and seek a more just world.*³¹

2. Awareness of Intersectionality and Forms of Multiple Discrimination in the Practice of International Human Rights Mechanisms

Article 1(3) of the United Nations Charter states that one of the purposes of the United Nations is:

[T]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This provision inspired the text in Article 2 of the Universal Declaration of Human Rights, which recognises that “everyone is entitled to all the rights and freedoms set forth (...) without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.” The subsequent adoption of the 10 core multilateral human rights treaties and the practice developed under each of these treaties has broadened the reach of international anti-discrimination law. Diversification has occurred not only in terms of the definition of the acts or omissions that may constitute discrimination, but also in relation to the grounds upon which discrimination must be prohibited. The oldest of these human rights treaties, namely the Convention on the Elimination of Racial Discrimination, prohibits distinctions based on “race, colour, descent, or national or ethnic origin”.³² The two International Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Eco-

31 See above, note 3, p. xi.

32 Convention on the Elimination of Racial Discrimination, Article 1(1).

conomic, Social and Cultural Rights (ICESCR) enriched the category of prohibited grounds by adding an open-ended list that includes, “sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³³

Treaty provisions on non-discrimination now routinely refer to “other status”, in order to leave the potential categories of prohibited grounds open, thus allowing the mechanisms a certain degree of latitude in their responses to newly identified forms of inequality and oppression. The category of “other status” has been read as including a number of different attributes such as, age,³⁴ disability,³⁵ migrant or refugee status,³⁶ place of residence,³⁷ health situation,³⁸ status of deprivation of liberty,³⁹ sexual orientation,⁴⁰ physical appearance,⁴¹ and poverty.⁴²

While the evolving and constantly growing list of grounds of discrimination prohibited by international human rights law would seemingly provide the basis for a systematic consideration of intersectional forms of discrimination, to date this has not been the case. As a general rule, most of the treaty bodies have approached inequality as a singular or separate phenomenon, paying little attention to the substantive rethinking of international anti-discrim-

33 International Covenant on Civil and Political Rights (ICCPR), Article 2(1); and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(2).

34 Committee against Torture (CAT), *General Comment No. 2, Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, Paras 21–22; CAT, *General Comment No. 3, Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, Paras 8, 32; Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24, Article 12 of the Convention (women and health)*, 1999, Para 24; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 6, The economic, social and cultural rights of older persons*, 7 October 1996, Para 12; and CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 29.

35 Human Rights Committee (HRC), *General Comment No. 2, Reporting Guidelines*, 28 July 1981, para 13; and CEDAW Committee, *General Recommendation No. 24, Article 12 of the Convention (women and health)*, 1999, Para 25.

36 Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation No. 31, The prevention of racial discrimination in the administration and functioning of the criminal justice system*, UN Doc. CRPD/C/GC/31, 20 August 2004.

37 CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2 July 2009, Para 34.

38 *Ibid.*, Para 33.

39 *Ibid.*, Para 27.

40 CAT, *General Comment No. 3, Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, Paras 8, 32.

41 CERD Committee, *Concluding Observations: The Dominican Republic*, UN Doc. CERD/C/DOM/CO/13-14, 19 April 2013, Para 16.

42 CEDAW Committee, *Concluding Observations: Peru*, UN Doc. CEDAW/C/PER/CO/6, 2 February 2007, Para 36.

ination law that would be necessary in order to effectively capture and redress situations of intersectional inequality.⁴³

In recent years, however, a number of the human rights treaty monitoring bodies, including, the CERD Committee,⁴⁴ the CRC Committee,⁴⁵ the Human Rights Committee (HRC)⁴⁶ and the CESCR⁴⁷ have begun to mention forms of multiple and intersectional discrimination within their work. It appears that awareness of the need to counter the “single-axis thinking” and essentialism that characterise the formulation of the non-discrimination provisions within most of the international human rights instruments is slowly growing.

The changing nature of the treaty bodies’ engagement with forms of intersectional discrimination is also apparent in several illustrative cases decided under the Optional Protocol to Convention on the Elimination of Discrimination against Women (Optional Protocol). Some of these cases are analysed in more detail below. While the text of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly refers to particular groups of women in Article 14, on rural women, and in Article 12(2), on equal access to health care where special mention is made of pregnant and breast-feeding women, until recently, the CEDAW Committee carried out its work without much analysis of the forms of intersectional oppression that groups and individual women may face. The group “women” was viewed by the Committee as being an essentially unitary category with comparisons being made against a male comparator (presumably also devoid of any identifying features other than biological sex).

43 See above, note 30, p. 141.

44 CERD Committee, *General Recommendation No. 25, Gender related dimensions of racial discrimination*, 20 March 2000.

45 See, for example, Committee on the Rights of the Child (CRC Committee), *General Comment No. 11, Indigenous children and their rights under the Convention*, UN Doc. CRC/C/GC/11, 12 February 2009; CRC Committee, *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/C/GC/2005/6, 1 September 2005; and CRC Committee, *Draft General Comment on the Rights of Adolescents*, 2015.

46 HRC, *General Comment No. 18, Non-Discrimination*, 10 November 1989. While the Committee does not expressly refer to intersectional or multiple forms of discrimination, it insists upon substantive (*de facto*) equality as the standard that it uses to assess state compliance with obligations under Articles 2 and 26 of the ICCPR. The Committee therefore argues that differential treatment is justified in order to redress inequalities and in paragraph 8, it cites the example of the provisions in Article 6(5) of the ICCPR that prohibit the death sentence being carried out on pregnant women.

47 See above, note 37, Para 17, “[s]ome individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.” The CESCR does not go further to suggest which particular measures states must take to consider or remedy “cumulative” or multiple discrimination.

3. The CEDAW Committee and its Evolving Practice in Considering Intersectionality in Individual Communications

This section of the article compares several decisions on individual communications submitted to the CEDAW Committee, *A.S. v Hungary*,⁴⁸ *Kell v Canada*,⁴⁹ *R.P.B. v the Philippines*,⁵⁰ and *E.S. and S.C. v Tanzania*.⁵¹ The authors of each communication are women belonging to particular groups: A.S. is a Roma woman; Cecilia Kell is an Aboriginal woman and a survivor of domestic violence; R.P.B. is a girl with disabilities; and E.S. and S.C. are widows and members of the Sukuma ethnic group.

a. *A.S. v Hungary*

In 2004, in one of its earliest decisions under the Optional Protocol, the CEDAW Committee examined the case of *A. S. v Hungary*. The case concerned the medical sterilisation of a Hungarian Roma woman, A.S. without her full and informed consent.⁵² A.S. argued her case on the basis of the right to health information under Article 10(h), the right to non-discrimination in the health sector in Article 12 and the right to freely decide on the number and spacing of children under Article 16(1)(e) of the CEDAW. In her allegations, A.S. stressed her “extremely vulnerable situation (...) as a woman who would lose her child and as a member of a marginalised group of society – the Roma”.⁵³ She also maintained she would have never consented to the sterilisation given her “strict Catholic religious beliefs that prohibit contraception of any kind”.⁵⁴ The issue of informed consent is central to the Committee’s discussion of the merits of the three articles invoked by the author.⁵⁵

The *A.S. v Hungary* case was ground-breaking in that the decision indirectly raised the issue of the systemic discrimination faced by many Roma women in Hungary and elsewhere in the region.⁵⁶ It also underscored the State’s obligation to eliminate discrimination and provide accessible and understandable reproductive and sexual health information

48 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004.

49 *Cecilia Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008, 26 April 2012.

50 *R.P.B. v the Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011, 12 March 2014.

51 *E.S. and S.C. v Tanzania*, Communication No. 48/2013, UN Doc. CEDAW/C/60/D/48/2013, 13 April, 2015.

52 See above, note 48. A.S. was sterilised during a caesarean section medical intervention prompted by the death of her foetus.

53 *Ibid.*, Para 9.4.

54 *Ibid.*, Para 2.4.

55 *Ibid.*, Para 11.5.

56 Schultz, D.L., “Translating Intersectionality Theory into Practice: A Tale of Romani-*gadže* Feminist Alliance”, *Signs*, Vol. 38, 2012, pp. 37–43.

for all.⁵⁷ However, the Committee failed to engage with the intersectional forms of oppression that A.S. encountered. At the heart of her complaint was the fact that being subjected to forced sterilisation violated both her religious convictions and her interest in following Roma traditions, especially since “having children is said to be a central element of the value system of Roma families”.⁵⁸ The Committee did not explicitly take into account the fact that the author belonged to the Roma minority, nor did it undertake any analysis of her particular circumstances as a Roma mother and whether these factors fundamentally altered the kind of discrimination that she faced.

The discussion of the merits of the allegation under Article 12 provided the right opportunity for the CEDAW Committee to discuss how A.S.’s belonging to the Roma community resulted in differential treatment in the context of accessing health care services. However, the Committee did not take this opportunity. The Committee recalled its General Recommendation No. 24 on women and health, but only in so far as it related to informed consent, omitting to refer to the part of the Recommendation that stresses circumstances, other than biological differences, which impact on women’s health status:

*[W]hile biological differences between women and men may lead to differences in health status, there are societal factors that are determinative of the health status of women and men and vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups.*⁵⁹

The Committee should have taken into account that the author belonged to a Roma community, her particular vulnerability and her religious beliefs regarding contraception as “societal factors” determinative of her health status and treatment. The Committee apparently assumed that the author suffered the violation in the same way as a non-Roma woman, failing to recognise that, from a gender perspective, the experience of non-minority women does not encompass the experience of all women.⁶⁰

The remedies offered by the CEDAW Committee in *A.S. v Hungary*, while adequate in some respects, do not go as far as they might have in shining a light on the specific, systematic and intersectional forms of discrimination experienced by Roma women in the context of sexual and reproductive health care. The Committee called on the State to take measures that would raise the awareness of relevant personnel in public and private health centres with respect to the provisions of the CEDAW and the Committee’s General Recommendations concerning women’s reproductive health. The treaty body also stressed important amendments that the

57 See above, note 48, Para 11.5.

58 *Ibid.*, Para 2.4.

59 See above, note 35, Para 6.

60 See above, note 48, Para 11.5.

State needed to introduce in order to strengthen respect for the principle of informed consent in all cases of sterilisation, including by monitoring public and private health centres that perform such medical procedures.⁶¹ The Committee's formulation of the recommendations reflects that it is the gender of A.S. that is regarded as the primary axis of oppression when, in fact, it was the intersection of her situation as a member of the Roma community and as a mother that resulted in her forced sterilisation.

The Committee's analysis would have benefited from consideration of the interpretative instruments previously elaborated by the CERD Committee and the CESCR. In 2000, the CERD Committee adopted a General Recommendation addressing the gender aspects of racial discrimination⁶² and a General Recommendation looking specifically at the situation of Roma persons.⁶³ Similar to the CEDAW Committee's observation that societal factors influenced women's health status in particular ways, the CERD Committee stated that:

*There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.*⁶⁴

The CERD Committee further acknowledged that:

*Certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilisation of indigenous women.*⁶⁵

Consideration of the comments of the CESCR in relation to the right to health also could have assisted the CEDAW Committee to develop a more in-depth analysis of A.S.'s experiences. In its General Comment No. 14 on the right to health, the CESCR states that the:

61 *Ibid.*

62 See above, note 44.

63 CERD Committee, *General Recommendation No. 27, Discrimination against Roma*, 2000.

64 See above, note 44, Para 1. In paragraph 5, the Committee also indicates that it will take several methodological steps to systematise its consideration of the gendered aspects of racial discrimination, namely it commits to: (a) examine the form and manifestation of racial discrimination; (b) identify the circumstances in which racial discrimination occurs; (c) enquire on the consequences of racial discrimination; and (d) establish the availability and accessibility of remedies and complaint mechanisms for racial discrimination. Importantly, if the CEDAW Committee had taken these practical steps into account in its decision in *A.S. v Hungary* six years later, it would have opened up the possibility of a discussion of the particular circumstances of the applicant as a Roma woman in the health care system.

65 *Ibid.*, Para 2.

[R]ight to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.⁶⁶

The approach of the CESCR to define the right to health based on its interrelated and essential elements of availability, accessibility, acceptability and quality would have allowed the CEDAW Committee to examine and understand the author's experiences.⁶⁷ The author's description of the facts contained indications of the physical barriers that affected her access to emergency medical services.⁶⁸ This raises questions from the point of view of the obligation to provide accessible health facilities without discrimination.⁶⁹ A.S. also claimed that it took only 17 minutes to register her arrival at the hospital, to perform the caesarean section, to ask for her consent to be sterilised and to perform the sterilisation.⁷⁰ This course of events raises serious doubts about the accessibility of information concerning reproductive and sexual-health care and the element of acceptability, which requires respect for the culture of individuals and minorities as well as sensitivity to gender and life-cycle diversity.⁷¹

In future cases relating to the right to health, the CEDAW Committee may find CESCR's General Comment No. 22, issued in March 2016, supports recognition of intersectional discrimination. The Comment focuses on the right to sexual and reproductive health and acknowledges that for:

[C]ertain individuals and population groups that experience multiple and intersecting forms of discrimination that exacerbate exclusion in both law and practice, (...) the full enjoyment of the right to sexual and reproductive health is further restricted.⁷²

66 CESCR, General Comment No. 14, *The right to the highest attainable standard of health (Article 12 of the ICESCR)*, UN Doc. E/C.12/2000/4, 11 August 2000, Para 4. The analysis of the CESCR would also allow the CEDAW Committee to establish not only that the State failed in its obligation to provide information with regard to sexual and reproductive health, but also emphasise the fact that withholding or misrepresenting health-related information amounts to a violation of the obligation to respect the right to health.

67 *Ibid.*, Para 12.

68 See above, note 48, Para 2.2.

69 See above, note 66, Para 12(b)(ii).

70 See above, note 48, Para 2.3.

71 See above, note 66, Para 12(b)(iv) and (c).

72 CESCR, *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the ICSECR)*, UN Doc. E/C.12/GC/22, 4 March 2016, Para 2.

Importantly, the CESCR explicitly recognises that “individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health”.⁷³ Such groups may include women living in poverty as well as women belonging to different ethnic minorities.⁷⁴ The connection established by the CESCR regarding the likelihood that women belonging to ethnic minorities may experience intersectional discrimination may dismantle some of the apparent reluctance of treaty bodies to pay more attention to forms of intersectional discrimination.

In 2015, the CEDAW Committee did go some way towards recognising that different groups of women face different and unique barriers to accessing sexual and reproductive health services, when it issued its findings from an inquiry under Article 8 of the Optional Protocol into the situation of sexual and reproductive rights in the Philippines.⁷⁵ Although the inquiry did not specifically address intersectional discrimination, it did highlight the situation of economically disadvantaged women and adolescent girls in Manila as being of particular concern, and its recommendations to the government emphasised the need to ensure that these groups of women, as well as others, have effective access to sexual and reproductive health services, including information.⁷⁶ The Philippines inquiry demonstrates that the CEDAW Committee is gradually expanding its understanding of the barriers facing specific groups of women in relation to access to sexual and reproductive health services, including information. The next part of this section will consider the case of *Kell v Canada*, a case involving property rights.

b. *Kell v Canada*

In 1990, Cecilia Kell, an Aboriginal woman from the Canadian Northwest Territories, returned to her home community of Rae-Edzo after attending university.⁷⁷ When the local housing authority made lodging available to indigenous people under a special scheme, Kell decided to apply. She was living with her partner, one of the directors of the Housing Authority Board at the time who, hearing of the scheme, attempted to apply in his own name. After his application was rejected because he was not a member of the community, the housing authority advised Kell to list both herself and her partner in her application. This proved successful and a house was granted to them as co-owners and both were named on the Assignment Lease.⁷⁸

73 *Ibid.*, Para 30.

74 *Ibid.*, Para 30.

75 CEDAW Committee, *Summary of the Findings Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc. CEDAW/C/OP.8/PHL/1, 22 April 2015.

76 *Ibid.*, Para 52 (a).

77 See above, note 49.

78 *Ibid.*, Para 2.3.

Over the three years that followed the house purchase, Kell was subjected to domestic violence by her partner and this worsened after she found a job and became financially independent. In 1993, the Northwest Territories Housing Corporation, the public authority administering the properties, removed Kell's name from the Assignment Lease at the request of her partner without her knowledge or consent. In 1995, she was evicted from her home by her partner. Over the next 10 years, she fought to regain her property rights through the Canadian legal system. She filed three consecutive suits and had a different legal aid lawyer assigned for each case. She alleged that all of these lawyers failed to follow her instructions and negotiated without her consent.⁷⁹ Shortly after the first suit, Kell's former partner was diagnosed with cancer and died. By the time she filed the third action, the property had been sold by her partner's estate.⁸⁰

In 2008, contending that she had exhausted all domestic remedies, Kell brought an individual complaint under the Optional Protocol. She claimed, in particular, that Canada had "failed to ensure that its agents refrain from engaging in any act or practice of discrimination against women, when they removed [Kell's] name from the lease without her consent."⁸¹ She further submitted that the State had violated Article 16(1)(h) of the CEDAW as it failed to ensure her equal right to ownership, acquisition, management, administration and enjoyment of her property.⁸² Her further submission noted that:

*[T]he failure to reach a settlement in her lawsuit was a result of discrimination perpetrated against her by lawyers assigned to the case and by officials at the Northwest Territories Legal Services Board. As an aboriginal person, she experienced racism, and as a woman, she experienced sexism. Both of these aspects of discrimination contributed to a pattern of behaviour that was – at best bullying and at worst abusive.*⁸³

The CEDAW Committee concluded that Kell's property rights had been prejudiced by the public authority acting with her partner, and that she had been discriminated against on the basis of her identity as an Aboriginal woman who was a victim of domestic violence.⁸⁴ The Committee reiterated its interpretive guidance on intersectional discrimination in its General Recommendation No. 28, and found that the scope of the general obligations of states contained in Article 2 of the CEDAW had to be interpreted in light of the intersecting forms of discrimination experienced by Ms Kell:

79 *Ibid.*, Para 2.13.

80 *Ibid.*, Para 2.11.

81 *Ibid.*, Para 3.2.

82 *Ibid.*, Para 2.13.

83 *Ibid.*, Para 9.3.

84 This conclusion was not unanimous. Ms. Patricia Schulz submitted a dissenting Individual Opinion whereby she disagreed with the Committee's decision on the admissibility of the complaint, and the finding on intersectional discrimination.

*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. States parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned (...) Accordingly, the Committee finds that an act of intersectional discrimination has taken place against the author.*⁸⁵

The Committee determined that Canada had violated Articles 2(d) and (e) and 16(1)(h) of the Convention and that “[a]s the author is an aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination.”⁸⁶ Aside from recommending that Kell be provided with reparations for the specific harms she suffered, the Committee held that Canada was required under the Convention to ensure effective access to justice for all Aboriginal women, by taking steps to recruit and train more Aboriginal women to provide legal aid to women “from their communities, including on domestic violence and property rights.”⁸⁷ It further recommended that professional legal aid services be provided for Aboriginal women with a focus on domestic violence and property rights.⁸⁸

c. *R.P.B. v the Philippines*

The Committee also took into account the existence of several systems of oppression based on age, gender and disabilities in its 2014 decision in *R.P.B. v the Philippines*.⁸⁹ R.P.B., who is unable to speak and hearing impaired, was 17 years old at the time that her neighbour allegedly raped her. She reported the incident to the police; where her sister interpreted for her using sign language. The affidavit drawn up was in Filipino. As the education system for the hearing impaired in the Philippines is almost entirely in English, R.P.B. could not understand the affidavit, nor was she provided with an interpreter (instead relying on her sister).⁹⁰

85 See above, note 49, Para 10.2. In its findings in an inquiry conducted in 2013 in Canada, the CEDAW Committee confirmed its findings regarding the intersectional forms of discrimination that Aboriginal women may suffer. The Committee added that “the intersectional discrimination faced by Aboriginal women living on reserves is exacerbated by their living in a rural environment, because of their geographical isolation and limited mobility, the lack of safe transportation and their limited access to law enforcement, protection and counselling services”. See, CEDAW Committee, *Report of the inquiry concerning Canada*, UN Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015, Para 204.

86 See above, note 49, Para 10.3.

87 *Ibid.*, Para 11.

88 *Ibid.*, Para 12. Similarly, in *da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 27 September 2011, the Committee considered that the deceased’s status as a woman of African descent and her social-economic status placed her in a vulnerable sector of society in relation to access to health services.

89 See above, note 50.

90 *Ibid.*, Para 3.9.

In her petition to the Committee, R.P.B. argued that in addition to the use of gendered myths and stereotypes about the behaviour of “ordinary” Filipina women, her particular situation, that of being a girl minor and having a disability, was not taken into account. As such, there was a violation of the State’s obligation to end discrimination in the legal process under Articles 1 and 2(c), (d) and (f) of the CEDAW. She also claimed that the lack of a sign language interpreter, either at the investigative stage or at trial, violated her rights under Article 21(b) of the Convention on the Rights of Persons with Disabilities (CRPD).⁹¹

In its assessment, the Committee noted that R.P.B. had suffered moral and material damages as a result of the:

*[E]xcessive duration of the trial proceedings, by the court’s failure to provide her with the free assistance of sign language interpreters and by the use of the stereotypes and gender-based myths and disregard for her specific situation as a mute and deaf girl in the judgment.*⁹²

As a result, the Committee recommended that the State provide reparation in the form of “monetary compensation commensurate with the gravity of the violations” as well as psychological counselling and therapy for R.P.B. and her affected family members and “barrier-free education with interpreting.”⁹³ More generally, the Committee recommended that free and adequate sign language interpretation be provided at all stages of proceedings, that rape legislation be reviewed and that criminal proceedings be conducted “in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim’s gender, age and disability.”⁹⁴

In the *R.P.B.* case, the Committee considered the obligations of states in relation to women and girls with disabilities for the first time. In the absence of textual recognition of the specific situation of women and girls with disabilities in the CEDAW, the Committee satisfied itself with observing that myths and stereotypes prevent courts from considering the individual circumstances of the victim, which may include disability and age.

Although the Committee made progress in taking account of the complex circumstances that formed the background to R.P.B.’s situation, the decision also demonstrates the limits of its capacity to follow an intersectionality-based analysis through to its natural conclusion. R.P.B. requested that the Committee make a decision on alleged violations of Article 2 (c), (d) and (f) in relation to fair trial guarantees free from discrimination as to sex, age, and disability. Despite the Committee’s display of awareness of, and concern for, R.P.B.’s situation as a girl

91 *Ibid.*

92 *Ibid.*, Para 8.11.

93 *Ibid.*, Para 9.

94 *Ibid.*

with hearing and speech impairments, its views still prioritised the sex and gender aspects of the communication.

In its decision, the Committee refers to its General Recommendation No. 18 on women with disabilities⁹⁵ where it acknowledges that these women “may face double discrimination linked to their special living conditions.”⁹⁶ With this argument, the Committee seems to be closer to an additive understanding of inequalities rather than an intersectionality-based logic. Its conclusion, by focusing only on the sex-and gender-based discrimination that lie within the mandate narrowly defined by the Convention, fails to properly take in the disability aspects of the violation. Furthermore, the Committee disregarded the age dimension of the complaint, and treated the author as an adult woman.

Under Article 2(f) of the CEDAW, the Committee explained that compliance by a state with its obligation to eliminate gender stereotypes needs to be assessed in light of “gender, age and disability sensitivity applied in the judicial handling of the author’s case”.⁹⁷ The Committee’s examination of the degree of sensitivity exercised by domestic authorities comprised assessments of the courts’ use of gender stereotypes based on gender and sex constructing a typology of “ordinary Filipina female rape victim” who would “summon every ounce of her strength and courage to thwart any attempt to besmirch her honour and blemish her purity”; and the courts’ observations that R.P.B’s conduct did not match that of the constructed model, in that she had not tried to escape by making noise or using force.⁹⁸ While in this case, the Committee stated that it was going to take account of the triple-tiered situation of the victim, its conclusions separate sex and gender, on the one hand, and age and disability, on the other. The Committee held that the facts of the case amounted to sex and gender-based discrimination and *disregard* for the author’s disability and age.⁹⁹ Thus, the Committee neither decided on additive discrimination on the basis of sex, gender, age and disability, nor intersectional discrimination. Despite its analysis, it still preferred to operate with a conceptual separation of the applicant’s experiences and focus on sex and gender-based discrimination to the detriment of age and disability.

As with *A.S. v Hungary*, the Committee’s analysis of the merits would be enriched if it extended its purview to relevant practice from the other treaty bodies, particularly the CRC Committee and the CRPD Committee. In 2007, the CRC Committee adopted a General Comment on the rights of children with disabilities where it recognised that:

95 *Ibid.*, Para 8.3.

96 *Ibid.*

97 *Ibid.*, Para 8.8.

98 *Ibid.*, Para 8.9.

99 *Ibid.*

[I]n many cases, forms of multiple discrimination – based on a combination of factors, i.e. indigenous girls with disabilities, children with disabilities living in rural areas and so on – increase the vulnerability of certain groups.¹⁰⁰

If the CEDAW Committee were to integrate this interpretation into its reasoning on future cases involving girls with disabilities, perhaps it would help establish a jurisprudence based on the recognition of multiple discrimination, rather than severing and prioritising personal experiences.

The most comprehensive understanding and application of an intersectionality-based logic appears in the draft General Comment of the CRPD Committee regarding Article 6 of the CRPD which focuses on women with disabilities. In the draft, the CRPD Committee states that taking an intersectional approach constitutes a:

[R]eflection of human rights becoming truly universal and personalised. It acknowledges that human beings experience discrimination differently according to their statuses throughout life-cycle and that discrimination occurs in various forms, directly, indirectly, structurally or systemic, or multiple.¹⁰¹

The CRPD Committee therefore recognises that women and girls with disabilities are often confronted with intersectional discrimination. It defines intersectional discrimination as comprising several layers of discrimination based on various grounds whose interaction produces new forms of discrimination that are unique and cannot be correctly understood by describing them as double or triple discrimination.¹⁰²

This draft General Comment constitutes an important source of interpretation concerning the content of an intersectionality-based analysis of discrimination and the main advantages it presents compared to the single-axis approach. First, the Committee understands intersectional discrimination as a form of discrimination based on the interlinking of multiple grounds. Second, the draft General Comment posits that, unlike the case of additive discrimination, in the case of intersectional discrimination, the grounds of discrimination are inextricably linked and it is impossible to untangle them in order to tell which part of the discrimination is based on a certain ground. Third, it stresses that intersectionality is useful to uncover experiences that may remain invisible in the single axis analysis, and to account for the complexity of human experiences at the intersection of sex, gender, age, sexual orientation, ethnicity, or cultural or religious backgrounds. This acknowledgment recognises that:

100 CRC Committee, *General Comment No. 9, The rights of children with disabilities*, UN Doc. CRC/C/GC/9, 27 February 2007, Para 8.

101 CRPD Committee, *Draft General Comment on Article 6, Women and disabilities*, UN Doc. CRPD/C/14/R.1, 22 May 2015, Para 4.

102 *Ibid.* Para 8.

*[P]ersons experience discrimination not as members of a homogenous group but as individuals with different statuses and in different life circumstances. It means to acknowledge that multiple discrimination has unique and specific impact on individuals and merits particular consideration and remedying.*¹⁰³

Particularly relevant for future cases such as *R.P.B. v the Philippines*, the CRPD Committee states that:

*[G]irls with disabilities face intersectional discrimination on account of their age, gender, sex and disability when subject to sexual assault. It is this intersection of identities which concurrently reflects and produces a perceived and actual situation of risk and exclusion which renders possible such an act.*¹⁰⁴

This interpretation touches upon the essence of the argument made in the *R.P.B.* case, and states what the CEDAW Committee did not articulate. In defence of the CEDAW Committee, it can be argued that, unlike the text of the CEDAW, the CRPD explicitly acknowledges that women and girls with disabilities face intersectional discrimination, and calls on states parties to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.¹⁰⁵

d. *E.S. and S.C. v Tanzania*

In one of its most recent decisions, *E.S. and S.C. v Tanzania*, the CEDAW Committee examined the situation of two widows with minor children who were ordered to vacate their homes following the deaths of their husbands.¹⁰⁶ In each instance, the local courts applied patrilineal customary law provisions that granted male family members the right to administer and dispose of the estate.¹⁰⁷ In 2006, the women appealed to the High Court of Tanzania which concluded that “the impugned paragraphs [were] discriminatory in more ways than one”, but that “it was impossible to effect customary change by judicial pronouncements”.¹⁰⁸ The High Court decided that it would not overturn the provisions because doing so would “be opening the Pandora’s box, with all the seemingly discriminative customs from our 120 tribes plus following the same path”.¹⁰⁹ Several subsequent appeals by the women were dismissed on procedural grounds.¹¹⁰

103 *Ibid.*, Para 17.

104 *Ibid.*, Para 8.

105 Convention on the Rights of Persons with Disabilities, G.A. Res.A/RES/61/106, 2006, Article 6.

106 See above, note 51.

107 *Ibid.*, Paras 2.5–2.6.

108 *Ibid.*, Para 2.8.

109 *Ibid.*

110 *Ibid.*, Paras 2.9–2.10.

Having exhausted domestic remedies, the women turned to the CEDAW Committee. The women's complaint stated that there are three separate systems of intestate inheritance law in Tanzania that are divided along ethnic and religious lines, with codified customary law being the most widely applied system.¹¹¹ The Committee concluded "that inheritance matters are governed by multiple legal systems in the State party and that the authors have been subjected to Sukuma customary law on the basis of their ethnicity."¹¹² Although it does not elaborate further upon the situation of the authors as widows subject to patrilineal customary inheritance law, a footnote refers to the Committee's General Recommendations No. 28 and No. 29 in connection with intersectional discrimination.¹¹³

In its determination, the Committee highlights the fact that widows are forced to "perpetually depend on their male relatives and their children" and that they therefore suffer violations of their right to economic independence under Article 13 of the CEDAW.¹¹⁴ The Committee also found that Tanzania had breached its obligations under Articles 2 (c), 2 (f), 5 (a), 15 (1), 15 (2), 16 (1)(c) and 16 (1)(h) of the Convention, "read in the light of General Recommendations Nos. 21, 28 and 29."¹¹⁵ In addition to its recommendations concerning compensation for the authors of the complaint, the Committee urged Tanzania to ensure that the rights guaranteed in the CEDAW prevail over inconsistent national laws and that it repeal or amend local customary laws, "with a view to providing women and girls with equal administration and inheritance rights upon the dissolution of marriage by death, irrespective of their ethnicity or religion."¹¹⁶

The *E.S. and S.C. v Tanzania* case thus raises the possibility of an intersectional approach but again, the Committee failed to follow up its observations with a detailed analysis of the specific impact of discrimination on the basis of gender, marital status, ethnic group and geographical location.

The cases decided by the CEDAW Committee under its Optional Protocol demonstrate a developing awareness of intersectional discrimination.¹¹⁷ The evolution of the Committee's thinking is apparent in the four cases presented above, however, it is not a linear progression and there is still a large gap between the rhetorical acknowledgement of intersectionality

111 *Ibid.*, Para 2.1.

112 *Ibid.*, Para 7.6.

113 *Ibid.*, footnote 32, p. 11.

114 *Ibid.*, Para 7.8.

115 *Ibid.*, Para 8.

116 *Ibid.*, Para 9 (ii).

117 While not explored in detail in this Article, this awareness can also be seen in the CEDAW Committee's investigations of reproductive and sexual health rights in the Philippines and the disappearances of Aboriginal women in Canada under the inquiry procedure. See, CEDAW Committee, *Report of the inquiry concerning Canada*, UN Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015, Para 204; and above, note 75.

as a framework of analysis and the full application of intersectional methodologies in the determination of remedies. In its 2004 decision in *A.S. v Hungary*, the Committee did not acknowledge the fact that the author was a Roma woman and the remedies that were ordered were of a general nature that did not go to the heart of the specific forms of discrimination within sexual and reproductive health care that she experienced as a result of her situation as a mother from a Roma community. In the later cases of *Kell v Canada*, decided in 2012, and *R.P.B. v the Philippines*, decided in 2014, the Committee referred to the concept of intersectionality and attempts to incorporate elements of an intersectional approach into its recommendations. Finally, in the 2015 decision *E.S. and S.C. v Tanzania*, the intersectionality of the situation of the authors as widows from a specific ethnic group is only alluded to in passing and the remedies recommended addressing the question of gender-based discrimination in customary laws on inheritance and property rights in general, without a detailed analysis of the particular situation of widows from ethnic groups that apply patrilineal customary inheritance laws. Arguably, the Committee took a backward step in *E.S. and S.C. v Tanzania*, although such a conclusion is difficult to base on one case alone, and the future jurisprudence of the Committee will be telling in this regard.

4. Beyond Individual Cases: the CEDAW Committee’s Interpretive Practice on Intersectionality in General Recommendations

In addition to the legislative, budgetary and policy measures recommended in individual cases and inquiries in relation to specific country situations, the CEDAW Committee has, as briefly noted above, also issued more general guidance on the identification, reparation and prevention of intersectional discrimination. This section of the paper traces some of the recent developments that are apparent in the Committee’s interpretive General Recommendations, including its effort to achieve greater institutional coherence on the question of intersectional discrimination against girl children in the context of harmful traditional practices.

a. Intersectionality through Substantive Interpretation in General Recommendations

In 1991, the CEDAW Committee adopted an extremely brief General Recommendation on disabled women in which it refers to the “double discrimination” faced by women with disabilities.¹¹⁸ This General Recommendation was followed, in 2004, by General Recommendation No. 25 on temporary special measures in which the Committee discusses the fact that:

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such

118 CEDAW Committee, *General Recommendation No. 18, Disabled women*, 1991, Preamble.

*multiple forms of discrimination against women and its compounded negative impact on them.*¹¹⁹

While this General Recommendation provided the first explicit acknowledgement of the multiplicity of identities that may exist within the group “women”, it still approached multiple discrimination from an essentially additive perspective. The qualitatively different nature of intersectional forms of oppression is not recognised and, as a result, the category of “women” is maintained as the norm with other groups within the category being positioned as “mere derivatives”.¹²⁰

In 2010, the CEDAW Committee adopted General Recommendation No. 28 on the core obligations of states parties to the CEDAW. A paragraph of the General Recommendation is dedicated to intersectionality, which is described as a “basic concept for understanding the scope of the general obligations for states’ parties contained in Article 2”.¹²¹ In the same paragraph, the Committee notes that the discrimination that women experience because of their gender is “inextricably linked with other factors such as race, ethnicity, religion or belief, health status, age, class, caste and sexual orientation and gender identity” and that discrimination on the basis of gender may consequently “affect women belonging to such groups to a different degree or in different ways to men.”¹²² The CEDAW Committee goes on to note that states must “legally recognize such forms of discrimination and their compounded negative impact on the women concerned and prohibit them” and that policies and programmes to redress intersectional discrimination must also be adopted.¹²³

General Recommendation No. 28 represents a shift in the Committee’s thinking about intersectional discrimination in that the notion of the “inextricable” linkage between different grounds of discrimination is evoked. The paradigm has changed from one in which discrimination is viewed in an additive way, with different grounds being stacked on top of one another and, therefore, relatively easily identified, to an acknowledgement that cases of intersectionality may reveal an entirely new form of discrimination. Unfortunately, (and this is almost certainly a result of the construction of the CEDAW itself which focuses exclusively on discrimination against women) this recognition is immediately linked to a male comparator, thereby diminishing the complexity of the analysis and ultimately rendering it less potentially disruptive to the settled system of international human rights law than it might otherwise have been.

119 CEDAW Committee, *General Recommendation No. 25, Temporary measures*, 2004, Para 12.

120 See above, note 28, pp. 205–242.

121 CEDAW Committee, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, Para 18.

122 *Ibid.*

123 *Ibid.*

The Committee has continued to take up the language of intersectionality in some of its other recent General Recommendations, including: Recommendation No. 30 in 2013 which discusses women and conflict prevention, conflict and post-conflict situations;¹²⁴ No. 34 in 2016 on the rights of rural women;¹²⁵ and General Recommendation No. 33 in 2015 on women's access to justice.¹²⁶ Importantly, the latter General Recommendation notes that "discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women."¹²⁷ The movement away from the male comparator to recognition of the fact that differences *between* women may be more decisive in some cases of intersectional discrimination than differences between men and women is a crucial step in the evolution of the Committee's thinking on intersectionality.

b. Intersectionality through Institutional Developments: the CEDAW and CRC Committee's Joint General Recommendation/General Comment on Harmful Practices

For the first time in the history of the United Nations human rights treaty body system, in 2014, two monitoring bodies issued a joint interpretive instrument. The CEDAW and CRC

124 CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 1 November 2013, Paras 6 and 7, in which the Committee notes that "women are not a homogenous group" and that "[d]iscrimination against women is also compounded by intersecting forms of discrimination, as noted in General Recommendation No. 28. Given that the Convention reflects a life-cycle approach, States Parties are also required to address the rights and distinct needs of conflict-affected girls that arise from gender-based discrimination."

125 CEDAW Committee, *General Recommendation No. 34, Rights of rural women*, UN Doc. CEDAW/C/GC/34, 4 March 2016, Para 14, which states, "[i]n line with GR 28, States parties should recognize that rural women are not a homogenous group and often face intersecting discrimination." In Para 15, the Committee notes, "States parties should eliminate all forms of discrimination against disadvantaged and marginalized groups of rural women. For example, States parties should ensure that disadvantaged and marginalized groups of rural women including indigenous; afro-descendent; ethnic and religious minorities; female heads of household; peasant; pastoralists; fisherfolk; landless; migrant; and conflict-affected rural women are protected from intersecting forms of discrimination and have access to education, employment, water and sanitation, health care, etc. States parties should develop policies and programmes ensuring the equal enjoyment of rights by disabled rural women, including by ensuring accessibility of infrastructures and services. States parties should similarly ensure that older rural women have access to social services, adequate social protection, as well as economic resources and empowerment to live life with dignity, including through access to financial services and social security."

126 CEDAW Committee, *General Recommendation No. 33, Women's access to justice*, UN Doc. CEDAW/C/GC/33, 3 August 2015, Para 8, where the Committee states, "[i]n addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice."

127 *Ibid.*, Para 8.

Committees adopted a Joint General Recommendation/General Comment on harmful practices.¹²⁸ This ground-breaking initiative was attempted following observations by both treaty bodies that harmful practices fall within the purview of each of the CEDAW and the Convention on the Rights of the Child (CRC), and that these practices have also been a subject on which the Committees have repeatedly expressed shared concern.¹²⁹

From the perspective of discrimination based on sex, the approach that the Committees take in the General Comment/Recommendation is to acknowledge harmful practices as human rights violations producing continuous effects from childhood into adulthood, and thus affecting girls and adult women alike.¹³⁰ The Committees further state that sex and gender-based discrimination intersects with other factors that affect women and girls, in particular those who belong to, or are perceived as belonging to, disadvantaged groups, and who are therefore at a higher risk of becoming victims of harmful practices.¹³¹ As such, the two Committees assert that harmful practices are “grounded in discrimination based on sex, gender and age, among other things,”¹³² as they are “deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles.”¹³³

The General Recommendation/Comment defines harmful practices as:

*[P]ersistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.*¹³⁴

128 CEDAW Committee and the CRC Committee, *Joint General Recommendation No. 31/ General Comment No. 18 on harmful practices*, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18, 14 November 2014.

129 The Convention on the Elimination of All Forms of Discrimination against Women provisions that are relevant for an analysis on harmful practices are: Article 1, Article 2, Article 5, and Article 16. From the point of view of the Convention on the Rights of the Child, the relevant provisions would be: Article 2, Article 3, Article 19(1), and Article 24. The interpretative instruments developed by the respective treaty monitoring bodies have additional value, such as the CEDAW Committee’s *General Recommendation No. 14, Female circumcision*, 1990; *General Recommendation No. 19, Violence against women*, 1992; *General Recommendation No. 21, Equality in marriage and family relations*, 1994; and above, note 35. On the other hand, the CRC Committee elaborated the *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts.19; 28, para. 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, 21 August 2006; and *General Comment No. 13, The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/14, 29 May 2013.

130 See above, note 128, Para 68.

131 *Ibid.*, Para 6.

132 *Ibid.*, Para 7.

133 *Ibid.*, Para 6.

134 *Ibid.*, Para 15.

Intersectional discrimination is also reflected in the recommendations that the Committees make in the General Recommendation/Comment. For instance, with regard to the recommendation to states to adopt or amend legislation with a view to effectively eliminating harmful practices, the Committees note that such legislation should address the root causes of these practices, including “discrimination on the basis of sex, gender, age and other intersecting factors”.¹³⁵ The preventive measures recommended by the treaty bodies also stress the fact that harmful practices cannot be treated in isolation, but require a rights-based approach that recognises the indivisibility and interdependence of rights.¹³⁶

The General Recommendation/Comment presents several particularities. The normative content under the CEDAW and the CRC outlined in the General Recommendation/Comment, instead of being firmly anchored in the text of the Conventions themselves, is derived from the interpretative work of the two treaty bodies on other, related issues. The definition of harmful practices follows the model developed in the practice of the CRC Committee with regard to violence against children¹³⁷ and corporal punishment.¹³⁸ Another element from the practice of the CRC Committee is the focus on upholding the dignity and integrity of the individual. In its General Comments regarding violence against children and corporal punishment, the CRC Committee stresses “the concept of dignity requires that every child is recognised, respected and protected as a rights holder”.¹³⁹ On the other hand, the determination that harmful practices constitute a form of discrimination against women and children is rather specific to the narrative of the CEDAW Committee with the addition of discrimination against children. In its General Recommendation No. 19 on violence against women, the CEDAW Committee defines gender-based violence as a form of discrimination that inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men in accordance with Article 1 of the CEDAW.¹⁴⁰ Furthermore, General Recommendation No. 19 draws attention to the linkage between discrimination against women, violence against women and violations of human rights.¹⁴¹ In the same

135 *Ibid.*, Para 55(e).

136 *Ibid.*, Para 58.

137 CRC Committee, *General Comment No. 13, The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13, 18 April 2011, Para 4. This reads “violence is understood to mean all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention”.

138 CRC Committee, *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para 2; and 37, inter alia)*, UN Doc. CRC/C/GC/8, 2 March 2007, Para 11. This reads “[t]he Committee defines ‘corporal’ or ‘physical’ punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”.

139 See above, note 137, Para 3(c).

140 CEDAW Committee, *General Recommendation No. 19, Violence against women*, 1992, Paras 1, 6.

141 *Ibid.*, Para 7. This reads “gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention”.

vein, the General Recommendation/Comment on harmful practices highlights the connection between discrimination, violence and human rights violations by reminding states parties of their due diligence obligations to prevent acts that impair the recognition, enjoyment or exercise of rights by women and children and to ensure that private actors do not engage in discrimination against women and girls, including gender-based violence.¹⁴²

The General Recommendation/Comment is undeniably valuable in that it paves the way for future collaborations among the treaty bodies, provides a substantive and nuanced analysis of the human rights violations that arise from harmful practices through its integration of perspectives from both the CEDAW and the CRC, and ensures greater consistency in the application of human rights norms in this area. However, it should not be read as an unqualified success. The undertaking of the two treaty bodies shows that the mere fact of institutional cooperation on a given issue is not necessarily enough to achieve substantive integration and convergence. For example, the obligation of due diligence as it is reflected in the General Recommendation/Comment is segregated and states are informed that the CEDAW interpretation of the concept should be applied if the harmful practice concerns violence against women and girls, whereas the CRC forms the referential standard if the case involves violence against children in general.¹⁴³

This type of interpretation may result in further separation and marginalisation, as Nura Taefi points out by examining the discourses on girls' rights, and comparing the approaches taken by women's and children's rights narratives.¹⁴⁴ Taefi demonstrates that, while both the CEDAW and the CRC are applicable to girls, the application of both treaties and the discourses related to women's rights and to children's rights result in failure to address girls' particular needs. Taefi argues that girls remained marginalised in the discourse on adult women's rights on account of age, and in the discourse on children's rights on account of gender. She carries the argument further to imply that under the CEDAW, the underlying subject of rights is the white woman; while under the CRC, the underlying subject is the male child.¹⁴⁵ Not considering the intersection of age and gender results, first, in the misrecognition of girl children as subjects of rights, and, second, in a partial approach to the protection on girls' rights, where the focus has been primarily on issues connected to harmful practices and sexual violence. Thus, Taefi also views an intersectional analysis as a method for uncovering these tensions and gaps, and as a mechanism for redesigning the human rights framework of protection.¹⁴⁶

142 CEDAW Committee and the CRC Committee, *Joint General Recommendation No.31/ General Comment No. 18 on harmful practices*, Para 11.

143 *Ibid.*

144 Taefi, N., "The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalization of the Girl-Child", *International Journal of Children's Rights*, Vol. 17, 2009.

145 *Ibid.*, p. 348.

146 *Ibid.*, p. 346.

Moreover, an argument can be made that the General Recommendation/Comment presents a level of inconsistency in that it relies solely on provisions of the CEDAW and the CRC, without wider reference to the ICCPR or the ICESCR. Many arguments have been made that the thematic human rights treaties, such as the CRC, the Convention on the Rights of Migrant Workers and Members of their Families, or the CRPD, are a form of *lex specialis* in relation to the ICCPR and the ICESCR which contain the general norms of human rights protection.¹⁴⁷

The two specialist committees, the CEDAW Committee and the CRC Committee, invoked their shared concern and practice with regard to harmful practice as a justification for their innovative approach in adopting a joint General Recommendation/Comment. However, both the HRC and the CESCR had also previously issued interpretive guidance in relation to harmful practices. In its Concluding Observations on Indonesia, the HRC recommended that the State make efforts to prevent and eradicate harmful practices.¹⁴⁸ The CESCR has expressed deep concern at the lack of progress made by India in eliminating traditional practices and provisions of personal status laws that are harmful and discriminatory to women and girls.¹⁴⁹ The inclusion of the two generalist treaty bodies in the discussion surrounding the adoption of a joint interpretive instrument would have marked a turning point in institutional thinking about intersectionality. A future path towards improved coordination could involve joint action by all of the treaty bodies in the development of a common interpretation of the non-discrimination guarantees that are contained in each of the core human rights treaties.

Conclusion

Intersectionality scholarship invites us to observe and recognise the complexities and multiple dimensions of different systems of power and oppression and the impact that these may have on individuals and groups.¹⁵⁰ The challenge remains in translating these observations into the development of responses that go beyond highly individualised remedies to meaningfully confront and transform oppressive structures, particularly within the confines of a

147 O’Flaherty, M. and O’Brien, C., “Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper of the High Commissioner’s Proposal for a Unified Standing Treaty Body,” *Human Rights Law Review*, Vol. 7, 2007, pp. 141–172.

148 HRC, *Concluding Observations: Indonesia*, UN Doc. CCPR/C/IDN/CO/1, 21 August 2013, Para 12. See also HRC, *Concluding Observations: Djibouti*, UN Doc. CCPR/C/DJI/CO/1, 19 November 2013, Para 8; HRC, *Concluding Observations: Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 19 August 2011, Para 10; HRC, *Concluding Observations: Malawi*, UN Doc. CCPR/C/MWI/CO/1/Add.1, 19 August 2014; and HRC, *Concluding Observations: Kenya*, UN Doc. CCPR/C/KEN/CO/3, 31 August 2012, Para 15.

149 CESCR, *Concluding Observations: India*, UN Doc. E/C.12/IND/CO/5, 8 August 2008, Para 25. See also CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4, 16 December 2009, Para 20; CESCR, *Concluding Observations: Nepal*, UN Doc. E/C.12/NPL/CO/3, 12 December 2014, Para 14; and CESCR, *Concluding Observations: The Gambia*, UN Doc. E/C.12/GMB/CO/1, 20 March 2015.

150 See above, note 6, Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics”, pp. 150–152.

system of international human rights law that continues to primarily function using a “single-axis” approach to inequality.

There are indications that international human rights mechanisms are gradually beginning to take steps to more fully respond to forms of intersectional discrimination. An examination of the jurisprudence and recommendations issued by the CEDAW Committee over the course of a decade reveals both the progress that the treaty body has made, as well as its reluctance to forge ahead with the substantive application of an intersectional approach. The Committee’s initial failure to engage with issues of multiple and intersectional discrimination as seen in *A.S. v Hungary*, was counterbalanced four years later with a strong affirmation of intersectionality in its decision in *Kell v Canada*. General Recommendation No. 28 on the states parties’ core obligations under the CEDAW also reflects the Committee’s willingness to assert intersectionality as a basic concept for the interpretation of general obligations to guarantee substantive equality under the Convention. The General Recommendation acknowledges differences between women and calls on states to legally recognise and prohibit intersectional forms of discrimination.

However, the CEDAW Committee’s application of intersectionality as a method of analysis has not followed a linear path. In its recent decisions in *R.P.B. v the Philippines*, and particularly in *E.S. and S.C. v Tanzania*, the Committee arguably took a step back. In the former case, the treaty body demonstrated awareness of the author’s complex situation as a girl with disabilities but decided to prioritise sex and gender discrimination over age and disability. In the latter case, the Committee did not engage in any meaningful discussion of the applicants’ status as widows from a specific ethnic group in the context of a patrilineal customary law system.

A comparison with the interpretive practice of other treaty bodies shows that there is potential for greater clarity and consistency on anti-discrimination law within the international human rights system, and provides insights into the ways in which the current gaps in the CEDAW Committee’s reasoning on intersectionality could be closed. Steps in this direction were taken in General Recommendation/Comment No. 31 on harmful practices elaborated jointly by the CEDAW and CRC Committees, which highlights the intersectional dimensions of harmful practices and draws on the specific expertise of each body to develop a more holistic approach. However, fragmentation remains in the approach taken in the General Recommendation/Comment and in its development.

The evolving interpretive practice by the treaty bodies demonstrates that intersectionality does have a place in international human rights law as an observational tool and as a framework for guiding policy and legislative change. The inconsistency and hesitation shown by the treaty bodies in the application of intersectionality may be explained by the fact that they have yet to develop a comprehensive or uniform methodology for assessing inequality. There are no clear or common definitions of the notions of multiple and intersectional discrimination.

Intersectional practice by the international human rights system is also valuable for its potential to influence the future shape of national anti-discrimination laws and policies. Recom-

recommendations by treaty bodies to states have recently focused on ensuring that cases of intersectional discrimination are justiciable at the national level through, *inter alia*, the adoption of consolidated anti-discrimination legislation and an expansion of the mandates of national human rights institutions so that they are able to consider complaints that simultaneously invoke intersecting grounds of discrimination.¹⁵¹

As a theory and as a practical tool for the implementation of human rights, intersectionality provides insights as to how we might promote substantive equality and encourage participation by diverse individuals and groups in the conceptualisation, development, implementation and monitoring of policies, laws, budgets and administrative programmes that have an impact on the enjoyment of human rights. By ensuring that a rich range of experiences is brought before judicial and quasi-judicial authorities, intersectionality offers a framework to comprehensively prevent and remedy inequalities. The scope and nature of the human rights violations that arise at the intersections of different forms of discrimination can, as a result, be more effectively identified and addressed, reinforcing universal, regional and national human rights guarantees.

151 See, for example, note 126, Para 60 (c). This reads “provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination.”