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Protecting the Invisible: An Intersectional Approach to International Human Rights Law

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ABSTRACT:

This article researches intersectionality in the area of international human rights law. Moving attention away from the field of anti-discrimination law, it examines how an intersectional approach to international human rights law can offer stronger human rights protection to people who share a number of characteristics associated with distinct groups of marginalised people. In order to illustrate the application of this approach the article provides a case study addressing three groups of disabled people who possess such characteristics, namely: 1) disabled women; 2) disabled people who belong to racial or ethnic minorities and; 3) disabled children. It concludes by arguing for the adoption of ‘intersectional mainstreaming’ in international human rights law. The article thereby aims to close a gap in research on intersectionality in the field of human rights. Providing a novel analysis of intersectionality, it proposes a remedy for the deficiencies of anti-discrimination law and shows how intersectionality can be applied in practice.

KEY WORDS: Intersectionality – Discrimination – Human Rights – Disability – Marginalised Groups – UN treaty bodies

1. INTRODUCTION

Intersectionality has been the subject of much discussion in the last two decades. Research has shown the limits of anti-discrimination law in handling cases of intersectional discrimination. Far less research has been undertaken on intersectionality in the field of human rights. While existing research affirms the potential of international human rights law to address intersectionality, it has been mainly expository and has fallen short in offering solutions to better frame, encompass and deal with instances of intersectionality as a matter of human rights practice. This article is an attempt to close that gap and articulate a framework within which intersectionality can be accommodated more effectively.

In order to do so, the article critically assesses whether and how an intersectional approach to international human rights law can enhance human rights protection for people who share a number of characteristics associated with distinct groups of marginalised people. By putting forth the universal dimension of international human rights law and by arguing for greater consideration for people's varied experiences, it examines how to transform intersectionality into a practical device. The article advances research on intersectionality through using an intersectional perspective in order to reshape the way in which international human rights law is applied to particular groups of marginalised people. In doing so, it provides a novel scholarship analysis of intersectionality.

The article also provides a case study in order to illustrate the application of the proposed intersectionality approach. It does so with special attention on a frequently ignored dimension of intersectionality, namely disability, rather than the more familiar focus on gender and race.

The article proceeds with a discussion of the meaning of intersectional discrimination and human rights protection in the face of intersecting grounds of discrimination and then analyses the conceptualisation of intersectionality and the adoption of an intersectional perspective in international human rights law. Using the Convention on the Rights of Persons with Disabilities (CRPD), it then undertakes a case study of disabled people.¹ In order to illustrate how an intersectional perspective can be made to work, it investigates how the combined application of different human rights treaties can enhance human rights protection for three groups of disabled people: 1) disabled women; 2) disabled people from racial or ethnic minorities and; 3) disabled children. The article concludes with an examination on how human rights protection can be improved for those who fall under the remit of several group-specific human rights treaties through 'intersectional mainstreaming' in international human rights law.

The approach taken in this article is principally doctrinal. The conceptual analysis builds on the vast academic literature on intersectionality, while relating its observations to the field of human rights. Based on evidence from relevant academic and policy sources, the case study on disability is conducted through an examination of examples of intersectionality analysed within the parameters of international human rights law. The legal analysis undertaken takes due account of the provisions on treaty interpretation of the Vienna Convention on the Law of Treaties (VCLT).

2. INTERSECTIONALITY AND INTERNATIONAL HUMAN RIGHTS LAW

¹ Convention on the Rights of Persons with Disabilities 2006, 46 ILM 443 (CRPD). In order to reflect the social model of disability that inspired the drafters of the CRPD, the term 'disabled people' will be used in the present article. Although the Convention itself refers to 'persons with disabilities', 'disabled people' was chosen because it underscores the fact that it is the way in which society is organised that creates barriers to their full participation. This can be contrasted with anti-discrimination law which focuses on individual characteristics for its application.

Protection against discrimination on various grounds has been the centrepiece of human rights protection for marginalized groups. Over time there has emerged a concern that anti-discrimination law, as applied in practice, has not effectively accounted for discrimination that cannot be reduced to a single ground. The section that follows explains how international human rights law protects against intersectional discrimination – or discrimination that intersects across more than one ground. It does so by first explaining the concept of ‘intersectional discrimination’ and how it is addressed by international human rights law. It then explores whether and how international human rights law can better accommodate intersectionality. It further sets forth a new approach to intersectionality and goes on to suggest how it could be applied in practice.

A. The Concept of ‘Intersectional Discrimination’

Intersectional discrimination is generally used to refer to situations which result from discrimination on the basis of various grounds which cannot be disentangled from each other and which through being interconnected create unique forms of disadvantage. The term was famously first used in this sense by Kimberly Crenshaw in relation to gender and race.² Not only does it recognise the heterogeneity of particular groups of marginalised people (e.g., women, children, racial minorities or disabled people), as legally defined, but also that intra-group differences may lead to diverse forms of discrimination. These forms of discrimination are not merely additive; they entail more than the addition of two or more grounds of discrimination.³ Nonetheless, discerning discrimination that is intersectional and distinguishing it from discrimination that is just based on cumulatively applied grounds can be a difficult task.

A frequently cited illustration is the case of black women who are systematically refused jobs, not only because they are black or because they are women but because they are both, while white women and black men find jobs more readily according to statistical data.⁴ The particular form of discrimination they experience is the result of their combined characteristics of gender and race. When taken together, gender and race can create a particular disadvantage that is greater than the sum of their parts.⁵ The people in question may not be regarded as victims of either racial or gender discrimination if taken in isolation. But nor would they necessarily be considered victims of the different grounds of discrimination if taken cumulatively, since it can be that neither women nor black men are subject to systematic employment refusal. Black women, therefore, may face a unique forms of discrimination rooted in the intersection of gender and race. In other words, the intersection of the grounds of discrimination creates a situation that occurs *only* when both of them are taken together.

Taking the above example, what makes black women more likely to be refused jobs than if they merely possessed only one characteristic leading to a particular form of disadvantage? This entails assessing the nature of the experience of groups who are share common characteristics associated with distinct groups of marginalised people. This particular form of

² Crenshaw, ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 4 *University of Chicago Legal Forum. Feminism in the Law: Theory, Practice and Criticism* 139 at 145. Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford Law Review* 1241 at 1244.

³ Uccellari, ‘Multiple Discrimination: How Law can Reflect Reality’ (2008) 1 *The Equal Rights Review* 24 at 25; Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Turku: Institute for Human Rights-Åbo Akademi University, 2002) at 10-11.

⁴ Hannett, ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’ (2003) 23 *Oxford Journal of Legal Studies* 65 at 68-69.

⁵ Solanke, ‘Putting Race and Gender Together: A New Approach to Intersectionality’ (2009) 72 *Modern Law Review* 723 at 731.

disadvantage actually stems from the synergy of different grounds of discrimination so that its causes cannot be understood by simply combining these grounds.⁶ How, then, can human rights practice examine the forces behind the disadvantage faced by the group in question? Understanding that it is not enough to analyse the factors affecting discrimination sequentially, taking each ground in turn, what approach will factor the complexity of intersectionality into account? The concept of intersectionality commands an evaluation of how the aggregation of two or more grounds of discrimination works to reinforce subordination and disadvantage. The recognition of intersectional discrimination, therefore, requires analysis of discrimination at the nexus of two or more grounds of discrimination in order to establish an altogether unique kind of vulnerability.⁷ From a terminological viewpoint, ‘intersectional discrimination’ differs therefore from ‘additive’ or ‘compound’ discrimination. The latter refers to a situation in which the various grounds of discrimination can be neatly disaggregated and considered individually and which therefore would also be experienced by those people who are discriminated against on the basis of only one of these grounds. Both the terms ‘intersectional discrimination’ and ‘additive’ or ‘compound discrimination’ generally come under the overarching concept of multiple discrimination.⁸ It should however be noted that the three terms are often mixed up and used interchangeably. This demonstrates the residual lack of precision about what exactly constitutes cases of intersectional discrimination.

B. Human Rights Protection against Intersectional Discrimination

International human rights law has gradually evolved towards in the direction of explicit recognition of the human rights of historically marginalized groups of people. Following the adoption of the International Bill of Human Rights comprising the Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ the international human rights framework progressively developed within the context of specific groups of highly marginalised individuals. Thus, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) and the CRPD were adopted in order to improve human rights protection for these groups.¹⁰

⁶ Solanke, ‘Infusing the Silos in the Equality Act 2010 with Synergy’ (2011) 40 *Industrial Law Journal* 336 at 347-348.

⁷ The article will use the term ‘marginalised people’ rather than ‘vulnerable people’ in order to avoid confusion with the vulnerability theory developed by Martha Fineman. This theory claims that vulnerability is inherent to the human condition and that there is a social responsibility to build reserves of reliance. See: Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1; Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

⁸ Hanneth, *supra* n 4 at 68; Solanke *supra* n 5 at 726; Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2007) at 170-73.

⁹ International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR).

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (ICERD); Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC). Two human rights treaties were also adopted on thematic issues: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT); International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2715 UNTS 3 (CED). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) will not be examined considering its low ratification status which includes mainly ‘migrant-sending countries’ and almost no ‘migrant-receiving countries’

The ICCPR and the ICESCR prohibit discrimination and each has a non-discrimination clause with an open-ended list of prohibited grounds of discrimination.¹¹ Article 26 of the ICCPR also includes an autonomous provision, which prohibits discrimination beyond the enjoyment of the rights protected by this Covenant thereby extending its application to the area of economic, social and cultural rights, as confirmed by the Human Rights Committee in both General Comment No 18 on non-discrimination and its jurisprudence.¹² With the exception of the CRC and the CRPD,¹³ the group-specific human rights treaties only prohibit discrimination on the basis of those grounds that target the particular groups of marginalised people who fall under the remit of these treaties.¹⁴ More recent group-specific human rights treaties have further broadened the prohibition of discrimination but they have done so inconsistently. Earlier treaties, such as the ICERD and CEDAW, mainly elaborate the non-discrimination clauses, whereas later treaties, such as the CRC and the CRPD, go further and contain the full range of human rights. Each human rights treaty has its own UN treaty body that is in charge of monitoring compliance with that treaty. The Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR Committee), the Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the Committee on the Rights of the Child (CRC Committee) apply the ICCPR, the ICESCR, the ICERD, CEDAW and the CRC, respectively. Their role is to monitor compliance with the aforementioned treaties. An unwanted consequence of this categorisation, however, is that the emphasis lies potentially on unique categories, disregarding groups who also fall under the remit of other group-specific human rights treaties.

UN treaty bodies have, to some extent, dealt with intersectionality, the CEDAW Committee in particular. This Committee was the one that adopted General Recommendation No 25 on gender related dimension of race discrimination in which it reckoned that certain forms of race discrimination only occur in relation to gender.¹⁵ It also adopted General Recommendation No 18 on women with disabilities.¹⁶ In addition, the CEDAW Committee has handled cases of intersectional discrimination several times in its jurisprudence.¹⁷ In a case concerning the rape of a deaf woman, for instance, it considered that the failure to provide for sign language in the court proceedings exhibited a lack of protection against discrimination.¹⁸

(International Convention on the Protection of the Rights of All Migrant Workers 1990, 2220 UNTS 39481 (CMW).

¹¹ Article 2 (1), ICCPR; 2 (2), ICESCR.

¹² Article 26, ICCPR. See: Human Rights Committee, General Comment No 18: Non-discrimination, 10 November 1989, HRI/GEN/1/Rev.6 at 146, at para 12; Human Rights Committee, *Broeks v The Netherlands*, Views, 9 April 1987, CCPR/C/29/D/172/1984, at para 12.3; Human rights Committee, *Zwaan de Vries v The Netherlands*, Views, 9 April 1987, CCPR/C/29/D/182/1984, at para 12.3.

¹³ Article 2 (1), CRC; Article 5 (2), CRPD.

¹⁴ Article 1 (1), ICERD; Article 1, CEDAW.

¹⁵ Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No 25: Gender Related Dimensions of Racial Discrimination, 20 March 2000, HRI/GEN/1/Rev.6 at 214.

¹⁶ Committee on the Elimination of All Forms of Discrimination against Women, General Comment No 18 on women with disabilities, 30 January 1991, A/46/38.

¹⁷ Committee on the Elimination of All Forms of Discrimination against Women, *A.S. v Hungary*, 29 August 2006, CEDAW/C/36/D/4/2004, at para 11.3; Committee on the Elimination of All Forms of Discrimination against Women, *Alyne da Silva Pimentel v Brazil*, 10 August 2011, CEDAW/C/49/D/17/2008, at para 7.7; Committee on the Elimination of All Forms of Discrimination against Women, *Kell v Canada*, 26 April 2012, CEDAW/C/ 51 /D/19/2008, at para 10.2.

¹⁸ Committee on the Elimination of All Forms of Discrimination against Women, *R.P.B. v the Philippines*, 12 March 2014, CEDAW/C/57/D/34/2011 at para 8.7.

Other UN treaty bodies also paid attention to intersectionality. The CRC Committee adopted General Comment No 9 on children with disabilities.¹⁹ The CRPD Committee recently issued General Comment No 3 on women and girls with disabilities, in which it stated that ‘[i]ntersectional discrimination recognizes that individuals do not experience discrimination as members of a homogeneous group, but rather as individuals with multidimensional layers of identities, statuses and life circumstances’, and also issued General Comment No 4 on the right to inclusive education, in which it recognised that disabled people ‘can experience intersectional discrimination based on disability, gender, religion, legal status, ethnic origin, age, sexual orientation or language’ in relation to education.²⁰

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have also weighed in on intersectionality. In General Comment No 28, on the equality or rights between men and women, the Human Rights Committee advised that discrimination on the basis of gender is often ‘intertwined’ with discrimination on other grounds.²¹ In General comment No 20 on non-discrimination in economic, social and cultural rights, the CESCR Committee also acknowledged that several grounds of discrimination can intersect and have a ‘unique and specific impact’ on people.²² The categorisation of human rights treaties has thus been somewhat compensated by the UN treaty bodies’ consideration for intra-group differences.

Research on intersectionality has been undertaken in the field of EU anti-discrimination law. This research revealed the difficulties involved in making linkages between different grounds of discrimination and in capturing intersectional discrimination through the traditional anti-discrimination calculus.²³ The latter requires that the applicant demonstrate unequal treatment on the basis of individual grounds of discrimination, which fails to take into account the intersection of the different grounds. For example, a claim of discrimination that has elements of gender and race cannot be pursued as a single form of discrimination but instead requires the pursuit of two separate claims of discrimination (one on race and one on gender). A further challenge of non-discrimination law, as currently framed, is that establishing intersectional discrimination involves comparing people with others who share none of their characteristics.²⁴ For instance, in the aforementioned claim there would be a comparison of the situation of black women with that of ‘white’ men but not with that of black men or ‘white’ women. In addition, the different grounds of discrimination may vary both in scope and in the possibilities for justification, as is the case with disability which is restricted to the areas of employment and occupation but triggers a duty to provide reasonable accommodation for disabled people.²⁵ Although several solutions have been explored in order to overcome those obstacles through hypothetical comparators and positive duties,²⁶ the fact remains that anti-

¹⁹ Committee on the Rights of the Child, General Comment No 9: the rights of children with disabilities, 27 February 2007, CRC/C/GC/9.

²⁰ Committee on the Rights of Persons with Disabilities, General comment No 3. Article 6: Women and girls with disabilities, CRPD/C/GC/3, 2 September 2016, at para 16; Committee on the Rights of Persons with Disabilities, General comment No 4. Article 24: Right to inclusive education, CRPD/C/GC/4, 2 September 2016, at para 13.

²¹ Human Rights Committee, General Comment No 28: Article 3 (The equality of rights between men and women), 29 March 2000, HRI/GEN/1/Rev.9, at para 30.

²² Committee on Economic, Social and Cultural Rights, General comment No 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, 2 July 2009, at para 17.

²³ Schiek and Lawson (eds), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Farnham: Ashgate, 2011); Schiek and Chege (eds), *European Union Non-discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge-Cavendish, 2009).

²⁴ Elles and Watson, *EU Anti-discrimination law*, 2nd edn (Oxford: Oxford University Press, 2012) at 156.

²⁵ Directive 2000/78/EC, Establishing a general framework for equal treatment in employment and occupation 2000 O.J. L. 303/16.

²⁶ Schiek, Waddington and Bell, *supra* n 7 at 218-22; Jonker and Halrynjo, ‘Multidimensional Discrimination in Judicial Practice. A Legal Comparison between Denmark, Norway, Sweden and the Netherlands’ (2014) 34

discrimination law is originally designed to accommodate only a single ground of discrimination.

In comparison, academic literature on protection against intersectional discrimination by international human rights law is still embryonic albeit slowly emerging. The subject has received some attention particularly as regards gender and race.²⁷ One journal recently addressed the question in a special issue,²⁸ and pointed out the need to complement the explanatory dimension of intersectionality with an exploration of practical methods for its application.²⁹ One scholar demonstrated how international human rights law protects rights relating specifically to women migrant workers.³⁰ The protective impact of international human rights law for several groups of disabled people has also been noted by another two scholars who have thoughtfully outlined the question and identified the CRPD's potential usefulness in affording human rights protection to such groups.³¹ This scholarly work, however, has not yet investigated whether and how an intersectional perspective could afford better human rights protection to these groups. That being said, several scholars have also called for further research into how international human rights law can be applied to practices of intersectional discrimination, and have proposed drawing up interpretive protocols in order to fill this gap.³²

C. Conceptualising Intersectionality in International Human Rights Law

International human rights law consists of various human rights treaties which either apply generically to all persons, like the ICCPR and the ICESCR, or are devoted to the application of human rights to the particular situation of marginalised groups of people, as in the ICERD, the CRC, CEDAW and the CRPD.³³ The UN has deemed these groups as requiring special attention by having their rights specifically protected by a human rights treaty. The disability rights

Netherlands Quarterly of Human Rights 408-33 at 422-28; Chege, 'The European Union Anti-discrimination Directives and European Union Equality Law: the Case of Multi-dimensional Discrimination' (2012) 13 *ERA Forum* 275 at 288; Koldinska, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma women in central and Eastern Europe' in Schiek and Lawson, supra n 23 241 at 253-54.

²⁷ Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 19 *Human Rights Law Review* 453; Vakulenko, 'Gender and International Human Rights Law: the Intersectionality Agenda' in Joseph and McBeth (eds), *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar Publishing, 2010) 97; Ravnbøl, 'The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics' (2010) 17 *International Journal on Minority and Group Rights* 1; Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193; Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71; Crenshaw, supra n 2.

²⁸ Equal Rights Review, *Special Focus: Intersectionality. Vol. 16* (London: Equal Rights Trust, 2016).

²⁹ Truscan and Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 *The Equal Rights Review* 103 at 107-8.

³⁰ Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights & Development Law Journal* 1.

³¹ Degener, 'Intersections between Disability, Race and Gender in Discrimination Law' in Schiek and Lawson, supra n 23 at 29; de Silva de Alwis, 'Mining the Intersections: Advancing the Rights of Women and Children with Disabilities within an Interrelated Web of Human Rights' (2009) 18 *Pacific Rim Law & Policy Journal* 293 at 307-8.

³² Bond, supra n 27 at 75-76; Crenshaw, *Gender-related Aspects of Race Discrimination*, Background Paper for Expert Meeting on Gender and Racial Discrimination, 21-24 November 2000, Zagreb, Croatia (EM/GRD/2000/WP.1) at 14-16.

³³ Two other human rights treaties focus on thematic issues: CAT and CED. See: supra n 10.

movement had been calling for a new binding international legal instrument on the human rights of disabled people, which eventually led to the adoption of the CRPD in 2006.³⁴ While it is true that disabled people were largely invisible within the international human rights framework, other groups likewise are now calling for a human rights treaty to protect the rights that relate specifically to them.

The proliferation of international legal instruments has led to a double phenomenon. On the one hand, it is the result of a desire to adopt human rights treaties for particular marginalised groups. While new treaties were being negotiated, special attention was given to particular sub-groups already recognised in earlier treaties. For example, gender discrimination was specially addressed in the drafting of new human rights treaties, such as the CRPD. By contrast, the issue of disability was given no consideration in the human rights treaties prior to the adoption of the CRC. Interestingly, race and ethnic origin which were given special treatment in a human rights treaty remained unaddressed in later international legal instruments. On the other hand, the more human rights treaties deal with groups sharing a number of characteristics associated with distinct groups of marginalised people, the more these groups will be able to benefit from human rights protection. The greater the attention paid to them in these treaties, the less likely they are to continue to fall through the net. Those left out will generally fail to draw much attention to themselves, with the result that they will be less able to mobilise international support. As far as the CRPD is concerned, disabled women and children have already been the subject of much discussion at UN level since the adoption of the Convention,³⁵ whereas other particular groups of disabled people have by and large been ignored in debates on human rights.³⁶ These groups are just referred to in passing if at all, as will be seen in Part 3. UN treaty bodies therefore tend to continue to focus on unitary categories, except where their corresponding human rights treaty give consideration to particular sub-groups within the groups of marginalised people who fall under the remit of the treaty in question. International human rights law, therefore, is both a consequence and a cause of the varied level of human rights protection for groups who are sharing a number of characteristics which are associated with distinct groups of marginalised people.

International human rights law is a reflection of the way in which legislation and policies regard different groups of marginalised people. The modern emphasis on individualism produced images of identities – women, children, racial minorities, disabled people and so on – that are, in large part, devoid of difference and reflect an understanding of the self that is stable and fixed. The human rights community accordingly tends to concentrate on monolithic identities, thereby creating unitary categories that neatly give way to legal definitions but that inadvertently downplay the multiple and changing characteristics of individuals. These categories are mainly formed on the basis of the most dominant member's experiences but largely disregard the experiences of the group's more disadvantaged members.³⁷ A focus on identities obscures the differences and even the struggles between the members of the group, and both deny people's real life situations and ignore intra-group domination.³⁸ Civil society organisations concerned with particular groups likewise tend to represent their most dominant

³⁴ Lord, 'Disability Rights and the Human Rights Mainstream: Reluctant Gate-Crashers?' in Clifford (ed.), *The International Struggle for New Human Rights* (Philadelphia: University of Pennsylvania Press, 2008) 83 at 88-89.

³⁵ See, for instance: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD17April2013.aspx> [last accessed 12 December 2016].

³⁶ The CRPD does not refer to indigenous disabled people who participated in the Convention's negotiations but were not strong enough to find adherence to their cause. As a result, indigenous origin is solely mentioned in the Preamble.

³⁷ Crenshaw, *supra* n 2 at 1298; Makkonen, *supra* n 3 at 18-22.

³⁸ Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107 at 112.

members and pay less attention to particular sub-groups within these groups.³⁹ The focus on identities moreover overlooks the more generic problems of disadvantage that affect the whole of society.⁴⁰ Intersectionality is to a certain extent a reaction to such essentialism, which ignores intra-group differences that result in systematic subordination.⁴¹ It recognises that people are not constituted by any single essence, and should not have to define themselves according to that essence. An intersectional perspective thus involves looking beyond unitary categories and acknowledging that people are not defined by a single characteristic. What intersectionality requires is that social complexities be taken into account and the reassembling of various dimensions of identity from the artificially constructed monolithic identities be questioned.

The adoption of human rights treaties for particular groups of marginalised people leads to a misrepresentation of the real world. Not only are identities intertwined but the characteristics that form the groups in question are to a large extent social constructs.⁴² Like disability, race and gender are based not only on biological factors but also on social norms and cultural practices. This is not to deny the utility of categories, particularly in the service of providing human rights protection to marginalized groups. A universalistic approach is impossible, since it is impractical to register the various characteristics of every single individual. But a bias for particularism which resists all forms of categorisation also prevents the systematic strengthening of human rights protection and changes to the social patterns of marginalisation. Categorisation is to a large extent necessary in order to take organised action, and legislation and policies need to target issues relating to broader groups.⁴³ Doing this is impossible without establishing the distinctiveness of such groups, and thereby proceeding to a certain level of essentialism.⁴⁴ In addition, people are usually subject to discrimination because of their identity, which marks the boundaries of the group to which they belong.⁴⁵ The point, therefore, should not be to reject categories altogether, but to increase awareness of the pitfalls of ignoring or denying variations within those categories.

D. Intersectional Approach to International Human Rights Law

Anti-discrimination law has come under scrutiny for its failure to accommodate intersectional discrimination. The anti-discrimination calculus operates according to discrete groups, which can be very powerful if an individual belongs to a group targeted by a particular ground of discrimination. However, it also creates or sustains a distorted picture of an individual's lived

³⁹ Verloo, 'Intersectional and Cross-Movement Politics and Policies: Reflections on Current Practices and Debates' (2013) 38 *Signs* 893 at 906-7.

⁴⁰ Fineman (The Vulnerable Subject), supra n 7 at 21-22.

⁴¹ Crenshaw, supra n 2 at 1297-99; McCall, 'The Complexity of Intersectionality' (2005) 30 *Signs* 1771 at 1987; Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1997) 40 *Howard Law Journal* 619 at 634-35.

⁴² Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York/London: Routledge, 1990) at 6; McCall, supra n 41 at 1777.

⁴³ Conaghan, 'Intersectionality and the Feminist Project in Law' in Grabham, Cooper, Krishnadas and Herman (eds), *Law, Power and the Politics of Location; Intersectionality and Beyond* (Abingdon: Routledge-Cavendish, 2009) 21 at 42; Truscan and Bourke-Martignoni, supra n 29 at 106; Makkonen supra n 3 at 22.

⁴⁴ Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 172.

⁴⁵ McCorquodale, 'Group Rights' in Moeckli, Shah, Sivakumaran and Harris (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010) 333 at 334.

experience.⁴⁶ As a rule, intersectional discrimination can only be demonstrated through discrimination on the basis of different grounds that are added up.⁴⁷ Victims of intersectional discrimination, however, face more complex forms of discrimination that *a priori* do not fall within the ambit of anti-discrimination law. In practice, anti-discrimination law compels an invocation of the best-protected ground of discrimination, since this will increase their chances of winning their case.⁴⁸ This constraint denies people's real experience, which cannot be perceived through the perspective of one or another of the particular groups of marginalised people to which they belong.⁴⁹ Anti-discrimination law is thus a form of reductionism that underestimates the fluidity and permeability of identities.⁵⁰ While it may be used to identify cases of intersectional discrimination, it makes it more difficult to tackle these forms of discrimination and provide appropriate responses. It is therefore doubtful whether anti-discrimination law can adequately address intersectionality.

By contrast, international human rights law could be a useful instrument for the accommodation of intersectionality. Not only does it provide for the prohibition of discrimination but it also proclaims a series of other rights, including civil, political, economic, social and cultural rights. Human rights treaties aim to guarantee the human dignity of all people and to ensure their full participation in society. This article argues that this broader dimension, one that aims bring about social changes that empower marginalised groups of people, is a more effective device to addressing intersectionality. Because it requires contextualisation, international human rights law is able to better tackle situations of multiple disadvantages. Such contextualisation goes further than just unpacking these situations and can unravel the underlying causes of increased vulnerability. It can thus address the root causes of multiple disadvantages by activating the whole range of rights that have been added to the non-discrimination clauses. As a result, international human rights law can provide a larger range of remedies to apprehend and remedy instances of intersectionality and indicate, more accurately, what type of measures are needed towards this end. It provides a more comprehensive approach to redress the situation of marginalised groups. Another point is that human rights practice utilises a wider range of tools other than individual litigation. While anti-discrimination law is primarily enforced by judicial mechanisms, international human rights can systematically address disadvantages beyond the facts of individual cases. This has major advantages for addressing instances of intersectionality considering the complexities involved and the prevailing powerlessness of the people affected.

Human rights, therefore, can be applied to fully resolve instances of intersectionality. The hurdle, however, is that international human rights law has lined up the various identities in several group-specific human rights treaties. This raises the question of how to best overcome this hurdle. The myriad of human rights treaties makes it difficult to apply human rights for people who share common characteristics associated with distinct groups of marginalised people, thereby complicating an already complex situation. While intersectionality provides an

⁴⁶ Hendriks, 'The UN Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law Be Modelled Accordingly?' in Waddington and Quinn (eds), *European Yearbook of Disability Law* (Antwerp/Oxford/Portland: Intersentia, 2010) 7 at 14-15; Hannett supra n 4, 69-70.

⁴⁷ Uccellari supra n 3 at 26.

⁴⁸ Milner, 'EU Equality Law. From Protecting 'Groups' to Protection of All' in Wetzel (ed.), *The EU as A Global Player in the Field of Human Rights Law* (London: Routledge, 2014) 213 at 222; Best, Edelman, Krieger and Eliason, 'Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation' (2011) 45 *Law & Society Review* 991 at 1019; European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (Brussels: EU, 2007) at 21.

⁴⁹ Brems, 'Should Pluriform Human Right Become One? Exploring the Benefits of Human Rights Integration' (2014) 4 *European Journal of Human Rights* 447 at 466.

⁵⁰ Quinn, 'Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law' (2016) 16 *The Equal Rights Review* 63 at 69.

opportunity to enhance human rights protection, it can also present a challenge to international human rights law.

As proposed by Johanna Bond, a means of addressing this is to adopt a ‘qualified universalism’, which accommodates human differences across unitary categories.⁵¹ This ‘qualified universalism’ does not preclude categorisation of the kind mandated by a traditional non-discrimination calculus, but requires due consideration to those multiple triggers that increase disadvantage. Such triggers place certain people in a particularly disadvantaged situation. Not only can these triggers include grounds related to those personal characteristics that are more evident, like race or ethnic origin, gender or age, but also grounds related to those that may be invisible, like social and socio-economic background. Such grounds are the very ones that exacerbate existing vulnerabilities. It is often the combination of triggers that creates the most severe forms of intersectional discrimination.⁵² Intersectionality does not deny group experiences, which are important for legislation and policies, but sheds light on differences by looking beyond ‘unidimensional notions of discrimination’.⁵³

Human rights practice, therefore, can find a middle way that integrates both universalism and particularism. Instead of focusing on particular groups of marginalised people as if they were homogeneous, it can thus act through those groups and examine how a number of characteristics may conjointly lead to acute marginalisation. An intersectional approach to international human rights law is facilitated not only through group-specific human rights treaties that address intra-group difference but also in how some human rights treaties apply transversally across all groups. By looking beyond unitary categories and adopting a holistic approach, human rights practice can emphasise the interconnectivity of the various identities. While anti-discrimination law is bound to remain attached to those identities, international human rights law can use its universal dimension to lessen their static nature. Attention would no longer go to the question of membership but instead to the question of hierarchies created within as well as across the categories. These hierarchies create situations of subordination that could be addressed through the proposed intersectional approach. As will be demonstrated in the remainder of this article, an intersectional perspective can strengthen human rights protection for those people who fall under the remit of several group-specific treaties. The focus is not on the combination of different grounds of discrimination – including disability. Instead, it is on a certain number of particular groups of disabled people. This focus is in line with the categories used by international human rights law, which contains several group-specific human rights treaties.

In view of this, the usefulness of adopting new human rights treaties for particular groups of marginalised people is questionable.⁵⁴ The benefits that group-specific human rights treaties confer are to make these groups more visible in the international human rights framework and spell out more clearly their rights in international human rights law. This is the very reason why the ICERD, CEDAW, the CRC and the CRPD were added to the ICCPR and the ICESCR. The risk, however, is that alleviating one hierarchy may generate new intra-group hierarchies, while

⁵¹ Bond *supra* n 27 at 155.

⁵² See, for instance: Committee on the Elimination of All Forms of Discrimination against Women, *Alyne da Silva Pimentel v Brazil*, 10 August 2011, CEDAW/C/49/D/17/2008, at para 7.7.

⁵³ Cho, Crenshaw and McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications and Praxis’ (2013) 38 *Journal of Women in Culture and Society* 785 at 79

⁵⁴ An ‘Open-Ended working group on ageing for the purpose of strengthening the protection of the human rights of older persons’, was created to examine the possibility of elaborating a human rights treaty for older people in 2010. Without diminishing the importance of the rights of older people, the question is not only how such a treaty would improve human rights protection for them but also how this treaty would relate to the CRPD as there is a certain overlap between old age and disability (UN GA, Resolution 65/182, 16 November 2010, A/RES/65/182, at para 28; UN GA, Resolution 67/139, 13 February 2013, A/RES/67/139, at para 1). To be sure, it is regrettable that old age was not even mentioned in the CRPD.

depreciating those groups who have no particular human rights treaty devoted to them. This article therefore argues that the solution lies not in further developing the international human rights framework but in adopting an intersectional approach to international human rights law. This is not just a question of interpretation but of appropriate action. The approach is pragmatic in the sense that it does not involve expanding international human rights law but rather holistically applying existing international legal instruments, as will be endeavoured in the next part.

3. INTERSECTIONALITY AND DISABLED PEOPLE

The adoption of the CRPD provides an opportunity to reassess the operation of intersectionality and to do so in an under-examined context. The section that follows accordingly examines how an intersectional approach to international human rights law can be made to work. It does so through a case study of disabled people. It introduces the CRPD and its relevance for intersectionality and examines intersectionality with respect to three groups of disabled people, namely disabled women, disabled people who belong to racial or ethnic minorities and disabled children. Its aim is to examine the protective impact of international human rights law for these three groups utilising an intersectional perspective.

A. Convention on the Rights of Persons with Disabilities (CRPD)

Prior to the adoption of the CRPD, the international human rights law framework had no binding instrument on the human rights of disabled people. The latter have moreover been largely marginalised and neglected in existing human rights treaties which even fail to mention disability (except the CRC). As a result, disabled people were almost invisible in the international human rights framework. The CRPD was an attempt to remedy this lack of visibility. After four years of negotiations, the Convention was adopted by the UN General Assembly in 2006.⁵⁵ In December 2016, it had attained 160 signatories and 172 ratifications.⁵⁶

The CRPD adopts the social model of disability, thereby giving a new direction to international human rights law.⁵⁷ Rather than focus on deficiencies, this model considers disability a consequence of the way in which society is organised.⁵⁸ The social model had a considerable influence on the drafters of the CRPD, who were eager to have a human rights treaty to fight against the marginalisation of disabled people, as reflected in the Convention's approach to the meaning of disability.⁵⁹ The Convention therefore aims not only to preserve the dignity of disabled people by providing them with optimal prospects for autonomy, but also to abolish the various mechanisms that exclude them.

The CRPD is a deft entry point for researching intersectionality in the area of international human rights law. Besides protecting the human rights of disabled people in general, it pays attention to particular groups of disabled people. Its preamble notes that States Parties are '[c]oncerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language,

⁵⁵ UN GA, Resolution 61/106, 24 January 2007, A/RES/61/106.

⁵⁶ See: <https://www.un.org/development/desa/disabilities/> [last accessed 12 December 2016].

⁵⁷ Kayess and French, 'Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1 at 24; Kanter, *The Development of Disability Rights under International Law. From Charity to Human Rights* (London/New York: Routledge, 2015) at 7-8.

⁵⁸ Oliver, *Understanding Disability. From Theory to Practice*, 2nd edn (New York: Palgrave Macmillan, 2009) at 42-48.

⁵⁹ Article 1, CRPD.

religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.⁶⁰ Moreover, the the CRPD guarantees protection against discrimination 'on all grounds'.⁶¹ The Convention also includes a stand-alone provision on disabled women, which refers to 'multiple discrimination', as well as a stand-alone provision on children.⁶² In addition, the Convention is the latest human rights treaty for a particular group of marginalised people adopted by the UN. This means not only that its provisions are the most advanced, because they build on existing human rights treaties, but also that it is possible to interpret these provisions in the light of those treaties.⁶³ Consequently, it provides an excellent opportunity to examine how international human rights law can better accommodate intersectionality.

B. Particular Groups of Disabled People

In order to study intersectionality in the area of international human rights law, this sub-section examines particular groups of disabled people. Three groups are discussed here: 1) disabled women; 2) disabled people who belong to racial or ethnic minorities and; 3) disabled children. Each of these groups has an additional human rights treaty devoted to it, namely CEDAW, ICERD and the CRC, respectively. While the focus is on the group-specific human rights treaties, attention will also be given to the ICCPR and ICESCR.

In order to show how to use an intersectional approach to international human rights law, the sub-section provides a specific example of intersectional discrimination against each of the aforementioned groups, which is then resolved through the combined application of the CRPD and other relevant international legal instruments. The idea is to demonstrate how an intersectional perspective can offer stronger human rights protection to such groups and thereby test the argument that this perspective is a better tool to accommodate intersectionality than the non-discrimination calculus. The purpose, therefore, is not to provide an exhaustive application of the approach in question but only to sketch out in a preliminary way a number of concrete illustrations that would be part of a larger project and compel a deeper analysis of intersectionality in the future.

(i) Disabled Women

Disabled women are particularly prone to discrimination due to their extremely marginalised position in society.⁶⁴ They face a high level of stereotyping, negative attitudes and social rejection in a way that is usually invisible to the general public. They experience exploitation, violence and abuse at a very high rate and in a very unique way.⁶⁵ This includes not only

⁶⁰ Preamble (p), CRPD.

⁶¹ Article 5 (2), CRPD.

⁶² Articles 6 and 7, CRPD.

⁶³ de Silva de Alwis, *supra* n 31 at 307-8.

⁶⁴ Schur, Kruse and Blanck, *People with Disabilities. Sidelined or Mainstreamed?* (New York: Cambridge University Press, 2013) at 157-58; Leonard Cheshire Disability, *Realising the Rights of Women and Girls with Disabilities*, March 2014, at section 1, available at: http://www.leonardcheshire.org/sites/default/files/Women_and_girls_with_disabilities_0.pdf [last accessed 12 December 2016].

⁶⁵ Fundamental Rights Agency of the EU (FRA), *Violence against women: an EU-wide survey. Main Results* (Vienna: FRA, 2014) at 186-88; Frohmader and Ortoleva, *The Sexual and Reproductive Rights of Women and Girls with Disabilities* (Issues Paper commissioned by the ICPD International Conference on Human Rights) at 5, The Hague, available at: http://www.womenenabled.org/pdfs/issues_paper_srr_women_and_girls_with_disabilities_final.pdf [last accessed 12 December 2016].

domestic violence by family members or strangers but also abuse by caregivers in institutions and residential homes.⁶⁶ Disabled women themselves often do not even realise that they are subject to these practices. There is also a general belief that disabled women are not supposed to have children.⁶⁷ These women are consequently more likely to have their children removed from their care or lose custody of their children in cases of separation or divorce.⁶⁸

Forced sterilisation is a common example of intersectional discrimination against disabled women.⁶⁹ It affects intellectually disabled women in particular.⁷⁰ These women suffer from a unique form of disadvantage arising from being both disabled and female.⁷¹ Such disadvantage takes place not only because they are frequently placed in institutions often with the purpose of suppressing menstruation,⁷² but above all because gender and disability – especially intellectual disability – together work to produce unique forms of discrimination rooted in stigma and stereotyping. This includes, for example, the false assumption that women with disabilities are asexual and unsuitable for motherhood or, by contrast, are hyper-sexual.⁷³ Disabled women also experience a very high level of sexual violence, much more so than with other women.⁷⁴ As a result, forced sterilisation is extensively directed at disabled women. Variants include forced abortion or persistent suggestion to abort and denial of access to fertility treatment. Disabled women also have a limited access to services relating to sexual and reproductive healthcare as well as information on sexual and reproductive rights.⁷⁵ Prenatal, delivery and post-natal care likewise are often ill-adapted to the needs of these women.⁷⁶ It is again assumed that these women do not need such services.

The question is whether an intersectional perspective can strengthen human rights protection for disabled women. To see whether this is so, one should look into the group-specific human rights treaties that apply to them. Forced sterilisation is a violation of the CRPD. The Convention provides that disabled people have the right ‘to decide freely and responsibly on the number and spacing of their children’ and ‘retain their fertility on an equal basis with others’.⁷⁷ The CRPD Committee declared in this regard that States Parties must ‘[c]ombat multiple discrimination through ... prohibiting all forms of forced sterilization’.⁷⁸ States Parties are also called upon to take measures to protect these persons against ‘all forms of exploitation,

⁶⁶ Leonard Chesshire Disability, *Realising the Rights of Women and Girls with Disabilities*, March 2014, at section 3.4, available at: http://www.leonardcheshire.org/sites/default/files/Women_and_girls_with_disabilities_0.pdf [last accessed 12 December 2016].

⁶⁷ Schur, Kruse and Blanck, supra n 63 at 177; Serra, ‘Feminism and Women with Disabilities’ (2015) 15 *The Age of Human Rights Journal* 98 at 107-8.

⁶⁸ Leonard Chesshire Disability, supra n 65 at section 3.4.; Frohmader and Ortoleva, supra n 64 at 5-6.

⁶⁹ Frohmader and Ortoleva, supra n 64 at 4; Schur, Kruse and Blanck, supra n 63 at 177.

⁷⁰ World Health Organisation (WHO), *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement by OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO* (Geneva: WHO, 2014) at 5; World Health Organisation (WHO), *World Report on Disability* (Geneva: WHO, 2011) at 78; FRA, supra n 64 at 75-76; Frohmader and Ortoleva, supra n 64 at 4-5 and 7;

⁷¹ Makkonen, supra n 3 at 11.

⁷² Leonard Chesshire Disability, supra n 65 at section 3.4; WHO, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*, supra n 70 at 5-6.

⁷³ S. Vaidya, ‘Women with Disability and Reproductive Rights: Deconstructing Discourses’ (2015) 45 *Social Change* 517 at 521-22 and 523-35; Frohmader and Ortoleva, supra n 64 at 5-6; WHO, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*, supra n 70 at 5.

⁷⁴ Vaidya, supra n 72 at 522.

⁷⁵ WHO, *World Report on Disability*, supra n 69 at 61; Frohmader and Ortoleva supra n 64 at 6-7.

⁷⁶ Alvares, Case, Kronenberger, Ortoleva and Tosti-Vasey, *Reproductive Health Justice for Women with Disabilities* (Washington: Centre for Women Policy Studies, 2011) at 6, available at: <http://www.centerwomenpolicy.org/programs/waxmanfiduccia/2011OnlineSeriesBarbaraWaxmanFiduccia.asp> [last accessed 12 December 2016].

⁷⁷ Article 23 (1) (b) and (c), CRPD.

⁷⁸ Committee on the Rights of Persons with Disabilities, General comment No 3. Article 6: Women and girls with disabilities, CRPD/C/GC/3, 2 September 2016, at para 62.

violence and abuse, including their gender-based aspects'.⁷⁹ The CRPD moreover stipulates that they must 'combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life'.⁸⁰ Forced sterilisation is also a violation of CEDAW. The Convention requires that States Parties guarantee 'the safeguarding of [their] function of reproduction' and the right to 'decide freely and responsibly on the number and spacing of their children'.⁸¹ While CEDAW has been criticised for not sufficiently addressing gender-based violence,⁸² the CEDAW Committee recommended that measures should be taken to combat such practices.⁸³ The Declaration on the Elimination of Violence against Women (DEVAW) also recognises that 'some groups of women, such as ... women with disabilities ... are especially vulnerable to violence'.⁸⁴ The CESCR Committee moreover considered that the forced sterilisation of 'a woman with disabilities without her prior informed consent' violates her right to family life.⁸⁵ The Special Rapporteur against Torture also expressed the view that such sterilisation violates the prohibition of torture,⁸⁶ which adds a dimension of physical integrity to the issue.

Regarding services, the CRPD states that disabled people must have access to healthcare 'including in the area of sexual and reproductive health' as well as 'reproductive and family planning education'.⁸⁷ It therefore provides disabled women with a broad right to reproductive healthcare, reproduction and family life.⁸⁸ Considering that '[w]omen with disabilities ... often have difficulty with physical access to health services' and that '[they] are particularly vulnerable', the CEDAW Committee also recommended taking measures to 'ensure that health services are sensitive to the needs of women with disabilities'.⁸⁹ It is thus clear that such services must be attentive to their rights, including their sexual and reproductive rights, which are explicitly referred to in the CRPD (which was adopted after CEDAW). Healthcare services should be accessible to disabled women, for instance, by making available special tools and by sensitising medical personnel.

Therefore, the adoption of an intersectional approach, in particular with the CRPD, results in considerable gains for disabled women. In addition to several provisions taking gender into account, the Convention includes a stand-alone provision on disabled women, which explicitly mentions that they are subject to 'multiple discrimination'. There is thus a 'dual approach' to gender related issues in the CRPD.⁹⁰ In contrast, CEDAW considers women a homogeneous group, with the exception of rural women.⁹¹ The CEDAW Committee has remedied this problem, although it still focuses mainly on gender alone.⁹² Other UN monitoring mechanisms have also paid attention to disabled women.

⁷⁹ Article 16 (1), CRPD.

⁸⁰ Article 8 (1) (b), CRPD.

⁸¹ Articles 11 (1) (f) and 16 (1) (e), CEDAW.

⁸² Otto, 'Women's Rights' in Moeckli, Shah, Sivakumaran and Harris, supra n 45, 316 at 324-26.

⁸³ Committee on the Elimination of All Forms of Discrimination against Women, General Comment No 19 on violence against women, 30 January 1992, A/47/38, at para 24.

⁸⁴ Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104.

⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment No 5: Persons with disabilities, 9 December 1994, E/1995/22, at para 31.

⁸⁶ Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2003, A/HRC/22/53, at para 48.

⁸⁷ Articles 23 (1) (b) and 25 (a), CRPD.

⁸⁸ WHO, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization*, supra n 70 at 6.

⁸⁹ CEDAW Committee, General Recommendation No 24 on women and health, 9 July 1999, A/54/38 at 5, at para 25.

⁹⁰ Kim, supra n 87 at 120-21.

⁹¹ Article 14, CEDAW.

⁹² Truscan and Bourke-Martignoni, supra n 29 at 119.

As demonstrated by the example, the CRPD together with CEDAW offers claims that not only go beyond the prohibition of discrimination based on individual grounds but also provide a broader set of remedies in order to combat forced sterilisation. Both the high level of attention to disabled women in the CRPD and the whole gamut of obligations resulting from different human rights treaties help to find an appropriate solution. While forced sterilisation can be considered a form of intersectional discrimination, an intersectional approach to international human rights law allows to capture further the complexity of intersectionality and to tackle the issue from a number of different angles. By integrating the broader spectrum of human rights, such a perspective can bring many other related aspects to the surface.

As a result, the combined application of different human rights treaties can bear fruit with regard to disabled women despite some major differences remaining between the CRPD and CEDAW. The CRPD extensively deals with disabled women. The CEDAW Committee also has contributed to bringing a gender-based perspective to disability. Given the attention paid to the intersection of disability and gender, international human rights law can offer strong protection to disabled women.

(ii) Disabled People Belonging to Racial or Ethnic Minorities

Although there is still a lack of research on the intersection between race and disability, experience shows that society is particularly prejudiced against disabled people who belong to racial or ethnic minorities. The main obstacle is their cultural and linguistic particularities, which create communication barriers and may lead to stigma and stereotyping.⁹³ In some countries, they are excluded from social protection if they are migrants, since national legislation provides that such protection is only granted to persons holding a permanent residency permit.⁹⁴ Moreover, disabled people from racial or ethnic minorities are often labelled as (mentally) disabled people, and therefore likewise suffer from discrimination on the basis of disability.⁹⁵ As will be discussed in the next subsection, this occurs particularly in the field of education, which is where the intersection of race and disability has received the greatest attention.

A common form of intersectional discrimination against disabled people belonging to racial or ethnic minorities is limited job opportunities. These disabled people have severe difficulties in finding jobs due to a combination of several factors, including educational disadvantages, language barriers and lack of accessibility.⁹⁶ They are disproportionately unemployed, and find themselves more often in low status employment compared with both non-disabled people from racial or ethnic minorities and 'white' disabled people.⁹⁷ As a result, people who belong to racial or ethnic minorities frequently live in poverty, which itself contributes to the greater occurrence of disability amongst them.⁹⁸ The prejudice results from the intersection of different grounds of discrimination, which create unique forms of disadvantage in the labour market. While it can be partly explained by disabled people and people from racial or ethnic minorities equally suffering from discrimination, the work

⁹³ Stienstra, 'Race/Ethnicity and Disability Studies' in Watson, Roulstone and Thomas (eds), *Routledge Handbook of Disability Studies* (London: Routledge, 2012) 376 at 380-81.

⁹⁴ FRA, supra n 64 at 55.

⁹⁵ Goodley, *Disability Studies. An Interdisciplinary Approach* (London: SAGE Publications, 2011) at 36; Lawson, 'Disadvantage at Intersection of Race and Disability: Key Challenges for EU Non-Discrimination Law' in Schiek and Lawson, supra n 23 at 49-50.

⁹⁶ Lawson, supra n 94 at 54.

⁹⁷ Strauser, *Career Development, Employment, and Disability in Rehabilitation From Theory to Practice* (New York: Springer, 2013) at 152-153; Schur, Kruse and Blanck, supra n 64 at 182-183.

⁹⁸ Schur, Kruse and Blanck, supra n 63 at 183-4.

opportunities of disabled people from racial or ethnic minorities are significantly lower in statistical terms.⁹⁹ This not only further marginalises them but also prevents their integration into communities. One example occurred in the Netherlands, where a blind Turkish woman wanted to take a test in Braille instead of an oral examination to determine her position within her organisation.¹⁰⁰ She asked for the Braille test because the oral examination was especially difficult given her linguistic skills. However, she was refused the test in question. The Dutch Equal Treatment Commission advised that she should have the right to take the test in Braille and that she was being discriminated against due to an ‘intersection’ between her Turkish background and her blindness.¹⁰¹

The question is how an intersectional approach can be used to resolve the problem. Disabled people belonging to racial or ethnic groups fall under the remit of both the CRPD and ICERD. The CRPD does lay down some of the measures that can be relevant to them. Article 27 (1) of the Convention requires that States Parties ensure that their labour markets are ‘open, inclusive and accessible’ to disabled people. It also makes provisions for equal conditions of recruitment, hiring and employment and career advancements ‘including equal opportunities and equal remuneration for work of equal value’.¹⁰² Although it provides that disabled people are entitled to ‘recognition and support of their specific cultural and linguistic identity’,¹⁰³ this relates more to deaf and blind people. The CRPD does not have specific provisions for disabled people from racial or ethnic minorities, and nowhere does it refer to race or ethnic origin (except in the preamble).¹⁰⁴ This is in stark contrast with the attention given to gender in the Convention. The question is therefore whether the ICERD can provide a race based perspective on disability. The ICERD guarantees equal treatment in the field of work.¹⁰⁵ While the Convention is not concerned with intersectionality, the CERD Committee examined gender related dimensions of racial discrimination.¹⁰⁶ But it never focused on disability, or any discrimination ground other than gender. The Durban Declaration and Programme of Action includes a commitment to improve the prospects of persons subject to ‘multiple discrimination’.¹⁰⁷ It also encouraged NGOs and the private sector ‘to address the situation of persons with disabilities who are subject to racism’ and invited the UN to elaborate ‘an integral and comprehensive international convention to protect and promote the rights and dignity of disabled people’.¹⁰⁸ The encouragement to adopt such a convention, i.e. the CRPD, shows a lack of direction with regard to the rights relating specifically to disabled people belonging to racial or ethnic minorities. The call of the Durban Declaration and Programme of Action to have more attention paid to race in relation to disability was not however followed up.

Although the CRPD and ICERD provide a limited solution and each fails to refer to race and disability, respectively, an intersectional perspective could help to articulate a greater number of remedies for the low degree of access to employment of disabled people belonging to racial or ethnic minorities. While the issue can be addressed through anti-discrimination law, international human rights law can be fine-tuned in order to bring about tailored measures to

⁹⁹ Strauser, *supra* n 96 at 158.

¹⁰⁰ Burri, ‘Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission’s Case Law’ in Schiek and Lawson, *supra* n 23, 97 at 104-105.

¹⁰¹ Oordeelnummer 2006-256, para 3.26-27, available at: <http://www.mensenrechten.nl/publicaties/oordelen/2006-256/detail> [last accessed 12 December 2016].

¹⁰² Article 27 (1) (a), CRPD.

¹⁰³ Article 31 (2) (4), CRPD.

¹⁰⁴ Lawson, *supra* n 91 at 47; Hendriks, *supra* n 45 at 23.

¹⁰⁵ Article 5 (e) (i), ICERD.

¹⁰⁶ Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No 25: Gender Related Dimensions of Racial Discrimination, 20 March 2000, HRI/GEN/1/Rev.6, at 214.

¹⁰⁷ Paras 79, 104, 172 and 212, Durban Declaration and Programme of Action.

¹⁰⁸ Paras 57 and 180, Durban Declaration and Programme of Action.

increase their job opportunities. Further efforts, however, need to be done to strengthen human rights protection for disabled people from racial or ethnic minorities. This would involve a closer reading of the CRPD through a triggering of its provisions relating to cultural and linguistic particularities and a greater use of those relating to awareness-raising, thereby going beyond establishing intersectional discrimination. By adopting an intersectionality approach to applying international human rights law, the CRPD Committee and CERD Committee, but also the other UN treaty bodies, could investigate how disability and race intersect and advice on measures for such people.

The result is that disabled people from racial or ethnic minorities could benefit more from the combined application of different human rights treaties. The problem is that the CRPD is principally concerned with intersectionality with specific regard to disabled women and children. Although the Durban Declaration and Programme of Action gave disabled people from racial or ethnic minorities some consideration, it was sporadic and eventually forgotten. No attention was given to this group by any of the UN treaty bodies. Furthermore, the intersection of disability and race has hitherto gone almost unnoticed in academic debates. While some attention was given to race in disability studies,¹⁰⁹ research on human rights has left this intersection untouched. This gap has negatively impacted human rights protection for disabled people who belong to racial or ethnic minorities, which has led to their invisibility within the international human rights framework up until now.

(iii) Disabled Children

Disabled children find themselves at the intersection of age and disability. This group raises not pure questions of intersectionality, since the group of children has particular features without equivalence in terms of discrimination. The ground of age is much broader than childhood. Disabled children, however, can rely on both the CRPD and the CRC, which is the reason why they have been included in the present article.

Disabled children experience significant stigma, prejudice and discrimination. They are considered inferior as compared to other children, and sometimes perceived to bring shame on their families.¹¹⁰ They are subject to particular forms of violence, including sexual violence, and to punishment.¹¹¹ Disabled children are regularly separated from their families and placed in institutions, where they live in bad conditions.¹¹² Another factor is that their disabilities affect not only them but also their parents, who face challenges, for instance, in terms of combining parenthood responsibilities with employment. As a result, families with disabled children live, by and large, in poverty.¹¹³ Because the parents are usually the only ones caring for these children, they have little or no respite time, and have difficulties in coping with their own

¹⁰⁹ See: Erevelles and Minear, 'Unspeakable Offences. Untangling Race and Disability in Discourses of Intersectionality' (2010) 4 *Journal of Literary & Cultural Disability Studies* 127; Ahmad (ed.), *Ethnicity, Disability and Chronic Illness* (Buckingham: Open University Press, 2000); Stienstra, supra n 89; Goodley, supra n 91 at 36-39.

¹¹⁰ UNICEF, *The State of the World's Children. Children with Disabilities* (New York: UNICEF, 2013) at 2, available at: https://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf [last accessed 12 December 2016].

¹¹¹ Kanter, supra n 55 at 225.

¹¹² UNICEF, supra n 105 at 46-47.

¹¹³ *Ibid.* at 14.

lives.¹¹⁴ Moreover, these parents may themselves experience associational discrimination. Discrimination on the basis of disability actually affects not only disabled people but also those who are close to them such as family members, a phenomenon called ‘discrimination by association’.

The area of education is one in which the exclusion of disabled children is particularly acute. School buildings, including classrooms and toilets, are often not accessible to disabled children.¹¹⁵ Those who suffer mental health problems do not get the support they need. Another reason is that disabled children are often regarded as unable to fit into the general education system. There is a general belief that these children would compromise the quality of education, a view exacerbated by the fact that standard tests are inappropriate for them.¹¹⁶ In many parts of the world, disabled children can therefore not go to school.¹¹⁷ In industrialised countries, disabled children are often educated in special schools, since education systems are not sufficiently adapted to their particular needs.¹¹⁸ These schools often provide a lower standard of education, and weaken their pupils’ opportunities as future adults. By contrast, disabled children who are educated in mainstream schools have a much greater chance of working in the labour market and of participating in cultural, recreational and political life.¹¹⁹

The question is whether an intersectional perspective can afford better human rights protection for disabled children. The latter fall under the remit of the CRPD and the CRC. The CRPD guarantees the right to inclusive education for disabled people. Article 24 (1) of the Convention provides that States Parties have to ‘ensure an inclusive education system at all levels and lifelong learning’. They have to guarantee that ‘[p]ersons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others’ and ‘receive the support required, within the general education system, to facilitate their effective education’.¹²⁰ The CRPD moreover provides for measures fostering ‘at all levels of the education system ... an attitude of respect for the rights of persons with disabilities’.¹²¹ The principle of inclusive education was for the first time recognised in the Salamanca Statement,¹²² and is thus not included in the CRC (which predates the Salamanca Statement). The CRC can nonetheless help in interpreting the CRPD. It sets out the general principle of the rights of the child to life, survival and development.¹²³ Article 23 (3) of the CRC (its stand-alone provision on disabled children) requires that education for disabled children be provided ‘in a manner conducive to the child’s achieving the fullest possible social integration’. Taken together these provisions set out what should be the aims of inclusive education for disabled children. As

¹¹⁴ Inclusion Europe, *Children’s rights for all! Implementation of the United Nations Convention on the Rights of the Child for children with intellectual disabilities* (Inclusion Europe: Brussels, 2011) at 14, available at: <http://www.eenet.org.uk/resources/docs/6130.pdf> [last accessed 12 December 2016].

¹¹⁵ Inclusion International, *Better Education for all when we are included too. A Global Report* (Inclusion International: Salamanca, 2009) at 82, available at: http://ii.gmalik.com/pdfs/Better_Education_for_All_Global_Report_October_2009.pdf [last accessed 12 December 2016].

¹¹⁶ Slee, *The Irregular School: Exclusion, Schooling and Inclusive Education* (London/New York: Routledge, 2011) at 71.

¹¹⁷ UNICEF, *supra* n 105 at 27-28.

¹¹⁸ UNICEF Innocenti Research Centre, *Promoting the Rights of Children with Disabilities* (Florence: UNICEF, 2007) at 17, available at: http://www.un.org/esa/socdev/unyin/documents/children_disability_rights.pdf [last accessed 12 December 2016].

¹¹⁹ Rieser, *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities*, 2nd edn (London: Commonwealth Secretariat, 2012) at 289-91.

¹²⁰ Article 24 (2) (b) and (d), CRPD.

¹²¹ Article 8 (2) (b), CRPD.

¹²² World Conference on Special Needs Education, *Salamanca Statement and Framework for Action on Special Needs Education: Access and Equality*, Salamanca, 7-10 June 1994.

¹²³ Article 6 (2), CRC.

recommended by the Committee on the Rights of the Child, such education requires ‘the reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies’.¹²⁴ In a report specifically on disabled children, the Special Rapporteur on the Right to Education also pointed out the need to make ‘structural changes (for instance, organization, curriculum and teaching and learning strategies)’ in order to include these children in education.¹²⁵ The CRPD Committee has also considered that inclusive education ‘involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education’.¹²⁶ Instead of compelling disabled children to conform to a particular kind of education, international human rights law therefore obliges states to design education systems that are inclusive from inception.

The result is that an intersectional perspective proves very helpful for disabled children. The combined application of different human rights treaties gives disabled children a high level of human rights protection. Disabled children are at the heart of both the CRPD and the CRC. The CRPD contains a stand-alone provision on disabled children in addition to several provisions that provide for age-appropriate measures. As with disabled women, it thus adopts a ‘dual approach’ for disabled children, although it makes no reference to ‘multiple discrimination’. The CRC likewise includes a stand-alone provision on disabled children, while the CRC Committee has given special attention to these children. Both the CRPD and CRC Committees in addition to the Special Rapporteur on the Right to Education addressed the issue.

The combined application of the CRPD and the CRC can result in an expansive set of remedies for the inclusion of disabled children in education. Such remedies range from the improvement of accessibility and provision of support and to the adaptation of curricula and changing of social attitudes. The comprehensive set of obligations for achieving inclusive education, therefore, helps to remedy their situation in a holistic manner. While anti-discrimination law focuses on their particular disadvantage in a given educational context, an intersectional perspective can make international human rights law a more effective tool for accommodating intersectionality with all its complexities.

An intersectional approach to international human rights shows that both the CRPD and the CRC each have a different emphasis but can complement each other. Whereas the CRPD includes provisions that have been drafted mainly with adults in mind, such as the right to independent living, the CRC does not really prescribe inclusion for disabled children, as is the case with education. The CRC was drafted at a time when full participation in society was not regarded as a primary objective for disabled people. Although the Convention – for the first time in a human rights treaty – pays particular attention to disability, it aims more at protecting disabled children against discrimination than at guaranteeing their inclusion in society.¹²⁷ However, it does provide a child-based perspective that has ready application to disabled children. References to the CRC Committee’s recommendations by the (more recently) established CRPD Committee confirm that the CRPD and the CRC are very much intertwined.¹²⁸

As explained earlier, whether the exclusion of disabled children from the general education system amounts to a form of intersectional discrimination is debatable. Such

¹²⁴ Committee on the Rights of the Child, General comment No 1: The aims of education (Article 29 (1)), 17 April 2001, CRC/GC/2001/1, at para 18.

¹²⁵ Munoz, The right to education of persons with disabilities. Report of the Special Rapporteur on the right to education, 19 February 2007, A/HRC/4/29, at para 12.

¹²⁶ General comment No 4. Article 24: Right to inclusive education, CRPD/C/GC/4, 2 September 2016, at para 11.

¹²⁷ Sabatello, ‘Children with Disabilities: A Critical Appraisal’ (2013) 21 *International Journal of Children’s Rights* 464 at 469-70.

¹²⁸ McCallum and Martin, ‘Comment: The CRPD and Children with Disabilities’ (2013) 20 *Australian International Law Journal* 17 at 26.

exclusion may imply discrimination on the basis of disability only. Where questions of intersectionality may arise are situations where disability is combined with other grounds of discrimination, such as, for instance, the practice of transferring children from racial or ethnic minorities to special schools. Because these children are recurrently found to have emotional and behavioural difficulties and are less likely to benefit from inclusion programmes, they tend to be over-represented in such schools.¹²⁹ They are then pushed into leaving the general education system because they are considered disabled, although they may be fully capable of staying on. This concerns boys in particular,¹³⁰ which adds gender to the intersection of disability, age and race. In this regard, the European Court of Human Rights has ruled that Roma children's exclusion from the general education system constituted racial discrimination in several cases including the *D.H. and others v. Czech Republic* case.¹³¹

Besides the CRPD and the CRC, the ICERD could be applied in the present example, since race comes into play as well. The Convention prohibits racial discrimination in the enjoyment of the right to education,¹³² and therefore the exclusion of children from the general education system on the basis of race or ethnic minority. In addition, this type of exclusion is in contravention of the CRPD, because disability is invoked to discriminate against these children. The CRPD Committee has acknowledged that 'intersectional discrimination' occurs in education and has listed a number of measures for disabled girls (but not for other groups of disabled people).¹³³ The problem is that the alleged motive may differ from the real one, although it can be said that disability is largely a social construct. The disability factor, however, is overlooked with the result that the intersection of disability and race remains generally ignored.

The question therefore is whether the CRC can provide a way forward to resolve the problem. As with the ICERD, the CRC requires that States Parties prevent discrimination on the basis of race or ethnic minority. The Convention moreover provides that education must inculcate tolerance among children, including respect for racial minorities.¹³⁴ But there is still no indication whatsoever on how to take into account linguistic and cultural particularities when designing inclusive education systems.

This analysis has demonstrated that more needs to be done offer better human rights protection to children from racial or ethnic minorities who are considered disabled. As seen from the discussion above, the triple combination of disability, age and race exacerbates the problem but leads to under-inclusion. This occurs when certain grounds are made invisible because attention is focused solely on one ground.¹³⁵ Race therefore receives the most attention, whereas disability is practically ignored. The result is that attention is paid exclusively to

¹²⁹ Tomlinson, 'Special Education and Minority Ethnic Young People in England. Continuing Issues' (2015) 37 *Discourse: Studies in the Culture and Politics of Education* 1 at 3-5; Schur, Kruse and Blanck, supra n 63 at 188-89; UNDP, *Roma Education in Comparative Perspective. Analysis of the UNDP/World Bank/EC Regional Roma Survey* (UNDP: Bratislava, 2011) at 66-70, available at: <http://www.eurasia.undp.org/content/dam/rbec/docs/Roma-education-in-comparative-perspective.pdf> [last accessed 12 December 2016].

¹³⁰ Strand and Lindsay, 'Ethnic Disproportionality in Special Education: Evidence from an English Population Study' (2009) 43 *Journal of Special Education* 174 at 176-77; Tomlinson, supra n 128 at 8.

¹³¹ *D.H. and others v Czech Republic* Application No 57325/00, Merits, 13 November 2007. See also: *Sampanis and others v Greece* Application No 32526/05, Merits, 5 June 2008; *Oršuš and others v Croatia* Application No 15766/03, Merits, 16 March 2010; *Horváth and Kiss v Hungary* Application No 15766/03, Merits, 29 January 2013.

¹³² Article 5 (c), ICERD.

¹³³ General comment No 4 Article 24: Right to inclusive education, CRPD/C/GC/4, 2 September 2016, at paras 13 and 44.

¹³⁴ Article 29 (1), CRC.

¹³⁵ Bamforth, Malik and O'Connell, *Discrimination Law: Theory and Context* (London: Sweet and Maxwell, 2008) at 533-553; Crenshaw, supra n 2 at 4-8.

discrimination on the basis of race or ethnic minority. This is reflected in the above-mentioned case of *D.H. and others v. Czech Republic* where what was condemned was the segregated education of Roma children but not that of disabled children in general. The risk when having recourse to anti-discrimination law, therefore, is that one even unconsciously pushes forth one ground to allege discrimination at the expense of others, which confirms the close connection of anti-discrimination law to identities. The question is whether an intersectional approach international human rights law can provide a corrective to these limitations. As mentioned with regard to the intersection of race and disability, the CRPD could be applied with greater attention to cultural and linguistic particularities so as to define measures for including (allegedly) children from racial or ethnic minorities in education. By contrast, anti-discrimination law leads, at best, to a partial picture and provides, in any event, a narrow answer to the problem. The result is that children who belong to racial or ethnic minorities and suffer prejudice in the name of disability are one of the most invisible groups in international human rights law.

4. 'INTERSECTIONAL MAINSTREAMING' IN INTERNATIONAL HUMAN RIGHTS LAW

This section examines the capacity of UN treaty bodies to afford better human rights protection to those who fall under the remit of several group-specific human rights treaties. It does so by exploring the way in which such bodies could increase their collaboration in order to better address intersectionality.

UN treaty bodies have given some consideration to intersectionality. However, their engagement with intra-group differences has largely been unequal. Some of these bodies, like the CEDAW Committee, have over the years been consistently sensitive to intragroup differences,¹³⁶ whereas others, like the Human Rights Committee, have merely acknowledged that different discrimination grounds can be intertwined.¹³⁷ UN treaty bodies have thus been addressing intersectionality disparately while concentrating on gender in particular.¹³⁸ In doing so, they have given more attention to the ground that relates to their corresponding human rights treaty, as the CEDAW Committee has done with gender.¹³⁹ It goes without saying, however, that UN treaty bodies cannot but consider groups primarily from the perspective of the said human rights treaty and not from that of several human rights treaties concurrently if they are to remain within the boundaries of their mandates. It is therefore true that they are, to a certain extent, ill-equipped to address intersectionality. The way in which the international human rights framework has been developed is therefore intrinsically an obstacle.¹⁴⁰ Nonetheless, this

¹³⁶ *Supra* n 16-18.

¹³⁷ *Supra* n 21.

¹³⁸ See: Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No 25: Gender Related Dimensions of Racial Discrimination, 20 March 2000, HRI/GEN/1/Rev.6 at 214; Human Rights Committee, General Comment No 28: Article 3 (The equality of rights between men and women), 29 March 2000, HRI/GEN/1/Rev.9; Committee on the Elimination of All Forms of Discrimination against Women, The equal right of men and women to the enjoyment of all economic, social and cultural rights, 11 August 2005, E/C.12/2005/3; Committee on the Rights of Persons with Disabilities, General comment No 3. Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3.

¹³⁹ Truscan and Bourke-Martignoni, *supra* n 29 at 122-23.

¹⁴⁰ Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights' (2004) *Georgetown Journal of Gender and the Law* 897 at 909.

article argues that UN treaty bodies still have the capacity to achieve ‘intersectional mainstreaming’ in international human rights law.

These treaty bodies have asserted that intersectionality leads to further disadvantages but have offered no explanation for these disadvantages.¹⁴¹ The next step, therefore, is to investigate the cases in which such disadvantages occur as well as the underlying causes and the way forward. An intersectional approach, however, requires enhanced collaboration between the UN treaty bodies. This is the sine qua non condition for looking to intra-group differences, even though such collaboration admittedly would not be enough to reach that goal. In order to adopt a truly intersectional perspective, they would also have to distinguish between those situations where grounds of discrimination intersect with each other from situations where these grounds are just aggregated.

Attempts have been made to reform UN treaty bodies because of their relative ineffectiveness. A proposal was made to consolidate the separate bodies into a single UN treaty body. The overlapping of provisions in human rights treaties was cited as a reason for consolidation.¹⁴² Although intersectionality was left out of the argument, it could have been taken as an example. The proposal to create a single treaty body, however, was eventually rejected. Arguments against consolidation included the risk of giving away expertise on the different groups of marginalised people.¹⁴³ Another obstacle was the prerequisite of having to amend all the human rights treaties.¹⁴⁴ The failed attempt to reform the UN treaty bodies was followed by a consultation on the way in which these bodies could be strengthened, which ended up in a report drafted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) as well as a resolution adopted by the UN General Assembly.¹⁴⁵ While none of them mention intersectionality, the General Assembly encouraged the UN treaty bodies to continue their collaboration.¹⁴⁶

The same result, and even more, could be achieved through other means, especially since nothing guarantees that a single UN treaty body would pay more attention to intersectionality. Collaboration between the UN treaty bodies could be enhanced to a much greater degree than is presently the case. The reporting procedure has been revised to prevent duplication.¹⁴⁷ The UN treaty bodies also meet through the Inter-Committee Meetings and the Annual Meeting of Chairpersons.¹⁴⁸ Collegial work, however, should be further facilitated with a view to fostering greater dialogue between these bodies. In view of this, intersectionality could be more adequately considered through the adjustment of their working methods. The UN treaty bodies could refer more often to each other’s concluding observations or even adopt – partially –

¹⁴¹ Chow, *supra* n 27 at 472-74.

¹⁴² OHCHR, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, 22 March 2006, HRI/MC/2006/2, at paras 30, 44 and 51, available at: <http://www2.ohchr.org/english/bodies/icm-mc/docs/HRI.MC.2006.2.pdf> [last accessed 12 December 2016].

¹⁴³ O’Flaherty and O’Brien, ‘Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body’ (2007) 7 *Human Rights Law Review* 141 at 165-72; Johnstone, ‘Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body’ (2007) 7 *Human Rights Law Review* 173 at 185.

¹⁴⁴ Scheinin, ‘International Mechanisms and Procedures for Monitoring’ in Krause and Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University-Institute for Human Rights, 2009) 601 at 607.

¹⁴⁵ OHCHR, *Strengthening the United Nations human rights treaty body system A report by the United Nations High Commissioner for Human Rights* (Geneva: OHCHR, 2012), available at: <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBSstrengthening.pdf> [last accessed 12 December 2016]; UN GA Resolution 68/268, 21 April 2014, A/RES/68/268.

¹⁴⁶ UN GA Resolution 68/268, 21 April 2014, A/RES/68/268, at para 39.

¹⁴⁷ Scheinin, *supra* n 143 at 606.

¹⁴⁸ See: <http://www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/MeetingChairpersons.aspx> [last accessed 12 December 2016].

common concluding observations to offer better human rights protection to those who fall under the remit of several group-specific human rights treaties (provided the State under review ratified the treaties in question). They could also draft ‘joint general comments’,¹⁴⁹ as already done by the CEDAW Committee and the CRC Committee,¹⁵⁰ which is perhaps the easiest way to start with and which may eventually have the broadest impact. They could also consider cases of alleged intersectional discrimination not just on their own, as done by the CEDAW Committee, but together with other such bodies, leading to ‘joint decisions’, as well as to ‘joint common inquiries’. In this regard, a proposal to establish a joint UN treaty body working group on communications is still on the table.¹⁵¹ In addition, UN treaty bodies could increase their collaboration by holding their sessions simultaneously, where possible, and also by having their secretariats cooperate more closely. Secondments could also be organised between these bodies as well as to common working groups.

Nonetheless, the question remains whether in doing so the UN treaty bodies would not violate the very human rights treaties that created them.¹⁵² As mentioned earlier, this was an argument made against their consolidation, and endeavours to increase their collaboration through consolidation may face the same obstacle. Except for the drafting of common general comments, UN treaty bodies could overstep their mandates should they begin to deal with issues in the light of human rights treaties other than those to which they correspond. Therefore, a new common protocol would be necessary to allow them to adopt common concluding observations and decisions as well as to hold partially shared sessions. Such a protocol has already been proposed in relation to the ICCPR and the ICESCR.¹⁵³ While further collaboration could be achieved by adjusting the working methods, a higher level of integration would require the UN treaty body mandates to be revised. The consequence is that all states within the UN would have to agree on such a revision, which on a practical level would be impossible.

In view of this, solutions must be found to enhance collaboration between the UN treaty bodies without amending the human rights treaties. Informal means of collaboration, through secondments and secretariat cooperation, as well as the formation of common views, through ‘joint general comments’ and ‘joint discussions’, could meet the threshold and play an important role in achieving this objective. It would be particularly important to also involve the Human Rights Committee and the CESCR Committee, which are well placed to create a new dynamism around intersectionality.¹⁵⁴ There is room for some flexibility in trying to achieve the best possible arrangement, and UN treaty bodies have already exploited this in the past. The CRPD Committee is currently testing such arrangements by organising side-events as well as ‘joint meetings’ on areas of common concern with other UN treaty bodies.¹⁵⁵ The CRC Committee, too, has made the step of appointing ‘focal points’ in each of the UN treaty bodies.¹⁵⁶ This could pave the way for adopting further ‘joint general comments’ in addition to organising ‘joint discussions’ in the future. Instead of advising on the various rights in relation to one particular group of marginalised people, they could examine those rights across categories and zero in on

¹⁴⁹ OHCHR, *supra* n 141 at para 20.

¹⁵⁰ Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, Joint general recommendation/general comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices, 4 November 2014, CEDAW/C/GC/31-CRC/C/GC/18.

¹⁵¹ OHCHR, *supra* n 144 at 68.

¹⁵² All UN treaty bodies were created by their corresponding human rights treaty with the exception of the CESCR Committee, which was set up by the Economic and Social Council (ECOSOC, Resolution 1985/17, 28 May 1985, E/RES/1985/17).

¹⁵³ Schrijver, ‘Column - Paving the Way Towards ... One Worldwide Human Rights Treaty!’ (2011) 29 *Netherlands Quarterly of Human Rights* 257 at 260.

¹⁵⁴ Truscan and Bourke-Martignoni, *supra* n 29 at 129.

¹⁵⁵ I am grateful to the CRPD Committee’s Secretariat for having provided me with this information.

¹⁵⁶ I am grateful to the CRPD Committee’s Secretariat for having provided me with this information.

intragroup differences. In order to do so, they could find inspiration in the work of the Special Rapporteurs, several of whom have been examining these rights in precisely such a way.¹⁵⁷

What matters in the end is whether states will also consent to this kind of collaboration. These same states could even contribute to the efforts made to highlight the importance of intersectionality. One way they could do so would be to nominate experts who have affinity with the different groups of marginalised people right across the UN treaty bodies, instead of appointing experts on each separate group within a single UN treaty body. This would allow them to discuss how human rights treaties relate to each other and how enhanced human rights protection can be afforded to particular sub-groups within such groups. There could therefore be a fractional merger between the UN treaty bodies that would allow ‘intersectional mainstreaming’. The purpose would be not to integrate but to ensure that these bodies do not just remain each within a specific brief but are guided by the entire international human rights law spectrum.

There are already signs that UN treaty bodies are showing greater concern for intersectionality. At a general day of discussion on the right to education for disabled people, the CRPD Committee invited members of the CEDAW Committee and the CRC Committee to start the day by making presentations on disabled women and children.¹⁵⁸ Engagement could be furthered by collaboration with other UN treaty bodies and, as suggested earlier, by having them co-sign future general comments. To be sure, there are limits as to what dialogue can achieve beyond, perhaps, a superficial nod to intersectionality. This is shown by the fact that the CERD Committee was absent from the general day of discussion on the right to education for disabled people. There is a lack of clarity as to whether such dialogue will become a consistent and enduring means that proffers substantive progress on intersectionality, reflected in the actual practice of UN treaty bodies. Depending on the mutual understanding and willingness of the UN treaty bodies, collaboration may therefore not work as well for all of these bodies and consideration for intra-group differences could remain fragmented. There are indeed disagreements between the UN treaty bodies that may prevent them from further collaborating despite mutual consultations.¹⁵⁹ While states can only benefit from such disagreements, the issue is how to reconcile these disagreements and, if impossible, how to choose between the diverging opinions. An intersectional perspective requires that UN treaty bodies look beyond their corresponding human rights treaties but if their views are opposed such perspective does not help to work out a solution to the problem. This problem is arguably inherent to the mandates of these treaty bodies.

Another example of concern for intra-group differences is the efforts by UN agencies to mainstream gender throughout the UN agenda. These agencies are also often compartmentalised in unitary categories. Over the years they have nonetheless been paying more attention to gender in their activities, which helps to explain why women have been given a prominent place in recent human rights treaties like the CRPD. Gender mainstreaming,

¹⁵⁷ See: *supra* notes 85 and 124.

¹⁵⁸

See:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGDontherighttoeducationforpersonswithdisabilities.aspx> [last accessed 12 December 2016].

¹⁵⁹ The Human Rights Committee, for instance, permits the detention of disabled people who may pose a danger either to themselves or to others (Human Rights Committee, General Comment No 35: Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, at para. 19), whereas the CRPD Committee provides that these people must not be detained without consent in conformity with Articles 12 and 14 of the CRPD (CRPD Committee, General Comment No 1: Article 12: Equal recognition before the law, 19 May 2014, CRPD /C/GC/1, at para. 40)). Furthermore, the Human Rights Committee considers that mental capacity may prevent someone from voting or standing for elections (Human Rights Committee, General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), 12 July 1996, CCPR/C/21/Rev.1/Add.7, at para. 4) which is against the right of disabled people to vote and stand for elections as protected by Article 29 of the CRPD.

however, remains the exception, alongside race and ethnic origin, albeit to a lesser extent.¹⁶⁰ It is also recommended that other grounds of discrimination, such as disability, likewise be mainstreamed throughout the UN agenda.¹⁶¹ Ideally and as far as possible, ‘intersectional mainstreaming’ should offset the existing emphasis on monolithic identities. Contrary to what has been done to date, the different groups of marginalised people would no longer be considered in an isolated manner. Instead, such an approach would see intersectionality addressed more comprehensively by the UN treaty bodies.

Rather than transforming UN treaty bodies by adopting a new common protocol, which is unlikely to happen, it is possible to achieve ‘intersectional mainstreaming’ through human rights practice. Such an approach could facilitate the application of human rights treaties in a way that better resembles the Vienna Declaration’s vision of human rights as indivisible, interrelated and interdependent. Achieving this vision in practical terms would surely strengthen human rights protection for many groups who experience discrimination and human rights violations on account of multiple characteristics. In contrast with an approach that refers to the rights provided for in a single human rights treaty, the UN treaty bodies would apply the different human rights treaties in combination and activate those rights that allow them to enlarge the set of remedies for addressing instances of intersectionality. Interpreting these treaties in such a way, however, would require that these bodies adopt a consistent intersectional approach. If collaboration between treaty bodies could occur on an ongoing and consistent basis, they could move away from a compartmentalised approach to international human rights law. This would help to improve their sensitivity to situations where different grounds of discrimination intersect in a way other than superficial recognition of cases of intersectional discrimination. The issue concerns other actors as well, since civil society organisations also need to shift the focus away from unitary categories for this approach to work. In short, the human rights community should be encouraged to recognise multiple identities and no longer consider the different groups of marginalised people as homogeneous groups.¹⁶²

This ‘intersectional way of thinking’ could help towards building bridges across disciplines and further exploring permeability between these groups.¹⁶³ Through the further use of informal means of collaboration and formation of common views, UN treaty bodies could then focus on cross-categories with a view to addressing intersectionality. While human rights treaties make room for the proposed ‘intersectional mainstreaming’, it will then be up to these bodies to identify what kind of experiences shape the context within which intersectionality is occurring and find the appropriate response.

The intersectional perspective that is offered here – in which the UN treaty bodies would adopt a common approach to accommodate intersectionality – would allow each treaty body to retain its specialisation but in a way that would make room for intersectionality and move away from essentialist approaches. While categorisation would continue and specialisation be valued, attention would shift from commonalities to differences within the multifarious groups of marginalised people. Without amending the human rights treaties, such a shift could redress fragmentation and pave the way towards reunification of the international human rights framework.

¹⁶⁰ Bond, *supra* n 27 at 138.

¹⁶¹ For instance, there has been some concern that the Millennium Development Goals (MDGs) altogether failed to address disability. This was subsequently remedied by having the Sustainable Development Goals (SDGs) referring to disability in several goals (namely Goal 4. Quality Education, Goal 8. Decent work and economic growth, Goal 10. Reduced Inequalities and Goal 11. Sustainable Cities and Communities) although this was not done throughout.

¹⁶² Crooms, *supra* n 41 at 634-35.

¹⁶³ Cho, Crenshaw and McCall, *supra* n 53 at 795.

CONCLUSION

While there is undoubtedly a burgeoning of academic literature on intersectionality since Kimberly Crenshaw's definition of intersectional discrimination, there has been far less attention paid to research on intersectionality in the area of international human rights law. This article has focused on closing this gap. It has done so through an examination of disability in particular, because research to date has concentrated on intersectionality in the context of gender and race.

How can international human rights law tackle the disadvantages faced by groups who share a number of characteristics associated with distinct groups of marginalised people? This is an important question, since many people belong to these groups and since their complex and multivariate characteristics may create unique forms of disadvantage. The answer lies in achieving a balance between universalism and particularism. On the one hand, categorisation is practically unavoidable and even necessary for a systematic protection of human rights. On the other hand, a focus on monolithic identities negates the heterogeneity that is the lived experience of many people. This, in turn, creates its own kind of disadvantage, rendering invisible persons who claim more than one identity. Acknowledging the permeability of various identities makes easier the discernment of how these identities interconnect. This article claimed that an intersectional approach to international human rights law could be used to achieve this. Through a case study of disabled people, it showed how an intersectional perspective could afford stronger human rights protection to those people who fall under the remit of several group-specific human rights treaties. While acknowledging that this approach has its limitations and that it may not resolve all instances of intersectionality, it allows international human rights law to reach its full potential for the benefit of these people as a matter of human rights practice. Conversely, intersectionality has been criticised for being more an observation tool than a practical device. An intersectional approach to international human rights law will demonstrate how the concept can be put into practice and help define strategies that take greater account of intra-group differences.

Nonetheless, there are limitations in this way of analysing intersectionality, one of which is that it still provides a limited picture of people's various characteristics, which include not only gender, race and disability but also age, sexual orientation, religion and any other ground. Although this article has addressed such criticism, it argued that intersectionality seen in such a way helps to question how the different groups of marginalised people are formed and encouraged looking beyond such groups with a view to improving human rights protection. By putting a difficult issue at the forefront of debates on human rights, this article has claimed that international human rights law offers an untapped potential to apprehend and remedy instances of intersectionality.

The accommodation of intersectionality in international human rights law is not an easy goal to achieve. It resists the neat categorisation that is privileged in anti-discrimination law and requires that social complexities be taken much more into account. The argument made here is that human rights treaties provide a certain – albeit underexploited – leeway for accommodating intersectionality. In order to promote an intersectional approach to international human rights law, the various facets of the disadvantages faced by marginalised groups of people must be examined in the light of their different characteristics. While several group-specific human rights treaties have, more often than not, been interpreted in a compartmentalised fashion, intersectionality requires that these treaties be interpreted flexibly and that one looks beyond the various identities. While it was beyond the scope of this article to provide a full study of instances of intersectionality, the examination of intersectionality within the context of disabled people illustrated the application the proposed intersectional approach and, hopefully, paved the way for future research efforts. Although the task is not

easy, one should not be afraid to tackle it. ‘A good teacher is a master of simplification and an enemy of simplism’, said Louis Berman. By adopting an intersectional perspective and encouraging enhanced collaboration between UN treaty bodies, we can have a clearer idea of how to go about the task of achieving a robust approach to ‘intersectional mainstreaming’ throughout the entire framework of international human rights law.