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"Doing intersectionality" through international human rights law: Substantive international human rights law as an effective avenue towards implementing intersectionality to counter structural oppression?

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Abstract

Intersectionality's roots in anti-discrimination law were essential to its conception and development. However, anti-discrimination law is, by nature, tied to formal equality, exacerbates some of intersectionality's most criticised aspects, and is ill-equipped to implement a more structural/systemic vision of intersectionality. Substantive IHRL, by contrast, may be better suited to implement some of intersectionality's most promising elements. Since its focus is on the substantive realisation of rights rather than on equal access to rights, substantive IHRL could be a tool to achieve substantive equality and counter structural oppression. To this end,

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substantive IHRL contains existing interpretative principles (e.g. anti-stereotyping and vulnerability reasoning) that could be employed to encourage intersectional reasoning and redress by monitoring bodies. This contribution will explore how, based on these factors, substantive IHRL may help bridge the gap between intersectional analysis/critique and "doing intersectionality" in practice.

Keywords: intersectionality, international human rights law, human rights, structural oppression.

1. Introduction

The present article aims to explore substantive international human rights law ("IHRL") as an avenue for "doing intersectionality" in practice, with a particular focus on its potential for countering structural oppression. In order to do so, it will start by discussing intersectionality's roots in anti-discrimination law *(2.1)*, pointing out how this field lent itself perfectly to the "discovery" of intersectionality. Nevertheless, anti-discrimination law contains a non-negligible number of obstacles to the optimal implementation of intersectionality. These obstacles will be examined *(2.2)* and compared with the field of substantive IHRL *(2.3)* to show how substantive IHRL may be a more practical and efficient tool for the implementation of intersectionality.

Moving beyond purely practical considerations, this article will then contrast two differing aspects of intersectionality – the first a theory of specificity, and the second a theory of systems *(3)*. This analysis will lead to the conclusion that, while anti-discrimination law may be well-suited to implement the first theory of intersectionality, IHRL fits better with the second, and can, as such, be tailored to implement a systemic understanding of intersectionality that can be employed to counter structural oppression.

IHRL, however, does present a number of challenges that must be overcome in order to ensure an optimal implementation of intersectionality, namely the fragmentation of international human rights law *(4.1)*, the intersectional inaccessibility of the judicial system *(4.2)*, and the question of structural remedies *(4.3)*. These challenges will be discussed, potential solutions will be suggested, and examples of such solutions in existing case law from the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR) and Convention for the Elimination of Discrimination against Women (CEDAW) Committee will be provided.

Lastly, the present article will turn its attention towards existing interpretative principles in IHRL that have already been employed to – implicitly – address situations of intersectional oppression, namely vulnerability reasoning *(5.1)* and anti-stereotyping *(5.2)*, and will show how these lines of legal reasoning could be adapted in the future in order to optimally utilise their potential to implement intersectionality for structural change.

2. Implementing intersectionality through law: practical considerations

2.1. Intersectionality's roots in anti-discrimination law

The theory of intersectionality has its roots in anti-discrimination law. Kimberlé Crenshaw (1989) coined the term in her article *"Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics"*, in which she highlighted the inadequacies of the US court system to handle the discrimination of Black women in the workforce. A critical study of anti-discrimination law was certainly the perfect legal field to examine intersectionality. By pinpointing the fact that anti-discrimination law was utilised in a way that offered insufficient protection to persons whose marginalisation could not easily be reduced to a single axis of oppression or to the simple

sum of multiple axes of oppression, the theory of intersectionality drew attention to the existence of such types of marginalisations, and to the need to counter the discrimination and oppression of intersectionally marginalised people (Atrey 2020).

Nevertheless, the nature of anti-discrimination law also means that it contains a number of obstacles to the optimal implementation of intersectional protection and redress (de Beco 2020). These obstacles will be outlined below. They do not render anti-discrimination law incapable of addressing intersectional situations; Atrey (2019) has devoted an entire book to the question of how to rethink and restructure anti-discrimination law, including all the obstacles outlined below, around intersectionality. Instead, the present article means to consider IHRL as an alternative avenue for "doing intersectionality" – one that may circumvent some of anti-discrimination law's obstacles (though it has its own challenges) and fulfil other, perhaps more structural aspects of intersectionality's potential.

2.2. Obstacles to the implementation of intersectionality through anti-discrimination law

A first obstacle to the implementation of intersectionality through anti-discrimination law is the use of discrimination grounds. Most anti-discrimination provisions, whether in national or in international law, rely on a list of prohibited grounds of discrimination. The most obvious problem this poses for intersectional redress arises when one or more of the grounds at play are not included in that list. This is, of course, mostly an issue for anti-discrimination provisions that contain closed/exhaustive lists of protected grounds, which would lead to applicants having to exclude certain of the axes of oppression at play in their particular case. In practice, many enumerations of protected grounds are open/non-exhaustive. Even monitoring bodies working with closed lists have been known to extend the scope of the prohibition of discrimination based on grounds not explicitly mentioned among the protected grounds, on the basis of analogy reasoning. Nevertheless, both these options still require the applicant to convince the court to include this

ground in their reasoning and apply it to their situation, which is necessarily harder than relying on an established ground. (Atrey 2019, 146-156)

Furthermore, in a case of intersectional discrimination, it is often rather complicated to figure out which grounds were at play, or even whether it was a case of intersectional discrimination. A lot has been written about the differences between additive and intersectional discrimination (see Chow 2016, Yuval-Davis 2006, Walby *et al*. 2012, and Atrey 2019) and the complexity of this topic can lead to reluctance to define a certain situation as intersectional discrimination (though it must be noted that Atrey (2019) has posited the rather convincing argument that in practice, multiple discrimination is almost always intersectional, and should consequently be treated as such by courts.) Crenshaw herself explained the complexity of grounds in intersectional discrimination: when a person crosses a busy intersection comprised of many roads – Patriarchy Road, Sexism Road, Racism Road – and comes to harm, it is often very difficult to know whether they were hit by one or multiple cars, whether all at once or at different moments in time, and from which roads they came (Yuval-Davis 2006, see also Bello 2009). This makes it very difficult to disentangle intersectional situations, especially the complex ones, in order to isolate the grounds at play in one particular case.

Another problem lies in the fact that, to establish differential treatment, anti-discrimination law generally requires the use of a comparator. This is, of course, complicated in intersectional situations. If a Black woman experiences discrimination, whom must she compare herself to establish differential treatment based on the intersection of race and gender? A white man, a white woman, a Black man, or any combination of the above? This obviously gets even more complex in cases of intersectional discrimination on more than two axes. (Atrey 2019, 173-179)

This issue is intimately tied to the unreasonable burden of proof applicants face in cases of intersectional discrimination. Indeed, proving (or even establishing *prima facie*) discrimination based on more than one ground – especially grounds

inextricably tied together – is by definition, more difficult than proving discrimination based on only one ground. (Atrey 2019, 190-197)

The issue of the comparator is less applicable in indirect discrimination claims than in direct discrimination claims, as indirect discrimination is often tied to a measure's disproportionate impact on a group rather than to direct – as its name suggest – differential treatment. Nevertheless, indirect discrimination presents a problem of its own. Indeed, evidence of indirect discrimination often relies on statistics, and statistics related to intersectional discrimination and oppression remain rare (Atrey 2019, 170). This means the burden of proof in intersectional claims in consistently higher than in single-axis claims.

The consequences of this go beyond courts not providing victims of intersectional oppression with sufficient protection and redress. It also carries consequences for the strategic aspects of litigation. Since bringing an intersectional discrimination case has a lower chance of success, applicants and/or their lawyers may choose to "simplify" a case, leaving the intersectional aspect to the side, to have a higher chance to win their case and be provided with some sort of redress or just satisfaction (de Beco 2020). Beyond the fact that this means that the applicant in this individual case does not receive sufficient and appropriate redress for the intersectional oppression they faced, such strategic choices – understandable though they are for individual applicants – also lead to an erasing and invisibilising of intersectionality in general (Atrey 2019, 199).

Sufficient and appropriate redress for intersectional discrimination is an issue in itself as well. Indeed, the difficulty in untangling the grounds at play can also mean it is equally difficult to fully redress each aspect of the discrimination at play. This plays out on two fronts: the quantitative and qualitative nature of remedies (Atrey 2019, 202). Qualitatively, the remedies must be able to redress the intersectional discrimination at play, which requires a thorough individual analysis of each case in order to determine the most appropriate remedies. Monetary remedies do not

really fit this qualitative requirement, but they are often the remedies awarded in discrimination cases. That then raises the quantitative question: should a monetary compensation be higher in intersectional cases or not? As we have seen above, intersectional discrimination cases are harder to win, and a higher compensation may serve as a motivation for applicants and practitioners not to erase the case's intersectional aspect in their application (Atrey 2019, 203). However, monetary compensation's purpose should be to redress the harm caused, and should therefore be proportionate to this harm – which may not necessarily be higher in cases of intersectional discrimination.

Lastly, due to its focus on differential treatment and on equal access to human rights, an anti-discrimination perspective lends itself rather well to ensuring the rights of an intersectionally marginalised subset of an already marginalised group, by establishing that they need the same guarantees as the other, non-intersectionally marginalised members of that group. This does, however, mean that there exists a risk of this intersectionally marginalised subgroup simply being given the same rights as the larger group, without paying proper attention to their specific needs. Consequently, anti-discrimination law is better suited to the pursuit of formal equality than of substantive equality. "Better" does not mean "exclusively" - it has of course been shown that anti-discrimination law can be utilised to push for substantive equality (Smith 2016, Atrey 2019). Nevertheless, it could be argued that, although anti-discrimination law can be restructured to apply intersectionality within the framework of substantive equality, it is by nature rooted within the pursuit of formal equality. Consequently, it may not be the most efficient or natural way to achieve substantive equality through intersectionality, and other areas of law may be better suited to this purpose.

2.3. Circumventing those obstacles through international human rights law

The argument this article makes is that IHRL may be a productive alternative legal avenue to "do intersectionality", since it circumvents some of the common obstacles present in anti-discrimination law. It is, of course, important to note that the difference between anti-discrimination law and IHRL is not that clear-cut. Indeed, the prohibition of discrimination/guarantee of equal treatment is a substantive right in many instruments of IHRL (for example, Art. 1 of Protocol 12 to the European Convention on Human Rights, Art. 26 of the UN Convention on Civil and Political Rights, and Art. 24 of the Inter-American Convention on Human Rights), and so IHRL contains anti-discrimination law within itself. However, this article means to explore the possibilities of substantive IHRL for intersectionality beyond its equality provisions. Indeed, in general, the stated purpose of IHRL is to ensure substantive realisation of human rights, rather than formal equality in the form of equal access to human rights (de Beco 2020).

The first consequence of this is that it eliminates the need to establish differential treatment: what is important is whether the applicant was guaranteed their human rights or not, rather than whether they were guaranteed the same human rights as other persons. This is not synonymous with simply treating intersectionally marginalised persons the same way as everyone else. On the contrary, realising an intersectionally marginalised person's (or community's) rights substantively by definition means taking into account their specific needs and situation.

This perspective on implementing intersectionality logically eliminates some of the challenges inherent in the comparative aspect of anti-discrimination law. There is no need for a comparator, and no need to prove differential treatment compared to that comparator. The conclusion that the applicant's rights were violated *in se* would suffice, which could lighten the burden of proof in intersectional situations (de Beco 2020).

Furthermore, when it is no longer necessary to rely on discrimination grounds to prove the case's *raison d'être*, it becomes easier to contend with intersectionality's complexity without it risking impacting the outcome of the case. It allows international human rights monitoring bodies ("IHRMB") to explore the different elements and axes of the intersectional situation at play, not to decide whether the applicant's complaint is justified, but to comprehend how their situation arose and, if possible, how to best rectify their situation. In some cases, it may allow them to include within their reasoning aspects of intersectionality that are harder to include in anti-discrimination law, because it would require all the weight of recognising a new ground of protection – colourism, for example, or gender expression, or weight.

Though the previous example is more identity-based, IHRL also has the potential to "do intersectionality" beyond identity categories. An example of this would be to pay attention to intersections of intersections: (intersectionally) marginalised people are a lot more likely to find themselves in certain situations, which can then in turn intersect with their pre-existing marginalisations. For example, Black men face a higher risk of being imprisoned (Sawyer 2020); trans women are more likely to become sex workers (Nadal *et al.* 2014); and the intersection of disability and trans identity has been shown to vastly increase the risk of living in poverty (Mulcahy *et al.* 2022). While some of these situations are not, strictly speaking, grounds of protection in all anti-discrimination provisions, they are nevertheless simultaneously nexuses of intersections and axes of oppression in themselves. This shows how a departure from anti-discrimination law into IHRL allows the putting into practice of a conceptualisation of intersectionality beyond strict identity categories into a more structural and systemic analysis of oppression: an intersectionality of systems, which we will come back to later.

This, in turn, also allows courts to apply intersectionality more loosely than in pure discrimination cases, in a manner that goes beyond the intra-categorical and

contends with what Atrey (2019) calls "sameness and difference in patterns of group disadvantage". An interesting example of this is the IACtHR's reasoning in *Expelled Dominicans and Haitians v. Dominican Republic*. In this case, the IACtHR points out that a collective expulsion meant to target Afrodescendent Haitians was still discriminatory, even though the citizens of the Dominican Republic are also majoritarily Afrodescendants, because the refugees' mistreatment and expulsion were rooted in racism compounded with colourism and classism. In this reasoning, the Court contends both with the similarities between the island's inhabitants – their ancestry and ethnicity – and with their differences – in skin colour and in social status – and this leads to the Court finding a violation. The IACtHR's looser approach to anti-discrimination provisions in this case, grounding it in access to rights and in structures of oppression, acts as a good example of how IHRL can implement intersectionality in a more structural manner.

3. Systems and specificity: the focuses of intersectionality

The above discussion of structural change is crucial to the exploration of intersectionality and IHRL. Indeed, beyond the more practical questions discussed above, anti-discrimination law and IHRL also differ with regard to which focuses of intersectionality they are more suitable to implement. This article argues that anti-discrimination law is more apt to implement intersectionality's potential for focusing on specificity, while IHRL would serve better to implement intersectionality's focus on systems.

Intersectionality is often represented one of two ways in scholarship: either as a theory of specificity, or as a theory of systems. Despite the fact that this article focuses largely on the advantages of the second, intersectionality's power and innovativeness lies precisely in the fact that it can be utilised to achieve both these goals. Both specific redress and structural change are essential to the concrete

realisation of the human rights of all persons, including the most marginalised. In fact, Crenshaw's very critique of anti-discrimination law was aimed at the system's inability to efficiently redress the structural oppression specifically affecting Black women, showcasing how those two aspects of intersectionality are fundamentally linked (Atrey 2019, 39).

The first view of intersectionality insists on the need for higher and sustained attention and support for the rights and autonomy of specific subgroups of people: the most marginalised persons among marginalised groups, or, in general, people who are marginalised on more than one axis. This is the common – though, as argued above, rather reductive – perception of the origin of intersectionality: the example of the Black woman, who is left behind in Black activism because she is a woman and in feminist activism because she is Black. This could be described as an "intra-community" perception of intersectionality, in the vein of McCall's (2005) concept of "intra-categorical intersectionality" (see also Bello 2009). It is often critised as being linked to a rather reductive analysis of intersectional oppression in the form of a "hierarchy of oppressions", in which a person is necessarily more oppressed than another if they face marginalisation on more axes (Atrey 2020). Since those axes are often limited to identities, this critique is also linked to the criticism of intersectionality being too closely tied to identity politics (de Beco 2020).

The second view of intersectionality focuses more on systems of privilege and oppression and on ways to enact structural change. It focuses not on diversity as a separator, but on "sameness and difference" reasoning as a vector of structural analysis (Atrey 2019). In that vein, it pinpoints intersectionality's potential for coalition-bonding across marginalised communities: the intersections of identities and marginalisations serving as links between marginalised communities (Karaian

2011; Smith 2016). In this view, our example above could be represented as follows: Black and feminist activists should organise together, because they have common goals and struggles through Black women.

Perhaps more importantly for the legal field, this vision of intersectionality also focuses largely on systems of oppression. It goes beyond an analysis based on identity categories, instead looking at the social context in which those categories intersect, creating a system of power relationships and structural oppression and privilege that transcend those identity categories. This type of intersectionality considers not just the intersections of identities and lived experiences, but the intersections of systems of oppressions, which do not exist independently from each other (de Beco 2020). This is the vision of intersectionality present in Collins' (1990) theory of the "matrix of domination". It can be regarded as an "inter-community" view of intersectionality, and leans more towards McCall's (2005) "inter-categorical intersectionality".

By analysing systems of structural oppression beyond identities, this vision of intersectionality can focus on nexuses of oppression and how they in turn interact with other axes of oppression (such as, as mentioned above, poverty, imprisonment, sex work, and migration status). Through and beyond those nexuses of oppression, this vision of intersectionality also examines social institutions in a variety of domains – healthcare, education, employment, housing, political participation, etc. – and how individuals are included in or excluded from those social institutions (de Beco 2020). This focus on social institutions and the structural oppression resulting from individuals' and communities' exclusions from them makes this theory of intersectionality more closely related to substantive equality than to formal equality.

Due to the obstacles discussed above, anti-discrimination law is under-equipped to deal with such complex structures of oppression, while the higher flexibility of IHRL may allow it to address such matters more efficiently. Not coincidentally, the

domains and social institutions de Beco (2020) pinpoints as important elements of intersectional systems of oppression and privilege are also important areas for the fulfilment of human rights and therefore within IHRL. The substantive realisation of all persons' human rights thus requires reckoning with the intersections of those systems, and vice-versa. This inextricable link between intersectionality, human rights and structural oppression shows why substantive IHRL may be the right field, and an efficient tool, to implement intersectionality to counter structural oppression.

4. Challenges to the implementation of intersectionality through international human rights law

This is not to say that IHRL does not contain any challenges to the ideal implementation of intersectionality as described above. In fact, as de Beco (2020) argues, IHRL has largely – though not systematically – failed to transcend the identity-focused vision of intersectionality and to contend with the intersectionality of systemic and structural oppression. Consequently, the following section will explore the challenges that may explain those shortcomings, as well as examine how those challenges may be overcome. Where possible, illustrations will be given of cases in which IHRMB did manage to address intersectionality in a more structural manner.

4.1. Fragmentation and integration of international human rights law

A first major challenge is the fragmentation of international human rights law. When a rights holder becomes the victim of a human rights violation, they must first decide which forum to bring their complaint to. First, they may have to choose between the UN system or a regional system, if the latter is applicable to them. This choice may be guided by strategic considerations (such as the binding nature of decisions or the outcome in previous similar cases), the potential remedies, the

IHRMB's competence etc. (Brems 2018). Another important factor, of course, is which international human rights treaties the relevant State has ratified. In the specific case of the UN Treaty Bodies, there is of course the added question of whether the State has accepted the possibility of individual communications before the Treaty Body. Often, those individual communications also have strict admissibility requirements (Shelton 2014, 289). Therefore, the first hurdle is a very pragmatic, yet extremely decisive one.

If there is any choice left once that first hurdle is cleared, and if the applicant or their counsel chooses to apply to one of the UN Treaty Bodies, they may first have to choose between UNTB. First, the nature of the violation they suffered might steer them to one body over another, depending on which rights were at play (is it a matter for the Human Rights Committee, the CESCR Committee, the CAT Committee, the CED Committee?) This is further complicated by the interdependence of human rights (see Bouchard and Meyer-Bisch 2016): the applicant's situation could very well concern different types of human rights and thus be relevant to the competence of more than one of these bodies.

The same is true for intersectionality. Indeed, the UN has created specific treaties, monitored by specific treaty bodies, to protect the rights of specific vulnerable groups (the CEDAW, CERD, CRC and CRPD Committees). It is immediately obvious how this creates a problem regarding intersectional human rights violations: what about persons who belong to more than one of the groups protected by specific treaties? They can only take their application to one of the Treaty Bodies, and each Treaty Body cannot overstep their competence. This means that, by definition, one of the aspects of the intersectional situation (the one under the Treaty Body's competence) will be prioritised over the others. This shows how fragmentation renders the international human rights protection system unable to exhaustively deal with such complex human rights violations (de Beco 2020).

Beyond the negative impact on the individual applicant, this also has the consequence of certain intersectionally marginalised subgroups enjoying strongly differing protection under different IHRMB. A striking example of this phenomenon can be found in the very differing protection offered Muslim women in headscarf ban cases under different IHMRB. A telling study by Castillo-Ortiz *et al*. (2019) has found that Muslim women systematically lose their cases before the ECtHR, including in headscarf ban cases; CEDAW has a similar attitude towards headscarves, considering them to be justified by the protection of women's rights (and consequently erasing their concrete intersectional impact on Muslim women in particular) (Chow 2016). By contrast, the UNHRC and the CRC are rather critical of headscarf bans, condemning their disproportionate intersectional impact on the concrete fulfilment of Muslim women's rights (Chow 2016). The UNHRC even explicitly used the term "intersectionality" in its reasoning in four headscarf ban cases (Van de Graaf *et al*. 2021). Headscarf bans are, of course, a very specific issue among the many that affect Muslim women's rights, but their treatment by the different monitoring bodies shows the importance of context in the assessment of intersectional issues. The ECtHR's stance on headscarves, for example, arguably cannot be separated from the European conception of race/ethnicity (Bello 2009), the political context in the midst of increased migration (Bello 2009), and the rising islamophobia in the European context (see Van de Graaf *et al*. 2021).

This example shows how human rights fragmentation leads to very inconsistent human rights protection in intersectional cases. This also impact the legitimacy and efficacy of international human rights law, since it leaves States without consistent guidelines to best fulfil the human rights of the people under their jurisdictions (Brems 2018).

A possible solution to this problem would be a stronger integration of IHRMB. More conversation and cooperation between IHRMB would help them share their expertise to better realise intersectionality and the interdependence of human

rights by avoiding artificially "lifting out" a single issue from a complex human rights situation (de Beco 2020; Brems 2018). This should be done, however, with sufficient attention for the benefits of human rights specialisation (borne from the expertise apparent both in the treaties' formulations and in the IHRMB's composition) and of contextualisation (since regional, historical, economic, ideological and cultural context are all relevant factors in the best solution for a human rights violation) (Brems 2018). Thus, intersectionality is best achieved through IHRL by what Brems (2018) calls "smart human rights integration".

Concrete examples of such a conversation and cooperation between IHRMB within this "smart human rights integration" can be found in de Beco's (2019) theory of "intersectional mainstreaming". He argues that handing down joint decisions on intersectional cases would violate the treaties the UNTB are built on in the absence of a common protocol to this effect, and that such a thorough revision of those treaties would be impossible in practice. Nevertheless, he posits that UNTB could enhance their practice of intersectionality through informal cooperation, such as holding simultaneous sessions, secondments, and cooperation between the UNTB secretariats. The Human Rights Committee's and CESCR Committee's broad mandate would put them in an ideal position to take this cooperation between UNTB beyond equality and anti-discrimination reasoning and into the substantive realisation of the human rights protected in the treaties they monitor.

4.2. Intersectional accessibility of international human rights monitoring bodies

Another issue concerning the effectiveness of international human rights law regarding intersectionality lies in its accessibility to rights holders. Indeed, in order to obtain redress for an intersectional human rights violation, a rights holder must first be able to bring their case to an IHRMB (which requires, as noted above, the relevant State having ratified a particular treaty, and having exhausted the domestic remedies first). Access to the judicial system in general is not always within

reach for the most marginalised among us – it requires connections, money, and even simply the knowledge that those options exist, which are not available to everyone (Dobe 2016; MacDowell 2014, 2017). Intersectional marginalisation magnifies this: indeed, it has been shown that intersectional marginalisation can trap someone in a cycle of oppression, significantly impacting their socio-economic status or even their access to education (see Campbell 2020). This means that intersectional redress through IHRL remains out of reach for the very persons who would benefit from it most: the ones on whom intersectional oppression has had the biggest negative impact.

It must noted that this is a problem that the entire legal system must contend with – it is not limited to IHRL (Dobe 2016; MacDowell 2014, 2017). Nevertheless, the fact that the exhaustion of domestic remedies is a requirement for access to IHRMB does magnify this problem for IHRL: before accessing an IHRMB, an applicant first needs to access each step of the domestic judicial system first, which compounds the accessibility problem. This highlights how human rights can never only be a matter of laws, treaties and courts. In order to find those persons and provide them with immediate support as well as access to a court to – hopefully – address their human rights issues more comprehensively and effectively, local initiatives and organisations are absolutely essential. Indeed, they play a major role in facilitating access to the judicial system in general and to IHRMB in particular, through such varied means as financial support, legal aid, outreach programs and strategic litigation. This also highlights the importance of human rights education for all persons. In that sense, the UN Declaration on Human Rights Education and Training and its adjacent World Program for Human Rights Education may be a good step towards solving a few of the aforementioned accessibility problems.

4.3. Reparations and redress

An additional problem arises at the very end of the legal procedure. Even in the scenario in which the rights holder managed to access an IHRMB, and in which the IHRMB in question addressed the intersectional aspects of the case in its reasoning, a problem arises at the remedies stage. How, indeed, does an IHRMB best remedy an intersectional human rights violation? They are, by nature, often very complex, and their impact is rarely limited to only the applicant(s) in one particular case. This leads to two main questions, the first being whether the IHRMB should limit its remedies only to the applicant(s) of the case or extend them to other persons who are (potentially) affected by the same human rights issue, and the second being how the IHRMB can best remedy such a complex situation while staying within its competence (Atrey 2019, 197-206).

4.3.1. Who should the remedies extend to?

Atrey (2019, 202) argues that the first question should unquestionably be answered as broadly as possible. Indeed, as argued above, intersectionality's strength lies in its capacity to address more structural issues, and remedies should reflect this potential. Atrey posits that a specific applicant (or group of applicants) bringing an intersectional case before a court grants said court the perfect opportunity to uncover a particular area of intersectional oppression. The IHRMB's role, once it has uncovered this issue, would consequently be to address the issue as a whole in order to put a stop to similar violations experienced by persons who did not have the opportunity to bring their claim, and to prevent future human rights violations.

Atrey points out that the CEDAW Committee has already done this. In the case of *Kell v. Canada,* the Committee made two separate sets of recommendations: one concerning the author of the case, and one concerning other persons in a similar situation to hers (in this case, specifically, those recommendations concerned some concrete steps to take to provide aboriginal women with adequate legal aid).

Those recommendations can also be broader still: in *Jallow v. Bulgaria*, for example, the Committee extended its recommendations to prevent domestic violence to "all women victims of domestic violence, especially migrant women". By contrast, in *Teixeira v. Brazil*, the CEDAW Committee only recommends remedies concerning access to healthcare for women in general, paying no further attention to the impact of the applicant's race, class and rural location on the quality of the healthcare she received (Campbell 2016). Another case by a UN Treaty Body solved this question by not recommending any concrete remedies at all: in *Lovelace v. Canada* – a case concerning an indigenous woman who lost her right to live on her community's reserve when she married a non-indigenous man, when a man who married a non-indigenous woman would not have suffered the same consequence – the UN Human Rights Committee found the finding of a violation of Art. 27 ICCPR to be sufficient redress (see also David 2014). It is relevant to note, however, that this case is over forty years old. As we will see later (see 4.1), the HRC has since become very aware of the concrete impact of intersectional oppression.

The IACtHR regularly orders remedies with a broader scope than the applicants in the case itself. While it does in most cases require that the victims be listed in the original applications in order to be eligible to receive reparations, it does not apply that scope very restrictively. For example, it employs a rebuttable presumption that the victim's direct family are "injured parties" in some cases, and it has stepped away from its requirement that victims be listed individually in the application in cases in which that would prove too difficult, such as those involving detention centres or massacres (Pasqualucci 2003, 196). Furthermore, the IACtHR also grants measures of reparation that by nature impact other persons than the victims in a particular case, such as community-based reparations, capacity-building and legislative reform, of which we will see some specific examples below) (Pasqualucci 2003).

4.3.2. What should the nature of those remedies be?

As Atrey argues based on these examples, intersectional oppression is intimately tied to structural oppression, and countering consequently requires structural remedies. The structural aspect of these remedies are consequently also important with regard to their nature, and not just with regard to whom they are applied to. Which type of remedies, then, can be considered sufficiently structural? Financial compensation can hardly be considered a structural remedy (Bouchard and Meyer-Bisch 2016), but it does already raise the question of how to best address intersectionality at the remedies stage. As mentioned above, bringing an intersectional case before an IHRMB comes with a higher risk of losing the case, increasing the likelihood that applicants and practitioners will instead focus on one aspect of the case to the exclusion of its intersectional dimension (de Beco 2019). The argument then goes that, in order to incentivise bringing attention to intersectionality, the monetary compensation for an intersectional human rights violation should be higher.

This argument is laudable from a practical point of view, but is nevertheless questionable both from a legal perspective and from the perspective of intersectionality as a theory concerning structures of oppression. Indeed, firstly, the purpose of remedies (even monetary remedies) are not to incentivise applicants to bring a case before an IHRMB, but in fact simply to remedy (or compensate) the harm suffered by them. This leads us to the second point: intersectional harm is, in fact, not necessarily worse harm – the difference with single-issue oppression is qualitative, not quantitative, and so reparation for the harm suffered should similarly not be quantitatively different. Consequently, the financial compensation awarded to applicants for intersectional human rights violations should be awarded based on the severity of the violation, and not on its intersectional nature (Atrey 2019).

However, if intersectional human rights violations are qualitatively different, then redressing them appropriately should also require a qualitatively different approach. And if intersectional oppression is so intimately tied to structural oppression, then those qualitatively different remedies should indeed be structural remedies.

The nature of the remedies is also necessarily limited by the competence of different IHRMB. Indeed, in order to impose or recommend structural remedies, an IHRMB must have competence over such remedies and utilise that remedy. However, not all IHRMB do this to the same extent. For example, under Art. 46 ECHR, the execution of ECtHR judgment is generally left to the State's discretion, under the supervision of the Committee of Ministers. The advantage of this supervision is that the Committee of Ministers can exert a form of direct control over the remedies within the Council of Europe system. Even with this control, however, judgment execution remains lacking (Fikfak 2019). The ECtHR does have the competence under Art. 46 to order remedial measures to remedy systemic human rights violations, but it does so only very rarely, with no real increase in recent years (Donald and Speck 2019). Donald and Speck (2019) have found that the Court more often indicates general measures than individual measures, which is an interesting insight for the implementation of the link between intersectionality and structural oppression.

Nevertheless, the Court's willingness to consider a human rights issue to be structural does remain rather selective, which also impact the nature of the remedies. For example, in *B.S. v. Spain* – a case concerning police violence suffered by a Black woman working as a sex worker, which has been lauded as an important step towards intersectional reasoning on the part of the ECtHR (Yoshida 2013) – the Court rejects the applicant's request for specific measures to address discrimination such as the one she faced (§67 of the judgment).

Perhaps more damning yet are the so-called "Roma sterilisation cases": *V.C. v. Slovakia, N.B. v. Slovakia* and *I.G. and others v. Slovakia*, three distinct cases concerning (in total) five Roma women from a disadvantaged socio-economic background who had been sterilised without their consent during childbirth. The fact that the ECtHR was presented with three cases concerning the very same human rights issue – non-consensual sterilisation – affecting the same intersectionally marginalised community – Roma women from a disadvantaged socio-economic background – by all means does show a systemic issue at play. Yet the Court refuses to separately examine the possible discriminatory (racist, sexist, and classist) aspects of the case under Art. 14, which might have allowed it to address the systemic nature of the human rights issue revealed by those cases (Curran 2016). Consequently, it also does not seek to redress this systemic issue through specific measures, and the only remedy the applicants are awarded is financial in nature.

By contrast, other IHRMB may be a lot more flexible with measures and remedies. We have seen that the CEDAW Committee has made more structural recommendations for remedies. This could be explained by the fact that UNTB are more flexible in this regard since their recommendations are non-binding. This argument would, however, be restrictive, since the IACtHR, another regional Court whose judgments are binding, employs the same flexibility with regard to remedies.

The IACtHR is authorised to order the State to make reparations to the victims under Art. 63(1) of the Inter-American Convention on Human Rights (IACHR). Beyond restitution and financial compensation, which it handles similarly to its European counterpart, the IACtHR can also order such varied reparations as medical and psychological treatments, public ceremonies, social programs such as vocational or housing programs, and – explicitly – community-based reparations, to name but a few. These community-based reparations have been applied both in cases of large-scale human rights violations, and in cases that made only a few victims but could impact society as a whole (Pasqualucci 2003).

The latter has taken place, for example, in the case concerning the murder of an environmental activist, in which the Court ordered the State to organise a campaign to educate the public on the work on environmental activists and their impact on human rights. Such collective reparations are also ordered to remedy similar violations affecting persons who were not applicants in the case, such as three cases of child abduction, in which the Court ordered the State to create a web database and/or National Registry to reunite persons who suspect they were abducted with their families. The IACtHR also orders measures for capacity-building to ensure non-repetition of violations, such as training programs for government officials or legislative reform (Pasqualucci 2003). These examples show how these forms of remedies, being a lot more structural, are considerably better equipped to deal with structural human rights violations.

4.3.3. An example of structural remedies in a case of intersectional oppression: Gonzales Lluy v. Ecuador

A specific example of intersectional reasoning strengthened by structural remedies is the 2015 case of *Gonzales Lluy v. Ecuador*. This is the first case in which the IACtHR explicitly acknowledged the role of intersectional discrimination in a human rights violation. The applicant, Talia, was a young woman who suffered a blood disorder and had been contaminated with HIV after a blood transfusion as a child. As a result, she and her family had faced extensive discrimination based on her HIV-positive status: she had been expelled from several schools when the officials learned of her status, her family had been evicted from their housing, and her mother had been fired from her job.

In its analysis of the merits of the case, the IACtHR includes an extensive analysis of the intersectional discrimination Talia had faced throughout her life due to the intersecting factors of her HIV-positive status, her gender, her age, and her socio-economic status. The Court explicitly hearkens back to Crenshaw's conception of intersectional discrimination as a type of discrimination that cannot be reduced to

the sum of its part in a superb reasoning that clearly lays out how each aspect of Talia's lived experience interacted with the others to create a new form of discrimination, and which is reproduced below:

> 290. The Court notes that, in Talía's case, numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talía has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling.345 In sum, Talía's case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups.

This paragraph also beautifully illustrates the structural cycles of oppression tied to intersectional marginalisation, showcasing, once more, the link between intersectional oppression and structural oppression. The Court is also clearly very aware of this, and follows up on it in the section on reparations. In the reparations

it orders, the Court very clearly tries to address every aspect of the intersectional human rights violation Talia and her family suffered: beyond financial compensation and public acknowledgment of State responsibility, the Court also orders the State to provide Talia with adequate medical care (both physical and psychological) by any means necessary (§§359-360), to grant her a scholarship for university in order to compensate her for the difficulties she experienced in her education (§§372-373), and to provide her with decent housing free of charge to guarantee her right to life (§377). The Court also extensively examines the measures the State has taken to guarantee non-repetition of the violations regarding the right to health and the right to education and non-discrimination, and finds that the State has implemented adequate public policies to avoid such violations occurring again (§§384-387 and §§393-395). This shows how the Court is also concerned with the broader structural disadvantage affecting persons in similar situations.

5. Existing interpretative principles

While IHRL certainly allows certain IHRMB to be more flexible with equality reasoning, in practice, IHRMB still largely contend with oppression only through the lens of equality provisions (de Beco 2020)[1]. This means that the obstacles enumerated above are not actually truly done away with in IHRL. In order to truly remove those obstacles, IHRMB should be willing to consider oppression through other lenses than formal equality/anti-discrimination.

As it turns out, such lenses already exist. Indeed, different IHRMB have developed interpretative principles that have or could be utilised to address intersectional human rights issues. This article will therefore briefly discuss two of those interpretative principles – vulnerability reasoning and anti-stereotyping – and their

[1] Even in *Gonzales Lluy*, for example, even as the IACtHR focuses strongly on other substantive rights (the right to health and to education), it still analyses those rights through the equality lens.

potential for the implementation of intersectionality. Both of these principles are still closely tied to anti-discrimination provisions in IHRL, which serves as a further example that IHRMB still regard intersectionality mostly through the equality prism. Nevertheless, as we will see, those principles have managed to detach themselves from a strict anti-discrimination reasoning, and could therefore be an interesting path to explore to further shift IHRMB's reasoning towards intersectionality and towards a systemic understanding of the substantive realisation of all human rights, beyond the right to equality.

5.1. Vulnerability reasoning

Vulnerability is an interpretative principle developed by the ECtHR, that has since been used as well by other IHRMB, such as the IACtHR, as we have seen in *Gonzales Lluy v. Ecuador*. In Art. 14 cases, the ECtHR has tied the classic "suspect grounds" approach to "vulnerable groups", whose discrimination requires very weighty reasons for justification, and who are considered vulnerable because they have historically been subject to prejudice with lasting consequences, resulting in their social exclusion (Arnardóttir 2017; Peroni and Timmer 2013). The Court has applied this principle in Art. 14 cases concerning Roma, people with mental disabilities, people living with HIV, and asylum seekers (Peroni and Timmer 2013; Heri 2021, 33). In *Alajos Kiss v. Hungary*, the Court also expressly listed sex, race or ethnicity, sexual orientation as discrimination grounds potentially related to vulnerable groups, and disability was later added in *Kiyutin v. Russia* (Arnardóttir 2017; Heri 2021, 33).

The Court's description of vulnerable groups as historically subject to prejudice, leading to their social exclusion, reveals a social-contextual understanding of group membership (Arnardóttir 2017). As Peroni and Timmer (2013) argue, the ECtHR's account of intersectionality is relational: vulnerability is inherently tied to wider social circumstances, shaped by social, historical and institutional forces. In other

words, vulnerability serves as a proxy for structural oppression. This shows how the ECtHR – and, by extension, other IHRMB who have taken inspiration from vulnerability reasoning – could apply the concept of vulnerability to address structural human rights issues affecting intersectionally marginalised groups who have also been subject to lasting prejudice and social exclusion.

Curran (2016) stresses this link between vulnerability and intersectionality in her analysis of the Slovakian Roma sterilisation cases. She points out that, when the Court calls the Roma community "vulnerable", it obscures the role of the State in this vulnerability by artificially separating this vulnerability from the structures that caused it. Curran argues that, if the Court had employed an intersectional perspective in these cases, it would have considered the structural factors and systemic oppression that make the Roma people vulnerable (notably, Slovakia's policies and practices concerning health care, education and employment for the Roma community). Consequently, it follows that a truly thorough vulnerability analysis would necessarily reveal the systemic and intersectional nature of the oppression that causes this vulnerability.

Rubio-Marin and Möschel (2015)'s analysis of these cases is also relevant to this discussion. It focuses on the way in which the Court erases their gender dimension and lets the racial perspective prevail, erasing the intersection of race and gender (and, arguably, class). Even the racial dimension, however, gets obscured in practice: the Court, refusing to examine the case under Art. 14, argues that there is not enough evidence of an organised policy behind the sterilisations. In doing so, the Court subordinates the finding of a violation of the anti-discrimination provision to the existence of intent, which goes against its standard equality doctrine. Combined with Curran's analysis of these cases, this also seems to subordinate a systemic analysis of the situation to the existence of intent. Rubio-Marin and Möschel call this phenomenon the "Holocaust Paradigm": in matters of life or physical integrity, the Court unconsciously replaces the discrimination paradigm with a criminal/genocidal paradigm, which introduces the need for intent. In doing so, it

fails to truly recognise and thus to redress the racist oppression inherent to such cases.

Interestingly, though, a very recent case on non-consensual sterilisation offers another insight in the Court's treatment of intersectionality and vulnerability – one that does depart from a purely anti-discrimination approach, but that also shows this departure can lead to the wrong conclusions about structural oppression. In *Y.P. v. Russia*, the applicant is a Russian woman who also got non-consensually sterilised during childbirth, and the Court finds that this sterilisation does not reach the threshold of applicability of Art. 3 ECHR. It bolsters this finding with references to the lack of ill intent on the part of the medical personnel, and the lack of additional vulnerabilities on the applicants' part. Scholars have argued that this suggests that the Court sees the racial element as an aggravating factor under Art. 3 (see Graham and Tongue 2022). Consequently, despite the Court's lack of engagement with systemic vulnerability in the Roma sterilisation cases, the *de facto* situation does seem to be, at present, that Roma women (who are intersectionally positioned) are better protected against non-consensual sterilisation than women who are not intersectionally marginalised (or not in the same way). This is, of course, a very questionable interpretation of the impact of (intersectional) vulnerability on the protection of one's human rights. Racist or eugenic intent (or impact) in non-consensual sterilisations can, of course, be very relevant to determine the existence of systemic oppression. However, as Judges Serghides and Pavli argue in their dissenting opinion, the specific (intersectional) vulnerability of Roma women does not means that women in general are not vulnerable in the exercise of their reproductive rights. The absence of intersectional marginalisation in this case, should therefore not have been decisive for the applicability of Art. 3. (Graham and Tongue 2022)

Nevertheless, the ECtHR has also employed the concept of vulnerability to examine an intersectional situation in a more constructive manner. In *B.S. v. Spain*,

which was discussed above, the Court underlined *"the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute"*. This cannot truly be considered a thorough analysis of the link between intersectionality and vulnerability in the way Curran (2016) calls for, but it is an acknowledgement of intersectional marginalisation through the proxy of vulnerability (Yoshida 2013). Expanding this line of reasoning – especially to vulnerable groups and not just a vulnerable individual, and while paying due attention to not fall into traps such as those in *Y.P. v. Russia* – could therefore be a practical avenue towards implementing intersectionality through the reasoning of IHRMB.

The IACtHR has explicitly linked vulnerability to intersectionality. In both *Gonzalez Lluy v. Ecuador* and *I.V. v. Bolivia*, the Court refers to "the intersection of multiple factors of vulnerability". As Sosa (2017) demonstrates, though, this approach is not yet consistent, especially not in all types of cases. Sosa analyses IACtHR cases concerning femicide and violence against women, and finds that the Court's intersectional analysis is lacking in some regards. The aspect of socio-economic class, for example, gets almost entirely erased. Sosa also shows how, while age (specifically in the case of children) is treated as a socio-structural vulnerability in many IACtHR cases, that socio-structural approach does not extend to the intersection of age and gender. When it comes to girls, specifically, the Court's assessment of vulnerability seems to be a much more embodied, biological one, rather than structural and intersectional. Nevertheless, Sosa shows how the IACtHR's approach to the intersectional elements at play in cases concerning violence against women is improving – and improves the most when the Court employs a structural vulnerability analysis.

These examples show how an optimally structural implementation of this avenue should contend with systemic vulnerability outside of anti-discrimination provisions, and should thoroughly examine the impact of this vulnerability on the realisation of other substantive rights. In this sense, monitoring bodies could highlight

systems of oppression that make the realisation of certain specific human rights particularly difficult for certain persons/communities by declaring them to be not just vulnerable to discrimination, but vulnerable to the non-realisation of those specific human rights.

5.2. Anti-stereotyping reasoning

Stereotyping has been tied to intersectionality since the theory's inception: Crenshaw points to racist, sexist and intersectional stereotypes in *"Demarginalising the intersection of gender and race"* (1989). This is not surprising: intersectional oppression, like other types of oppression, is intimately tied to negative stereotypes about the persons concerned. As Timmer (2011) argues, stereotypes are both cause and manifestation of structural disadvantage. They presuppose shared group characteristics that are imposed upon individuals and communities, which leads to denying their dignity and autonomy, and consequently impairs the realisation of their human rights. Stereotypes can also impact intersectionally marginalised community and consequently also underpin this form of structural oppression. Some examples are the stereotypes of Black women being aggressive (Jones and Norwood 2017); Muslim women being oppressed (Timmer 2011); and queer men being sexually promiscuous (*Ibidem*).

Consequently, IHRMBs could also employ anti-stereotyping reasoning to counter intersectional stereotypes, and therefore to address intersectional oppression. As it turns out, the first steps of this evolution have already taken place in certain IHRMB, notably the ECtHR and the CEDAW Committee.

The first example of this can be found in *Carvalho Pinto de Sousa Morais v. Portugal*. In this case, a fifty-year-old woman suffered a loss of sexual ability and pleasure and became depressed after a failed surgery. The domestic appeal court had reduced the compensation awarded to her in first instance on the basis that the woman had already had two children, and that sex was no longer of such high

importance at her age. This reasoning reveals a very clear underlying intersectional stereotype: the idea that, once women are past child-bearing age, sex is no longer important for them – i.e. that sex (and sexual pleasure) in itself is unimportant for the self-fulfilment of older women. In its judgment, the ECtHR names these compounded stereotypes, and states that *"the applicant's age and sex appear to have been decisive factors in the final decision"* (§53*)*. Even more interestingly, despite pushback from the dissenting judges, the majority found a violation of Art. 14 ECHR in the absence of a comparator *(*Peroni 2017*)*. This shows IHRL's capacity to address intersectional oppression outside of a strict anti-discrimination framework.

The CEDAW Committee, in the case of *R.P.B. v. the Philippines*, also condemns the stereotypes that lead the domestic courts to disadvantaging a mute and Deaf (minor) girl who had been the victim of rape, observing that myths and stereotypes prevented courts from considering the individual circumstances of the victim, including her gender, disability and age. (Her language was arguably relevant as well, though the Committee grants this aspect very little attention: since R.P.B. was Deaf, she had pursued her education in English, and did not know Filipino very well). While the Committee sticks very closely to its competence and mainly focuses on the gender dimension of the case, it does address the fact that the domestic courts' reasoning completely fails to take R.P.B.'s intersectional positioning into account (Truscan and Bourke-Martignoni 2016). Indeed, the domestic courts stated that "ordinary Filipina female rape victim" would have used every opportunity to resist or escape her rapist, and since R.P.B. did not do so, there was not enough evidence to convict her attacker. The Committee condemns this reasoning, pointing out that the domestic courts should have taken into account the fact that R.P.B. was not, on account of her age and disability, an "ordinary Filipina female rape victim", and should not be punished for failing to conform to this stereotype constructed by the domestic courts (Truscan and Bourke-Martignoni 2016).

While the previous two examples handle intersectionality rather implicitly, their impact on an intersectional reality is nevertheless concrete. For an explicit discussion of intersectionality in a case that also deals with stereotyping, we can look to the IACtHR's *I.V. v. Bolivia*. This case is very similar to the ECtHR's Roma sterilisation cases: it also concerns a migrant woman of low socio-economic status and with health issues, who was sterilised without her consent during childbirth. The IACtHR states that "*non-consensual sterilization is a phenomenon that, in different contexts and parts of the world has had a greater impact on women who form part of subgroups with greater vulnerability to suffer this human rights violation, due either to their socio-economic status, their race, their disabilities, or to the fact that they are living with HIV*" (§247)[2]. It concludes that, while there is no sign that the applicant's nationality, situation as a refugee or socio-economic status directly influenced her medical team's decision to sterilise her, those factors did impact the magnitude of the harm she suffered in her personal integrity. It also explicitly concludes that she faced intersectional discrimination in her access to justice (§321).

The Court goes on to examine the prevalence of paternalistic gender stereotypes in the medical sector – even explicitly naming some of them – and their impact on the care women receive. While its anti-stereotyping reasoning focuses solely on the case's gender aspect, excluding any intersecting elements, it does stress the importance of never performing such a procedure without full and informed consent, *"particularly in cases where the woman has scarce financial resources and/or low levels of education (§188)"*. It also condemns the pretext of sterilisation as a form of population control. This can be regarded as an implicit intersectional analysis in an anti-stereotyping reasoning.

[2] It may be regretted that the Court does not explicitly mention the applicant's health issue – endometriosis – in this list of intersecting factors of oppression. This highlights the difficulty for IHRMB in addressing all the aspects of an intersectional situation in a particular case.

It is notable that these analyses coexist in Court's reasoning on this case; it seems but a small step to combine them explicitly in the future. Furthermore, it is interesting to note that, in its intersectionality reasoning, the IACtHR once more refers to "subgroups with greater vulnerability." This suggests that intersectionality, vulnerability and anti-stereotyping reasoning could easily be combined together into a structural, systemic analysis of access to human rights. The Court even comes very close to doing exactly that: it notes, in §185, that women's right to make autonomous decisions about their reproduction can be jeopardised, among others, by "*the existence of additional factors of vulnerability, and of gender and other stereotypes among health care providers*" and that "*[f]actors such as race, disability and socio-economic status cannot be used as grounds to limit the patient's freedom of choice with regard to sterilization, or to circumvent obtaining her consent*". Though this paragraph does not explicitly link stereotypes, vulnerability and intersectionality, it does juxtapose them in a way that seems promising for a combined analysis in the future.

These examples shows how anti-stereotyping reasoning can help implement intersectionality through IHRL. Indeed, when a stereotype about an intersectionally marginalised person of community leads to a human rights issue, countering this stereotype is an essential step in solving this human rights issue and thus countering intersectional oppression. Nevertheless, as with vulnerability, anti-stereotyping reasoning is still tied to anti-discrimination provisions. Both vulnerability and anti-stereotyping reasoning, however, have helped shift anti-discrimination reasoning from a rather formal view of equality to a more substantive and structural version of it. Therefore, they could be useful tools to shift IHRL more towards the type of structural and systemic reasoning necessary for realising the full potential of "doing intersectionality".

6. Conclusion

Anti-discrimination law has unquestionably been essential to the development of intersectionality as a theory and to the reflections linking intersectionality to substantive equality and structural oppression. Nevertheless, anti-discrimination law as a field presents a number of practical obstacles to the implementation of intersectionality to counter structural oppression and to achieve the substantive realisation of intersectionally marginalised persons' human rights. This article, instead, explored the potential of international human rights law as an alternative avenue to help achieve the afore-mentioned goals.

In this exploration, the present article showed how IHRL is, in some ways, better suited to implement intersectionality to counter structural human rights issues. It also discussed a number of challenges that IHRL must overcome to be able to fully address intersectionality as a united front. Nevertheless, some IHRMB are less affected by these challenges than others, which leads them to being better equipped to implement intersectionality in their judgments.

Furthermore, IHRL contains a number of interpretative principles that have already been used to – implicitly – address intersectionality and could be expanded in that direction in the future. This article discussed vulnerability and anti-stereotyping reasoning as two of the most prominent and promising examples of this possibility.

Part of what makes these interpretative principles so promising is their indissociable link to structural oppression. They act as examples of the fact that IHRL's most innovative and transformative role in "doing intersectionality" lies in its potential for countering structural oppression through an analysis of intersecting systems of oppression, allowing for the redress of systemic human rights issues affecting intersectionally marginalised persons and communities.

References

Doctrine

Arnardóttir, O.M. (2017), Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?, in *Oslo Law Review*, vol 4, No 3, pp. 150–171.

Atrey, S. (2019), *Intersectional Discrimination*, Oxford, Oxford University Press.

Atrey, S. (2020), Intersectionality and Comparative Antidiscrimination Law: The Tale of Two Citadels, in *Brill Research Perspectives in Comparative Discrimination Law*, vol. *4*, no. 1, pp. 1–86 - https://doi.org/10.1163/24522031-12340008

Bello, B.G. (2009), Multiple Discrimination between the EU Agenda and Civic Engagement: The Long Road of Intersectional Perspective, in *Roma Rights Quarterly*, no. 2, pp. 11–20.

Bouchard, J., and Meyer-Bisch, P. (2016), Intersectionality and Interdependence of Human Rights: Same or Different?, in *Equal Rights Review*, no. 16, pp. 186–203.

Brems, E. (2018), "Smart human rights integration", in Brems, E., and Ouald-Chaib, S., *Fragmentation and Integration in Human Rights Law*, Edward Elgar Publishing, pp. 165–194 - https://doi.org/10.4337/9781788113922.00013

Campbell, M. (2016), CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination, in *Oxford University Working Paper*, vol. 2, no. 3, p. 48.

Campbell, M. (2020), "Sexual and Reproductive Health Rights of Rural Women and Girls", in Atrey, S., and Dunne, P. (eds.), *Intersectionality and Human Rights Law*, Hart Publishing, pp. 147–166.

Castillo-Ortiz, P., Ali, A., and Samanta, N. (2019), Gender, intersectionality, and religious manifestation before the European Court of Human Rights, in *Journal of Human Rights*, no. 16 - https://doi.org/10.1080/14754835.2019.1581054

Chow, P.Y.S. (2016), Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence, in *Human Rights Law Review*, vol. 16, no. 3, pp. 453–481 - https://doi.org/10.1093/hrlr/ngw016

Collins, P.H. (1990), *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, London, Routledge.

Crenshaw, K. (1991), *Mapping the margins: Intersectionality, identity politics, and violence against women of color* - https://doi.org/10.2307/1229039

Crenshaw, K. (1989), Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, *University of Chicago Legal Forum*, *1989,* no. 1, p. 31.

Curran, S. (2016), Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women, in *Equal Rights Review*, no. 16, pp. 132–159.

David, V. (2014), Reparations at the Human Rights Committee: Legal Basis, Practice and Challenges, in *Netherlands Quarterly of Human Rights*, vol. 32, no. 1, pp. 8–43 -https://doi.org/10.1177/016934411403200103

de Beco, G. (2019), Intersectionality and disability in international human rights law, in *The International Journal of Human Rights*, no. 23 - https://doi.org/10.1080/13642987.2019.1661241

de Beco, G. (2020), "Harnessing the Full Potential of Intersectionality Theory in International Human Rights Law: Lessons from Disabled Children's Right to Education", in Atrey, S., and Dunne, P. (eds.), *Intersectionality and Human Rights Law*. Hart Publishing, pp. 39–58.

Dobe, D. (2016), Contesting Essentialism: The Role of Pluralism and Intersectionality in Access to Justice, in *Queen Mary Law Journal*, no. *7* (Special Conference Issue), pp. 125–134.

Donald, A., and Speck, A.-K. (2019), The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments, in *Human Rights Law Review*, vol. *19*, no. 1, pp. 83–117 - https://doi.org/10.1093/hrlr/ngy043

Fikfak, V. (2018), Changing State Behaviour: Damages before the European Court of Human Rights, in *European Journal of International Law*, vol. *29*, no. 4), pp. 1091–1125 - https://doi.org/10.1093/ejil/chy064

Graham, L., and Tongue, Z.L. (2022, September 30), Y.P. v Russia: Sterilisation Without Consent, Article 3, and Weak Reproductive Rights at the ECtHR, in *Strasbourg Observers* - https://strasbourgobservers.com/2022/09/30/y-p-v-russia-sterilisation-without-consent-article-3-and-weak-reproductive-rights-at-the-ecthr/

Heri, C. (2021), *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR. Bloomsbury Academic* - https://doi.org/10.5040/9781509941261

Jones, T., and Norwood, K.J. (2017), Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman, in *Iowa Law Review*, no. *102*, pp. 2017–2069.

MacDowell, E.L. (2014), Reimagining Access to Justice in the Poor People's Courts, in *Georgetown Journal on Poverty Law and Policy*, vol. *22*, no. 3, pp. 473–544.

MacDowell, E.L. (2017), Vulnerability, Access to Justice, and the Fragmented State, in *Michigan Journal of Race & Law*, vol. *23*, pp. 51–104.

McCall, L. (2005), The Complexity of Intersectionality, in *Signs: Journal of Women in Culture and Society*, vol. *30*, no. 3, pp. 1771–1800 - https://doi.org/10.1086/426800

Mulcahy, A., Streed, C.G., Wallisch, A.M., Batza, K., Kurth, N., Hall, J.P., and McMaughan, D.J. (2022), Gender Identity, Disability, and Unmet Healthcare

Needs among Disabled People Living in the Community in the United States, in *International Journal of Environmental Research and Public Health*, vol. 19, no. 5 – 2588 - https://doi.org/10.3390/ijerph19052588

Nadal, K.L., Davidoff, K.C., and Fujii-Doe, W. (2014), Transgender Women and the Sex Work Industry: Roots in Systemic, Institutional, and Interpersonal Discrimination, in *Journal of Trauma & Dissociation*, vol. 15, no. 2, pp. 169–183 - https://doi.org/10.1080/15299732.2014.867572

Pasqualucci, J.M. (2003), *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, Cambridge University Press.

Peroni, L. (2017). Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v. Portugal, in *Strasbourg Observers* - https://strasbourg.weichie.dev/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/

Peroni, L., and Timmer, A. (2013), and Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, in *International Journal of Constitutional Law*, vol. 11, no. 4, pp. 1056–1085 - https://doi.org/10.1093/icon/mot042

Rubio-Marín, R., and Möschel, M. (2015), Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism, in *European Journal of International Law*, vol. *26*, no. 4, pp. 881–899 - https://doi.org/10.1093/ejil/chv058

Sawyer, W. (2020), Visualizing the racial disparities in mass incarceration, in *Prison Policy Initiative* - https://www.prisonpolicy.org/blog/2020/07/27/disparities/

Shelton, D. (ed.) (2014), *The United Nations system for protecting human rights*, Farnham, Ashgate.

Smith, B. (2016), *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*. 30.7.

Sosa, L.P.A. (2017), Inter-American case law on femicide: Obscuring intersections?, in *Netherlands Quarterly of Human Rights*, vol. 35, no. 2, pp. 85–103 - https://doi.org/10.1177/0924051917708382

Timmer, A. (2011), Toward an Anti-Stereotyping Approach for the European Court of Human Rights, in *Human Rights Law Review*, vol. 11, no. 4, pp. 707–738 - https://doi.org/10.1093/hrlr/ngr036

Truscan, I., and Bourke-Martignoni, J. (2016), International Human Rights Law and Intersectional Discrimination, in *Equal Rights Review*, no. 16, pp. 103–131.

Van de Graaf, C., Brems, E., Ouald Chaib, S., Schoentjes, S., Van Baelen, A., Bribosia, E., Médard Inghilterra, R., Ouhnaoui, H., Rorive, I. (2021), *Third party intervention in the case Mikyas and others v. Belgium* -http://hdl.handle.net/1854/LU-8716420

Walby, S., Armstrong, J., and Strid, S. (2012), Intersectionality: Multiple Inequalities in Social Theory, in *Sociology*, vol. 46, no. 2, pp. 224–240 - https://doi.org/10.1177/0038038511416164

Yoshida, K. (2013), Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain, in *Feminist Legal Studies*, vol. 21, no. 2, pp. 195–204 - https://doi.org/10.1007/s10691-013-9241-1

Yuval-Davis, N. (2006), Intersectionality and Feminist Politics, in *European Journal of Women's Studies*, vol. 13, no. 3, pp. 193–209 - https://doi.org/10.1177/1350506806065752

Case law

European Court of Human Rights

ECtHR, 8 November 2011, *Case of V.C. v. Slovakia*, App. no. 18968/07 - https://hudoc.echr.coe.int/eng?i=001-107364

ECtHR, 12 June 2012, *Case of N.B. v. Slovakia*, App. no. 29518/10 - https://hudoc.echr.coe.int/eng?i=001-111427

ECtHR, 24 July 2012, *Case of B.S. v. Spain*, App. no. 47159/08 - https://hudoc.echr.coe.int/eng?i=001-112459

ECtHR, 13 November 2012, *Case of I.G. and others v. Slovakia*, App. no. 15966/04 - https://hudoc.echr.coe.int/fre?i=001-114514

ECtHR, 25 July 2017, *Case of Carvalho Pinto de Sousa Morais v. Portugal*, App. no. 17484/15 - https://hudoc.echr.coe.int/eng?i=001-175659

ECtHR, 20 September 2022, *Case of Y.P. V. Russia*, App. no. 43399/13 - https://hudoc.echr.coe.int/eng?i=001-219209

Inter-American Court of Human Rights

IACtHR, 8 August 2014, *Case of Expelled Dominicans and Haitians v. Dominican Republic* - https://www.corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf

IACtHR, 1 September 2015, *Case of Gonzales Lluy et al. v. Ecuador* - https://www.corteidh.or.cr/docs/casos/articulos/seriec_298_ing.pdf

IACtHR, 30 November 2016, *Case of I.V. v. Bolivia* - https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf

United Nations Committee on the Elimination of Discrimination against Women

CEDAW, 28 February 2012, *Kell v. Canada,* Communication No. 19/2008

CEDAW, 23 July 2012, *Jallow v. Bulgaria,* Communication No. 32/2011

CEDAW, 21 February 2014, *R.P.B. v. the Philippines*, Communication No. 34/2011