Intersectional Human Rights at CEDAW: Promises, Transmissions and Impacts

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Abstract

Starting from the premise that international human rights law is not a neutral fact, this dissertation is a critical exploration of the promises, transmissions and impacts of intersectionality as an approach to gender protections in international human rights law. I begin with a definition of intersectionality at the individual claimant and jurisprudential levels, as an approach to anti-discrimination and equality law that attempts to move beyond static conceptions and fixed identities of discriminated subjects, and, based on Kimberlé Crenshaw's powerful metaphor of a traffic intersection, delineates the flow of discrimination as multi-directional, and injury as seldom attributable to a single source. But in its life beyond these early works, intersectionality's epistemological and ontological claims have since come to express the possibility of a nearly infinite entanglement of human experience as impacted by systems of governance and regulation. In exploring this, I articulate an additional conditioning intersection. That is, in addition to the intersection of multiple harms, forms of discrimination or identities—which are, variously, the meanings ascribed to intersectionality as an approach to international human rights law—the intersection this dissertation fundamentally straddles is that between social critique and instrumental engagement. This dissertation is guided by an engaged ambivalence about the core project of harnessing feminist social critique, such as that invited by intersectionality's migratory path, to the perilous project of feminist governance. I mobilize a critical international law framework, to review relevant literature, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) practices and decisions, related United Nations memos, documents and Special Rapporteur materials, along with original interviews with CEDAW Committee members to assess the legal status, governance implications and feminist goals realized and missed in the intersectional turn in international human rights. It concludes that intersectionality both advances critical legal practice, and remains entangled in the imperial vestiges of international law's genealogy.

Dedication

"[I]t is, in fact, far easier to act under conditions of tyranny than it is to think."

Hannah Arendt, *The Human Condition*[1]

This dissertation is dedicated to the generosity of the CEDAW Committee members, UN staff and past CERD member who shared their insights with me in a spirit of intellectual openness; to all the women who have shared their personal and collective stories of intersectional discrimination and resiliency over my time organizing and advocating for women's rights.

And, to the love of my life, Anja Kessler, who taught me to love, to live fully and to believe that I am the right person to do what I am doing.

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[1] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 324.

Acknowledgments

This dissertation comes late in life. Even more than the products of youth, it therefore owes its existence to many. And yet none of them should be burdened with responsibility for its failings or follies. Premier among the many are the clients, staff and board of directors of the Barbra Schlifer Commemorative Clinic, which I have called my activist and organizing home since 2010. Nora Angeles gracefully stepped into a role she neither relished nor sought in order to free me up to initiate and then complete this project. On the way, she also taught me a great deal about my subject and myself.

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I must acknowledge the profound influence of Fay Faraday on my life and thought over the last few years. Fay entered my life as my “boss” when I was assigned as Teaching Assistant to her section of a first-year legal ethics class at Osgoode Hall Law School. I leave that role as her friend, colleague, and in the way of feminist organizing, her “boss” on the projects we have ignited together to address the experiences of women who can count on the Schlifer Clinic’s support in their various struggles to live free from intersectional violence.

I owe a great deal to the support of Osgoode Hall, Dayna Scott, Janet Mosher and many of my peers who began this journey with me and encouraged and supported me, chief among them Julie Falck and Dana Phillips. Materially, none of this would have been possible without the support of the Joseph-Armand Bombardier Canada Graduate Scholarship, Social Sciences and Humanities Research Council of Canada; the Fellowship of the Jack and May Nathanson

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To my dear old friend, Andrea Meeson, I owe the life-long challenge of engagement and reflection on political activism, as well as the practical assistance of expert copyediting. To my brother Jamie, I owe the spur of survival and intellectual fierceness; to my brother Matt, the recalled gift of humour and creativity; to my sister Lisa, the few protections of a troubled childhood; to my father, a love of learning and intellectual curiosity. They all remain influential although they are all long gone. While writing this, I also lost my mother, a vibrant and mercurial woman who taught me a great deal about social justice, writing and determination. I miss her as this project ends. My small remaining family of niece Robyn, nephew Adrian, and their spouses Tom and Calla, my smart and beautiful goddaughters Claire and Lucie, as well as Nour, and granddaughters Emma and Freija, along with their generous parents, have sustained and invigorated me through many ups and downs related to this project and all of life's concurrent challenges.

To the fierce and uncompromising women whose intellectual and activist trails blazed a path for me, and those who are blazing many more alongside me, I hope I have honoured you throughout with serious engagement of your ideas and actions. Thank you!

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Glossary of Terms

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CO	Concluding Observations
CRPD	Convention for the Rights of Persons with Disabilities
CSW	Sub-Commission on the Status of Women
DEDAW	Declaration on the Elimination of Discrimination Against Women
DAW	Division for the Advancement of Women (United Nations)
FORB	Freedom of Religion and Belief
GBV	Gender-based Violence
GC	General Comment
GCRF	Global Critical Race Feminism
GR	General Recommendations
HRC	Human Rights Committee (United Nations, CCPR)
ICC	International Criminal Court
ICCPR	International Convention of Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRL	International Human Rights Law

INGO	International Non-Governmental Organization
LBT	Lesbian Bisexual Trans
LGBT	Lesbian Gay Bisexual Trans
LGBTQI	Lesbian Gay Bisexual Trans Queer Intersex
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
R2P	Responsibility to Protect
SRSG-SVC	Special Representative of the Secretary-General on Sexual Violence in Conflict
SRVAW	Special Rapporteur on Violence Against Women
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNIFEM	United Nations Development Fund for Women
VAW	Violence Against Women

Introduction

"Can feminism foster a critique of its own successes"?[2]

In a 2002 essay,[3] Anne Orford issued a challenge to feminist international legal theorists and practitioners. Within an overall critique of the imperial shadow cast over the deployment of women's rights' rhetoric and its effect in a neoliberal economic context, Orford asks: "What might a feminist reading that attempts to avoid reproducing the unarticulated assumptions of imperialism look like?"[4]

In this dissertation I ask, what if the introduction of intersectionality as a framework for approaching women's international human rights is a partial answer to this question? In order to both pose and answer this question, I will advance a critical exploration of the promises, transmissions and impacts of intersectionality as an approach to gender protections in international human rights law. Mobilizing a critical international law framework, I review relevant literature, practices and decisions of the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), related United Nations (UN) memos, documents and Special Rapporteur materials, along with original interviews with CEDAW Committee members

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[2] Janet Halley et al, eds, *Governance Feminism: An Introduction*, Legal Studies/Feminist Theory (Minneapolis: University of Minnesota Press, 2018).
[3] Anne Orford, "Feminism, Imperialism and the Mission of International Law" (2002) 71 Nord J Int Law 275.
[4] *Ibid.*

to assess the legal status, governance implications and feminist goals realized and missed in the intersectional turn in international human rights law.

Promising an account of the full complexity of discriminated persons, intersectionality at its most involute allows us to elaborate the specifically structural histories of exclusion from the distributional benefits of equality that an anti-imperial approach would require. Traceable through many academic fields, standpoints of critique and approaches to method, intersectionality has travelled the globe, articulating this promise through its potent metaphor of the confluence of pathways to harm through multiple identities. As with other feminist ideals active in public life, intersectionality has leapt from the page, transmitting and thereby being transformed through its movement "from the international to the local and back again, from centre to periphery and back again, from the ivory tower to the street and back again".[5] Although there is a strong body of work that catalogues intersectionality's failures in domestic law,[6] relatively little has been done to account for its robust adoption in international law. Notable exceptions to this are divided between critiques of the UN's allegedly incomplete understanding of the concept,[7] upset at the primacy of Kimberlé Crenshaw's work in informing it,[8] and practitioners' guides to its deployment.[9]

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[5] Janet E Halley, *Governance feminism: an introduction* (Minneapolis : University of Minnesota Press, 2018) at 23.
[6] Emily Grabham, *Intersectionality and beyond: law, power and the politics of location*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009).
[7] Johanna E Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory LJ 71.
[8] N Yuval-Davis, "Intersectionality and Feminist Politics" (2006) 13:3 Eur J Womens Stud 193; Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations* (London: Sage, 2011).
[9] Meghan Campbell, "CEDAW and Women's Intersecting Identities: A Pioneering New Approach" (2015) 11:2 Rev Dierito GV 479; Fredman, Sandra, *Intersectional discrimination in EU gender equality and non-discrimination law* (European network of legal experts in gender equality and non-discrimination: European Commission, 2016).

Of particular interest to me in this dissertation is intersectionality's now nearly ubiquitous appearance as a key aspect of women's international human rights law. Its deployment needs to be better understood so as to pose and explore the question of whether its adoption helps international law to shed its imperial mantel, effectively moving intersectionality from critical social theory to critical legal technique. Therefore, while there is a vast literature through which the concept can be traced and usefully sharpened, it is the transmissions and impacts—productions and receptions—particular to international human rights law that will shape the contours of this work. Specifically, I trace the promises, transmissions and impacts of intersectionality at and through CEDAW and its monitoring committee (the Committee), and consider the ways in which intersectionality has been elaborated as an approach to international human rights' protections for multiply[10] discriminated women.

For this context, I begin with a definition of intersectionality at the individual claimant and jurisprudential levels, as an approach to anti-discrimination and equality law that attempts to move beyond static conceptions[11] and fixed identities of discriminated subjects, and which, based on the metaphor of a traffic intersection, delineates the flow of discrimination as multi-directional, and injury as seldom attributable to a single source.[12] As I explore in Chapter 1 and continue to trace throughout the dissertation, the strain of intersectionality that arose in Crenshaw's work was an attempt to account for the duality of race and gender as they shaped experiences of discrimination and were rendered invisible by the systems that both inflicted

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[10] I use multiply in this context as an adverb, meaning in multiple ways, or in several ways.
[11] Emily Grabham et al, "Introduction" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social Justice (Abingdon, UK: Routledge-Cavendish, 2009) 1.
[12] Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chi Leg F 139 at 149.

harms and proposed remedies.[13] But in its life beyond these early works, its epistemic and ontological claims have since come to express the possibility of a nearly infinite entanglement of human experience as impacted by systems of governance and regulation. Does this extend the emancipatory possibilities of law as it accounts for these variables, or does the concept become incoherent? Does intersectionality as human rights law provide a way out of the impasses in rights protections that pit vulnerable groups against one another, that view human rights in solely binary fashion in either/or propositions, or that seek always to balance rights between winners and losers, or painfully, between aspects of a single individual seeking protection?

In attempting to answer these questions, this dissertation focuses on the promises, transmissions and impacts of intersectionality. In doing so, I articulate an additional conditioning intersection. That is, in addition to the intersection of multiple harms, forms of discrimination or identities—which are, variously, the meanings ascribed to intersectionality as an approach to international human rights law—the intersection this dissertation fundamentally straddles is that between social critique and instrumental engagement. This work is guided by an engaged ambivalence about the core project of harnessing feminist social critique, such as that invited by intersectionality's migratory path, to the perilous project of feminist governance. Put another way, throughout the chapters that follow, there is a "story" of intersectionality that traces the concept and its work, contextualizing where and how it appears on its route to acceptance as international legal technique. In doing so, and in accounting for both losses and advances made

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[13] Kimberle Crenshaw, "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" (1989) U Chi Leg F 139; Kimberle Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color" (1991) Stanford Law Rev 1241.

possible by its adoption, there is a more general question of what wider power struggles might be at play that allow for an idea's acceptance or pave the way for its advancement; what does the concept facilitate and what does it permit, both at the level of its expressed purpose and with a wider view. This is what is meant by asking what "work" a concept is doing in the worlds it travels through.

I begin this account of transmissions and impacts by asking what it is we are talking about when we refer to intersectionality, and for this I turn to the literature on intersectionality that simultaneously exceeds and informs law. Nevertheless, the act of tracing intersectionality through the literature is not an exhaustive intellectual history. The approach I have taken to the topic of intersectionality as a legal concept and practice recognizes that intersectionality has a life in and beyond law. It thus manifests as epistemology, ontology, methodology, as well as legal technique.

As an acknowledged "travelling idea",[14] intersectionality does not always appear under its own name. Its antecedents, co-travellers, as well as its staunchest critics, need to be considered to plumb its deeper meaning and contribution. I will note intersectionality's transformation across these categories and iterations as I explore them in the following chapters. This is necessary to assess its putative contribution to social critique before following its movement back and forth in law.

In all its travels noted above, intersectionality appears as a metaphor to express domestic human rights critiques as well as a concept in sociological, activist and legal analysis, and I

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[14] Halley, *supra* note 5.

explore this grounding in the literature in Chapter 1. Here, I also explore the implications of intersectionality as a manifestation of feminist theory, and as part of the long and *aporetic* relationship between feminism and governance, and more specifically, between feminism and law.

In Chapter 2, I distinguish the role of CEDAW as text and as Committee, exploring the textual life of the treaty as both instrument of law and discursive text, caught up in a history of empire and simultaneous resistance to particular manifestations of patriarchy, often couched as expressions of “culture”. In this context and throughout the dissertation, I challenge the oft-proffered reasoning that pits women’s rights as a self-evident entity in a reified clash with a fixed idea of “tradition” and “culture”, finding that CEDAW as text, and later in the dissertation as Committee, retains some imperial vestiges foreshadowed in the literature review.

Intersectionality has an active life as discourse in various UN documents, which I explore in Chapter 3. Here—as in all chapters—I critically examine the subtle ways in which the various notions of intersectionality surface and in which empire remains influential. It is this subliminally imperial discourse of international human rights law that I explore, and which I find newly embedded in sovereignty and security agendas. I examine what, if any modifications intersectionality has made to this mix. These agendas are equally relevant as I dig deeper into the literature on the clash between religious/cultural and gender-based rights that I first present in Chapter 1. This work sets the stage for a closer examination of the complicated role played by international human rights law and CEDAW as governance feminism, in Janet Halley’s sense,

and therefore as both vector of liberatory ideals and consolidator of forms of power.[15] In Anne Orford's formulation, these twin manifestations are most fruitfully seen through a method that traces their appearance as expressions and advancements of authority. Following Orford's example, I find a fragile thread that links a desire for mastery over the major geo-political events of genocide in the former Yugoslavia and in Rwanda with the UN's receptivity to an intersectional approach to the conceptualization of discrimination. This thread grows thicker with each step I follow along its vestigial path. I bring the reader on this journey throughout Chapter 3, until the links are made expressly through the documents I examine and that later, in Chapter 4, I ask my original sources to reflect on.

Intersectionality, in its more liberatory appearances, is an heuristic device for theoretical examination of the dynamics of power. I explore this in Chapter I as a theoretical proposition and further in Chapter 4 in light of my original interviews. In these chapters I discern the institutional, instrumental and normative grounding of intersectionality's adoption in the conflicted and contested terrain of CEDAW, and then examine and analyze these appearances through the lens of my conversations with CEDAW Committee members. A key part of my work mobilizes original research to assist in tracing the promises, transmissions and impacts of intersectionality. This takes the form of semi-structured interviews that I conducted in person during CEDAW's Fall 2016 session in Geneva, and via Skype interviews with additional informants no longer part of, or situated outside CEDAW, in the year following. I make meaning of this material as an element of "law's consciousness of itself"[16] and to do so I turn my attention

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[15] *Ibid*.
[16] ESIL Lecture Series, *Anne Orford - Histories of International Law and Empire* (University of Paris 1 Sorbonne, 2013).

fully to Orford and mobilize her body of work in critical international law. Orford holds that "law is inherently genealogical, depending as it does upon the movement of concepts, languages and norms across space and even time".[17] For Orford, making meaning in law hinges on the Foucauldian phrase "consciousness of itself",[18] because it signals the methodological approach of starting from the practices of law as they are given, or operate, but at the same time as they reflect on themselves and are rationalized. In Chapter 4, I employ this methodology in the analysis of my original interviews with CEDAW members as they reconstruct and reflect on the development and current practice of intersectionality in their deliberations. This places their individual and collective understanding of intersectionality in direct conversation with the twin aspects of authoritative and liberatory impulses in governance feminism, adding their reflections (individual law-makers' consciousness of themselves) to a literal account of law's consciousness of itself.

Following Orford's method further, in Chapter 5 I gather the preexisting but dispersed practices of intersectionality into a coherent examination, attentive to its adoption in the consideration and adjudication of women's international human rights at CEDAW. Here I assess the written decisions and pronouncements of the CEDAW Committee in its role as custodian of the treaty charged with protecting women's rights considering what I have examined before: the theoretical grounding and political promise of intersectionality; the geopolitical context of its adoption; the textual and discursive manifestations of it in international law; and the self-

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[17] ESIL Lecture Series, *Anne Orford - Histories of International Law and Empire* (University of Paris 1 Sorbonne, 2013).
[18] Anne Orford, "On International Legal Method" (2013) I:I Lond Rev Int Law 166; Michel Foucault, *The birth of biopolitics: lectures at the Collège de France, 1978-1979*, 1st Picador pbk ed.. ed (New York: Picador, 2010) at 3.

conscious adoption of it as an approach in decision making as articulated by the Committee members. This final chapter comes full circle to Orford's challenge, completing the task of scrutinizing the decisions of CEDAW as a window into assessing intersectionality's role as a legal tool in international jurisprudence, concluding that it simultaneously bolsters imperial authority and advances post-colonial critique.

A theme throughout this dissertation is the struggle to discern a distinct elaboration of intersectionality as a means to sharpen the focus on a mutually constitutive form of discrimination which is at once a product of multiple vulnerabilities and social oppressions, but not simply additive. Resisting the appearance of intersectionality as simply part of a "tag-cloud" of key recurring terms that inform contemporary theorizing,[19] I take its advent seriously. I advance a view of intersectionality as not an indiscriminate assemblage of concepts, but as revealing a range of different approaches to categorizing complex, violent and systemic discriminations, and attempts to trace the burdens of dynamic disempowerment these create. As such, its promise to reveal and illuminate must be taken seriously as a possible precondition to individual as well as collective resistance, amelioration and agency.

Although there is little room for intellectual or political purity in the world of applied feminism, there is a great need for reflection and accountability. Resisting naivety or easy answers in responding to Orford's gauntlet which began this introduction—indeed in honouring her method of assessing law's retrospective self-justification for its claim to authority—I trace

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[19] I paraphrase in a different context Orford, Hoffmann and Clark in, Anne Orford, Florian Hoffmann & Martin Clark, *The Oxford handbook of the theory of international law*, first edition. ed, Oxford handbooks (Oxford, United Kingdom : Oxford University Press, 2016).

the critical insights brought to law from intersectionality, both describing what I find, and elaborating what can be. It is my effort to make room for a conversation about "critically engaged governance",[20] and governance-engaged critique that drives this work overall. "Be prepared for paradoxes", [21] offers Janet Halley in a warning about the nature of feminism as a governance project that could equally apply to what follows here. My work seeks to be an open-eyed approach to weighing the complicated and sometimes fractured twin projects of social critique and governance technique. To do so, as I trace the ideas, governance pathways and people at the UN responsible for holding states accountable for preventing and ameliorating intersectional violence, inviting them as I go, to engage in a little reflection of their own.

A note about method

As I hope I will establish, intersectionality is a word that neither clarifies which academic terrain you are on nor what exact epistemological, ontological or political frames you are referencing. In part, this project has a purpose to precisely trace the meanings and disciplinary manifestations of the term and the work intersectionality does as an aspect of the back and forth nature of its relationship to law. Although there is an argument to be made that all contemporary advanced academic work is in some senses interdisciplinary,[22] some of the disciplinary norms of the work I engage are more fluid than others. The introduction of Queer Theory into the flow of understandings of intersectionality, for instance, precisely aims to "reflect both an unhomed interdisciplinarity as well as mediated tensions and deliberate blurring between area studies

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[20] Halley, *supra* note 5 at 266.
[21] *Ibid* at 261.
[22] Kristin Luker, *Salsa Dancing into the Social Sciences: Research in an Age of Info-Glut*, EBSCOhost (Cambridge, Mass: Harvard University Press, 2008).

knowledge formations and ethnic, diaspora, and transnational studies."[23] So while this is a dissertation in law, and as I will sketch briefly below and elaborate more fully in the chapters that follow, I engage a methodology proper to my discipline, much of what is asked of law by entertaining intersectionality requires consideration of contestations that come from beyond law's traditional borders.

I hope to bring these interdisciplinary insights into dialogue with what law has made of intersectionality to try to assess and if necessary, reinvigorate those aspects that it is law's natural tendency to flatten and make into easily justiciable claims. Along the way, it remains necessary to articulate the structures, processes and legal standing of the mechanisms and material that I am citing from *within* law. At times, the reader will need to forgive a remedial lesson in the structures, sources and status of international human rights law as it frames this discussion in order that the transition from insight to practice and possibility is made clear. If the interdisciplinary nature of the concept of intersectionality provides little coherence, the legal uses of it provide little more. Another ambition of this dissertation is to take the varied legal manifestations of intersectionality I probe and create a working set of definitions that help clarify and discern intersectionality's unique contribution to the field of international human rights law. By putting these worlds into direct dialogue, I am able to identify the gaps in, for instance, the self-proclaimed intersectional approach of the CEDAW Committee's interpretation of women's human rights as articulated in their General Comments, as reflected upon by many of them as

[23] Jasbir K Puar, *Terrorist Assemblages:Homonationalism in Queer Times*, tenth anniversary expanded edition. ed, Next wave (Duke University Press, 2017) at xxiv.

individuals in conversation with me, and as practiced in their Concluding Observations of reporting states, and their individual communications with claimants.

At the start of this introduction, I quoted Anne Orford. Her work as a critical international law theorist squarely places the claims of international law, including international human rights law, within the trajectory and project of international governance and authority. Orford's work has spawned resistance from traditional disciplinary historical accounts of law,[24] and simultaneously initiated methodological innovation in tracing the origins and meanings of international law.[25] Orford addresses her methodical choices head on in a volume of the *London Review of International Law*[26] devoted to her account of international authority's consciousness of itself in *International Authority and the Responsibility to Protect*.[27] Orford tells us that her research method—the rationalization and approach to "gathering" of materials—was influenced by, and is in the main not dissimilar from, "a sociological approach to the study of international organisations, and that places 'renewed emphasis on the study of practices, including the study of discourses as practices' rather than the study of 'disembodied structures, even abstractions'".[28]

Much of Orford's departure from traditional historical accounts is based in her assertion of an expressly legal way of tracing discourse, as I will briefly review in Chapters 1 and 3. Specifically, she asks "[w]hat kind of method is appropriate to a discipline in which judges,

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[24] Charlotte Peevers, "Conducting International Authority: Hammarskjöld, the Great Powers and the Suez Crisis" (2013) 1:1 Lond Rev Int Law 131; Jacqueline Mowbray, "International authority, the responsibility to protect and the culture of the international executive" (2013) 1:1 Lond Rev Int Law 148.
[25] Anne Orford, "In Praise of Description" (2012) 25:03 Leiden J Int Law 609; Orford, *supra* note 4; Orford, Hoffmann & Clark, *supra* note 19.
[26] Orford, *supra* note 18.
[27] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).
[28] Orford, *supra* note 4, at 168.

advocates, scholars and students all look to past texts precisely to discover the nature of present obligations?".[29] In answer, she advocates for an approach to international legal theory that she situates as based on "the core of legal method", wherein:

> […]as lawyers, particularly those of us with common law backgrounds, we are trained in the art of making meaning move across time—by learning, for example, how to make a plausible argument about why a particular case should be treated as a binding precedent, or why it should be distinguished as having no bearing on the present.[30]

Her argument here is against strictly contextualist interpretations of texts, actions and ideas—a method which holds that examining ideas and actions exclusively through the lens and meanings of their time is the "proper" approach to avoid misconstruing actors' motivations and the proper chronology of history. This approach, Orford argues, diverges from legal method and is not properly employed in the effort to trace the genealogy of legal concepts. As Orford has established, law "is inherently genealogical".[31] We have seen above how for Orford, making meaning in law hinges on the Foucauldian phrase "consciousness of itself".[32] Orford uses Foucault's method of embedding critique in the act of tracing origins, to show how "certain things were able to be formed and the status of what should obviously be questioned".[33]

Foucault used the phrase, "consciousness of itself" to characterize the rise and retroactive self-justification of the state system as a whole—as the entirety of the practices of a governing police state. Orford uses this same frame to examine a subset of statecraft, namely, international

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[29] *Ibid*.
[30] *Ibid*.
[31] ESIL Lecture Series, *supra* note 17.
[32] Orford, *supra* note 18; Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979*, 1st ed (New York: Picador, 2010).
[33] Foucault, *supra* note 32 at 3.

legal authority carried out through the Responsibility to Protect doctrine (R2P). In my work, International Human Rights Law (IHRL) can be seen as an instance of this larger project of international authority and governance, if perhaps the most legitimating aspect of it (alongside humanitarian intervention), grounding as it does the ideals of "benevolent humanitarianism" that come in the package of international law's valorization of capitalist cosmopolitanism, and of "free-trade, liberalized economies, informal empire".[34] Throughout this dissertation, my approach to tracing the movement "across space and … time"[35] of intersectionality, follows Orford's distinction of an international legal method that examines the history of its own concepts and ideas, based on the authority of juridical interpretation; namely, how "the past may be a source of present obligations".[36] I take authority's consciousness of itself as an approach to my exploration of the origins and impacts of intersectionality, as I already briefly noted. This is critical to underscore at the outset, because it assists the reader in comprehending the methodology of gathering the dispersed practices I trace.

Orford's approach of revealing the meaning of ideas both within and across time requires sociological techniques to carry it out, as does my work here. In Orford's R2P work, the sociological techniques were necessarily restricted to the examination of documents and discourse, which I also employ. While Orford examined the individuals, and their influences, who gave shape and form to the practices she was interested in, the main proponents and advocates of the doctrine she was interested in were dead. In the case of intersectionality's

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[34] ESIL Lecture Series, *supra* note 17.
[35] *Ibid*.
[36] ESIL Lecture Series, *Anne Orford - Histories of International Law and Empire* (University of Paris 1 Sorbonne, 2013), at 9:45-10:01.

genealogy, I can complement the written record I explore with the reflections of living proponents. The interviews I conducted with CEDAW Committee members fit into this methodology of tracing international law's consciousness of itself, as well as its claim to authority through its relationship with intersectionality.

Intersectionality is an active area of theory, methodology and feminist engagement with statecraft and governance; examining its promise and impact reveals the genuine urge to adapt law to account for the distributional inequalities of feminism's successes heretofore, as well as the need to hold these claims to a high standard of scrutiny and self-critique. In my discussion with CEDAW Committee members, they related that such a project would be a welcome opportunity for reflection. In the spirit of critical engagement, I offer this work to the conversations that have taken place and are yet to happen between practitioners, activists, international law practitioners and academics about the promises, transmissions and impacts of intersectionality in women's international human rights.

1 Promises: Intersectionality, Law and Women's Rights—A Literature Review of History in the Present

[R]ecovering the specifically feminist ideas that animate various governance feminism projects strikes us as an urgent undertaking —but one that, we think, should be approached with scholarly care and political vision.[37]

The account of 'feminist approaches' that I tell in this chapter is not one of origins, generations, or progress, but of hope and despair, paradox and conundrum, repetition and conflict, and the importance of history in the present.[38]

Intersectionality's institutional incorporation … requires attending to both continuities and breaches between the ways that intersectionality has been understood and practiced at different stages of its development in different national and institutional contexts.[39]

1.1 Introduction

In this initial chapter, I seek to provide the contours of the literature relevant to my telling of the promises, transmissions and impacts of intersectionality in relation to women's international human rights. While each aspect of that triumvirate is part of a continuous movement of ideas, places and institutions, and thus present throughout this dissertation, it is the promise of intersectionality that I trace specifically in this chapter because it is in the academic literature that the aspiration for what the theoretical project can illuminate is its keenest. The literature on intersectionality has ambitions far beyond an extension of the grounds of

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[37] Halley, *supra* note 5 at xi.
[38] Dianne Otto, "Feminist Approaches to International Law" in Anne Orford, Florian Hoffmann & Martin Clark, eds, *Oxf Handb Theory Int Law*, Oxford handbooks, first edition. ed (Oxford, United Kingdom: Oxford University Press, 2016) 488 at 488–489.
[39] Patricia Hill Collins & Sirma Bilge, *Intersectionality* (John Wiley & Sons, 2016) at 87.

discrimination protections, and its ambitions will be part of my consideration of its role as an extension of the law's protection.

In this chapter I will explore intersectionality's contested origins, meanings and applications; its appearance as epistemology, ontology and activist rallying cry, as well as the putative categories of identity it claims to draw into its metaphoric grasp. It is my contribution to curating, clarifying and critically appraising the variety of claims promised by intersectionality as a means to articulate and ameliorate women's oppression. In order to later assess the multiplicity of claims and complexity of harms addressed by an intersectional approach to gender at CEDAW, in this chapter I examine its constituent feminist and anti-racist strands, as well as the challenges and enrichments offered through critical Queer Theory and scholarship on the right to freedom of religion and belief (FORB). The examination of this literature is in direct response to the expanded terrain in which intersectionality, as an elaboration of gender protections, is asked to do its work internationally.

1.2 Intersectionality's intellectual origins: history in the present

The provenance of intersectionality is a matter of debate and contention. As intellectual history,[40] the question of origins engages strongly held approaches—claimed,[41] contested,[42] and refuted.[43] Simply raising the question of where intersectionality travels from and to opens broader questions as to the existence, or not, of dividing lines between past and present iterations of the main tenets of the concept. Is intersectionality primarily considered to be technique and

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[40] Ange-Marie Hancock, *Intersectionality: An Intellectual History* (New York, NY: Oxford University Press, 2016).
[41] Kimberle Williams Crenshaw, "Twenty Years of Critical Race Theory: Looking back to Move Forward Commentary: Critical Race Theory: A Commemoration: Lead Article" (2010) 43 Conn Law Rev 1253.
[42] Patricia Hill Collins & Sirma Bilge, *Intersectionality* (John Wiley & Sons, 2016) at 83.
[43] N Yuval-Davis, "Intersectionality and Feminist Politics" (2006) 13:3 Eur J Womens Stud 193.

methodology, or does its principle contribution only remain radical in its formation as epistemology and ontology.[44] Much of the literature contests the term itself, linking it to projects of "ownership" and prioritizing primacy of a given proponent's lived experience.[45] For instance, outside of the field of law, it is held that "[i]ntersectionality's history cannot be neatly organized in time periods or geographic locations", and that doing so is "far from neutral", and leads to "oversimplified explanations" of its origins and meanings and grants "authoritative" status to some accounts "at the expense of others".[46] For some, simply asking the question reveals "that intersectional originalism is its own practice of re-reading and re-interpretation that has its own complex temporal and racial politics, and which is animated by a desire to rescue intersectionality from critique in a moment in which identity politics are increasingly suspect".[47] There is little doubt that while there is "tremendous heterogeneity"[48] in how the term is defined and applied, its roots lie in the struggles of black women and women of colour,[49] and in the intellectual projects that took up those struggles and forged a coherent critique and praxis[50] of

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[44] Patricia Hill Collins & Sirma Bilge, *Intersectionality* (John Wiley & Sons, 2016).
[45] Hancock, *supra* note 40.
[46] Collins & Bilge, *supra* note 42 at 63–64.
[47] Jennifer C Nash, "Feminist Originalism: Intersectionality and the Politics of Reading" (2016) 17:1 Fem Theory 3 at 3.
[48] Collins & Bilge, *supra* note 42 at 2.
[49] Patricia Hill Collins, *Black feminist thought: knowledge, consciousness, and the politics of empowerment*, 2nd ed., Rev. tenth anniversary ed.. ed, Perspectives on gender (New York: Routledge, 2000); Bell Hooks, *Feminist theory: From margin to center* (Pluto Press, 2000); bell hooks, *Ain't I a Woman: Black Women and Feminism* (Taylor & Francis, 2014); Hae Yeon Choo & Myra Marx Ferree, "Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities*" (2010) 28:2 Sociol Theory 129; Collins & Bilge, *supra* note 39; Sirma Bilge, "Intersectionality Undone" (2013) 10:2 405.
[50] I use the term praxis to invoke various critical social theory engagements with the term as representing the everyday relevance of philosophical ideas to real life, or the application of theory to active social change. The term has a varied life in the works of Marx, Gramsci, Arendt and various members of the Frankfurt School.

them, resulting in a "general consensus"[51] about how the concept is understood. Collins and Bilge capture this in the broadest terms possible in the definition that follows:

> Intersectionality is a way of understanding and analyzing the complexity in the world, in people, and in human experiences. The events and conditions of social and political life and the self can seldom be understood as shaped by one factor. They are generally shaped by many factors in diverse and mutually influencing ways. When it comes to social inequity, people's lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.[52]

Interestingly, this definition does not make special reference to the role of intersectionality within feminism, or the role of feminism within the popularization of intersectionality, nor, for our purposes, its role in law. This is likely due to co-author Bilge's concern that "disciplinary academic feminism specifically attuned to neoliberal knowledge economy contributes to the depoliticization of intersectionality", keeping it palatable for market-oriented university settings by "confining it to an act of metatheoretical contemplation" and by "whitening" it through stripping its contextual belonging in black feminist politics.[53] Along with Bilge, this project is guided by an ethic of "encouraging methods of debate that reconnect intersectionality with its initial vision of generating counter-hegemonic and transformative

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[51] Kimberle Crenshaw, "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" (1989) U Chi Leg F 139.
[52] Collins & Bilge, *supra* note 42 at 2.
[53] Bilge, *supra* note 49 at 405–406.

knowledge production, activism, pedagogy, and non-oppressive coalitions",[54] expressly and methodologically resisting "confining intersectionality to an academic exercise".[55]

Bilge's work serves as an important starting place for the contributions of intersectionality to international law because it reminds us of the social and political context that gives it meaning and purpose. A critical difference between this project and hers is that Bilge is principally concerned with using intersectionality as an accountability mechanism within activism, for creating what she calls "non-oppressive coalitional politics".[56] I draw attention to this because in tracing the link to law, it is possible to lose intersectionality's bond with activism. Law tells its own stories of beginnings and can quickly dissolve intersectionality into a narrative used only to "analyse law… to unpack…the inadequate recognition of the complexly situated subject by various law-making or law-enforcing bodies or policy initiatives".[57]

It could be argued that law's claim to intersectionality is just one more version of originalism. There is, however, a clear geneology of intersectionality in law, arising from critical race theory, and the specific coining of the term in the work of Kimberlé Crenshaw,[58] although even this attempt to fix a moment of origins in law is complicated by the nearly simultaneous appearance of the word in the work of Canadian legal scholar Marlee Kline, who drew special attention to the intersection of indigeneity in criminal law in Canada.[59] I argue that the account of law as the original site of intersectionality is best understood as positioning law as one strand of

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[54] *Ibid* at 405.
[55] *Ibid*.
[56] *Ibid*.
[57] Grabham, *supra* note 6 at 2.
[58] Crenshaw, *supra* note 12; Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) Stanford Law Rev 1241.
[59] Marlee Kline, "Race, Racism, and Feminist Legal Theory" (1989) 12 Harv Womens Law J 115.

praxis in keeping with intersectionality's appearance as a multi-pronged route to "counter-hegemony".[60] Nevertheless, the simple act of naming raises "challenges associated with straightening intersectionality's history".[61]

As Collins and Bilge are quick to point out, "[c]ontemporary renditions of intersectionality's past increasingly bypass altogether the heterogeneous forms that intersectionality took during the period of social movement politics", which they locate temporally as being in the 1990s.[62] This "straightening", they argue, limits itself to crediting Crenshaw as the foremother, and the academy as the birthplace. Ultimately, they argue, the patterns of "incorporation" into the academy served to suppress the "transformative and potentially disruptive dimensions"[63] of the projects steeped in an intersectional critique. Although these are certainly not lost for good, they need reinvigoration in any assessment of the concept's utility to transformative action, whether legal or otherwise. For this reason, the link to activism and the goals of social change beyond the bounds of law, even if pursued through law, are important to attend to.

Far from confining the discussion to metatheoretical contemplation, intersectionality as a legal concept must be understood through its complex role as link to broader demands of structural social change, realized through law's contradictory role as both consolidator of precedent, and harbinger of new approaches to protection. This articulation of law's dual role as

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[60] Kathryn Henne, "From the Academy to the UN and Back Again: The Travelling Politics of Intersectionality" (2013) 33:Gender and Sexuality in Asia and the Pacific Intersections, online: <http://intersections.anu.edu.au/issue33/henne.htm>.
[61] Collins & Bilge, *supra* note 39 at 85.
[62] *Ibid*.
[63] *Ibid*.

fixed to its past and reinterpreted for its current context is a methodology Orford positions as immanent to law, elaborated through the approach set out in the Introduction.[64] Similarly, it is important to understand that Crenshaw's association with the "coining" of the term and the spread of the analytic approach of intersectionality is tied to her grounding in "law as both a site of repression and as a site of social justice".[65] That is, in Crenshaw's work, there is an important link between the "promise" of intersectionality as a form of critical inquiry, and its role as a form of praxis.

We return to these ideas throughout, and in some detail in Chapters 3 and 5.

1.3 At the intersection with Crenshaw

While it is an altogether different project from this one to determine an intellectual history of the concepts gathered under intersectionality, notwithstanding the word's appearance in Marilee Kline's work noted above, there seems little controversy that the term intersectionality appears early and frequently, and its most often sourced back to the work of Kimberlé Crenshaw.[66] Her work forms the core named influence in the uptake of the concept in international human rights law, as explored further in subsequent chapters.[67] Indeed, the literature on intersectionality that most influenced law originated in Crenshaw's feminist critical race writing of the 1980s. It has now become influential in a vast number of fields: Emily

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[64] Orford, Hoffmann & Clark, *supra* note 19; Orford, *supra* note 25; Orford, *supra* note 18.

[65] Collins & Bilge, *supra* note 39 at 81.

[66] N Yuval-Davis, "Intersectionality and Feminist Politics" (2006) 13:3 Eur J Womens Stud 193 at 1.Columbia Law School, "Kimberlé Crenshaw on Intersectionality, More than Two Decades Later", (18 June 2017), online: *Columbia Law Edu* <http://www.law.columbia.edu/news/2017/06/kimberle-crenshaw-intersectionality>.

[67] Kimberlé Crenshaw, *Gender-Related Aspects of Race Discrimination, Background Paper submitted to the Expert Group Meeting on Gender and Racial Discrimination*, Background Paper U.N. Doc. EGM/GRD/2000/WP. 1 (Zagreb, Croatia, 2000).

Grabham et al's brief survey reveals more than six disciplines, including socio-legal studies, to which it has since been applied.[68] As such, its potential reaches beyond the individual legal subject of liberalism into the realms of law's political, symbolic and structural influences with an appealing epistemological critique that aims to "foreground the erasure"[69]of—or put more positively, centre the consideration of—multiply discriminated women, in contrast to traditional fixed legal categories and practices.

The work of Kimberlé Crenshaw is pivotal in both the domestic (American) and transnational deployments of intersectionality. Referenced at the outset of this dissertation, Crenshaw's pivotal metaphor, more fully reflected here, asks us to

> Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions, and sometimes from all of them.[70]

Her early analysis of employment law and anti-discrimination cases in the American appellate and constitutional systems was part of a founding insight growing out of Critical Race Theory,[71] and her work was instrumental in analyzing the ways in which US antidiscrimination law took a 'but for' approach

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[68] Grabham et al, *supra* note 11 at 1.

[69] Elish Rooney, "Transitional Intersections: Gender, Sect and Class in Northern Ireland" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009) 205 at 209.

[70] Crenshaw, *supra* note 12 at 149.

[71] Kimberlé Crenshaw, Neil Gotanda & Gary Peller, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995).

to the basis of discrimination claims: that is, 'but for' being either black, or 'but for' being a woman, the claimant would have received different —equal to the norm—treatment. Thus, stripped of their complex social identity and only in negative relief against the putative norm of white males could claimants have their situations of harm addressed. Crenshaw's work set into stark relief the way in which,

> race and sex … became significant only when they operate to explicitly disadvantage the victims; because the privileging of whiteness or maleness is implicit, it is generally not perceived at all.[72]

This insight into the overarching epistemic framework of (anti-discrimination) law, privileging white male experience and encoding negative subjectivity, was further enriched by Crenshaw's observation that gender as a basis of claim, was exclusively modeled on white women's experiences. The encoding of gendered and racialized identities as 'other' and as 'victims' becomes the focus in many adaptations of intersectionality outside law, especially in sociology.[73]

In early academic pieces, intersectionality has an orientation to policy and law reform. Crenshaw's work was, in large part, a foundational project of critical race feminism to open a

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[72] Elish Rooney, "Transitional Intersections: Gender, Sect and Class in Northern Ireland" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009) 205 at 209.

[73] Anna Korteweg, "Gender, Religion and Ethnicity: Intersections and Boundaries in Immigration Policy Making" (2013) 20:1 Soc Polit Int Stud Gend State Soc 109; Yuval-Davis, *supra* note 43; Yuval-Davis, *supra* note 8; Nira Yuval-Davis, "Dialogical Epistemology—An Intersectional Resistance to the 'Oppression Olympics'" (2012) 26:1 Gend Soc 46.

dialogue between the once separate worlds of anti-racist and feminist activists, in which she identified how "dominant conceptions of discrimination condition us to think about subordination and disadvantage occurring along a single categorical axis."[74] This, she claims, yields a "distorted analysis of racism and sexism" and "contributes to the marginalization of Black women in feminist theory and anti-racist politics," and that because of this predicated "discrete set of experiences," the intersections of race and gender are not duly accounted for not only in the status quo, but also in the reforming challenges and possible remedies. Centrally, theory and policy are "predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender." [75] The aim of this formulation of intersectionality is to link the law to the lived experience of complex individuals with claims, and to highlight its status as an expository tool to check law's tendency to instrumentalize social identity and categorize remedy in discrete baskets of entitlements that can't be added together or compounded.

These aims remain relevant to the ongoing development of equality rights and anti-discrimination work. In the context of the widespread belief in a clash of claims for protection under human rights instruments and in liberal discourse about state duties to "accommodate" intersecting claims for protection or not,[76] intersectionality reminds us that it is not simply a matter of stacking up the claims of discretely oppressed persons, nor of balancing the single claims of a group on the basis of one set of protected grounds versus another; intersectionality metaphorically recasts discriminations not as additive, but as mutually constitutive.

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[74] Crenshaw, *supra* note 13 at 140.
[75] *Ibid*.
[76] Pascale Fournier, "Headscarf and Burqa Controversies at the Crossroad of Politics, Society and Law" (2013) 19:6 Soc Identities 689.

Crenshaw locates her initial discussion within the debates surrounding violence against women (VAW) as a universal experience of oppression, and contests that, "the location of women of colour at the intersection of race and gender makes our actual experience of domestic violence, rape and remedial reform qualitatively different from that of white women".[77] In this example, Black women are not only sometimes like white women in gender, and like Black men in race, but also often unlike either in an intersectional experience that constitutes its own form of discrimination, at times at the hands of the two groups they are most supposed to be like.

1.3.1 What intersections make up intersectionality?

While intersectionality has been widely acknowledged to be an influential concept,[78] it has also been accused of falling short of a fully elaborated theory, and of failing to articulate its scope and reach—"are all subjectivities/identities intersectional or only those multiply marginalized subjects"?[79] Is it important, for instance, to counter the pathologizing impulses of cataloguing social identity only in terms of its vulnerabilities to social marginalization, or do those who operate in the political and legal realm from positions of dominance not also carry intersectional identities?[80] As Crenshaw remarked in response to dominant journalistic analyses of the election of Donald Trump as President of the United States, "[w]hy is the intersection of maleness and whiteness driving our analysis and not the intersection of being a woman and a person of color?"[81]

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[77] Crenshaw, *supra* note 58 at 1245.
[78] "Intersectionality is the most important theoretical contribution that women's studies, in conjunction with related fields, has made so far." Leslie McCall, "The Complexity of Intersectionality" (2005) 30:3 Signs 1771 at 1771.
[79] Jennifer C Nash, "Rethinking Intersectionality" (2008) 89 Fem Rev 1 at 8.
[80]Fredman, Sandra, *supra* note 9 at 10.
[81] Columbia Law School, *supra* note 66.

Intersectionality is embedded in a murkiness that is inherently ambiguous as to its status as methodology, the number and meaning of situational identities it represents and their relation to its putative epistemic claim. There is little doubt, for instance, that while the initial insight of intersectionality was premised on the unique form of discrimination experienced in relation to being black and a woman, there has been a proliferation of identity threads feeding into an intersectional analysis since those early days. In an interview marking the 20th anniversary of her first use of the term, Crenshaw had the following to say about the epistemic applicability of the term:

> Q: You originally coined the term intersectionality to describe bias and violence against black women, but it's become more widely used—for LGBTQ issues, among others. Is that a misunderstanding of intersectionality?
>
> Crenshaw: Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.[82]

This generalizability of the term begs the related practical question of how one determines the "coherence between intersectionality and lived experiences of multiple identities?"[83] Davina Cooper has pointed out that there is no clear answer to the question of whether "the axes [of identity and discrimination] have an existence apart from the ways in which they combine".[84] This is a matter Yuval-Davis has taken up,[85] and which we will develop

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[82] *Ibid*.
[83] Nash, *supra* note 79 at 4.
[84] Grabham, *supra* note 6 at 191.
[85] Yuval-Davis, *supra* note 8.

more in relation to the concept's uptake at the UN, where we see the tendency for the mutual constituency of the harmed identities accounted for in intersectionality come apart again, into discreet ontologically guarded identity threads. That the original formulation, which highlighted the intersectional discrimination of race and gender, has expanded to acknowledge a range of discriminatory experiences, as Crenshaw acknowledges above, deepens the tapestries of epistemologies and ontologies that make up an intersectional approach; it has also been noted, as we have seen in Collins and Bilge, that the original insight into the operations of gendered racism that it came about to highlight remain crucial and even more complex.

1.4 Essentially anti-essentialist?

Based on the foregoing, we can see that intersectionality poses a conundrum for theory and law: it is at once an effort at anti-categorical, anti-essentializing thinking that is sometimes theory, sometimes social science methodology and sometimes legal technique, and which nevertheless categorizes and spotlights—if not fixes—social identities for the purposes of exposing inequality and disadvantage. This is a thread picked up later in this dissertation through exploration of the work of Nira Yuval-Davis,[86] who argues that in its interaction with international governance, intersectionality extends the very categorizations and reifications of identity the concept was meant to alleviate. This may simply be an effect of the conundrum at the heart of the attempt to enter governing spaces with critical concepts: intersectionality promises a powerful critique of the hegemonic grasp of law on social access that regardless, engages and works through law.

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[86] *Ibid*; Nira Yuval-Davis, *The politics of belonging: intersectional contestations* (London: Sage, 2011); Nira Yuval-Davis & Marcel Stoetzler, "Imagined Boundaries and Borders A Gendered Gaze" (2002) 9:3 Eur J Womens Stud 329.

The express use of intersectionality in the international human rights field since 2000 weaves concepts from both inside and outside explicitly legal formulations, including most directly, those of Crenshaw.[87] As Hill Collins and Bilge acknowledge, Kimberle Crenshaw's work "made a major contribution to intersectionality's dispersal in global venues".[88] I explore this "dispersal" in detail throughout the chapters to come, beginning in Chapter 2. For now, I return to the grounding and uptake of intersectionality's elaboration in the academic literature that makes it attractive to the project of international human rights' protections based on gender. Circling back to the debate about origins that began this chapter, many critical scholars not typically gathered under the banner of intersectionality have nonetheless analyzed the "intersections of race, gender, sexuality, and class within the context of global colonial capitalism."[89] Their contributions to an enhancement of intersectionality for IHRL are explored further below.

1.5 Women's international human rights, critical race feminism, global critical race feminism, and intersectionality

In the context of a career of critical examinations of the operations of law through detailed ethnographic method, it is significant that critical legal anthropologist Sally Engle Merry has stated that "[t]he global human rights system is now deeply transnational, no longer rooted exclusively in the west".[90] Nevertheless, she places this declarative sentence in the context of the

[87] Crenshaw, *supra* note 58; Crenshaw, *supra* note 12.
[88] Collins & Bilge, *supra* note 39 at 90.
[89] Kathryn Henne, "From the Academy to the UN and Back Again: The Travelling Politics of Intersectionality" (2013) 33: Gender and Sexuality in Asia and the Pacific Intersections, online: <http://intersections.anu.edu.au/issue33/henne.htm>.
[90] Sally Engle Merry, *Human Rights and Gender Violence Translating International Law into Local Justice*, Chicago series in law and society (Chicago: University of Chicago Press, 2006) at 2.

equally crucial conundrum at the heart of engaging intersectionality as an instrument of international human rights law: "how to relate the progressive ideal to imperial processes that skew what is considered to be legitimate progress and shape the impact of ideas and institutions that move across borders[?]"[91] This is another way of stating the problem set out in the introduction: how to work clearly and ethically with a travelling and therefore transmutable idea in the context of global power imbalances? It is in this context, with this overall framing that I draw attention to deliberations about the universality of international human rights standards, and the extent to which they are colonial,[92] neo-colonial,[93] part of structural adjustment strategies of the Global North,[94] or culturally determined.[95] For our purposes, the point of interest is that they frequently occur in the context of debates over women's human rights and related gender protections.[96] This is expressed succinctly by Florence Butegwa, when she asks "[w]hy is it only when women want to bring about change for their own benefit do culture and custom become

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[91] Ruth Margaret Buchanan & Peer Zumbansen, "Introduction: Approximating Law and Development, Human Rights and Transitional Justice" in Ruth Buchanan & Peer Zumbansen, eds, *Law Transit Hum Rights Dev Transitional Justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014) 1 at 28.
[92] Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010).
[93] Upendra Baxi, *The Future of Human Rights*, 2nd ed (New Delhi: Oxford University Press, 2006).
[94] Yves Dezalay & Bryant G Garth, "Yves Dezalay and Bryant G. Garth, Constructing Law out of Power: Investing in Human Rights as an Alternative Political Strategy" in Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering State Glob Era* (Oxford: Oxford University Press, 2001) 354.
[95] "[G]ender hierarchy can neither be understood nor explained by attributing women's disadvantages to a vague notion of culture". Celestine I Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries" (2000) 41 Harv Intl LJ 381 at 382.
[96] Laura Reanda, "Human Rights and Women's Rights: The United Nations Approach" (1981) 3 Hum Rts Q 11; Marsha Freeman, Christine Chinkin & Beate Rudof, eds, *The UN Convention on the Elimination of All Forms of Discrimination Against Women a commentary*, Oxford commentaries on international law (Oxford: Oxford University Press, 2012); Hilary Charlesworth, "Feminist Methods in International Law" (2004) 36 Stud Transnatl Leg Policy 159; Hilary Charlesworth, "Cries and Whispers: Responses to Feminist Scholarship in International Law Special Issue: New Approaches to International Law" (1996) 65 Nord J Int Law 557; Hilary Charlesworth, "Feminist Ambivalence about International Law Why Obey International Law" (2005) 11 Int Leg Theory 1; Hilary Charlesworth, "Not Waving But Drowning Gender Mainstreaming and Human Rights in the United Nations" (2005) 18:1 Harv Hum Rights J 1; Hilary Charlesworth & Sara Charlesworth, "The Sex Discrimination Act and International Law" (2004) 27 UNSWLJ 858.

sacred and unchangeable?" [97] Often, states, seeking to consolidate their sovereignty in regional or global systems, will use "culture" as a defense to encroachment by gender-related rights,[98] posing a clash between the rights guaranteed by international human rights law under the complex rubric of culture or FORB, and the protections offered to women *qua women*. According to Michael Freeman, "[w]omen suffer much more than men from justifications of the violations of almost all their human rights by appeals to culture".[99] Existing side by side to this are hegemonic notions of women's rights emanating from the Global North, in which non-western women are often represented as if they exist in a "permanently anterior time, with gender subordination uniquely integral to their culture".[100] This critical perspective on rights, gestures past intersectionality's primary interest in the conceptualization of widening the aperture of legal protections against harms. It concerns itself instead with a critique of the problematic formulations of global rights frameworks in their whole, as extensions of colonial and racist narratives that fundamentally silence the agency and vitality of 'the third world woman', reducing her to a trope used to the advancement of western women's rights. Leti Volpp's work articulates and advances this critical perspective on the global transmissions of feminism. Her scholarship advances the "multi-axis" approach to women's rights, central to the concerns of intersectional scholarship. While Volpp primarily is an observer of constructions of race and gender within the U.S. context, her work has surfaced as part of an American-based

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[97] Florence Butegwa, "Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Legal Action" in Abdullahi An-Na'im, ed, *Cult Transform Hum Rights Afr* (London: Zed) 108 at 123.
[98] 04/08/2008, CEDAW/C/SAU/CO/2, *CEDAW Concluding Comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia*.
[99] Michael Freeman, *Human Rights*, third edition. ed, Key concepts (Cambridge, UK ; Polity Press, 2017).
[100] Leti Volpp, "Feminism versus Multiculturalism" (2001) 101:5 Columbia Law Rev 1181 at 1201.

scholarship on, “Global Critical Race Feminism” (GCRF),[101] which takes the insights of American Critical Race Feminism into observations of women’s rights globally. Volpp initially developed her work to combat what she terms domestic conservative (feminist) backlash scholarship and critiques its construction of culture as *the* problem of feminism. In that work she focuses on the liberal and racist discursive move the dominant institutional U.S. feminist deployment of culture and race entails, and its role in obscuring the real institutional and other operations of women’s inequality.

Volpp complicates the dominant American feminist representation of patriarchy as a third world women’s problem, and locates its evocation within earlier, colonial models of progress which cast a reified binary of modern versus pre-modern. She approaches culture differently from its traditional implication in the oppression of women and, rather than an over-determined one-size-fits-all obstacle to their agency, Volpp asks what it would mean to our conceptualization of feminism and women’s rights if we highlighted culture’s role in support of women’s ingenuity and as a resource in their active engagement with their own struggles, a point explored in the work of Leslye Obiora over the course of decades.[102]

In defense of women’s rights *qua* women, culture, Volpp contends, is often constructed as the straw man, belonging only to those outside the metropolitan/cosmopolitan centres whereas “[t]hose with power appear to have no culture; […]Western subjects are defined by their abilities

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[101] Adrien Katherine Wing, *Global Critical Race Feminism: An International Reader*, Critical America (New York: New York University Press, 2000).
[102] L Amede Obiora, “Affirmations and Ambiguities: Some Thoughts on Women and Agency” (2003) 67 Alb Rev 629; Leslye A Obiora, “Perspective on Equality, A” (2000) 1 Comp Concepts Equal April 7 8 2000 Cornell Law Sch [1]; Leslye A Obiora, “Reclaiming a Heritage of Resistance, Excavating an Alternative Gender Critique Paradigm” (1999) 26 Syracuse J Intl Com 203.

to make choices, in contrast to third world subjects, who are defined by their group-based determinism".[103] As such, her work provides crucial conceptual clarity to counter the work of single axis feminism, in terms of both its western liberal democratic manifestations (grounded primarily in the U.S. context), and in terms of its positioning of non-western subjects globally. As an early participant in these debates, Orford noted this driving force of feminist international law as the mission of "white women saving brown women from brown men".[104] While Orford is best known for her innovations in the history of international law and critical approaches to international law,[105] her early work centred on a critical feminist approach to international law and international human rights law more specifically, observing "the extent to which feminist internationalism is haunted by the shades of those 19th-century European feminists … facilitating empire […]".[106]

Orford's early work in fact can be seen to have laid the groundwork for the methodology she is now known for; it was through her early critique of mainstream feminist engagements with international law that she began to "propose alternative methodologies for undertaking the risky project of reading international law."[107] Risk in this context means a risk of colluding with structures of power and empire that one is invoking human rights frameworks expressly to resist. Orford shows concern to scrutinize "the ways in which feminist legal theory is invited to

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[103] Volpp, *supra* note 100 at 1192.
[104] Anne Orford, "Feminism, Imperialism and the Mission of International Law" (2002) 71 Nord J Int Law 275 at 285.
[105] Orford, *supra* note 25; A Orford, "Scientific Reason and the Discipline of International Law." (2014) 25 Eur J Int LawJournal Eur Droit Int 369; ESIL Lecture Series, *supra* note 16.
[106] Anne Orford, "Feminism, Imperialism and the Mission of International Law" (2002) 71 Nord J Int Law 275, at 275.
[107] *Ibid* at 275.

participate in the project of constituting women and the international community", [108] remaking the world in its own (European) image.

These insights belong generally to the scholarship broadly defined as Critical Race Feminism. Adrien Katherine Wing[109] finds its origins in three distinct schools, Critical Legal Studies, Critical Race Theory and feminist jurisprudence.[110] To this synthesis, Wing adds the conditioning word "global" in a branch of scholarship that seeks to apply its insights to the global context: The word "global" implies the embrace of strands from international and comparative law, global feminism, as well as postcolonial theory.[111] The work represents a broadened application of American Critical Race Feminism; however, GCRF does not engage the express developments jurisprudentially under the new UN interpretations of race and gender within the treaty framework. Like Orford's early work, it seeks to displace white, northern feminism as the "protagonist" of the international human rights story:

> Paying attention only to the protagonists in this drama blinds us to the way in which the Third World is staged as a backdrop, with a cast of nameless extras imagined as playing a part they have not written. A feminist analysis of international law that focuses on gender alone, without analysing the exploitation of women in the economic 'South', would operate to reinforce the depoliticized notion of 'difference' that founds the privileged position of the imperial feminist.[112]

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[108] *Ibid*.
[109] Adrien Katherine Wing, "Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century" (2000) 11 J Contemp Leg Issues 811 at 815.
[110] Adrien Katherine Wing, "Polygamy from Southern Africa to Black Britannia to Black America: Global critical race feminism as legal reform for the twenty-first century" (2000) 11 J Contemp Leg Issues 811 at 815.
[111] *Ibid*.
[112] Orford, *supra* note 3 at 285.

Global Critical Race Feminism Studies is not the only quarter from which critiques of the uses put to culture in women's international human rights emanate. Traditional feminist IHRL scholars, such as Rikki Holmaat and Jonneke Naber,[113] have queried the treaty committee's choice to focus on violations as a result of culture and custom, and, in light of the role culture plays in an impasse of contested rights, they have suggested new avenues to broaden acceptance of women's rights by focusing on framing infringements differently.[114] As I come to examine the framing of women's rights' violations in the discourse of the treaty committee's utterances in the final chapter, I will show that the ghost of this dilemma is far from exorcised, although its existence is certainly addressed, in part, through the elaboration of an expressly intersectional approach.

The underlying issues of the intersections that are the focus of intersectionality have long been the purview of scholars of Third World Approaches to International Law (TWAIL),[115] insisting on writing accounts of international law and its effects based in third world experiences of them—itself a powerful epistemological and ontological challenge to human rights law[116]—

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[113] Riki Holtmaat & Jonneke M M Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Cambridge [England]: Intersentia, 2011).
[114] Simone Cusack, "The CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping" in *Womens Hum Rights CEDAW Int Reg Natl Law* 124 at 124.
[115] Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 Int Community Law Rev 371. Antony Anghie, "TWAIL: Past and Future Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities" (2008) 10 Int Community Law Rev 479; Ruth Buchanan, "Writing Resistance into International Law Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities" (2008) 10 Int Community Law Rev 445; Michael Fakhri, "Questioning TWAIL's Agenda Symposium: Third World Approaches to International Law (TWAIL) Conference: Capitalism and the Common Good: Introduction" (2012) 14 Or Rev Int Law 1; George R B Galindo, "Splitting TWAIL" (2016) 33 Windsor Yearb Access Justice 37.
[116] Obiora Chinedu Okafor, "Critical Third World approaches to international law (TWAIL): theory, methodology, or both?" (2008) 10:4 Int Community Law Rev 371; Pooja Parmar, "TWAIL: An Epistemological Inquiry Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities" (2008) 10 Int Community Law Rev 363.

displacing “positivist certainties about the autonomy and inherent justice of international law”.[117] Instead, they insist on accounting “for the importance of integrating consideration for the suffering of Third World peoples, the ongoing perpetuation of economic injustice by international institutions, and acts of resistance by states and social movements in the South, into an account of international law’s history as well as its possible futures”.[118] Some have specifically noted the turn to trade-related human rights internationalism, a selective instrumentalization of human rights’ obligations and values, exposing the fundamental material interest of western/northern states in human rights that takes precedence over its purported universalism.[119] Put another way, TWAIL has revealed that from a different perspective, “international law is seen as implicated in the preservation and maintenance of a deeply unjust global order”.[120] More plainly put, law is the “chosen instrument of northern domination”,[121] with “(Third World) poverty as, potentially, part of the very genetic programming of international law”.[122]

This latter, more deterministic view of the role of international law, is challenged by Orford’s subtle but profound embellishment of its core insight: that both taking international law at its word while simultaneously scrutinizing it for its long game of consolidating its own authority, yields a deeper and more complete view of its operations. From this perspective, IHRL

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[117] Orford, Hoffmann & Clark, *supra* note 19 at 5.
[118] Ruth Buchanan, “Writing Resistance into International Law Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities” (2008) 10 Int Community Law Rev 445 at 446.
[119] Baxi, *supra* note 93; Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays*, Oxford India paperbacks (New Delhi: Oxford University Press, 2009).
[120] Buchanan, *supra* note 115 at 445.
[121] D S Pradhan, *Third World Attitude Towards International Law* (New Delhi: MD Publications, 2010).
[122] Jason Beckett, “Creating Poverty” in Anne Orford, Florian Hoffmann & Martin Clark, eds, *Oxf Handb Theory Int Law*, Oxford handbooks, first edition. ed (Oxford, United Kingdom : Oxford University Press, 2016) 985 at 985.

can be seen as an instance of the larger project of international authority and governance traced by Orford. A close cousin to humanitarian intervention, IHRL grounds the ideals of "benevolent humanitarianism" that come in the package of international law's valorization of capitalist cosmopolitanism, and of "free-trade, liberalized economies, informal empire".[123]Within this larger view of the imperial work done through international human rights, the debates over "culture" play a pivotal discursive role in legitimizing, obfuscating and upholding a worldview that shores up its perpetuation.

Descending from the lofty heights of theorizing systems of power, and returning to the activist impetus for engaging human rights in the first place, feminist scholars from the TWAIL movement, such as Celestine Nyamu, demand a step away from "vague notions of culture" deployed in international human rights law, and instead call for a nuanced approach to how "formal legal institutions, culture, and customary practices interact".[124] Ratna Kapur counters international law's claims of being the champion of women's equality rights by showing that in Nepal, "UN interventions in conflict situations and noises around gender mainstreaming did not help disrupt deeply entrenched normative assumptions about gender…".[125]

Outside the TWAIL discourse, others, such as regional systems scholar Fareda Banda,[126] and minority rights scholars, such as Patrick Thornberry[127] and Alexandra Xanthaki,[128] have also

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[123] ESIL Lecture Series, *supra* note 17.
[124] Nyamu, *supra* note 95.
[125] Ratna Kapur, "Girls Will Be Girls: Peace the Gender Politics of Security Council Resolution 1325,1820" in 167 at 167.
[126] Fareda Banda, "Global Standards: Local Values" (2003) 17:1 Int J Law Policy Fam 1; Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Portland, OR: Hart, 2005).
[127] Patrick Thornberry, *Cultural Rights and Universality of Human Rights E/C.12/40/15* (CESAR, 2008).
[128] Alexandra Xanthaki, "Multiculturalism and International Law: Discussing Universal Standards" (2010) 32 Hum Rights Q 21.

attended to the intersections of multiple grounds of discrimination. Observers of religious rights in human rights, Nazila Ghanea-Hercock[129] and Ayelet Shachar,[130] also concern themselves with the intersections of gender, minority status, and freedom of religion and belief, so often conflated with culture; all these scholars attend to intersections in rights discourse and protections without the banner of intersectionality necessarily branding their work. As we will explore below, religious or believing women are arguably the most impacted by perceived impasses between culture or FORB and human rights, impasses that an intersectional approach true to its insights will have to reckon with. Queer critical culture theorists, like Jasbir K. Puar, argue from a different but related perspective "for new directions in cultural studies that critically reassess the use of intersectional models".[131]

Informed by the insights of the work of Volpp, Orford, Nyamu and the other scholars engaged above, women's rights as a subcategory of human rights is exposed as being posited frequently in teleological tension with the West. In this formulation, only westernization will drag women's equality behind in its wake.[132] Thus, resistance to this further attempt at perceived colonization pits feminists from the Global South in opposition to culture and as apologists for the last colonizing outreach of the Enlightenment.[133] This framing of women's rights entails the

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[129]Nazila Ghanea-Hercock, Alan Stephens & Raphael Walden, *Does God Believe in Human Rights?: Essays on Religion and Human Rights*, Studies in religion, secular beliefs, and human rights ; v 5 (Leiden: Martinus Nijhoff Publishers, 2007); Nazila Ghanea, *Women and Religious Freedom: Synergies and Opportunities* (United States Commission on International Religious Freedom, 2017); Heiner Bielefeldt, Nazila Ghanea & Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary*, 1st ed (Oxford: Oxford University Press, 2016).
[130] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001).
[131] Puar, *supra* note 23 at xxxv.
[132] While this phrasing is entirely my own, see the debates engaged in Leti Volpp, "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism" (1996) 96:6 Columbia Law Rev 1573.
[133] Radhika Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women" (2002) 34 George Wash Int Law Rev 483 at 490.

reification of each term—gender and culture—and assigns the two protections to the philosophical polarities of universal and particular, western and non-western, respectively. The insights from this work allow us to see that the human rights discourse—and its development of protections—despite the adoption of intersectionality, will continue to struggle with a conceptualization of gender as essential, and unaffected, except in negative ways, by cultural and other differences. Halley et al point out that adequate reflection on the intersections that complicate notions of gender protections implicated in global and intra- feminist power structures is crucial, to keep "feminist fingerprints" on governance projects.[134] Otherwise, "women benefit differentially", and "some are [thereby] harmed".[135] They point out that "transforming a feminist idea into law",[136]

> can consolidate a particularistic identity-based project, sometimes at the expense of alternative affiliations. It can respond to more general discursive or strategic demands making victimization and identity the prerequisites for legal intelligibility and leave behind questions about the costs of these formations.[137]

As Puar's call for reassessment above articulates, intersectionality is ripe for resistance to "prematurely settling"[138] its understanding of these affiliations, particularly with respect to LGBT rights. In the context of the Secretary-General of the United Nations' endorsement of LGBT rights,[139] the frequent articulation of the resistance to these rights as couched in the

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[134] Halley et al, *supra* note 2 at xi.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] United Nations, "Ban Calls for Efforts to Secure Equal Rights for LGBT Community", (21 September 2016), online: *Sustain Dev Goals 17 Goals Transform Our World*

language of culture and religious rights, and CEDAW's updated definition of intersectionality[140] as expressly extending gender protections to be "inextricably linked with … sexual orientation and gender identity"[141] (which we explore in detail in Chapters III and IV), means that the literature on critical LGBT international human rights deserves some attention here. This is not a primary focus of my work, but I enter these debates, as they are relevant to framing intersectionality's story at CEDAW. A brief summary of their status as rights follows below, in order to situate the critical examination of intersectionality demanded by transnational queer theory.

1.5.1 Critical intersectionality and LGBT rights

The articulation and protection of LGBT rights in international human rights law relies on express intersectional approaches to existing rights—most recently, as part of an expanded definition of gender protections at CEDAW and elsewhere—since LGBT rights are, unlike race (ICERD),[142] disability (CRPD),[143] women's (CEDAW)[144] and children's rights (CRC),[145] not secured through protections named in a discreet treaty.[146] In the strictly legal sense they are, in

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<http://www.un.org/sustainabledevelopment/blog/2016/09/ban-calls-for-efforts-to-secure-equal-rights-for-lgbt-community/>.

[140] *UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/GC/28* (2010).*General recommendation No. 35 on gender - based violence against women, updating general recommendation No. 19 [advance unedited version]* (2017) Art 35.

[141] *UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/GC/28* (2010) at 19.

[142] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 ((Entry into force: 4 January 1969)[ICERD], 1965).

[143] *Convention on the Rights of Persons with Disabilities*, A/RES/61/106 (24 January 2007 [CPRD]).

[144] *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 UNTS 13 (Entry into force: 3 September 1981)[CEDAW, 1979).

[145] *Convention of the Rights of the Child*, 1577 UNTS 3 (Entry into force: 2 September 1990 [CRC], 1989).

[146] Michael Wiener, "Freedom of Religion or Belief and Sexuality: Tracing the Evolution of the UN Special Rapporteur's Mandate Practice over Thirty Years" (2017) 6:2 Oxf J Law Relig 253.

fact, more like the rights to FORB, against which they are most often pitted, than other identity rights, in that they are not subject to separate treaty protection but dependent on the contested definition(s) of existing and aspirational protections.[147] I will explore this in some more detail in the chapters that follow. At this stage, the questions raised in the literature I have reviewed invite exploration as to how it is that as a group of protections, LGBT rights have become a lightning rod for wider debates about the globalization of culture and identities. The commentary in this area has begun to move from a plain assertion or denial of LGBT rights as a legitimate concern of IHRL to a more nuanced account of the politicization of these rights, and specifically of the essentially political, rather than cultural work they do through the battles mounted for and against them. Puar's wide-ranging work in particular, has opened a complex reflection on the operations of these protections and invites scrutiny of intersectionality's potential role in accounting for both the identity affiliations and protections claimed and contested, as well as the structural and conditioning elements to the work these rights do in the global context we have been referencing.

Puar asks:

> What are the historical linkages between various periods of national crisis and the pathologizing of sexuality, the inflation of sexual perversions? What are the heteronormative assumptions still binding the fields and disciplines of security and surveillance analyses, peace and conflict studies, terrorism research, public policy, transnational finance net- works, human rights and human security blueprints, and international peacekeeping organizations such as the United Nations?[148]

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[147] Bielefeldt, Ghanea & Wiener, *supra* note 129.
[148] Puar, *supra* note 23 at xxi.

Her work is concerned ultimately with “a very specific production of terrorist bodies against properly queer subjects,”[149] and offers a self-professed “new paradigm for the theorization of race and sexuality”.[150] As such, it falls outside the scope of the project at hand. To get there, however, her work is self-consciously and deliberately disruptive, demanding a “deeper exploration of these connections among sexuality, race, gender, nation, class, and ethnicity in relation to the tactics, strategies, and logistics of war machines.”[151] It therefore has insights that respond to Crenshaw’s invitation, quoted above, to move beyond the original binary of race and gender to make intersectionality relevant “to people who are subject to all of these things”.[152] Significantly, it places the discussion of LGBT rights in the context of global power relations. For this reason, “[i]t is an invitation to take stock of the inclusions and exclusions—the upsides and the downsides—across their full range”,[153] of what and how intersectionality’s promises transmit in these complex environments. Puar’s work warns of

> the powerful emergence of the disciplinary queer (liberal, homonormative, diasporic) subject into the bountiful market and the interstices of state benevolence—that is, into the statistical fold that produces appropriate digits and facts toward the population’s optimization of life and the ascendancy of whiteness: full-fledged regulatory queer subjects and the regularization of deviancy.[154]

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[149] *Ibid*.
[150] *Ibid* at xxxv.
[151] *Ibid* at xix.
[152] Crenshaw/Columbia Law School, “Kimberlé Crenshaw on Intersectionality, More than Two Decades Later”, (18 June 2017), online: *Columbia Law Edu* <http://www.law.columbia.edu/news/2017/06/kimberle-crenshaw-intersectionality>.
[153] Halley et al, *supra* note 2 at xi.
[154] Puar, *supra* note 23 at xxxv.

The brilliance of this disruptive work shines clearly on the intersections of governance and LGBT rights as they boomerang across global governance mechanisms and movements. These issues are taken up in a more linear fashion and in direct relationship to the mechanisms we are aiming to focus on, by others writing on global LGBT matters.

Of particular note in the literature is Meredith L. Weiss and Michael J. Bosia's anthology, *Global Homophobia: States Movements and the Politics of Oppression*.[155] The work complicates the polarized debate about the extent of the intersections of human rights protections, and their place in globalization, with a sophisticated and critical take on the terrain that owes much to Puar's formulation. Specifically, the volume,

> considers political homophobia as purposeful, especially as practiced by state actors; as embedded in the scapegoating of an 'other' that drives processes of state building and retrenchment; as the product of transnational influence peddling and alliances; and as integrated into questions of collective identity and the complicated legacies of colonialism.[156]

According to this critique of the mobilization of international human rights, it is often the politicization of domestic battles that drives the international agenda on this topic, provoking Bosia's "radically obvious question," namely, "tossing aside elusive dichotomies … [w]hy do state actors embrace homophobic policies and rhetoric"?[157] His answer weaves a nuanced view that eschews the oft-proffered reasoning of culture and tradition as the bulwark against the

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[155] Weiss, Meredith L & Michael J Bosia, eds, *Global Homophobia: States, Movements, and the Politics of Oppression* (Urbana: University of Illinois Press, 2017).
[156] Michael Bosia, "Why States Act: Homophobia and Crisis" in Meredith Leigh Weiss & Michael J Bosia, eds, *Glob Homophobia States Mov Polit Oppression* (Urbana: University of Illinois Press, 2017) 30 at 2.
[157] Meredith Leigh Weiss & Michael J Bosia, "Political Homophobia in Comparative Perspective" in Meredith Leigh Weiss and Bosia, Michael, ed, *Glob Homophobia States Mov Polit Oppression* (Urbana: University of Illinois Press, 2017) 1 at 2.

extension of rights. This language of culture and tradition which, as I explore further in the chapter following, is also the language of CEDAW, and serves to mask the interplay between internal state weakness, external pressure and globalization in the choices states make to employ homophobia as a state practice:

> It is neither profitable nor demonstrable to claim that state actors are constrained or compelled to adopt some form of state homophobia as 'the same end' because of personal belief, the traditions of the past, or the emergence of LGBT demands. Instead, the power and "will" of the state is such that these policies and rhetorics can create, refashion, and impose tradition or identity rather than merely reflect them.[158]

A more nuanced approach asks, what is "the work done by homophobia in periods of instability or uncertainty",[159] and the answer proffered by Bosia fits with the approaches I traced in critical international human rights law scholarship, which place current conflicts and the development of rights within the shadow of empire and the extension of current global authority. What Bosia terms "State homophobia" arises in times of violent conflict, resulting in his analysis, from profound changes in the international system, where "processes of sovereignty and belonging are in question and an emergent national security apparatus seeks to reestablish authority".[160] Making clear the intersection between the operations of violence against women as gender-based violence, and state homophobia, Bosia's work explores how "state actors, their proxies, and their allies use homophobic repression as a tool for the reconstitution of belonging, not only as ethnic cleansing through expulsion and sexual assault, but in the ways brutal

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[158] Bosia, *supra* note 156 at 31.
[159] *Ibid*.
[160] *Ibid* at 32.

sexualized and gendered violence affirms authority within."[161] Bosia additionally traces how ongoing pressures—such as those posed through structural adjustment policies and cyclical crises embedded within globalization, or emanating from allies or competitors—present state homophobia as a convenient tool for the "affirmation of rule," through the deployment of "prosecution and condemnation as improvisational strategies introducing very public discussions of sexual differentiation".[162]

Once thus mobilized, Bosia points to the work done by "neo-colonial networks that reinforce the imposition of sexual repression and the full articulation of an LGBT scapegoat within a Western sexual binary".[163] International Human Rights Law does complex work in this context: LGBT rights could be seen as an approximate, live version of the controversial entry into the human rights family that women's rights once represented,[164] and, likewise for these activists in both the Global South,[165] Muslim majority countries,[166] and in the human rights NGOs based in the North[167] or West,[168] human rights discourse, to repeat Sally Merry's assessment, represents "the major global approach to social justice".[169] In the same move, as a

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[161] *Ibid*.
[162] Weiss, Meredith L. & Bosia, *supra* note 155 at 32.
[163] *Ibid*.
[164] Cai Wilkinson & Anthony J Langlois, "Special Issue: Not Such an International Human Rights Norm? Local Resistance to Lesbian, Gay, Bisexual, and Transgender Rights—Preliminary Comments" (2014) 13:3 J Hum Rights 249.
[165] Hakima Abbas & Sokari Ekine, *Queer African Reader* (Dakar, Senegal: Pambazuka Press, 2013); Fran Martin, *Asiapacifiqueer: Rethinking Genders and Sexualities* (Urbana: University of Illinois Press, 2008).
[166] Sami Zeidan, "Navigating International Rights and Local Politics: Sexuality Governance in Postcolonial Settings" in Weiss, Meredith L & Michael Bosia, eds, *Glob Homophobia States Mov Polit Oppression* (Urbana: University of Illinois Press, 2017) 196.
[167] Scott Long et al, *More Than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (New York: Human Rights Watch, 2003).
[168] Council of Europe Commissioner for Human Rights, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe.* (Strasbourg: Council of Europe Pub, 2011).
[169] Merry, *supra* note 90 at 2.

frame of reference, IHRL can excite State repression based on fears that it counters "heteronormativity", with "homonormativity",[170] that is, extends the binary and fixed western view of sexuality that requires a particular performance of identity that complies with known definitions and protections, "as if sexual minorities everywhere claim the same rights that define LGBT organizing in only an handful of countries".[171] These identities are then refracted through a house of identity mirrors that distort, amplify and reflect the layers of imposition from the colonial to the neoliberal.

Religious approbation of "native" sexualities now inform post-colonial states,[172] who mobilize colonial tropes as nation building essentialism in order to resist internal and external political and economic threats.[173] At the same time, powerful states in which rights have allegedly been achieved, deploy what Christine Keating in the same volume calls, "homoprotectionism," which likewise, serves to "foster alliances that serve to bolster state power".[174] State homophobia and state homoprotectionism can be deployed simultaneously to this end; and both, Keating argues, are serving to legitimize "political authority both on a

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[170] Heteronormativity describes the valuation of "normal" sexuality from the policy and institutional level down to the interpersonal. It describes the assumption and promotion that heterosexuality is the only "normal" and "natural" orientation out there, privileging those who fit the norm and positing anyone outside of this as abnormal and wrong. Homonormativity implies a critical take on the essentializing norms in identity that take on power as LGBT rights are accepted and advanced. It is also referred to as a policing of sexual and gender expressions within LGBQ communities. Homonormativity draws attention to how identity politics can perpetuate assumptions, values, and behaviors, identifying the assumption that queer people want to be a part of the dominant, mainstream, heterosexual culture, and the way in which our society rewards those who do so, identifying them as most worthy and deserving of visibility and rights. See "Homonormativity 101: What It Is and How It's Hurting Our Movement", (24 January 2015), online: *Everyday Fem* <https://everydayfeminism.com/2015/01/homonormativity-101/>.

[171] Weiss & Bosia, *supra* note 157 at 2.

[172] Babacar M'Baye, "Variant Sexualities and African Modernity in Joseph Gaye Ramaka's Karmen Geï" (2011) 2:2 Black Camera 114.

[173] Weiss & Bosia, *supra* note 157.

[174] Christine Keating, "On the Interplay of State Homophobia and Homoprotectionism" in Meredith Leigh Weiss & Michael J Bosia, eds, *Glob Homophobia States Mov Polit Oppression* (Urbana: University of Illinois Press, 2017) 246 at 247.

national and on a transnational scale".[175] To Keating it is clear that both state homophobia and homoprotectionism are "deeply linked to and embedded in inequitable global relations of power," and the related systems of "colonialism, neocolonialism, and capitalist globalization".[176] Simultaneously, current deliberate western (mostly American) religious fundamentalists export a virulent homophobia that serves their (governance) projects at home.[177] Puar articulates this in relation to the spectre of the terrorist, and the manipulation of queerness, terror and the need for national security: "…sites of queer struggle in Europe—Britain, the Netherlands—have articulated Muslim populations as an especial threat to LGBTIQ persons, organizations, communities, and spaces of congregation.[178] Her work goes on to trace the

> emergence of a global political economy of queer sexualities that—framed through the notion of the ''ascendancy of whiteness''—repeatedly coheres whiteness as a queer norm and straightness as a racial norm.[179]

The role of an intersectional approach to international human rights can only work if its bounds extend to be able to account for the work it does in this highly charged, militarized and yet phantasmagoric context. Following suit, the clarity of analysis in Weiss and Bosia's work and throughout their edited collection, demonstrates that homophobia, despite its frequent articulation in terms of religion and culture, is "not as some deep-rooted, perhaps religiously inflected sentiment, nor as everywhere a response to overt provocation, but [is] a conscious

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[175] *Ibid* at 258.
[176] *Ibid* at 260.
[177] Kapya Kaoma J, "The Marriage of Convenience: The U.S. Christian Right, African Christianity, and Post-Colonial Politics of Sexual Identity" in Meredith Leigh Weiss & Michael J Bosia, eds, *Glob Homophobia States Mov Polit Oppression* (Urbana: University of Illinois Press, 2017) 87.
[178] Puar, *supra* note 23 at xxxv.
[179] *Ibid*.

political strategy often unrelated to substantial local demands for political rights."[180] Both intellectually and strategically, the push/pull between the binary of rights and religion sidesteps and distracts from this fundamental purpose of the contest. Neither uniform applications of IHRL to LGBT people, nor invocations of both false and misunderstood religious rights get us closer to an intersectional understanding of their interrelation and implication in the various global power struggles and security agendas that invoke them.

As we will see in the chapters that follow, the intersectional protections named in the CEDAW Committee's newest interpretations of its treaty articles include sexual orientation, gender identity and religious belief as intersecting grounds of states' obligations to gender protection. These same intersections are likewise named in the first comprehensive commentary on the international protections based on FORB.[181] In the view of its authors, "there is serious risk that women belonging to discriminated religious communities fail to benefit from any anti-discriminatory measures",[182] and, singling out the intersection of this with sexual orientation, they point out that the human rights protections include a right to an LGBT person's "freedom of thought, conscious, and religion".[183]

In this context, it is crucial not to overstate the dichotomy between the rights, to understand the precise nature of the rights themselves, and to understand the intersectional applications of them that seek to protect the most vulnerable, who are not served by grandstanding and the spectacle of inaccurate polarities. In their *Commentary*, Bielefeldt, Ghanea

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[180] Weiss & Bosia, *supra* note 157 at 14.
[181] Bielefeldt, Ghanea & Wiener, *supra* note 129 at 321, 478–540.
[182] *Ibid* at 321.
[183] *Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007[Yogyakarta], 2006) at principle 21.

and Weiner invoke intersectionality as a frame of reference for understanding this complex area of rights, and, to some extent, for seeking a truce between their claims and counter claims, without wishing to deny the "reality of conflicting human rights concerns".[184] Looking at similar matters as they play out in cases where women seek protection at the intersection with culture and religion, Pok Yin S. Chow has observed that even within the bodies that administer the intersectional treaty protections named above, "the binary logic adopted by the treaty bodies is that it denies that women who engage in or consent to certain cultural practices are legitimate participants in culture or religious life".[185] As a result, he has concluded that "intersectionality" does not consistently assist decision makers to understand the "ambivalence" women may hold toward aspects of their cultures and religions in the context of exercising their rights based on both religion and gender.[186]

Chow's work is an important advancement of the discussion of intersectionality in human rights contexts. At the same time, his study of intersectionality moves freely between CEDAW, across EU and UK human rights protections, and, within an overall concern with the limitations of an exclusively legal approach to culture and religion. It therefore does not concern itself with the nuances in intersectionality's development and deployment at CEDAW that I trace in the chapters that follow.

Nonetheless, the work that follows is indebted to all these scholars and their insights. The sheer variety of critical scholarship, which challenges law's relationship to culture, feminism's

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[184] Bielefeldt, Ghanea & Wiener, *supra* note 129 at 371.
[185] Pok Yin S Chow, *Cultural Rights in International Law and Discourse Contemporary Challenges and Interdisciplinary Perspectives* (Leiden Boston: Brill Nijhoff, 2018) at 217.
[186] Pok Yin S Chow, "Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence" (2016) 16:3 Hum Rights Law Rev 453.

relationship to law, and law and feminism's relationship to plurality, serves to enrich the goals of intersectionality's variously articulated projects. In keeping with this, I engage the works variously of Merry,[187] who brings insights from legal anthropology, and its deep understanding of the contested nature of culture and its interactions with law; Orford, who begins in an express struggle with feminist international law[188] and develops a critical legal theory and methodology that shapes the insights discussed here;[189] and Volpp, whose work decentres the white protagonist of feminism and the distorted view of multiculturalism that conflates patriarchy with third world culture.[190] Much of this work, however, was published either before or contemporaneously with the important and express development of the CEDAW Committee's own reorientation to take stock of such critiques and provide new guidance to its deliberations through the adoption of intersectionality, and for the most part, it does not concern itself with these developments. The scholarship I have explored in this chapter could therefore benefit from dialogue with this new terrain, just as the governance aims of this new terrain calls out for the insights of this critical scholarship.

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[187] Sally Engle Merry, "Constructing a Global Law-Violence against Women and the Human Rights System" (2003) 28:4 Law Soc Inq 941; Sally Engle Merry, *From law and colonialism to law and globalization* (JSTOR, 2003); Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law Soc Rev 869; Sally Engle Merry, "Human Rights Law and the Demonization of Culture (and Anthropology along the Way) Symposium: Anthropology and Legal Studies: Cross-Disciplinary Conversations" (2003) 26 PoLAR Polit Leg Anthropol Rev 55; Sally Engle Merry, *Human rights and gender violence translating international law into local justice*, Chicago series in law and society (Chicago: University of Chicago Press, 2006).

[188] Orford, *supra* note 3; Anne Orford, "Contesting Globalization: A Feminist Perspective on the Future of Human Rights Symposium: International Human Rights at Fifty: a Symposium to Commemmorate the 50th Anniversary of the Universal Declaration of Human Rights" (1998) 8 Transnatl Law Contemp Probl 171; Anne Orford, "Liberty, Equality, Pornography: The Bodies of Women and Human Rights Discourse" (1994) 3 Aust Fem Law J 72.

[189] Anne Orford, "In Praise of Description" (2012) 25:03 Leiden J Int Law 609; Orford, *supra* note 105; Anne Orford, *International authority and the responsibility to protect* (Cambridge, UK: Cambridge University Press, 2011); Orford, Hoffmann & Clark, *supra* note 19; Orford, *supra* note 18.

[190] Leti Volpp, "Feminism versus Multiculturalism" (2001) 101:5 Columbia Law Rev 1181; Leti Volpp, "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism" (1996) 96:6 Columbia Law Rev 1573; Leti Volpp, "On Culture, Difference, and domestic violence" (2002) 11 Am UJ Gend Soc Pol L 393.

Since intersectionality derives in large part from a theoretical and philosophical basis, and arises in international human rights legal discourse and authoritative texts at a particular juncture in relation to politics and world events, understanding that context, as demonstrated by the work of Puar as well as Bosia and Weiss is of vital importance to a more complete account of the role of intersectionality in international human rights law. This method of tracing intersectionality follows from the observation that "[f]or lawyers seeking to take responsibility for engaging with the practice of the discipline and for its present politics, it is useful to grasp the practice of theorizing as itself historically situated and existing in relation to particular concrete situations".[191] Following this lead, in the chapters that follow, I strive to subject intersectionality to the same scrutiny others have applied to various international legal concepts in the works here explored, that is, to "pay close attention to the interventions that particular theories make and the context in which they were first presented".[192]

1.6 What lies ahead

Feminist engagements with international law are often characterized in cheerful tones[193] as a progression in which a direct line between *The Universal Declaration of Human Rights*,[194] *CEDAW*,[195] *The Beijing Platform*[196] and international criminal protections against sexual

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[191] Anne Orford & Florian Hoffmann, "Introduction: Theorizing International Law" in Anne Orford, Florian Hoffmann & Martin Clark, eds, *Oxf Handb Theory Int Law*, Oxford handbooks, 1st ed (Oxford: Oxford University Press, 2016) 1 at 6.
[192] *Ibid* at 10.
[193] Cees Flinterman, "Universal Declaration of Human Rights: Legacy and Achievements, The" (1998) 16 Neth Q Hum Rts 427.
[194] *Universal Declaration of Human Rights*, 217 A (III) (10 December 1948[UDHR]).
[195] Hanna Beate Schopp-Schilling & Cees Flinterman, *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination Against Women* (The Feminist Press, 2007).
[196] *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women* (Endorsed by GA Resolution 50/203, 22 December 1995 [Beijing]).

violence in the context of genocide and war is charted.[197] The arrival of LGBT rights can now be added to this canon. And while this dissertation tracks the rise of intersectionality as a partial answer to the call to join critical international law's overt concern "with critically theorizing about international law with a view to its transformation",[198] it also acknowledges that feminist gains in international law are also sometimes "the product of despair about the apparent imperviousness of international law to feminist perspectives".[199] The trick is, rather than adopting the mantel of the outsider's remoteness from the effects of formal governance power, on account of this perceived "exclusion", their work guides a desire to acknowledge that "[t]o engage governance…is to make use of force".[200] This requires that we not be guided solely by the moment of despair, but develop a stance of what Halley et al have termed "engaged ambivalence"[201] towards the governance project of feminism. In their view, "[t]his stance is quite the opposite of deeply at odds with rhetorical renunciation of all feminist will to power".[202] But it does require us "to think anew about engaging directly with power".[203] Critical insight can lead to "renunciation", as the more deterministic moments of TWAILian insight explored above suggest.

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[197] Radhika Coomaraswamy, *Review Of Reports, Studies And Other Documentation For The Preparatory Committee And The World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia And Related Intolerance Preparatory Committee Third session A/CONF.189/PC.3/5* (UNGA, 2001).
[198] Orford & Hoffmann, *supra* note 191 at 7.
[199] Otto, *supra* note 38 at 289.
[200] Halley et al, *supra* note 2 at xix.
[201] Janet Halley, "Which Forms of Feminism Have Gained Inclusion?" in Janet Halley et al, eds, *Gov Fem Introd*, Legal Studies/Feminist Theory (Minneapolis : University of Minnesota Press, 2018) 23 at 31.
[202] Janet Halley, "Preface: Introducing Governance Feminism" in Janet Halley, ed, *Gov Fem Introd*, Legal Studies/Feminist Theory (Minneapolis : University of Minnesota Press, 2018) ix at xii.
[203] *Ibid* at xx.

Orford's work builds on TWAIL's insights, stating that TWAIL "argues that imperialism must still be thought of as part of international law," but gestures to its limits when she persists to demand, "the question is how"?[204] Orford indicates dissatisfaction with the spectre of a one-size-fits-all response to the meaning and purpose of each new twist in international law, such as observing a phenomena as merely a "Trojan Horse" for political intervention.[205] In partial response to this risk of imprecision, Orford's own method entreats international legal scholars, "rather than [focussing on] the study of disembodied structures, even abstractions",[206] instead to concern themselves with "the relation between the symbolic and the material dimensions of authority and of law",[207] and these practices as the concept I have proffered throughout this chapter, as international authority's consciousness of itself. In short, this means paying attention to what law claims about its own operations.

Orford's work reminds us that legal method trains us to "make a plausible argument about why a particular case should be treated as a binding precedent, or why it should be distinguished as having no bearing on the present".[208] This method of creating precedent and building law from it, is also the structure and process of the international human rights treaty bodies; in the case of the treaties, the committees charged with administering the obligations under the treaties build on their prior *de facto* decisions to create guidance for the future

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[204] ESIL Lecture Series, *supra* note 16.
[205] Orford, *supra* note 18 at 166.
[206] Anne Orford, "On International Legal Method" (2013) 1:1 Lond Rev Int Law 166 at 177.
[207] *Ibid* at 172.
[208] *Ibid*.

interpretation of states' obligations under the treaty document: this has been characterized as a "broad remedial approach to interpretation".[209]

The sheer proliferation of scholarship investigating intersectionality begs the question of the reason for its ubiquity. Along with Chow's declarative query as to whether intersectionality has reached its limits noted above, others have gone on to ask if the idea of an intersection is the "right analogy",[210] if we have reached a time to move "beyond" it,[211] or if it has come to rely too much on "identities" and "recognition", to the detriment of challenging structural inequality and calling for redistribution,[212] or if in Puar's sense, it requires a critical reassessment of intersectional models, keeping watch for "global forces of securitization, counterterrorism, and nationalism".[213] It seems that the sweeping claims of intersectionality have prompted the accusation that it does not prove its grandiosity through its merits:[214] as deployed outside of law, intersectionality has been accused of being a "project of limitless scope and limited promise";[215] within law, it can likewise be accused of doing the work of liberalism's optimistic reform,[216] narrowly and naively "explaining to the law its mistaken assumptions, [and believing this] will lead the law/state to a consciousness of its omissions and to rational change".[217]

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[209] Andrew Byrnes, "Article 1" in Marsha Freeman, Christine Chinkin & Beate Rudof, eds, *UN Conv Elimin Forms Discrim Women Comment*, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012) 51 at 68.
[210] Jerome Chang & Robert Culp, "After Intersectionality" (2002) 71 Univ Mo Kans City Law Rev 485 at 485.
[211] Emily Grabham et al, eds, *Intersectionality and Beyond: Law, Power and the Politics of Location*, Social Justice (Abingdon, UK: Routledge-Cavendish, 2009).
[212] Emily Conaghan, "Intersectionality and the Feminist Project in Law" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009) 21.
[213] Puar, *supra* note 23 at xxviii.
[214] Chow, *supra* note 186.
[215] Conaghan, *supra* note 212 at 31.
[216] Grabham et al, *supra* note 11 at 2.
[217] *Ibid*.

There is some evidence that the sophistication of intersectionality's theoretical forms, or more pointedly its most radical potential, is at best ill understood, and, at worst, undermined by the legal domestic orders in which it has been deployed and subsequently evaluated by academics.[218] Can the exploration of the international field augment this record with a more fluid and potent antidote to law's need to order, discipline and restrict, ultimately advancing the project of feminism's ambivalent engagement with law? Importantly, can it allow feminism to remain armed with some of the self-administered critiques of its own project of reform and radicalization, as explored here?

There is a conceit at the centre of feminism's engagement with the promise of intersectionality, namely that feminism is adequately self-reflective to responsibly manage the *aporia* between aspiration and real-world structures and legacies at the centre of all engagement with the potential of human rights law. In Halley et al's terms, this is the central risk of governance feminism and its will to power. Intersectionality at times appears to lay claim to being able to attend to and detail the imperial foundations of modern international law that concern Orford and drive my exploration here. At times, it also gestures to "the multiple trajectories by which that imperialist history can be linked to the ongoing failures of international law to respond meaningfully to the demands for inclusion made by states and peoples of the developing world".[219] It appears as a hope and a promise of intersectionality that insight can be an inoculation against the repetition of the problems of international law, even as we engage its

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[218] Toni Williams, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009) 79.
[219] Buchanan, *supra* note 118 at 446.

terms and foundations. It remains an open question that requires constant reflection as to how to radically transform social relations through engagement in the present restrictive terms of law, without either abandoning the possibility of change or falling prey to law as technique and sentinel to the status quo.

Anne Orford warns of the foundational fault line in legal scholarship—that of a practice-based approach, "premised on unarticulated theories".[220] My work attempts to unearth and articulate the theories that animate decision-making at the international level, particularly the uses intersectionality is put to at CEDAW. I am guided by an "endeavour to link theory to practice, and a search for ways to practice theory" that Orford finds "pervasive" among those who engage the law.[221] This quest is conditioned by a skeptical optimism, and a hope not fully supported by the existing record, for a "more egalitarian, inclusive, peaceful, just and redistributive international order".[222] In other language, I approach intersectionality as a form of praxis that its deployment at CEDAW shows promise of evidencing. At its most ambitious, intersectionality can be seen to do the work of the aborted grand theory projects of earlier feminist scholarship, which tried to marry Marxism and feminism with the insights of anti-racist movements; in the view of Joanne Conaghan, it does not inherit this legacy gracefully.[223] Kathi Weeks summarizes the loss of the grander terrain of feminism's aims as a stripping of context, in which "we end up with an impoverished model of the subject, that overestimates its capacities for self-creation and self-transformation",[224] or conversely, see her as over-determined and

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[220] Orford & Hoffmann, *supra* note 191 at 13.
[221] *Ibid* at 14.
[222]Otto, *supra* note 38 at 493.
[223] Conaghan, *supra* note 212 at 21.
[224] Kathi Weeks, *Constituting Feminist Subjects* (Ithaca, NY: Cornell University Press, 1998) at 4.

without agency.[225] In this critique, intersectionality emerges as a thin stand-in for the full critical consideration of the structures of inequality and social transformation at the heart of feminist engagements with law. Conaghan summarizes this transformational impulse in feminism as the standard against which intersectionality must be measured:

> feminist legal engagement is a practical activity designed to engender, directly or indirectly, socially transformative processes and effects. In this, it may be understood as part of broader feminist commitment to praxis, that is, to the convergence of theory and practice, a productive coming together of thought and action, ideas and strategies, scholarship and politics. It is, I would contend, against this standard that the value of intersectionality, as a theoretical and strategic approach, should be measured.[226]

It is possible that the continued appeal of intersectionality as a theoretical project represents "a dose of academic feminist guilt for having 'abandoned' the activist field". [227] It may represent nostalgia for what Weeks calls the "project of totality" (as distinct in her work from a totalizing theory).[228] Crenshaw herself resists this grand narrative of intersectionality's life outside her work, provocatively narrowing the use of the concept to the original employment law context in which she first introduced it:

> Some people look to intersectionality as a grand theory of everything, but that's not my intention. If someone is trying to think about how to explain to the courts why they should not dismiss a case made by black women, just because the employer did hire blacks who were men and women who were white, well,

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[225] Chow, *supra* note 186.
[226] Conaghan, *supra* note 212 at 42.
[227] I borrow this phrase and line of argument from Victoria Browne, who uses it to describe the nostalgia for second wave feminism she has observed, inVictoria Browne, "The Persistence of Patriarchy: Operation Yewtree and the return to 1970s feminism" (2014) 188 Radic Philos 9 at 10.
[228] Weeks, *supra* note 224 at 4.

> that's what the tool was designed to do. If it works, great. If it doesn't work, it's not like you have to use this concept.[229]

Victoria Browne wonders why we gave up theorizing patriarchy for greener post-modern pastures.[230] I end this chapter, therefore, in a similar manner to how I began it, by noting that taking intersectionality as a starting point, despite extensive exploration of its evocation, does not necessarily clarify the theoretical terrain one is on. As we will discover in the chapters ahead, nor does it necessarily provide guidance as to the correct intersectional approach to concrete situations. Toni Williams' work on the deployment of intersectionality as an incomplete recognition of Indigenous women's social realities reveals the problematic neutrality of an intersectional approach when it becomes a tool of law and policy.[231] This is in line with what Crenshaw calls the "problem of complexity", in that, "intersectionality can get used as a blanket term to mean, "'[w]ell, it's complicated.' [And that s]ometimes, 'It's complicated' is an excuse not to do anything".[232] In this sense, an intersectional analysis of subject positions "need not even be particularly critical or used to improve the lives of targeted groups".[233]

Jennifer C. Nash, like Puar, although in quite different ways, speaks of the necessity of a reform to intersectionality in order that it continue to "grapple with the messiness of subjectivity",[234] a messiness surely augmented by the works explored above. At the same time, just as its sun appears to be setting, Grabham warns against moving away from intersectionality

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[229] Crenshaw/Columbia Law School, *supra* note 152.
[230] Browne, *supra* note 227 at 9.
[231] Williams, *supra* note 218.
[232] Crenshaw/Columbia Law School, *supra* note 152.
[233] Grabham et al, *supra* note 11 at 13.
[234] Nash, *supra* note 79 at 4.

"without careful thought".[235] Kathy Davis has argued that it was the alleged weaknesses of the concept, "its ambiguity and open-endedness that were the secrets to its success and, more generally, make it a good feminist theory".[236] Nevertheless, after accounting for all its embellishments and detractions, can it help make good law? In pursuing this question in the chapters that follow, I seek to trace "the vital connection between practical innovation, theoretical elaboration, and social transformation, both in relation to the political instrumentalization of theory in practice and in the search for a critical practice of international law in its different articulations".[237] The connective tissue of this search in the case of intersectionality lies in CEDAW, which, as both text and committee, grounds the historical, normative, discursive, institutional and practical application of the concept, giving us a view of its conditions, limitations and operations as law.

1.7 Conclusion

In the chapters that follow, I engage Orford's methodology to trace the development of women's rights at the UN in the "shadow of empire", its normative and textual advances and limitations, and the structure of the treaty body system, to comprehend the fertility of the milieu intersectionality is proposed within, and the work it is observed to be doing. The guidance on intersectionality that now characterizes the treaty system, explored in further chapters, arose out of a legacy of contestation at the heart of the meanings, situations and projects attributed to women and gender in all its intersections as I have explored above. The mechanisms I will

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[235] Grabham et al, *supra* note 11 at 15.
[236] K Davis, "Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful" (2008) 9:1 Fem Theory 67.
[237] Orford, Hoffmann & Clark, *supra* note 19.

explore in the international human rights realm that have engaged these debates now provide jurisprudential heft to the deliberations and exchanges among and between various UN institutions, NGOs, and women activists from the Global South at public forums[238] and through the academy.[239] Collins and Bilge,[240] Henne,[241] Merry,[242] Nazela Ghanea,[243] Johanna Bond,[244] Nila Yuval-Davis[245] and more recently, Pok Yin S. Chow[246] are among the few scholars who variously reference or engage overtly with the "intersectional turn" in the international human rights context. Meghan Campbell and Sandra Fredman tackle this advance head-on in their crucial work on intersectionality's interpretation and potential as a form of legal practice.[247] The analysis I have just conducted on the scholarly contemplations of intersectionality will serve to help to scrutinize the how the promise of intersectionality traverses the road from critique to technique, and I will return to the challenges and advances in the conceptualization of intersectionality throughout what follows.

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[238] Collins & Bilge, *supra* note 42 at 88–114.
[239] Johanna E Bond, "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 52 Emory LJ 71.
[240] Collins & Bilge, *supra* note 42.
[241] Henne, *supra* note 89.
[242] Sally Engle Merry, "Intersections: Epilogue: The Travels of Gender and Law", (14 September 2017), online: <http://intersections.anu.edu.au/issue33/merry.htm>.
[243] Nazila Ghanea, *Women and Religious Freedom: Synergies and Opportunities* (United States Commission on International Religious Freedom, 2017).
[244] Bond, *supra* note 239.
[245] Yuval-Davis, *supra* note 43.
[246] Chow, *supra* note 186.
[247] Meghan Campbell, "CEDAW and Women's Intersecting Identities: A Pioneering New Approach" (2015) 11:2 Rev Dierito GV 479; Fredman, Sandra, *supra* note 9.

2 Transmissions: The Institutional, Textual and Normative Grounding of Women's International Human Rights at CEDAW

> We the peoples of the United Nations determined, to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and […] to employ international machinery for the promotion of the economic and social advancement of all peoples, [….][248]

> Promotion of human rights is a widely accepted goal[.] … Further, it is one of the few concepts that speaks to the need for transnational activism and concern with the lives of people globally. The Universal Declaration of Human Rights, adopted in 1948, symbolizes this world vision and defines human rights broadly. While not much is said about women, Article 2 entitles all to "the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Eleanor Roosevelt and the Latin American women who fought for the inclusion of sex in the Declaration and for its passage clearly intended that it would address the problem of women's subordination.[249]

> It would seem that the creation of specialized machinery and procedures is necessary in order to ensure that the human rights codified in international instruments are interpreted and applied in such a way that women are guaranteed their full enjoyment.[250]

> Building on the Universal Declaration, women's movements appropriated the universally agreed language of human rights and

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[248] *Charter of the United Nations*, Can TS 1945 No 7 (24 October 1945[The Charter], 1945) at Preamble.
[249] Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights" (1990) 12 Hum Rights Q 486 at 287.
[250] Reanda, *supra* note 96 at 12.

> transformed the international human rights framework to address their concerns. The evolution of women's history, especially since 1970s, has revealed the commonalities and the global connectedness of women's local resistance. The United Nations provided a platform for women to network and integrate the common elements of this history into the work of the Organization, which has resulted in the growth of a well-established gender equality and women's rights regime. Most important in this regard is the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (1979) by the General Assembly.[251]
>
> Although the Universal Declaration in its own terms guarantees the enjoyment of human rights without gender distinction, the rights of women and the specific circumstances under which women suffer human rights abuses have in the past been framed as different from the classic vision of human rights abuse and therefore marginal within a human rights regime that aspired toward universal application. This universalism, however, was firmly grounded in the experiences of men.[252]

2.1 Introduction

To establish the ground and potential of intersectionality as an approach to women's rights within international human rights law, it is necessary to trace the institutional, instrumental and normative grounding for its adoption in the human rights approaches of CEDAW,[253] both as treaty and treaty body. The CEDAW is seen as the principal instrument for the delineation and protection of women's human rights; it is often referred to as the "Women's Charter". But it was a relative latecomer to the first generation of human rights[254] and although it has made some

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[251] Yakin Ertürk, *UN Human Rights Council: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Intersections between Culture and Violence against Women*, A/HRC/4/34 (Fourth session, 2007) at 11.
[252] Crenshaw, *supra* note 67 at 2.
[253] UN CEDAW, *Convention on the Elimination of All Forms of Discrimination Against Women* (United Nations, Treaty Series, vol. 1249, p. 13, 1979).
[254]Hanna Beate Schopp-Schilling, "The Nature and Scope of the Convention" in, Beate Schopp-Schilling & Flinterman, *supra* note 195., 10-30

significant breaks from the established order, its genesis is also shaped by preexisting norms and approaches, making it a conflicted and contested terrain for the establishment of an intersectional approach to human rights protections.[255] In this section we will explore the legality, normativity and institutional drivers in the framing of CEDAW, highlighting its potential for the elaboration of intersectionality.

2.2 Before CEDAW

Women's rights have been explicit in the UN family of human rights since its founding human rights document, the Charter of the United Nations (The Charter, 1945), affirming the "equal rights of men and women" and prohibiting discrimination on the basis of "race, sex, language and religion".[256] This was followed closely by the Universal Declaration of Human Rights (UDHR, 1948),[257] which, although rife with indications of faux universality through references to "mankind" and "brotherhood",[258] names sex as a prohibited ground for "distinction" in the granting of its enumerated rights and freedoms. The important scholarship that distinguishes sex from gender was not yet in currency; a shift in attribution of characteristics from sex (biology, immutable) to gender (socially assigned, changeable) was only brought into the official framework of women's human rights after the creation of CEDAW, in 1979 (adopted 1981).[259]

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[255] Hanna Beate Schöpp-Schilling, "Treaty Body Reform: the Case of the Committee on the Elimination of Discrimination Against Women" (2007) 7:1 Hum Rights Law Rev 201.
[256] note 248, para 1.3.
[257] note 194, para 13.
[258] Women at the time argued against this entrenchment of androcentric norms in, UN Women, "Short History on the Commission on the Status of Women", online: *Brief Hist CSW Download More Detail Hist CSW* <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf> at 4.
[259] note 144.

Although CEDAW retains the language of "sex", it is infused with the implicit conceptual transition to gender through its mandate of cultural change in the assignment of gender attributes.[260] In General Comment (GC) 25, CEDAW moves explicitly to the use of "social construction" as the approach that guides its work and accounting of gender, pointedly referencing it as a "social stratifier", on par with "race, class, ethnicity, sexuality and age".[261] Certainly the explicit deployment of "gender" drives the examination of rights under the treaty, according to its members. [262] In GC 25, gender appears alongside, rather than enmeshed with other social stratifiers, such as we might expect to see in later expressly intersectional approaches.

Lars Adam Rehof, the scholar of CEDAW's documentary origins (referred to as the *traveaux preperatoires*), traces elements of international protections for women as far back as 1904, when early iterations of anti-human trafficking instruments were being developed.[263] That the preeminent *traveaux* scholar marks this as the first instance of women's distinctly articulated international human rights, alerts us to a genesis story embedded in Victorian-era anxiety about prostitution and the fight against so-called "white slavery".[264] One official history of this thread

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[260] Riki Holtmaat & Jonneke M M Naber, *Women's human rights and culture: from deadlock to dialogue* (Cambridge [England]: Intersentia, 2011) at 56.

[261] *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (Adopted at the Thirtieth Session of the Committee on the Elimination of Discrimination against Women 2004[GR 25]) at para 6.

[262] Frances Raday, "Culture, Religion, and CEDAW's Article 5(A) in Beate Schopp-Schilling & Flinterman" in Beate Schopp-Schilling, ed, *Circ Empower Twenty-Five Years UN Comm Elimin Discrim Women* (The Feminist Press, 2007) 68 at 69.

[263] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers, 1993) at 369.

[264] Kristiina Kangaspunta, "A Short History of Trafficking Persons", online: *UNICRI Freedom Fear* <http://f3magazine.unicri.it/?p=281> She writes: "In Europe, white slavery was discussed at a conference organized in Paris in 1895, followed by similar conferences in London and Budapest in 1899. International Conferences against white slavery were organized in Paris in 1899 and in 1902. In 1904 an International Agreement for the

in IHRL credits the use of the term "slavery" as purposely evocative of the Abolitionist movement's increasing success at halting the global slave trade in Africans.[265]

To many feminists of colour, these analogies to specific historic suffering of others as metaphor are an indication of the foundational racism inherent in dominant women's rights discourses.[266] Perhaps it is no surprise that women's international human rights shares a pedigree as well as inherent value framing with many other official documents of this era.[267] It adopts a posture of colonial shock at the 'barbarism' of 'other' cultures, and by analogy, draws comparison to the assumed 'slavery' of women in prostitution. In this sense, European women's emerging sense of injustice is embedded in what has been referred to elsewhere as an agenda of "social cleansing" of "undesirables" at home, and conquest of "the uncivilized" abroad.[268]

The title of the early international anti-human trafficking agreement Rehof refers to as foundational to women's international human rights makes no attempt to hide an exclusive concern for white, European and North American women. In this sense, women's rights emerge on the international scene with a set of preoccupations that affirms the role of protective mechanisms to ensure the rightful place of a particular view of white, middle class European and

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Suppression of the 'White Slave Traffic' (League of Nations 1920) was signed in Paris. The agreement aimed to ensure that women and girls are protected against criminal traffic known as the 'White Slave Traffic'. Even though the security of victims is mentioned in the Agreement, the focus is on the control and repatriation of migrant women and girls".

[265] *Ibid*.

[266] Jennifer C Nash, "Home truths on intersectionality" (2011) 23 Yale JL Fem 445; Nash, *supra* note 47.

[267] Sally Engle Merry, *From law and colonialism to law and globalization* (JSTOR, 2003); Sally Engle Merry, "Human Rights Law and the Demonization of Culture (and Anthropology along the Way) Symposium: Anthropology and Legal Studies: Cross-Disciplinary Conversations" (2003) 26 PoLAR Polit Leg Anthropol Rev 55; Merry, *supra* note 242; ESIL Lecture Series, *supra* note 16; Orford, *supra* note 3.

[268] Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (University of Toronto Press, 2008); Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*, ACLS Humanities E-Book (New York: Routledge, 1995); Orford, *supra* note 3.

North American womanhood. These limitations in the early vision of protections as essentially paternalistic, Eurocentric and class bound are certainly not limited to women's rights within the international human rights arena;[269] nevertheless they foreshadow the ghostly appearance of similar concerns in the women's rights documents we explore below.

In addition to this trajectory of protections, the Convention of the Political Rights of Women, 1953,[270] pre-dated the International Convention of Civil and Political Rights (ICCPR, 1966),[271] marking a forward-thinking commitment to women's formal civil and political rights. In addition, various committees and sub-committees, special rapporteurs and specialized agencies, such as the Sub-Commission on the Status of Women (CSW) of the Commission on Human Rights, were charged with addressing women's political equality, civil equality, and subsequently, social and economic equality. Between 1952 and 1962, the CSW sponsored a total of three international conventions, two of which, The Convention on the Nationality of Married Women[272] and The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage,[273] signaled a departure from the strict parameters of civil and political rights by delving into the sphere of family law as it limited civil and political rights. In 1962, the United Nations General Assembly (UNGA) initiated a long-term vision and program with

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[269] Moyn, *supra* note 92; Ruth Margaret Buchanan & Peer Zumbansen, eds, *Law in transition: human rights, development and transitional justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014); Buchanan, *supra* note 118; ESIL Lecture Series, *supra* note 16; Makau W Mutua, "The Transformatin of Africa: A critique of Rights in Transitional Justice" in Ruth Buchanan & Peer Zumbansen, eds, *Law Transit Hum Rights Dev Transitional Justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014) 91.

[270] *Convention on the Political Rights of Women*, A/RES/640(VII) (Entry into force 7 July 1954, 1952).

[271] *International Covenant on Civil and Political Rights*, 999 UNTS 171 (Entry into force: 23 March 1976 [ICCPR], 1966).

[272] *Convention on the Nationality of Married Women,* (Entry into force 11 August 1958, 1957).

[273] *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (Entry into force 9 December 1964, 1962).

respect to the advancement of women's rights,[274] with the establishment of CEDAW's closest relative and most important antecedent, the Declaration on the Elimination of Discrimination Against Women (DEDAW),[275] being one of its most significant outcomes.

Notwithstanding critiques of their effectiveness, DEDAW, together with the earlier development of political rights, show that a spectrum of rights for women had been enumerated prior to CEDAW. In political science terms—and of particular import to the emerging women's movement campaigning around the slogan "the personal is political"—these enumerated rights crossed the traditional barrier between public and private concerns going back to the Greeks; [276] a bifurcation seen through emerging feminist analysis as a cornerstone of patriarchal social relations.[277] The Convention on Eliminating all forms of Discrimination Against Women, building on DEDAW, arguably takes human rights farthest into the private sphere of all the treaties, finding in *Ms. A.T. v Hungary* that: "[w]omen's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy".[278] In GC 28, the Committee articulates this as a warning to states: "Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State

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[274] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers, 1993).
[275] *Declaration on the Elimination of Discrimination against Women*, A/RES/2263(XXII) (22nd Session [DEDAW], 1967).
[276] Arendt, *supra* note 1.
[277]'The personal is political' emphasized that the protection of women's rights required understanding the role of the private sphere in codifying women's inequality, and the need to scrutinize the private sphere through responses at the political/public/legal level. See Patricia Jagentowicz Mills, *Woman, Nature, and Psyche* (New Haven: Yale University Press, 1987).
[278] *AT v. Hungary*, CEDAW/C/36/D/2/2003 (2005), para 9.3.

under international law".[279] This "due diligence principle" has become the cornerstone and rallying cry for a number of global women's rights organizations seeking legal sanction for failures of state protection in cases of domestic violence.[280] While its legal enforceability, explored further below, remains tenuous at best, this principle in international human rights law emboldens and gives focus to women's rights activists who continue to experience state complacency or even complicity in the forms of violence that women experience in the privacy of their intimate relationships.[281]

In a further elaboration of this principle, the Committee provides a compendium of its meaning and legal authority in its 2017 update to the obligations of States parties with respect to what it now refers to as gender-based violence.[282] Here the Committee asserts that the obligation of due diligence "underpins the treaty as a whole", and that "failures or omissions constitute human rights violations".[283] CEDAW thus extends the range of states' obligations with respect to protection of women's rights into both the private sphere and over non-state actors. In international human rights law terms, CEDAW's elaboration of women's rights has pushed beyond the so-called "first generation", strictly civil and political rights, to incorporate "second generation" social, economic and cultural rights, finding the former curtailed within family arrangements and general cultural norms.

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[279] *UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/GC/28* (2010).[GC 28], para 13.

[280] Merry, *supra* note 173.

[281] Sarizana Abdul Azis & Janine Moussa, *Due Diligence Framework on State Accountability for Eliminating Violence against Women* (S.l.: s.n., 2016).

[282] *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW /C/GC/35 ([advance unedited version], 2017) at 35.

[283] note 140 at 24(b).

Women's rights, and CEDAW in particular, have tended to "suffer from the brunt of international skepticism toward 'second generation rights'".[284] While canonical commentators hold that the schism and the resultant hierarchy between civil and political rights on the one hand, and economic, social cultural rights on the other, has been overcome in IHRL generally,[285] CEDAW, as a treaty comprised of a blend of both types of rights, continues to experience resistance from commentators and states for simultaneously extending too far into proscriptive admonishments that infringe on state's right to social policy self-determination;[286] for not adhering to the proper scope of IHRL *qua* law;[287] and for being a program so broad it is "not realistic".[288]

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[284] Jennifer Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process Note" (2002) 34 George Wash Int Law Rev 605 at 629..
[285] Henry J Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 3rd ed (Oxford: Oxford University Press, 2007).
[286] Patrick Thornberry, *Patrick Thornberry, email to the author: Response of the Holy See to Concluding Observations of CRC* (2015); Holy See, *UN Committee on the Elimination of Racial Discrimination (CERD), Consideration of reports submitted by States parties under article 9 of the Convention, Sixteenth to twenty-third periodic reports of States parties due in 2014 :CERD/C/VAT/16-23, l* (2015); Jane Adolphe, "The Holy See in Dialogue with the Committee on the Rights of the Child" (2011) 1:1 Ave Maria Int Law J, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159503> While hardly a typical State, the Holy See has entered what Thornberry calls a "scathing" legal rebuke to CERD's extension of its articles to encompass matters that were not expressly articulated in the original Treaty. Such a critique is see as a possible thin edge of a wedge by States generally against Treaty Bodies' General Comments: as such they may cause us to "reflect on State challenges to the treaty bodies'' readings of their texts and what it implies". The Holy See's response to CERD: 'Committee proposals that add new terminology or create new obligations depart from the original spirit of the CERD and would constitute an unforeseen and fundamental change of circumstances, which in turn, would have the effect of "radically" transforming the extent of the Holy See's "obligations still to be performed under the Treaty" within the meaning of art. 62 (1) (b), VCLT. According to art. 62 (3) VCLT, the Holy See would, as a result, be permitted to invoke such a fundamental change of circumstances as a ground for "terminating or withdrawing" from the Treaty or from "suspending the operation" of the same'."
[287] Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 Am J Int Law 607.
[288] Holtmaat & Naber, *supra* note 113 at 67.

2.2.1 A mandate to broaden the provision and protection of women's human rights

Prior to CEDAW, the UN's approach to women's rights had been informed by classically liberal legal preoccupations with respect to the *de jure* or black letter aspects of law, "to raise the status of women, irrespective of nationality, race, language or religion, to equality with men in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law".[289] The famous United Nations Economic and Social Council Resolution 75(v), which had declared that the then Commission on Human Rights had "no power to take any action with regard to any complaints concerning human rights", was accompanied by a parallel resolution that declared the Commission on the Status of Women likewise "had no power to take action in regard to any complaints concerning the status of women".[290] International conventions created before CEDAW had focused on these categories of rights and concerns, and were now judged by their critics to have a "restricted scope" along with the "lack of […] provision for international review".[291] Thus, both the mainstream human rights protections offered through the ICCPR and the separate instruments on women's rights were, by the 1970s, seen to "have remained extremely limited in their ability to affect the condition of women".[292] For example, although the Human Rights Committee (HRC) did adjudicate women's rights matters under ICCPR, those advocating for CEDAW judged the Committee to have placed exclusive emphasis on "legal,

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[289] *Report of the Commission on the Status of Women*, E/281/Rev1 (1947) at 12.
[290] *Communications Concerning Human Rights Resolution 75 (V) & 76 (V) Resolutions Adopted by the Economic and Social Council*, 2 During its 5th Session from 19 July to 16 1947 (5 August 1947: ECOSOC).
[291] Laura Reanda, "Human Rights and Women's Rights: The United Nations Approach" (1981) 3:2 Hum Rights Q 11 at 19.
[292] *Ibid*.

rather than *de facto* situations", revealing their grounding in a foundational feminist critique of law as abstracted from the lived experience of the women who seek its benefit.[293]

In 1979, the existing paradigms of minority rights, civil and political rights as well as the "social development" orientation of the CSW, were beginning to be acknowledged as inadequate to the violations women were experiencing globally. To the framers of CEDAW, it left an enormous gap that women around the world were daily falling through.[294] Despite formal recognition of women as a protected group within the family of existing instruments, there was no practical mechanism that was equipped to screen for their particular rights violations. Subsequent developments in the family of treaties failed to address the gaps in understanding regarding women's rights. The limitations of the available instruments gave rise to CEDAW; it is a period well summarized in practical terms by Kimberlé Crenshaw in her paper introducing intersectionality to the UN in 2000:

> [W]hile women's enjoyment of human rights were formally guaranteed, these protections were compromised to the extent that women's experiences could be said to be different from the experiences of men. Thus, when women were detained, tortured, and otherwise denied civil and political rights in the same fashion as men, these abuses were clearly seen as violations of human rights. Yet when women were raped in custody, beaten in private, or denied access to decision-making by tradition, their differences from men rendered such abuses peripheral to core human rights guarantees.[295]

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[293] *Ibid* at 15.
[294] IWRAW, "Making the Human Rights System Work For Women" (1996) 10:1 Womens Watch, online: <http://hrlibrary.umn.edu/iwraw/ww10-1-1996.html>.
[295] Crenshaw, *supra* note 67 at 2.

In addition, committees, such as the HRC were, in 1979, still made up exclusively of men (a fact that remained the case in 2000)[296] who were judged by their contemporaries advancing the women's human rights agenda to have neither knowledge of nor expertise in women's rights, nor any links to national women's rights groups who could challenge the rosy views of domestic legal rights invoked by States parties.[297]

2.3 Women's human rights?

The engagement with the UN system of rights protections was itself a contested terrain of activism. Both those from outside the UN mechanisms and from NGOs, as well as those within, expressed their ambivalence in briefs, fliers, memos and discussion papers, as well as in the draft notes for the treaty itself.[298] Although faith in the existing UN mechanisms was not particularly strong, the scholars and activists engaged in the elaboration of the treaty still preferred the framing of women's rights as the human rights of women "to emphasize the globality and indivisibility of all human rights, and their full applicability to women as human beings".[299] They nevertheless concurrently feared "relegation to structures endowed with less power and resources than the general human rights structures".[300]

Despite the uncertain normative and institutional terrain, they saw it as a risk worth taking, since it appeared to them that the overall project of human rights promised belonging in "one of the few moral visions subscribed to internationally", although they understood the

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[296] Steiner, Alston & Goodman, *supra* note 285 at 193.
[297] Reanda, *supra* note 291 at 16.
[298] *Ibid* at 19; Rehof, *supra* note 274.
[299] Reanda, *supra* note 291 at 12.
[300] *Ibid*.

fragility of its consensus, concluding that “its scope is not agreed on universally”[…].[301] Because of its normative anchor in the best game in town, it was seen as strategically expedient: “Human Rights is a widely accepted goal and thus provides a useful framework for seeking redress of gender abuse”.[302] The CEDAW was to expressly recognize the limitations of the civil and political rights of traditional concern to IHRL. The CEDAW’s proponents pushed these legal boundaries in the resulting convention. This normative struggle also took place in the context of many institutional obstacles, which early members of the Committee keenly recall.[303]

The genesis of CEDAW occurred at a time of “superpower confrontations and battles between ideologies”[304] and amid hesitation about economic, social and cultural rights, codified in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[305] for what they owed to socialist ideals. The project of drafting CEDAW set out to answer the criticism that the “root causes” of discrimination against women had been neglected in previous instruments. The existing gender protections within the UN machinery had failed to highlight, respond to or adequately acknowledge either the fact or the scope of the ongoing violations of women’s specific human rights in either their deliberations or conclusions.[306]

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[301] Bunch, *supra* note 249 at 486; Maria Riley, “Human Rights Are Women’s Rights” (1996) Scarboro Missions Mag, online: <https://www.scarboromissions.ca/Scarboro_missions_magazine/Issues/1996/February/human_rights_are_womens_rights.php>.
[302] Bunch, *supra* note 249 at 487.
[303] Hanna Beate Schopp-Schilling, “The Nature and Scope of the Convention” in *Circ Empower Twenty-Five Years Un Comm Elimin Discrim Women* (The Feminist Press, 2007) 10,30.
[304] Rehof, *supra* note 274 at 3.
[305] *International Covenant on Economic, Social and Cultural Rights*, UNTS 993 3 (Entry into force 3 January 1976 [ICESCR], 1966).
[306] Julia Peters & Andrea Wolper, “Introduction” in Julia Peters & Andrea Wolper, eds, *Women’s Rights Hum Rights* (New York, NY: Routledge, 1995) 1.

This orientation, identifying multiple "roots" and manifestations of gender discrimination, plowed the ground for the subsequent intersectional challenge. The CEDAW's articulation of discrimination, as embedded in overall social conditions and institutional responses, casts discrimination, in important part, as the result of a social process as well as visible through a single event, allowing for the complex structural viewpoint on discrimination that intersectionality promises.[307]

2.4 CEDAW: an instrument in, but not solely of, the UN

The Convention on Elimination of all forms of Discrimination Against Women was adopted and proclaimed on December 18, 1979 by the General Assembly by Resolution 34/180(1979). Open for signature in 1980, it came into force in 1981. At the time of this writing, 189 States are parties to it, while 109 have signed its 1999 Optional Protocol.[308] This latter fortification of the treaty was seen to address its relative weaknesses in the firmament of human rights treaties, and brings it in line with other human rights mechanisms, by allowing those individuals or groups of individuals residing in states that have signed and ratified it to bring forward claims once domestic remedies have been exhausted. Beyond the adjudication of individual cases, it additionally grants the Committee the power to conduct inquiries into situations of grave or systematic violations of women's human rights.[309]

As with all United Nations bodies excepting the Security Council, enforcement of its terms is restricted to the moral suasion inherent in being part of an international community, and

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[307] Andrew Byrnes, "Article 2" in Marsha Freeman, Christine Chinkin & Beate Rudof, eds, *UN Conv Elimin Forms Discrim Women Comment*, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012) 71.
[308] "OHCHR Dashboard", online: <http://indicators.ohchr.org/>.
[309] *Ibid*.

the relative power that inheres therein. For example, for states requesting entry to the international community as part of seeking other benefits, "[h]uman rights have come to be seen as central to the assessment of states of underdevelopment" and "an essential prerequisite in the facilitation of societal, legal economic and political progress".[310] Being a signatory to CEDAW is a hallmark of progress for those states (formerly) considered to be "backward", and compliance with its terms a form of measurement as to their progress away from their "pre-modern" past.

The convention's closest advocates heralded it outside the UN system as premier among treaty bodies for its consideration of civil society views and engagement of NGOs.[311] At the time of drafting, this newest treaty was expressly crafted from "comments from governments, specialized agencies and NGOs on a text which would be prepared by a working group set up by the CSW".[312] In the end, multiple working groups were struck to create the treaty over the course of its development and the *travaux* reflect the involvement of many NGOs in the drafting process: the All-African Women's Conference; the International Council of Social Democratic Women; the International Federation of University Women;[313] and the World YWCA.[314] From early in its evolution, CEDAW involved specialized agencies and NGOs in publicity activities to advance receptivity, awareness and adoption of women's rights among States parties.[315] It has

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[310] Buchanan & Zumbansen, *supra* note 91 at 13.
[311] Sylvia Braun, "NGOs are important for CEDAW – Take part: IWTC Women's Global Net #316", (9 January 2007), online: *IWTC Womens Glob Net* <http://www.iwtc.org/316.html>.
[312] Rehof, *supra* note 274 at 8.
[313] *Ibid* at 29.
[314] *Ibid* at 30.
[315] *Ibid* at 11.

also had an active and specialized NGO monitoring group with links to women's grassroots communities around the world.[316]

Sally Engle Merry, the CEDAW scholar and legal anthropologist, holds that among treaty bodies CEDAW remains outstanding for its collaborative approach.[317] The UN's official history of its advancement of women's rights traces this extraordinary partnership with advocates outside the UN institutions back to the early CSW days, making it explicit that the international grassroots movement for women's rights helped shape the UN's frameworks for advancing women's rights.[318] The previously identified need for a new mechanism for enforcement of women's rights resulted in a broadening and codifying of earlier statements on marriage and family rights because, "discrimination arising from customary law, from traditional institutions and practices, or from other forms of oppression not specifically defined in the covenant [ICCPR] tend to be neglected".[319] This focus on redress is plainly represented in the treaty's final text for Article 2(f), which requires of signatories that they undertake: "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women[.]"[320]

Thus, present at the conception of CEDAW was the identification of the roles of "custom", "culture" and "traditional practice" as at once responsible for the *invisibility* (appearing as natural or given) of women's human rights violations and as an engine of their

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[316] "Women Change the World", (2013), online: *Int Womens Rights Action Watch* <http://hrlibrary.umn.edu/iwraw/about.html>.
[317] Merry, *supra* note 187.
[318] "International Women's Rights Action Watch", (23 June 2018), online: <http://hrlibrary.umn.edu/iwraw/proceduralguide-08.html>.
[319] Reanda, *supra* note 291 at 15.
[320] note 144, para 2(f).

reproduction (justification of violations based on cultural defences).[321] The CEDAW broadened and solidified a framework of setting women apart as a group in the UN protections. It followed, rather than led the particularization of delineating rights for identity groups (ICERD led the way in 1966 by specifically codifying protections on the grounds of race). It did so, however, in a new and contentious way: while some rights were specified in earlier frameworks, CEDAW was to have the force of a treaty, and as such, it was to have powers of obligation to reach into states' "cultures" where discrimination against women was embedded, causing concern among states for their cultural integrity.[322] This spotlighting of culture became a flashpoint for the debate over the meaning of an intersectional approach to women's experiences of discrimination, with CEDAW's tone on culture appearing to limit its flexibility to adopt an intersectional posture in adjudication.[323]

The CEDAW has remained every bit as contentious as it was at its initiation.[324] At the time of writing, 58 countries have registered reservations or made declarations to CEDAW.[325] The definition of a reservation is taken from the Vienna Treaty of 1969: '"reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State."[326]

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[321] Reanda, *supra* note 291 at 17.
[322] Rehof, *supra* note 274 at 91.
[323] Chow, *supra* note 186.
[324] Rehof, *supra* note 274 at 2.
[325] "United Nations Treaty Collection", online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en#55>.
[326] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (Entry into force: 27 January 1980 [Vienna Treaty], 1969), para 2.1(d).

Most reservations to the CEDAW are related to Articles 2 and 16,[327] which the Committee deems central to the object and purpose of the convention, and which pertain to discrimination that takes place in the family, or as an outcome or purpose of culture, tradition and custom. Many states make reservations so sweeping as to effectively nullify state accountability; others are unilaterally asserted on religious grounds with no canonical (religious or legal) justification offered. International legal opinion holds such reservations, subjecting an entire treaty to religious or domestic law, are "incompatible with the object and purpose of the treaty", and thus, nullify the objecting states' adherence.[328] Moreover, such objections, couched in terms of "competing" rights to freedom of religion or belief (FORB), fundamentally misconstrue the nature of those rights in international human rights law. "Afterall", as scholar Nazela Ghanea-Hercock and Special Rapporteur Heiner Bielefeldt have both pointed out, "FORB, as a human right, 'does not protect religions per se (e.g., traditions, values, identities, and truth claims) but aims at the empowerment of human beings, as individuals and in community with others. This empowerment component is something that freedom of religion or belief has in common with all other human rights.'"[329]

Despite the clarity in international legal protections for FORB as applicable to individual rights holders, and the duty bearers as the states, many human rights scholars and the community of practitioners continue to characterize states' evocation of this set of rights as a "clash" of

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[327] "Reservations to CEDAW", online: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.
[328] *Final working paper submitted by Françoise Hampson on the Reservations to human rights treaties*, E/CN4/Sub2/2004/42 (2004), para 56.
[329] Ghanea, *supra* note 243 at 4; Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women.* (2013), para 70.

rights, rather than as an incorrect reading of those rights.[330]The incongruity of states' objections on these grounds, compounded with their incompatibility with the object and purpose of the treaty itself, thus is often not effectively disputed, and most frequently it does not result in clear sanction.

States' claims that a cultural or religious practice requires a reservation to CEDAW are often also disputed by the women active for women's rights within that state's boundaries, either from the dominant culture or from within another, minority culture. The feminist-egalitarian interpretations of Islam reflected in the shadow reports of Morocco to CEDAW, for example, are but one version of the complexity of potentially intersectional claims opened by the reservation system.[331] I attend to the work done by "culture" in this context briefly below.

2.4.1 **CEDAW's competing discourses**

CEDAW's drafting and ultimate ratification were the culmination of advocacy by women within and beyond the UN; its genesis and normative grounding is both embedded in and arguably limited by what it owes to the "women in development" discourse that emerged in the late 1960s and 1970s.[332] This "developmental discourse" is grounded in an implicit acceptance of the unequal relations of international political economy,[333] while the variants concerned with gender relations posit a social development role for women who, rather than appearing as rights bearers, are viewed as "indicators" of a community's capacity to advance toward a more

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[330] Ghanea, *supra* note 243.
[331] "Morocco", (2009), online: *Int Womens Rights Action Watch* <http://hrlibrary.umn.edu/iwraw/morocco.html>.
[332] Rehof, *supra* note 274 at 9.
[333] Issa G Shivji, "Human Rights and Development: A Fragmented Discourse" in Ruth Buchanan & Peer Zumbansen, eds, *Law Transit Hum Rights Dev Transitional Justice*, Osgoode readers volume 3 (Oxford: Hart Publishing, 2014) 49 at 54.

"developed" state. This legacy is evident in the Convention's preamble, which declares, "discrimination against women … hampers the growth and prosperity of society".[334] This discourse has remained dominant both within international NGOs and within the UN, where women's "advancement" on a whole raft of "indicators" joins other measurements to track states' progress.[335] This grounds women's equality as a legitimate endeavour not on its own merits, but on the basis of some other, more expedient principle based in shared benefit, obfuscating the fundamental and potentially unpalatable power shifts—locally and globally—required for its attainment. This recalls Puar's cultural studies normative critique of western attempts to expand "the statistical fold that produces appropriate digits and facts toward the population's optimization of life and the ascendancy of whiteness".[336] It is a form of "sisterhood", as Orford succinctly asserted two decades ago, "aimed at producing new female subjects of development without unsettling the priorities of globalization".[337] As Sundhya Pahuja has pointed out, "[i]nterventions directed at bringing about 'development' are assessed primarily by reference to the intentions of the 'developer', rather than the effect of those actions on the 'developing'".[338]

A striking, and a yet more compromised, example of this is the international concern with the situation of women in Afghanistan. Since the NATO invasion of that country in 2001, there

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[334] note 144, s Preamble.
[335] Kerry Rittich, "Governing by Measuring: The Millennium Development Goals in Global Governance" in Ruth Buchanan & Peer Zumbansen, eds, *Law Transit Hum Rights Dev Transitional Justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014) 165.
[336] Puar, *supra* note 23 at xxviii.
[337] Anne Orford, "Feminism, Imperialism and the Mission of International Law" (2002) 71 Nord J Int Law 275 at 279.
[338] Sundhya Pahuja, "Global Poverty and the Politics of Good Intentions" in Ruth Buchanan & Peer Zumbansen, eds, *Law Transit Hum Rights Dev Transitional Justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014) 31 at 46.

has been approximately 1.5 billion dollars invested in activities that were intended to benefit women.[339] Instead, a 2015 report by the UN Special Rapporteur on Violence against Women concluded that the aid "commitments have not translated into concrete improvements in the lives of the majority of women, who remain marginalised, discriminated against and at high risk of being subjected to violence".[340] The Special Rapporteur's report is itself an example of the contradictory hybrid of critique and complicity the international approach to women's rights can elicit.

The CEDAW is at once legally radical and normatively conservative: through its contextual reading of women's rights it articulates an expanded definition of human rights that integrates civil and political rights with a structural understanding of economic, social and cultural rights; it does so however within the context of an unchallenged framework of the human rights machinery itself, leaving unexamined the unequal terms of global engagement which is in-and-of itself the source of a great deal of the discrimination the globe's women experience.[341]These mutually contradictory frames condition much of the UN human rights discourse, and have not gone un-noticed by those most embedded in their operation.[342]At the

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[339] Rafia Zakaria, "Canada's International Aid Policy Is Now 'Feminist'. It Still Won't Help Women", (7 August 2017), online: *The Guardian* <https://www.theguardian.com/commentisfree/2017/aug/07/canada-international-aid-feminist-women-afghanistan?CMP=twt_gu>.
[340] Rashida Manjoo, *UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum : Mission to Afghanistan*, A/HRC/29/27/Add3 (2015), para 70.
[341] Saliwe M Kawewe & Robert Dibie, "The Impact of Economic Structural Adjustment Programs [ESAPs] on Women and Children: Implications for Social Welfare in Zimbabwe" (2000) 27 J Sociol Soc Welf 79; Bharati Sadasivam, "The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda" (1997) 19 Hum Rights Q 630; Nancy E Dowd & Michelle S Jacobs, *Feminist legal theory: an anti-essentialist reader* (New York: New York University Press, 2003); Samuel Moyn, "Powerless Companion: Human Rights in the Age of Neoliberalism, A" (2014) 77 Law Contemp Probs 147; Merry, *supra* note 187.
[342] Mac Darrow & Louise Arbour, "The Pillar of Glass: Human Rights in the Development Operations of the United Nations" (2009) Am J Int Law 446; Mac Darrow, "The Millennium Development Goals: Milestones or Millstones - Human Rights Priorities for the Post-2015 Development Agenda" (2012) 15 Yale Hum Rights Dev Law J 55; Mac

time of CEDAW's drafting, the "developmentalist" discourse sat alongside the influence of the new post-colonial states, which prior to CEDAW influenced the first new human rights standards developed after the UDHR, especially through CERD (1965), reflecting the concerns of the formerly colonized.[343] A similar influence is "also clear" in the Declaration on the Granting of Independence to Colonial Countries and Peoples, of 1960, which acknowledged "the evils of colonialism and the importance of the right to self-determination", and the strong "condemnation of Apartheid in General Assembly Resolution 1761 of 1962".[344]

The drafters of CEDAW followed a "lull" in this spate of new post-colonial instruments (that is, developed during the independence era of formerly colonial states),[345] in 1979, during which period, the "human rights discourse developed as a counterpoint to the developmentalist discourse".[346] The CEDAW's preamble reflects this history as well, stating: "the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of states is essential to the full enjoyment of the rights of men and women".[347]

The Convention sits still in some discomfort on the cusp of these differential approaches, with the "women in development" origins holding an ontological tension with the rights-based institutional framework that informs its status as a stand-alone human rights treaty with an

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Darrow & Amparo Tomas, "Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation" (2005) 27 Hum Rights Q 471.

[343] Sarah Louise Joseph & Adam McBeth, "The United Nations and Human Rights: Introduction" in Sarah Louise Joseph & Adam McBeth, eds, *Res Handb Int Hum Rights Law*, Research handbooks in international law series (Cheltenham, UK: E. Elgar, 2010) 1 at 3.

[344] *Ibid*.

[345] *Ibid* at 4.

[346] Shivji, *supra* note 333 at 52–53.

[347]note 144.

enumerated set of protections. The CEDAW's framers were influenced by emerging theories of women's subordination, grounded in critiques of the ontological frameworks of *all* cultures, on the basis that they shared some dominant and dominating forms of gender assignment.[348] In the scholarship emerging outside the UN machinery, but influential on it, this was summarized in the term "patriarchy", which newly expanded its conceptual reach to go beyond strict anthropological application. The long-observed universal organization of human cultures into kinship and reproductive units was now being reexamined with the insight that there was a differential outcome for men and women vis-à-vis equality: "men have certain rights in their female kin, and women do not have the same rights either to themselves or to their male kin".[349]

The compulsory assignment of heterosexuality and of the subordination of women through cultural kinship and marriage systems was gathered under the concept of patriarchal power. To paraphrase the American legal feminist Catherine MacKinnon, while great differences obtain over history and across cultures, from the perspective of women's role vis-à-vis equality with their male compatriots, "bottom is bottom".[350] This pithy reductionism, however, reveals an essentialized "woman" that is now considered problematic in complex international and multicultural contexts where, in fact, shifting power and social locations alter profoundly what constitutes "bottom", and patriarchal culture can become easily conflated with culture *per se*.

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[348] "[Violence against women is] rooted in the universal idea that women are inferior, either subject to the will of others or unworthy of serious consideration", International Women's Rights Action Watch, "The Women's Watch." (1993) 1:7 Int Womens Rights Action Watch 1 at 1.
[349] Sherry B Ortner & Harriet Whitehead, "Introduction: Accounting for Sexual Meanings" in Sherry B Ortner & Harriet Whitehead, eds, *Sex Mean Cult Constr Gend Sex Univ Camb 1981 1986* (University of Cambridge, 1981) at 11.
[350] Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

Holmaat and Naber have argued that the explicit language of cultural feminist scholarship was slower to enter the public international relations texts;[351] however, its influence can be felt in the norms and frameworks of understanding of the treaty open for signature in 1981. By 2004, CEDAW was interpreting the treaty in explicit terms against this cultural feminist broad definition of universal patriarchy:

> *Despite variations across cultures and over time, gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait*. [Gender] helps us understand the social construction of gender identities and the unequal structure of power that underlies the relationship between the sexes.[352]

A central insight of the intersectional approach will be that the "bifurcation of race and gender leads to the mistaken conclusion that the goals of multiculturalism and feminism are antithetical", setting them on an ideological collision path.[353] Class, racialization, ability, sexual orientation, etc., alter the position of women vis-à-vis men and other women. Yet, CEDAW *qua* document was devised at a time when "[c]ultural feminists developed the modern construct 'woman' by privileging sex differences over any other basis of oppression and asserting the existence of universal gender subordination across time and space".[354]

This form of gender essentialism, despite its intended internationalism, builds commonality of gender identity at the expense of context that might differently shape a woman's experience and agency. As we have seen, the marker on conceptualizing identity has since

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[351]Holtmaat & Naber, *supra* note 113.
[352] note 261, n 2. (citing 1999 World Survey on the Role of Women in Development, United Nations, New York, 1999, page ix.) emphasis added.
[353] Volpp, *supra* note 190 at 1575.
[354] Volpp, *supra* note 132 at 1581.

moved far from CEDAW's unproblematized "woman", with the most radical critiques of essentialism challenging the category of "woman" as an "ontological joke",[355] not at all useful due to its historical, cultural and "performative" variations and specificities,[356] and more recently, its fundamental biological instability.[357] This latter development has particularly troubled the Committee charged with overseeing the treaty's interpretation, as we shall see ahead. By 2003, Radhika Coomeraswamy, the Special Rapporteur on Violence Against Women (SRVAW), addressed the matter of women's multiple affiliations in international human rights protection with the following, more practical, disclaimer:

> Identity is not an essential immutable, permanent status, it has many constituent elements. Future experiences often transform the nature and direction of personal identity. Identity is often composite, made up of multiple selves, often contesting, contradicting, and transforming the other. Identity therefore reconstitutes itself, reacting to and negotiating ideology and lived experience.[358]

Coomaraswamy is articulating how an operating theory of gender allows the richness of lived experience, and particularly of not only violations, but also of resistance, to be seen, understood and supported by the instruments charged with the role of protecting women from harms; and, specific to international human rights contexts, how this contributes to remedy. It is also the central challenge of the intersectional turn.

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[355] Monique Wittig, "The Mark of Gender" (1985) 5:2 Fem Issues 3 at 6.
[356] Judith Butler, "Imitation and Gender Insubordination" in Ann Gary & Marilyn Pearsall, eds, *Women Knowl Real Explor Fem Philos* (New York, NY: Routledge, 1996) 371.
[357] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn, NY: South End Press, 2011).
[358] Radhika Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women" (2002) 34 George Wash Int Law Rev 483 at 483.

2.4.2 **The CEDAW Committee**

Articles 17-30 of the Convention govern the Committee's mandate and the administration of the Committee. In a formula similar to all nine core human rights treaties of the United Nations,[359] the implementation of CEDAW by States parties is overseen by a committee of 23 "experts" of "high moral standing and competence in the field covered by the Treaty",[360] put forward by their governments, but elected by the Committee through secret ballot. They receive reports on a schedule of every four years, and engage the States parties in what is termed "constructive dialogue" for the implementation at the national level of the Committee's program for implementation.[361] Despite the lack of concrete enforcement capabilities, the Committee's utterances are referred to as jurisprudence, with debate as to their status as binding or "soft law". Nonetheless, its General Comments are considered direct interpretations of the treaty's legal meaning; its Concluding Remarks on country reports, no less so, although it must rely on a system of "good faith" implementation on the parts of states.[362]

Similar to the Committee on the Elimination of all forms of Racial Discrimination (CERD), the CEDAW Committee has gone out of its way to establish itself as the custodian of a "living document".[363] It has therefore adopted its definitional scope in Article 1 of "*all* forms of discrimination", and its mandate under Article 21 of the convention to "make suggestions and

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[359] "OHCHR | Core International Instruments and Their Monitoring Bodies", online: *What Are Hum Rights* <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.
[360] note 144, para 17(1).
[361] Clive Parry, John P Grant & J Craig Barker, *Parry & Grant Encyclopaedic Dictionary of International Law* (Oxford University Press, 2009) at 119.
[362] Hanna Beate Schopp-Schilling, "The Nature and Scope of the Convention" in *Circ Empower Twenty-Five Years Un Comm Elimin Discrim Women* (The Feminist Press, 2007) 10 at 25.
[363] *Ibid*.

general recommendations based on the examination of reports and information"[364] to identify new and emerging forms or patterns of discrimination, whether named or not in the original document.[365] For instance, the Committee has read a core protection against violence from state and non-state actors back into the articles of the treaty, despite the original document's silence on the matter.[366]

At the time of CEDAW's establishment, treaty committees were becoming increasingly self-critical about the sources of their information on the status of a country's compliance with its respective obligations: it was the CERD that first went on record as requesting that "corrective information from sources other than states" be sought in the review processes, which had not yet fully integrated the alternative reports from civil society organizations into their deliberations.[367] The relationships with women's INGOs that characterized CEDAW's framing, continue unabated, with official histories recording, in dizzying detail,[368] world conferences, special meetings and special discussion sessions on women's international human rights that have mapped the rise of the treaty as a core part of the human rights firmament. [369] These activities have given rise to, established and tautologically confirmed women's international human rights' norms, topics and legal status.

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[364] note 144, para 21.
[365] Marsha Freeman, "Introduction: Towards a Convention on Elimination of Discrimination against Women" in Marsha Freeman, Christine Chinkin & Beate Rudof, eds, *UN Conv Elimin Forms Discrim Women Comment*, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012) 1.
[366] UN CEDAW, *CEDAW General Recommendation No. 19: Violence against women* (1992) at 19; Gemma Connell, *Survivors Of Domestic Violence In The Gaza Strip: Living In A Lacuna Of International Law?* (unpublished, University of Oxford, 2011) [unpublished].
[367] Reanda, *supra* note 291 at 16.
[368] "World Conferences on Women", online: *UN Women* <http://www.unwomen.org/how-we-work/intergovernmental-support/world-conferences-on-women>.
[369] Ivanka Corti, "Relationships with UN Conferences, Specialized Agencies, Programs, and Funds" in *Circ Empower Twenty-Five Years Un Comm Elimin Discrim Women* (The Feminist Press, 2007) 36.

For Annalise Riles, these relationships are exemplary of a discernable international human rights' aesthetic, such that relations between the UN and women's advocates in civil society have become part of a ubiquitous production of networks and documents, each comprising artifacts on par with one another, and worthy of study unto themselves, as ethnographies of international human rights law.[370] While Riles' work is informative of the extent to which the UN systems for engaging women's rights have become their own hermetic world, her work is a deep study of its own, and takes us in an ethnographic direction, not immediately pertinent to this legal study of the grounds for intersectionality.

2.4.3 **Limiting the normative scope: Reservations to CEDAW**

Clearly, CEDAW has attracted a "large number of reservations and reservations of a very general type".[371] In her previous Working Paper on Reservations to Human rights Treaties, Francoise Hampton observed that "[c]ertain treaties are more affected than others [by reservations], the Convention on the Elimination of All forms of discrimination Against Women being a notable example".[372] In Article 28, paragraph 2 of the Convention, CEDAW adopts the Vienna Convention on the Law of Treaties regarding the "impermissibility principle", stating that any reservation that is incompatible with the "object and purpose" of the convention shall not be permitted.[373] Likewise, "[a]general reservation subjecting a treaty as a whole to a religious

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[370] Jennifer Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process Note" (2002) 34 George Wash Int Law Rev 605; *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2000).
[371] note 328, para 29.
[372] *Reservations to Human Rights Treaties Working Paper Submitted by Ms. Francoise Hampson*, E/CN4/Sub2/1999/28 (1999), para 4.
[373] note 326, para 19(c); CEDAW, *supra* note 253, para 28; note 327.

law or to domestic law is likely to be found incompatible with the object and purpose of the treaty".[374]

While the legal debates with respect to reservations is not the principal subject of this paper,[375] the reservation regime is worth noting because of its close relationship to potentially intersectional interpretations of women's rights and the overall efficacy of the instrument. On the one hand, the broad social change required by states in order to be in strict adherence to the treaty may excuse qualifications in the name of "progressive realization" of its requirements, an accepted form of IHRL compliance;[376] on the other hand, generally weak enforcement mechanisms, combined with the number and extent of reservations to CEDAW, have occasioned much reflection on the reservation regime generally, and its implications for CEDAW in particular.[377] The development of the Optional Protocol to CEDAW of 1999 (December 22,

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[374] note 328, para 56.
[375] Rhona K M Smith, *Textbook on International Human Rights* (OUP Oxford, 2012) at 86–88.
[376] UN Women Asia Pacific, "Why does the CEDAW Convention allow Reservations from States Parties?", online: *CEDAW FAQs* <http://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq>. Explained thus: "It has been recognized that some rights may take more time to be realized than others. Some economic, social and cultural rights, for example, may require more time to be realized, because they require a greater investment of resources, or more substantial structural changes. Some countries at the time of ratification may have in place laws, traditions, and religious or cultural practices that may discriminate against women – time may be required to remove discriminatory provisions within the law, or change discriminatory behaviour. Where a State cannot be realistically expected to achieve a right immediately, its obligation is understood to be 'progressive', and can be satisfied by genuine efforts that produce incremental progress towards realization of the right."
[377] LA Hoq, "The Women's Convention and its Optional Protocol : Empowering Women to Claim Their Internationally Protected Rights" (2001) 32:3 Hum Rights Law Rev 677; Riddle, *supra* note 370; Konstantin Korkelia, "New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights" (2000) 13:2 EJIL 437; Hanna Beate Schopp-Schilling, "Reservations to the Convention on the Elimination of all forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments?" in Ineta Ziemele, ed, *Reserv Hum Rights Treaties Vienna Conv Regime Confl Harmony Reconcil*, Deutsches Institut fur Menschensrechte/The Raoul Wallenberg Institute Human Rights Library (Danvers MA: Springer) 3; Deutsches Institut Fur Menschenrechte, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, Ineta Ziemele, ed., The Raoul Wallenberg Institute human rights library (Springer, 2013).

2000),[378] allowing communications on behalf of individuals and groups, was hoped to have improved state accountability[379] by providing an additional check and balance on reservations through jurisprudence on the meaning of state obligations for individual claimants in situations of reservations. [380] The matter, Hanson opines, is "legally complex".[381] Since March 2006, there is also the State-driven Universal Periodic Review, monitoring the "universality, interdependence, indivisibility and interrelatedness of all human rights" to add to the arsenal of accountability of states to their human rights obligations.[382]

Konstantin Korkelia describes opinion on the reservations regimes for human rights treaties as swinging between the belief that consent by the state remains the fundamental principle in international law, and that therefore legal consequences of inadmissibility should be "taken by the reserving state alone"; and, on the other hand, that supervisory organs should "be competent to decide on the admissibility of reservations and to determine consequences of inadmissible reservations".[383] Jennifer Riddle summarizes this in the pithy formulation of "integrity" (of the treaty's norms) versus "universality" (of coverage). She traces the climate of

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[378] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 2131 UNTS 83 (Entry into force 22 December 2000 [Optinal Protocol], 1999); Elizabeth Evat, "Finding a Voice for Women's Rights : the Early Days of CEDAW" (2002) 34:3 George Wash Int Law Rev 515; Cees Flinterman, "United Nations Human Rights Reform: Some Reflections of a CEDAW-Member" (2003) 21 Neth Q Hum Rts 621. Unlike ICERD and the ICCPR, the Women's Convention originally made no provision for an individual complaints procedure, thus limiting access by women and opportunities for CEDAW to develop jurisprudence.
[379] Hoq, *supra* note 377.
[380] Riddle, *supra* note 370 at 605; note 326; "Choosing a Forum - How To Complain About Human Rights Treaty Violations", online: *Bafesky.com* <http://www.bayefsky.com/complain/44_forum.php>. A state party may have made reservations to one or more of the treaties which would affect the viability of the complaint. The complainant should therefore review any reservations entered by the state, and any commentary by the treaty body on the reservation."
[381] note 328, para 60.
[382] "Universal Periodic Review", online: *OHCHR UPR UPR* <https://www.ohchr.org/en/hrbodies/upr/pages/UPRMain.aspx>; Cees Flinterman, "Vienna Declaration and Programme of Action: 20 Years Late" (2013) 31 Neth Q Hum Rts 129.
[383] Korkelia, *supra* note 377 at 437, 476.

reservations for IHRL as having "moved from a unanimity rule to a reservations regime that places universal acceptance of multilateral treaties above preserving the integrity of each individual document's provisions".[384] The disassembled meaning of universality in this context is an obvious question to raise. While there is now general agreement that "the human rights treaty bodies have the competence to determine if a reservation is incompatible with the object and purpose of the treaty",[385] it is widely acknowledged that there are problems establishing invalidity in a climate of "constructive engagement". [386] CEDAW itself maintains that:

> Although the Convention does not prohibit the entering of reservations, those which challenge the central principles of the Convention are contrary to the provisions of the Convention and to general international law. As such they may be challenged by other States parties.[387]

As with other treaty bodies, CEDAW currently has limited responses open to it: its report-receiving function (under Article 18) allows the Committee to interrogate the meaning and suggest time limits to reservations as part of monitoring States parties' progress toward compliance with "a view to narrowing its content and/or withdrawing it".[388] To date, few reservations to Article 2 have been withdrawn or modified by any State party and reservations to

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[384] Riddle, *supra* note 370 at 66.
[385] note 328, s Summary.
[386] note 326, para 19(c); Smith, *supra* note 375 at 161; Martin Scheinin, "Reservations by States under the ICCPR and Its Optional Protocols" in Ineta Ziemele, ed, *Reserv Hum Rights Treaties Vienna Conv Regime Confl Harmony Reconcil*, Deutsches Institut fur Menschensrechte/The Raoul Wallenberg Institute Human Rights Library (Danvers MA: Springer) 41; William A Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform" (1994) 32 Can Yearb Int Law 39; Schopp-Schilling, *supra* note 377; Ineta Ziemele & Lāsma Liede, "Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6" (2013) 24:4 Eur J Int Law 1135.
[387] "Reservations to CEDAW", (2009), online: *UN Women* <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.
[388] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women Oman*, CEDAW/C/OMN/CO/1 (Geneva, 3 – 21 October 2011, 2011), para B(5).

Article 16 are rarely withdrawn.[389] Ultimately, the monitoring bodies represent "the interests of all states when they exercise their functions".[390] Official weight, however, is granted to other States parties, whose objections to incompatible reservations need to be registered. Nevertheless, according to the ICJ Genocide Convention decision, such objections can stand side-by-side with a state's continued status as a signatory to the treaty, only "if the reservation is compatible with the object and purpose of the Convention".[391]

In and of themselves, the existing state objections are of little use and reveal no helpful pattern that would empower the CEDAW committee.[392] In practice, a reserving state can be a party while considering itself exempt from the central tenets of the treaty, weakening the normative force of the treaty as a tool for practical protection and accountability.[393] Although the reservations to CEDAW have been characterized as "haphazard and subjective",[394] there is, in fact, a pattern: it is most frequently to those articles aimed at discrimination that takes place within the family, or as an outcome or purpose of culture, tradition and custom.[395] One powerful tool a treaty body has against reservations is the accepted non-derogability of certain rights. The law around women's rights internationally is inching toward an assumed status of international customary law, particularly when the matter of VAW within state boundaries is at issue.[396] Non-derogability in international human rights law applies generally to the following conditions:

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[389] note 387.
[390] note 328, para 47.
[391] *Ibid*, para 13.
[392] 9/9/2018 2:57:00 PM See for example selective objections of Sweden, Germany and Denmark; also, Canada's selective objection to substantively similar reservations, showing preference for their oil trading partner, Kuwait.
[393] Riddle, *supra* note 370 at 623.
[394] *Ibid* at 614.
[395] CEDAW, *supra* note 253, paras 2(f) & 16.
[396] Gemma Connell, *Survivors Of Domestic Violence In The Gaza Strip: Living In A Lacuna Of International Law?* (unpublished, University of Oxford, 2011) [unpublished] at 14.

> No State party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life ; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.[397]

There have been suggestions that VAW be cast as a matter of the integrity of the person, to test the possibility of this as one indisputable international standard in the protection of women's rights.[398] This has been referred to variously as the incoherent act of reading coverage by analogy to other, formally recognized, IHRL norms;[399] as "not yet" the status of international customary law",[400] and more recently, in more progressivist language as part of "a growing call to redefine customary international law in gender sensitive terms, [that] could eventually bring violence against women within jus cogens."[401]

The Committee itself addresses VAW's non-derogability status obliquely in paragraph 11 of GC 28 by stating that: "[t]he obligations of States Parties do not cease in periods of armed

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[397] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN4/1985/4 (Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva adressed to the Secretary-General., 1984), para 58; *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev1/Add6 (Adopted at the Fifty-second Session of the Human Rights Committee, 1994), paras 8–10.
[398] Radhika Coomaraswamy, *UN Special Rapporteur on Violence Against Women World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, South Africa* (2001).
[399] Hilary Charlesworth & Christine Chinkin, "The Gender of Jus Cogens" (1993) 15 Hum Rights Q 63.
[400] Beate Schopp-Schilling & Flinterman, *supra* note 224.
[401] Connell, *supra* note 396 at 14.

conflict or in states of emergency resulting from political events or natural disasters", and that they are required to attend to "the particular needs of women in times of armed conflict and states of emergency", gesturing to the context of VAW in such circumstances.[402] These previous and various statements about the nature and role of violence against women in both the evidence and construction of violations that fit the bill of non-derogability and, ultimately, of a protection guaranteed by customary international law, are gathered in the most recent update on the obligations of states with respect to violence against women in GR 35 on gender-based violence against women, updating GR 19.[403] In this context, the Committee states baldly that:

> For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.[404]

In GR 19, the Committee delineates "gender-based violence" as comprising the nullification of the following universal rights and freedoms:

a. The right to life;
b. The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
c. The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
d. The right to liberty and security of person;
e. The right to equal protection under the law;
f. The right to equality in the family;
g. The right to the highest standard attainable of physical and mental health;
h. The right to just and favourable conditions of work.[405]

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[402]note 140, para 11.
[403] *General Recommendation No. 35 on gender - based violence against women, updating general recommendation No. 19 [advance unedited version]* (2017).
[404] *Ibid*, para 2.
[405] CEDAW, *supra* note 366, para 7.

In GR 35, the Committee extends this observation through a compendium of decisions to date which together, underscore this evolving area of non-derogability in customary international law, by redefining torture in "gender sensitive" terms:

> The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender sensitive approach is required to understand the level of pain and suffering experienced by women, and that the purpose and intent requirement of torture are satisfied when acts or omissions are gender specific or perpetrated against a person on the basis of sex.[406]

In paragraph 25 of this GR, CEDAW makes a declaratory statement about the status of at least some forms of gender-based violence as *jus cogens*:

> In addition, both international humanitarian law and human rights law have recognised the direct obligations of non-State actors, including as parties to an armed conflict, in specific circumstances. These include the prohibition of torture, which is part of customary international law and has become a peremptory norm (jus cogens).[407]

Most attempts from outside the Committee to delineate a minimum international standard of "non-derogability" with respect to protection from VAW remain unconvincing. Many weaken the treaty's normative force by instrumentally extracting acts of violence from their crucial

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[406] note 282, para 17.
[407] *Ibid*, para 25.

context as part of a continuum of inequality that underscores and reproduces it,[408] a complexity the Committee has been at pains to maintain, pointing out "the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms".[409] In GR 35, the Committee once again makes this point:

> The Committee considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated. Throughout its work, the Committee has made clear that this violence is a critical obstacle to achieving substantive equality between women and men as well as to women's enjoyment of human rights and fundamental freedoms enshrined in the Convention.[410]

At heart, CEDAW is a treaty about non-discrimination, and holds this context central to its consideration of violations. To lay the groundwork for a later discussion of CEDAW's relationship to the elements of intersectionality, a committee-based definition of discrimination is necessary.

2.4.4 **CEDAW: Equality and non-discrimination**

As with ICERD, non-discrimination is the broad rubric under which CEDAW's articles are gathered. It has been noted that there is "little overall convergence or congruence"[411] among the treaty regimes as to the meaning and consequence in the use of "non-discrimination". Instruments range from naming non-discrimination within a sequence of rights of which non-discrimination is but one, to the ICCPR, which contains a self-standing prohibition of

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[408] Xanthaki, *supra* note 128.
[409] CEDAW, *supra* note 366, para 4.

[410] note 282, para II(10).
[411] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen: Intersentia, 2005) at 29.

discrimination.[412] Some contain only an ancillary right to non-discrimination; others contain an explicit guarantee for equality between women and men (ICCPR and ICESCR),[413] and still others, as we have seen, refer to sex as one of the prohibited grounds. The list of prohibited grounds itself differs from treaty to treaty.[414] The CEDAW and ICERD are set apart for their overarching focuses on non-discrimination, and for their self-contained definitions of discrimination. It has also been noted that legal scholars have often held that non-discrimination and equality are equivalent concepts, "two sides of the same coin", or "negative and positive forms of the same principle".[415] The CEDAW treaty body in fact holds them to be "different but equally important"[416] terms that set out the positive, remedial and preventative obligations on States parties. As such, "a right to equality (in the enjoyment of human rights) is broader than non-discrimination in that the latter prohibits discrimination only on certain grounds".[417]

Discrimination is defined in Article 1 of CEDAW in nearly identical terms to ICERD's with respect to racism. CERD states that discrimination is defined as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of life.[418]

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[412] note 271, para 26.
[413] *Ibid*, para 2; note 305, para 3.
[414] Vandenhole, *supra* note 411 at 29.
[415] Gillian MacNaughton, "Untangling Equality and Non- Discrimination to Promote the Right to Health Care for All" (2009) 11:2 Heath Hum Rights 47 at 47.
[416] *Report of the Committee on the Elimination of Discrimination against Women Twenty-sixth session (14 January-1 February 2002) Twenty-seventh session (3-21 June 2002) Exceptional session (5-23 August 2002)*, (A/57/38) [Belgium] (Fifty-seventh Session Supplement No. 38, 2002), para 146.
[417] Patrick Thornberry, *Email to Author: Equality in Human Rights* (2011).
[418] note 142, para 1.

In CEDAW, discrimination is:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[419]

The Treaty names prohibition of and protection against distinction for the purposes of diminishing equality as its core value and purpose, which is then elaborated in its subsequent articles. In the view of the Committee, a joint reading of Articles 1 to 5 and 24 "form the general interpretative framework for all the convention's substantive articles", and "indicates that three obligations are central to States parties' efforts to eliminate discrimination against women."[420] Article 1 is thus referred to as the "chapeau" article, meaning that it "caps", guides and fundamentally shapes all other articles within its terms.

The Committee's GC 25 names the related states' obligations as:

> Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination—committed by public authorities, the judiciary, organizations, enterprises or private individuals—in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by

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[419] CEDAW, *supra* note 253, para 1.
[420] note 261, para 6.

> individuals but also in law, and legal and societal structures and institutions.[421]

Furthermore, and most importantly to establishing a definition of equality, these obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men. Read through the lens of Article 4.1, providing for temporary special measures, CEDAW "goes beyond the concept of discrimination used in many national and international legal standards and norms".[422] It is quoted here in full:

> Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[423]

Leaving aside the determination of what constitutes temporary in this regard, for our purposes what is important is that equality in CEDAW's terms does not imply identical treatment, or sameness in treatment; if a distinction in treatment can be justified on the grounds that it will contribute to substantive (*de facto* rather than *de jure*) equality, then it will not be considered discrimination.[424] Read through the elaboration of Article 4, CEDAW proposes a definition of non-discrimination that moves from formal non-discrimination to positive equality.

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[421] *Ibid*, para 7.
[422] *Ibid*, para 5.
[423] CEDAW, *supra* note 253, para 1(4).
[424] Patrick Thornberry, "Confronting Racial Discrimination: A CERD Perspective" (2005) 5:2 Hum Rights Law Rev 1 at 17.

It requires positive action on the part of the state; it creates duties and obligations that go beyond those of restraint to those of active change; from the prohibition of breach to the requirement of both redress and moreover, "provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination."[425] The Committee elaborates this mandate as follows:

> The Convention targets discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. [426]

As Vandenhole describes it, both ICERD and CEDAW hold that "[d]iscriminatory intent is not a necessary element of discrimination";[427] both refer to "effect or purpose" with equal weight.[428] The Committee's elaboration of the treaty's intent with respect to discrimination therefore, while clarifying the conceptual and manifest differences between direct and indirect discrimination, makes no particular distinction between the obligations of states where intended or unintended discrimination occurs. As we have seen, in the view of the Committee, "cultural" and "societal contexts" that are discriminatory are, in fact, a "target" of the convention. Thus,

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[425] note 261 at 19; *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, CERD/C/GC/32 (24 September 2009 [GC 32], 2009).
[426] note 261, para 14.
[427] Wouter Vandenhole, *Non-discrimination and equality in the view of the UN human rights treaty bodies* (Antwerpen : Holmes Beach, Fla.: Intersentia ; Distribution for North America by Gaunt, 2005) at 35.
[428] note 144, para 1.

their intent is not, in the Committee's view, particularly relevant. It is their impact on substantive equality that matters. Notwithstanding, the important question as to the relationship between religion and culture (CESCR GC 21 embeds "religion or belief systems" in the *inter alia* definition),[429] underscoring the point at hand regarding interpretations of equality, the Committee's response in 2008 to the argument made by Saudi Arabia that complementarity of rights is equivalent to equality in "Islamic culture", is:

> The Committee is concerned with the State party's distinctive understanding of the principle of equality, which implies similar rights of women and men as well as complementarities and harmony between women and men, rather than equal rights of women and men.[430]

In 1994, CEDAW had already made this point in relation to all states:

> States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom, and progress to the stage where reservations, particularly to article 16, will be withdrawn.[431]

Noting the inherent "progressivism" discourse, we can nonetheless see the view of discrimination as more holistic than the traditional "same as" notion of equality critiqued as endemic to western liberalism.[432] Vandenhole specifies that in the case of indirect discrimination, "treating unequals equally leads to unequal results which can have the effect of fostering

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[429] *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, E/C12/GC/21 (2009), para 13.
[430] *Concluding comments of the Committee on the Elimination of Discrimination against Women: Saudi Arabia*, CEDAW/C/SAU/CO/2 (40th Session, 2008), para 13.
[431] UN CEDAW, *General Recommendation No. 21: Equality in Marriage and Family Relations* (1994), para 44.
[432] Angela P Harris, "Equality Trouble: Sameness and Difference in Twentieth-Century Race Law" (2000) Calif Law Rev 1923.

inequality".[433] In the European Commission Human Rights context, *Thlimmenos v Greece* makes a similar point, finding that the state "failed to treat differently persons whose situations differed greatly".[434] In essence, indirect discrimination "deals with institutional and structural biases", and the proof of its existence is determined by comparison between groups, whereas the proof of direct discrimination is determined by comparison between individuals.[435]

In the Committee's view, the prohibition on discrimination is against "both direct and indirect" forms,[436] and the elimination of discrimination and the promotion of equality are "two different but equally important goals in the quest for women's empowerment".[437] In this sense, we can see the "discriminatory dimensions" of "cultural contexts" referred to in GC 25 as comparable to indirect discrimination, with the disparate effect of cultural arrangements having a discriminatory impact on women as a group and as individuals. While it is *discrimination* that is the target of the treaty, the terms "condemn", "without delay", "eliminating" and "abolish" with respect to culture, custom and practices appear to leave little room for a gradualist approach to change or, importantly, for finding liberation from within culture. Thus, while the foregoing evidences the conceptual breadth for a fully structural approach to *discrimination* and equality within the terms of CEDAW *qua* text, it is here, in relation to its discourse on culture, that much of the trouble with CEDAW for an intersectional approach to discrimination begins.

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[433] Vandenhole, *supra* note 411 at 36.
[434] *Thlimmenos v Greece*, 2000 European Court of Human Rights,Strasbourg, para 44.
[435] Vandenhole, *supra* note 411 at 36.
[436] *Report of the Committee on the Elimination of Discrimination against Women*, A/55/38 [R of Moldova] (Twenty-second session (17 January-4 February 2000), Twenty-third session (12-30 June 2000)), paras 67–117, 91.
[437] note 416, para 146.

The CEDAW's primary consideration is the abolition of discrimination against women in all its forms. Although there was a UNESCO member present during its drafting, and the treaty names the right for women to take part in the "cultural life of their countries"[438] on an equal basis with men, it does not take up the meaning and potential weight of culture in international law.[439] However, like all treaties, CEDAW does not exist in isolation and, particularly in light of the numerous reservations on the basis of culture, it benefits from a brief examination in relation to other considerations of culture and its protection, since ultimately, CEDAW's interpretation must take place within the full family of protections.[440] As long-time CERD committee member Patrick Thornberry believes CERD practice has demonstrated, it is a nuanced and full reading of non-discrimination as a right within culture, as well as a limitation to the claims of culture against other rights that will open up the debate as to the "reach of human rights prescriptions into cultural space".[441] In the aftermath of colonial atrocities, any license to "eliminate" any aspect of culture matters a great deal.

2.5 A note about culture and human rights practice

Culture is a notoriously "spacious" concept in human rights, as Patrick Thornberry has noted, and "finding a discrete substance for the right" to culture is a "complex undertaking".[442] It is, in any case, not the primary interest here.[443] However, it is worth noting at a minimum, as Thornberry has, that bundled into the notion are a number of specific and discernible rights that

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[438] CEDAW, *supra* note 253, s Preamble.
[439] note 429, paras 10–13; Chow, *supra* note 185.
[440] Patrick Thornberry, *Cultural Rights and Universality of Human Rights E/C.12/40/15* (CESAR, 2008).
[441] *Ibid* at 18.
[442] *Ibid* at 4.
[443] Chow, *supra* note 185.

might well be named concretely, rather than tackled as an amorphous right.[444] Culture as an umbrella concept is particularly unhelpful in the context of reservations to CEDAW, where, frequently, from the states' side "culture is claimed as a justification for practices unlikely to be consistent with human rights".[445] This appears to be the position of the Committee. Its sole evocation of culture is as a prohibited ground when used as an excuse for the denial of the rights of women.

> A number of States enter reservations to particular articles on the ground that national law, tradition, religion or culture are not congruent with Convention principles, and purport to justify the reservation on that basis.[446]

The use of the word "purport" alerts us to a skepticism that, on the one hand, may appear to close down the debate about "cultural differences" in women's human rights from the Committee's perspective, anticipating CESCR, that "no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope".[447] This is more pointedly reiterated in the General Assembly Declaration on the Elimination of Violence Against Women of 1993, which declares: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination".[448] On the other hand, the short shrift in CEDAW *qua* treaty that culture receives begs consideration by the Committee of culture beyond its evocation for the

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[444] Thornberry, *supra* note 440 at 5.
[445] *Ibid* at 6.
[446] note 387.
[447] note 429, para 18.
[448] *General Assembly Declaration on the Elimination of Violence against Women [48/104]*, A/RES/48/104 (85th plenary meeting 20 December 1993), para 4.

purposes of limiting the human rights of women, especially in light of the Vienna Declaration of the World Conference on Human Rights regarding the indivisibility of culture from all other rights,[449] and particularly in light of its 2010 exhortation to intersectionality as part of States parties obligations, explored in a following section.

Defining culture is in and of itself no small task. CESCR's GC 21 admits it to be "multifaceted", but broadly outlined culture

> encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.[450]

This definition invites consideration of the woman who faces gender discrimination from within a culture of which she generally wishes to remain a part. In this sense, culture leads swiftly to the thorny matter of group *and* individual protections. Minimally, we could ascribe the concept of collective rights to individuals enjoying rights collectively as part of a culture or minority, where the individual may still be a rights bearer but the rights are oriented toward collective notions of social organization.[451] Group rights *per se* obtain where the group as entity

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[449] *Vienna Declaration and Program of Action*, Office of the UN High Commissioner for Human Rights (adopted by the World Conference on Human Rights in Vienna on June 25, 1993), para 5; Flinterman, *supra* note 382.
[450] note 429, para 13.
[451] Peter Jones, "Human Rights, Group Rights and Peoples' Rights" (1999) 21:1 Hum Rights Q 90.

corporately holds the right, and can hold its right against the individual members of the group. Even with the so-called "'saving clauses' designed to support more individualistic conceptions of rights and particular categories of persons",[452] women's negotiations at the intersection of these rights and affiliations are complex and painful. Culture in this sense must be examined more critically to "understand the link between culture and relations of power and domination" that so frequently pits a woman as a bearer of individual rights against the claimed requirements of culture, particularly in cases of violence.[453]

The CEDAW's conception of rights is firmly individual. However, "cultural rights are an integral part of human rights, which are universal, indivisible and interdependent".[454] Often, when speaking of culture, CEDAW is exclusively evoking, as in the following extract from GC 19, "stereotyped roles [that] perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision";[455] practices that are, to be sure, real and discriminatory, but about which some perspective and context are required to avoid descent into racist stereotypes. Such commentary has "reinforced the notion that metropolitan centres of the West contain no tradition or culture harmful to women, and that the violence which does exist is idiosyncratic and individualized rather than culturally condoned".[456] European forms of violent discrimination against women

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[452] Thornberry, *supra* note 440 at 10.
[453] Yakin Ertürk, *UN Human Rights Council, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 15 years of the United Nations SR on violence against women, its causes and consequences (1994-2009): a critical review* (A/HRC/11/6/Add.5, 2009), para 18.
[454] CEDAW, *General Recommendation No. 21: Equality in Marriage and Family Relations*, Contained in Document A/49/38 (1994), para 5.
[455] CEDAW, *supra* note 366, para 11.
[456] Volpp, *supra* note 100 at 1192.

seldom receive the same international attention,[457] and the preoccupation with the lurid and with "alien and bizarre" forms of gender persecution[458] among human rights advocates echoes colonial arrogance,[459] and CEDAW can ill-afford to underscore it.

The reasons for CEDAW's preoccupation with such manifestations of discrimination are at once straightforward and importantly complex.

2.5.1 Culture as discrimination

The CEDAW is concerned with discrimination, lifting women out of legal obscurity as adjuncts to husbands and family into personhood and thus individual rights protection. Therefore, in referring to culture, it is by necessity referring to those aspects of group norms that rankle or violate its mandated individual protections. Importantly, this is often in the context of responding to states' unilateral evocations of culture as a defense to non-compliance. While this is surely different from protecting an individual woman's right to cultural expression, or her right to be protected as a member of a group, it is not unrelated. Both the state and CEDAW are invoking a vision of culture that is at once partial and totalizing. Bearing in mind the UNESCO concept of culture that is not "a series of isolated manifestations or hermetic compartments",[460] "but […] a living process, historical, dynamic and evolving, with a past, a present and a future",[461] we can support CEDAW's vision of culture as changeable, against states' evocations of fixed homogeneity. But, culture is also "the set of distinctive spiritual, material, intellectual

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[457] Holtmaat & Naber, *supra* note 113 at 34.
[458] Volpp, *supra* note 100 at 1258.
[459] Coomaraswamy, *supra* note 133 at 486.
[460] United Nations High Commissioner for Refugees, "Refworld | General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)", online: *Refworld* <http://www.refworld.org/docid/4ed35bae2.html>. para 12.
[461] *Ibid*., para 11.

and emotional features of a society or group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs",[462] which CEDAW neglects in its singular focus on discrimination expressed *through* or *as* culture.

Change*able* does not necessarily equate with *must be changed*; and where it does, culture's relation to the similarly spacious concept, "self-determination", is relevant; that is, it matters how culture is altered and by whom. In the seesaw between the polarities of cultural relativism and universality that have so exorcised the human rights community, most successful détentes between the camps are brokered on some version of the concept of culturally self-defined human rights that appeals to universal values. Christof Heyns calls it "the struggle approach", locating the compelling power and central meaning of core human rights values and goals in the non-institutional manifestations of all cultures' struggles against indignity and oppression;[463] Thornberry speaks of "universality, not uniformity" and of "'importation', rather than 'exportation' of human rights";[464] and Merry speaks of "the right to difference" as potentially being "a positive, transcultural basis for human rights".[465] Sally Seyla Benhabib flips the problem, and speaks of the fear that universalism is ethnocentric as a "widespread anxiety" that rests on "false generalizations about the west" and "ignores elements of non-western cultures that may be perfectly compatible with and may even be the root of the west's own

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[462] *Ibid.*1para 2.
[463] Christof Heyns, "A Struggle Approach to Human Rights(Springer 2001)." in A Soeteman, ed, *Law Plur* (New York: Springer, 2001) 171.
[464] Thornberry, *supra* note 440 at 10, 13.
[465] Sally Engle Merry, "Changing rights, Changing Culture" in Jane K Cowan, Marie-Bénédicte Dembour & Richard A Wilson, eds, *Cult Rights Anthropol Perspect* (Cambridge ; New York: Cambridge University Press, 2001) 31 at 39.

'discovery' of universalism".[466] Ultimately, we see the question arise as to the "extent to which the Convention's discourse of equality can be married with the discourse of cultural diversity".[467] The answer to this in the case of the CEDAW, in part, is determined by the treaty's normative framework, which, in its more heavy-handed moments, conflates its central insights into the inner workings of patriarchy with the operations of culture *per se*.

Paralleling the broad parameters of the oppositional positioning of culture and gender rights, CEDAW, while not alone in this matter, has been singled out by some commentators as exemplary of the "opposition of international law to local culture".[468] The notoriously high numbers of reservations that have accompanied ratifications of the Convention—frequently on the basis of cultural difference—mark it as the "first among the human rights treaties" in this regard,[469] prompting questions as to its efficacy as an international instrument at all.[470]At the heart of this debate is the Treaty's Article 2(f), which calls for States parties to "take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".[471]

Exploring CEDAW's approach to culture is necessary to determine if the intersectional turn instructs and allows CEDAW's normative framework to stretch sufficiently to embrace the

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[466] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, 1 edition ed (Princeton, N.J: Princeton University Press, 2002) at 731.
[467] Thornberry, *supra* note 440 at 17.
[468] Bruce Frohnen, "Multicultural Rights? Natural Law And The Reconciliation Of Universal Norms With Particular Cultures" (2002) 52 Cathol Univ Law Rev 40 at 40.
[469] Steiner, Alston & Goodman, *supra* note 285 at 1125.
[470] Geraldine A Del Prado, "The United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled its Responsibility?" 2:1 William Mary J Women Law 23 at 70; Philip Alston, *The United Nations and human rights: a critical appraisal* (Oxford [England]: Clarendon Press, 1995) at 1.
[471] CEDAW, *supra* note 253, para 2(f).

possibility of culture as not just infringement and harm, but as access to other, intersecting rights, or even as sources of grounded social justice struggle. Studies such as that of Rikki Holmaat and Jonneke Naber,[472] have queried the Treaty Committee's choice to focus on violations as a result of culture and custom, and have suggested new avenues to broaden acceptance of women's rights by focusing on framing infringements differently, under language contained in other articles. Specifically, they suggest that focus on Article 5 regarding gender stereotypes, speaks to many of the same concerns with culture without evoking the colonial legacies of the specific language of custom and culture.[473] Their work, however, was published contemporaneously with the important and express development of the Committee's own reorientation to take stock of such critiques and provide new guidance to its deliberations in GC 28 on intersectionality. The examinations that follow engage with this new terrain.

2.6 The rise of intersectionality

The CERD GC 25[474] and CEDAW GC 28[475], while written a decade apart, both arose out of the legacy of contestation regarding the universality, coverage and meaning of the treaties' protections for those who experienced multiple grounds of discrimination simultaneously. Both documents were intended to provide jurisprudential heft to the deliberations and exchanges among and between various UN institutions, NGOs, and women activists from the Global South

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[472] Holtmaat & Naber, *supra* note 113.
[473] *Ibid* at 28–33; Simone Cusack, "The CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping" in *Women's Hum Rights CEDAW Int Reg Natl Law* (Cambridge UK: Cambridge University Press, 2013) 124.
[474] CERD, *General recommendation XXV on gender-related dimensions of racial discrimination, 56th Session Doc. A/55/18, annex V at 152 (2000)* (2000).
[475] note 141.

at public forums and through the academy, by deploying the language of intersectionality.[476] We will now turn to the question of to what degree this "intersectional turn"—in CEDAW in particular—addresses the normative restrictions in the treaty proper, to prepare the ground for a later consideration of to what extent and in which ways has it guided the adaptation of the Committee's rulings. We will do so first by examining the ways in which intersectionality came into the treaty's considerations through assembling a view of its antecedents.

[476] Bond, *supra* note 239.

3 Transmissions to Impacts: Intersectionality at CEDAW, Antecedents and Applications

> *The acceptance of an intersectional vocabulary at the international level opens up a space for feminist engagement. It offers the future possibility for feminist dialogue within the law—as opposed to one that merely focuses on the law. Such an approach keeps with intersectionality's counterhegemonic impetus by offering an epistemological guide to engage law's political, symbolic and structural limits and how structural conditions inform them.*[477]

> *Clearly, contemporary social theory needs ways to explain how ideas, practices and institutions circulate and how they come to ground. It is in these processes of movement, incorporation and resistance that culturally embedded concepts become visible.*[478]

> *Ensuring that all women will be served by the expanded scope of gender based human rights protection requires attention to the various ways that gender intersects with a range of other identities and the way the intersection contributes to the unique vulnerability of different groups of women.*[479]

3.1 Introduction

In the previous chapter, I made the argument that CEDAW's normative scope for examining women's experiences of discrimination was simultaneously spacious and constrained by the framers' reliance on fixed perspectives on the properties of culture, contained in Article 2. I examined the origins, limits and possibilities represented by the framing of CEDAW as part of the IHRL family of protections—assessing where it has advanced the capacity of law to make

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[477] Henne, *supra* note 89, para 33.

[478] Sally Engle Merry, "Intersections: Epilogue: The Travels of Gender and Law" (2013) 33:Gender and Sexuality in Asia and the Pacific Intersections, online: <http://intersections.anu.edu.au/issue33/henne.htm>, para 1.

[479] Janet Halley, "Conclusion. Distribution and Decision: Assessing Governance Feminism" in Janet Halley et al, eds, *Gov Fem Introd*, Legal Studies/Feminist Theory (Minneapolis: University of Minnesota Press, 2018) 253.

visible the violations of women's rights, and where that project of visibility has extended colonial prejudices and approbation. In contrast to my assessment, prominent commentators on IHRL[480] and CEDAW in particular,[481] have seen CEDAW's Article 2 in precisely the opposite light, as providing "a firm textual basis requiring the state to appreciate and account for all the identities, experiences and factors that contribute to gender discrimination and inequality."[482] In order to weigh these different perspectives on the treaty *qua* text and the developing intersectionality story at CEDAW, we will now turn to the antecedents of intersectionality *per se* in the lifecycle of the treaty.

This chapter will explore the extent to which intersectionality coheres around any definitional, institutional and practical understanding that can illuminate its potential contributions to human rights law. I will point to the evidence that receptivity to intersectionality emerges out of UN deliberations about its institutional failures in the face of contemporary genocidal conflicts that mobilized sexual violence against racialized women as their primary means. Through these explorations, I will begin to discern the exact nature of the concept we are tracing, its operations and its promises, including its transmissions into a legally discernable concept. In this sense, I engage intersectionality in the work of "norm clarification and elaboration" common to IHRL projects that engage in standard setting.[483]

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[480] Fredman, Sandra, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (European network of legal experts in gender equality and non-discrimination: European Commission, 2016).
[481] Byrnes, *supra* note 307.
[482] Campbell, *supra* note 9 at 487.
[483] Thornberry, *supra* note 440 at 2.

The story of intersectionality in this chapter is assembled from the threads and fragments of intersectionality's many avenues into IHRL. In one important respect, there is the self-conscious adoption of the language and positioning of intersectionality. This can be found mostly in UN statements, press releases and documents, as well as meeting notes. Then there is the related scholarship and discourse, which observes this particular intersectional turn, and through which we find textual, theoretical and legal interpretations of its significance.[484] Additionally, other IHRL explorations of intersectionality outside the UN provide analogy and clarity to the discussion of intersectionality's legal contours and meaning.[485] I will discern the origins and weight of each source in context in order to build a picture of intersectionality's origins and impacts in the UN context. Tracing the legal development of intersectionality from these fragments and into a framework that guides IHRL deliberations at CEDAW takes us back to the limitations and possibilities of framing, discussed above, and requires us to find clarity in the multitude of phrases, building block concepts and other precursor indicators of intersectionality's acceptance in IHRL. Tracing this trajectory also requires a telescoping in and out of simple representation to critical distance, querying the project of governance that intersectionality is thereby made party to. In Henne's words, "[u]sing intersectionality to frame an international legal agenda is therefore not about refining variables and correlations between them, but about embracing how feminist debate might inform an intersectional sensibility within law."[486]

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[484] Bond, *supra* note 7; Yuval-Davis, *supra* note 8; Byrnes, *supra* note 307.
[485] Sandra Fredman et al, *Intersectional discrimination in EU gender equality and non-discrimination law.* (Luxembourg: Publications Office, 2016).
[486] Henne, *supra* note 89, para 32.

Intersectionality, as we have seen in Chapter 1, has played an important intellectual and activist role in many fields of study. As a legal concept, and especially as international human rights law, it has a distinct pedigree that requires attention to context, precedent and fact-specific usages. There are, nevertheless, aspects of intersectionality's arrival on the IHRL scene that remain entangled with its life as a concept outside the legal realm, embedded in the intellectual genealogies explored in Chapter I. In this chapter, I will attempt to relate and distinguish these uses, highlighting intersectionality's arrival *qua* travelling idea, and legal concept; this twin materialization is the focus of my work in this section.

3.2 Intersectionality: mapping how the idea travels

In contrast to the foregoing thesis about the limitations of CEDAW as embedded in a single axis understanding of women's oppression, with a legacy of colonial views of culture, Meghan Campbell advances the argument that CEDAW is, by virtue of its framing *qua* text, a naturally occurring proto-intersectional guide to rights protection.[487] Whereas I, and other critics,[488] have seen CEDAW's single ground of "women" as an essentializing force in the treaty's norms, Campbell contends that it is precisely because the treaty advances a single ground for discrimination that a full spectrum of women's identities can be covered by its protections. She asserts that:

> Rather than limiting itself to traditional status based grounds, if women experience discrimination in relation to an identity, experience or cross-cutting problem that interacts with and is rooted in their sex and/or gender they are protected under CEDAW.[489]

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[487] Campbell, *supra* note 247.
[488] Bond, *supra* note 239; Holtmaat & Naber, *supra* note 113.
[489] Campbell, *supra* note 247 at 481.

Acknowledging the critiques of CEDAW's essentializing impetus, Campbell, following Andrew Byrne, argues that its broad definition of discrimination allows it to address those forms "not explicitly mentioned in the treaty".[490] They, like Fredman, argue that it is the capaciousness[491] of CEDAW's definition of discrimination and corollary concept of equality that allows it to support intersectionality as an approach to the Committee's deliberations.[492] According to Campbell, CEDAW is simply "doing" intersectionality by virtue of an unrestrictive grounding for the basis of claim; thus, CEDAW *qua* Committee is applying intersectional thinking, without a fully articulated reason for that practice. Campbell asserts that "[w]hile the Committee is in fact addressing women's intersectional discrimination, the legal basis for this remains unclear".[493] Thus, Campbell identifies the thinking work of lawyers and scholars as that of discerning, clarifying and shoring up the legal basis for CEDAW's intersectional instincts.

Both Fredman and Campbell offer an important if technical read of the jurisprudential portent of CEDAW, moving the debate about the possibility of its practical application into current practice contexts with sound evidence; but they are relatively unconcerned with the ways in which the idea of intersectionality has travelled or landed *qua* idea, institutional concept or vector of power. Their work is particularly illuminating and instructive on the legal points that have made CEDAW the place in law where the intersectionality action is, specifically in the face of national legal systems that appear to be unable to make the leap from single grounds

[490]Byrnes, *supra* note 307 at 73.
[491] Fredman et al, *supra* note 485.
[492]Byrnes, *supra* note 307.
[493] Campbell, *supra* note 247 at 480.

conceptions of rights infringements.[494] We will make use of their analysis as we explore the legal definitions and practical potential of intersectionality below, and in the chapters that follow.

Yet, even within a strictly legalistic or jurisprudential reading of the text of the treaty, a consistent application of the critical international legal method I have adopted from Orford demands a contextualization of ideas in relation to their progenitors' intended meaning and the changes they undergo in their movement in context over time. As Anne Orford takes stock of responses to her work on the UN's international governance project through the Responsibility to Protect (R2P),[495] she provides observations on international legal method that are instructive in this context:

> If we want to understand the work that a particular legal argument is doing, we have to grasp both aspects of law's operation—the way it relates to a particular, identifiable social context, and the way in which it gestures beyond that context to a conversation that may persist—sometimes in a neat linear progression, sometimes in wild leaps and bounds—across centuries.[496]

Following Orford's method of tracing the historic shift to R2P doctrine in international legal governance projects[497]—a move she painstakingly traces as one that gathered previous practices into an articulation and justification, rather than one that followed a conceptual direction—the following two chapters will trace the integration of "pre-existing but dispersed practices"[498] of intersectionality into "a coherent account"[499] of its adoption in the consideration

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[494] Conaghan, *supra* note 212.
[495] Orford, *supra* note 27.
[496] Orford, *supra* note 18 at 176.
[497] Orford, *supra* note 189 at 2.
[498] Orford, *supra* note 27 at 189.
[499] *Ibid* at 103.

and adjudication of women's IHRL. Mine is a much smaller canvass than Orford's. Hers is a project to trace the

> vital connection between practical innovation, theoretical elaboration, and social transformation, both in relation to the political instrumentalization of theory in practice and in the search for a critical practice of international law in its different articulations.[500]

In her work on R2P, Orford uses this approach to study a subset of statecraft, namely, international legal authority carried out through the Responsibility to Protect doctrine. Thus, while she is crafting a "history" of the R2P, she maintains this wide lens focus on the context of the doctrine and the work it is performing, specifically with respect to international law's genealogy in empire.[501] In the present conceptualization, IHRL is merely a subset of this larger project of international authority and governance, a matter that we have explored in the previous chapter. It is worth noting, however, that alongside humanitarian intervention, which specifically denotes jurisdiction derived from international authority to intervene in the affairs of another state, and can thus be seen to extend the project of international authority directly while offering its own (humanitarian) justification for doing so, IHRL likewise contributes to the softer side of international authority, loaning it legitimacy as it expresses law's most noble aspirations. In Orford's sense, these are not contradictory aims, but part and parcel of a deliberately constructed vision with roots in time and place, based on the valorization of "free trade, liberalized

[500] ESIL Lecture Series, *supra* note 16.
[501] *Ibid*.

economies, informal empire and benevolent humanitarianism", justifying "new forms of international action" based on an idea of a "universal history with a cosmopolitan purpose".[502]

In the legal shift to intersectionality at the UN, CEDAW in particular, and the context of the broader projects of the UN, the framers of CEDAW and the influential feminist ideas of the time all play their parts. In keeping with Orford's method, I am attentive to the location of intersectionality within this genealogy of empire, while tracing the aspiration she notes as perhaps unique to law as a discipline: a "passionate quest …for the possibility of positive change or—put simply—a 'better world'".[503] Thus, I find with Merry that,

> [w]hile we focus on the circulation of ideas designed to improve the human condition, it is important to remember that they include the modes of establishing and maintaining control of populations.[504]

Her work and the work of others work remind us that while "the UN … champions human rights as a way to counteract violence against individuals", it also "reflects older traditions of colonialism and patriarchy that valorize unequal treatments of race, gender, class, and culture" […].[505] As we seek clarity in and expansion of the capacity for law to provide visibility, reflection and protection for those most marginalized by the power relations of the world through the elaboration of an intersectional approach, we must attend to the operations of old narratives made new as they underlay and limit our best aspirations. This is not an act of cleverness, designed to undermine the project of protection and empowerment, but an act of

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[502] *Ibid*.
[503] Orford & Hoffmann, *supra* note 191 at 12.
[504] Merry, *supra* note 478, para 2.
[505] Henne, *supra* note 89, para 6.

clarity and vigilance in the face of law's nostalgia and self-regard for its own project of intervention in the world's great problems.[506] It is Halley et al's "ethic of responsibility", entreating us to "confront, rather than blindspot" that "enchanted engagement" can lead you to "help your friends", while hurting "some group of even-less-well-off players".[507] In this sense, I am following Orford's method as laid out in the introduction in a different context, by seeking to trace the practices of intersectionality as international authority's consciousness of itself [508] through attentiveness to the use of the term intersectionality, its meanings, uses and proxies, and its emergence in time and place.

3.3 Emerging grounds: Multiple, compound or intersectional discrimination?

The initial stage of intersectionality's appearance in the UN's discussion of women's human rights must be traced in part to Beijing in 1995. In that year, *The Beijing Declaration and the Platform for Action: Fourth World Conference on Women* [509] was launched. For most commentators, Beijing is an "immense"[510] part of this story; many link its ratification by the General Assembly to the commencement of an intersectional approach at the United Nations,[511] and tie this to the adoption of "Gender Mainstreaming,"[512] a UN-promoted approach to public policy development that "involves ensuring that gender perspectives and attention to the goal of

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[506] Anne Orford, "Embodying Internationalism: The Making of International Lawyers" (1998) 19 Aust Year b Int Law 1.
[507] Halley, *supra* note 479 at 265.
[508] ESIL Lecture Series, *supra* note 16; Orford, *supra* note 206 at 167.
[509] note 196.
[510] Merry, *supra* note 478, para 11.
[511] Fredman et al, *supra* note 485; Yuval-Davis, *supra* note 43.
[512] Coomaraswamy, *supra* note 197, paras 18 & 202(c); Sarah Louise Joseph, Adam McBeth & Anastasia Vakulenko, "Gender and international human rights law: the intersectionality agenda" in Sarah Louise Joseph & Adam McBeth, eds, *Res Handb Int Hum Rights Law*, Research handbooks in international law series (Cheltenham, UK: E. Elgar, 2010) 196; Crenshaw, *supra* note 67.; Anastasia

gender equality are central to all activities".[513] It is a related and supportive but separate concept and agenda, advanced in the human rights realm through both the Vienna Conference and Beijing, which has forced the consideration of gender as an intersection to all areas of UN concern.[514] It is a concept and practice not without its critics,[515] but many more agree that it prepared the ground for intersectionality.[516] Beginning intersectionality's story here secures it, by association, as a fixed part of a coherent international human rights regime,[517] owing to The Beijing Declaration's endorsement by the General Assembly Resolution on December 22, 1995,[518] since, in the simplest legal sense, "a claim is an international human right if the General Assembly says it is".[519] Agreeing that *The Beijing Declaration* "constitutes one of the earliest translations of the idea of intersectionality … into UN language",[520] Collins and Bilge nevertheless tie its inception internationally to the World Conference Against Racism, thus maintaining its link to the activist agenda.[521]

The General Assembly, through Article 13 of the Charter, is seen as the most "credible arbiter" of agreement and concurrence among those in the international community on what constitutes new human rights law.[522] In the present reading, I propose *The Beijing Declaration* as a proto-intersectional framework. That is, while advancing the agenda of accounting for

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[513] *Gender Mainstreaming: An Overview* (United Nations, Office of the Advancement of Women, 2002).
[514]*Gender Mainstreaming: An Overview* (United Nations, Office of the Advancement of Women, 2002).
[515] Charlesworth, *supra* note 96.
[516] Crenshaw, *supra* note 67; Coomaraswamy, *supra* note 197; Yuval-Davis, *supra* note 43; Joseph, McBeth & Vakulenko, *supra* note 512.
[517] Alston, *supra* note 287.
[518] note 196.
[519] "Alston, Philip. 'Conjuring Up New Human Rights: A Proposal For Quality Control' (1984) 78:3 American Journal of International Law 607." at 607.
[520] Collins & Bilge, *supra* note 42 at 91.
[521] *Ibid* at 90.
[522]Alston, *supra* note 287 at 609.

multiply discriminated women, the Declaration did not use the word "intersectional" once.[523] Article 32 of the Declaration stated that governments must, for instance:

> Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.[524]

The declaration therefore stands out for many as the "most important"[525] building block for an intersectional approach to IHRL, and for "including the core elements of an intersectional approach",[526] but is not the official launch of the concept as gathered under the terminology we are tracking. In the declaration, the listing of multiple characteristics, which constitute grounds for protection, signals the intention to complicate the single axis of gender discrimination that CEDAW was known for protecting, but it requires further analysis to determine if the terms variously used—such as multiple, compound, cumulative, combined, additive, overlapping, and complex discrimination[527] and intersectionality are synonymous.

In many documents, such as *The Beijing Declaration*, but also in many other jurisprudential uses,[528] various UN entities appear to use the terms synonymously. In her study of

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[523]Collins & Bilge, *supra* note 42 at 91.
[524] note 196, para 32.
[525] Fredman et al, *supra* note 485 at 26.
[526] Yuval-Davis, *supra* note 43 at 195; Collins & Bilge, *supra* note 42 at 91.
[527] Andrea Broderick & Lisa Waddington, *Remarks on the Outline of the Draft General Comment on Article 5* (2017) at 3. See the advice given to the U.N. Committee on the Rights of Persons with Disabilities to specify the "nuances between different terms" in feedback on the advanced draft of the CRPD General Comment on its Article 5.
[528] A search of the UNHROHC jurisprudence data base indicates a broad deployment of the term "multiple discrimination", with 37 instances concentrated in the individual representation findings of CCPR, CEDAW, CERD and the newly ratified CPRD. Both inadmissibility and findings were included in this count. The States represented in the data range from Canada to Uruguay, http://juris.ohchr.org/search/results/3?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0, October 10, 2017 .

the potential for intersectionality to be adopted in the decision making of the EU and its member states, Sandra Fredman signaled a similar conflation of terminology when she found that the terms were used "interchangeably although they might have subtly different meanings".[529] Fredman makes the following distinctions in that context, which provide general analytic clarity to the use of terms within anti-discrimination and human rights' contexts where forms of discrimination are contemplated as more complex than those conceived on a single axis.

Fredman distinguishes three main categories of "multiple" discrimination, only the third of which meets the definition of "intersectional": the first is "sequential multiple discrimination", which occurs when a person experiences discrimination on separate occasions, based on different grounds or for different aspect of herself, as discrete and sequential events. The second is "additive multiple" discrimination and this occurs when one person experiences two separate grounds of discrimination at the same time. This discrimination is "additive', and therefore is properly so-characterized because each ground of discrimination can be separately proved. It is clear in these cases that two separate grounds have been breached. Intersectionality, Fredman holds, is of a different order: it is not simply additive, but is the synergistic melding of grounds into a qualitatively new form of discrimination, and thus properly worthy of the metaphor that names it. Fredman characterizes this as "of a different order in that discrimination does not

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A similar search for the use of the term intersectionality in the same data base turns up a mere six references, the chronological first of which is in 2000, at CPRD, and was a word repeated in the decision of non-admissibility but quoted as submitted by the claimant, who saw his situation as arising at the "intersection of political opinion, race and religion", in Jasari vs Canada, CCPR/C/82/958/2000 at para 3.3. The only instance of the term in CEDAW's jurisprudence cropped up in the very rarely occurring dissenting opinion, in this case by Patricia Schultz (Switzerland), in M.W. v. Denmark, where she finds that "not every case of poor treatment of a female claimant amounts to discrimination based on sex, or foreign nationality or the intersection of both grounds", in CEDAW/C/63/D/46/2012, p. 19 at para 4.16.

[529] Fredman et al, *supra* note 485 at 7.

simply consist in the addition of two sources of discrimination; the result is qualitatively different", calling it "synergistic."[530]

Here Fredman follows Crenshaw's early analytic distinction, positing a mutually constitutive form of discrimination which is at once a product of multiple vulnerabilities, but not simply additive,[531] and singles this out as the authentic intersectional approach. She explicitly does so with the aim of creating a frame of reference for adjudication. Fredman's work does not refer to Crenshaw's "provisional protocol to be followed to better identify the occasions in which such interactive discrimination may have occurred,"[532] proffered in her 2000 paper for discussion at the UN. In this work, which we explore extensively below, Crenshaw develops an approach to "anticipate the various ways that race and gender vulnerabilities may intersect".[533] Here Crenshaw makes the distinction between "under-inclusion" and "over-inclusion" of violations within the grounds of discrimination when they are based in the binary of race and gender, and distinguishes from these the intersectional approach. She delineates over inclusion as typical of the mainstream feminist approach to gender discrimination, where "a problem or condition that is particularly or disproportionately visited on a subset of women is simply claimed as a women's problem. It is over-included to extent that the aspects of the circumstance that render it an intersectional problem are absorbed into a gender framework without any attempt to acknowledge the role that racism or some other form of discrimination may have played in contributing to the circumstance".[534] Its mirror approach, under-inclusion, strips the gender

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[530] *Ibid*.
[531] Crenshaw, *supra* note 58.
[532] Crenshaw, *supra* note 67 at 1.
[533] *Ibid* at 4.
[534] *Ibid* at 5.

dynamics of the discriminatory act and renders the gendered dimension "invisible as a matter of race or ethnicity".[535]

It is unclear to what extent Fredman's categories of "multiple" and "additive multiple" discrimination can remain legitimate approaches to discrimination, given her acceptance and promotion of an intersectional analysis, since, in her own estimation, an authentically intersectional approach refuses to disaggregate aspects of identity and harm. Therefore, as Yuval-Davis posited in 2006, "whether to interpret the intersectionality of social divisions as an additive or as a constitutive process is still central"[536] to the debates surrounding at least legal approaches to women's experiences of discrimination. At the heart of this distinction is the insight that for law to be more responsive to the harms intersectionality can assist in adjudicating, it must formulate its "test" such that "concrete experiences of oppression, for example, as 'a Black person'", can be recognized as "always constructed and intermeshed in other social divisions (for example, gender, social class, disability status, sexuality, age, nationality, immigration status, geography, etc.)".[537] We will return to these authors' work below.

Building on Fredman, we can see that the multiple barriers approach in *The Beijing Declaration* most closely approximates the additive multiple discrimination that she distinguishes above. As an antecedent, there is no doubt *Beijing* has a pivotal role in the development of intersectionality as law. The declaration was influenced by the unique role

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[535] *Ibid* at 6.
[536] Yuval-Davis, *supra* note 43 at 195.
[537] *Ibid*.

among human rights treaties played by the Commission on the Status of Women (CSW), which is the intermediary between women's civil society groups, women's movements globally and the UN women's rights machinery. *Beijing* was pivotal in no small part because of the activist struggles launched from international women's organizations to bring a critical race analysis to the deliberations of the UN women's gatherings, thereby providing the clarity, grassroots legitimacy and analytic tools that readied the institutions for the turning point to come.[538]

Five years after Beijing, the Division for the Advancement of Women (DAW), in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Fund for Women (UNIFEM), convened an expert group meeting on the theme of gender and racial discrimination, hosted by the Government of Croatia. The Expert Meeting on Gender and Racial Discrimination took place in Zagreb from November 21-24. 2000.[539] Yuval-Davis traces the official emergence of intersectionality by name to the contemporaneous emergence of the framework in CERD's GC 25, and the sequence of the preparatory documents to the meeting as part of the preparatory process to the UN World Conference Against Racism in Durban the following year.[540]

Yuval-Davis notes that Crenshaw's work "occupied centre stage",[541] and Crenshaw was asked to introduce the notion in a special session on the subject leading up to the Durban

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[538] Radhika Coomaraswamy, *Review Of Reports, Studies And Other Documentation For The Preparatory Committee And The World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia And Related Intolerance Preparatory Committee Third session A/CONF.189/PC.3/5* (UNGA, 2001); Crenshaw, *supra* note 67; Collins & Bilge, *supra* note 42 at 91.
[539] *Gender and racial discrimination Expert Group Meeting: Zagreb, Croatia* (2000); *Aide Memoire Expert Group Meeting on Gender And Racial Discrimination* (2000).
[540] Yuval-Davis, *supra* note 43.
[541] *Ibid* at 195.

conference. The tone of Yuval-Davis' positioning of this moment signals the unresolved intellectual debates surrounding the intersectional story, and specifically the dominance of American feminist critical race scholars in general, and Crenshaw in particular, in the various retellings. Yuval-Davis continues: "these issues have been debated by European (especially,but not only, British) feminist scholars since the end of the 1970s but, apparently, without noticeable effect on policymakers".[542]

As we have explored more thoroughly in Chapter 1, to the scholars of intersectionality as activist and intellectual history, as well as scholarly production, these questions remain hotly debated: is intersectionality primarily a story of American critical race feminism, specifically the brainchild of Kimberlé Crenshaw, who is credited with coining the term?[543]; the initiative of black British women and women of colour?;[544]does it begin the moment Sojourner Truth uttered the words "Ain't I a woman",[545] in her famous speech about black women former slaves being left out of the American white women's suffrage movement?;[546] or when bell hooks used the phrase attributed to Sojourner Truth in 1981, to develop her intellectual and political analysis that white-dominated feminism creates a topsy-turvy analytic reality where "the word men in fact only refers to *white* men, the word Negroes refers only to black *men,* and the word women refers only to *white* women"?[547]

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542 *Ibid*.
543 Crenshaw, *supra* note 12; Henne, *supra* note 89.
544 Yuval-Davis, *supra* note 43; Avtar Brah & Ann Phoenix, "Ain't I A Woman? Revisiting Intersectionality" (2004) 5:3 J Int Women's Stud 75; Yuval-Davis, *supra* note 8.
545 Brah & Phoenix, *supra* note 544.
546 Collins & Bilge, *supra* note 42 at 67–68.
547hooks, *supra* note 49 at 7.

In a story about origins, these intellectual and activist histories may matter a great deal. As a policy outcome, the various retellings of its genesis may be in fact more important than its intellectual antecedents. As an idea, whose time had come—or more accurately had been suppressed and had reemerged across the centuries[548]— intersectionality as an approach to the visibility of multi-discriminated women has many antecedents and foremothers, all of them based in critiques of dominant women's rights paradigms by black women and women of colour. In other words, as Grace Kyungwon Hong, paraphrased in Henne, has pointed out, "black feminism (among other women of colour feminisms) recognises that 'the racial project of Western civilization was always a gendered and sexualized project' and thereby has a rich tradition of analysing the 'intersections of race, gender, sexuality, and class within the context of global colonial capitalism'".[549]

In the context of the jurisprudential turn to intersectionality at the UN, there is little to suggest that Crenshaw's work did not form the original foundation and shape the later interpretive contours, no matter how far they came to stray from their origins. Even those who disagree on other important matters of origins agree that her background paper, introduced at Zagreb, "made a major contribution to intersectionality's dispersal in global venues".[550] Mirroring the appearance/disappearance/reappearance of intersectionality, travelling back in time to Sojourner Truth, the official story of the Zagreb moment is captured in the recollections of

[548] Hugh Collins, "Social Inclusion: A Better Approach to Equality Issues" (2004) 14 Transnatl Contemp Probs 897; Brah & Phoenix, *supra* note 544.
[549] Henne, *supra* note 89, para 7.
[550] Collins & Bilge, *supra* note 42 at 90.

those in attendance,[551] but the paper itself is missing from all UN catalogues,[552] including those in paper files at CEDAW,[553] electronically or otherwise, in both UN libraries in New York and Geneva. Indeed, the only way to obtain the paper in English at the time of writing is to receive it directly from Crenshaw herself.[554] (This may change in 2018 when Crenshaw is due to publish a collection of her work that will include a version of the paper.)[555]

Crenshaw's paper was delivered at a pivotal conference in Zagreb, meant in part, to both reckon with the genocidal events of the former Yugoslavia and those of Rwanda. Thus, in terms of both timing and content, the paper links the story of intersectionality's recent reappearance at the international level to some of the most heinous projects of racialized sexual violence in the 20th century.

3.4 What intersectionality owes to the UN failures in Rwanda and Bosnia Herzegovina

The institutional groundswell responsible for the receptivity of the concept of intersectionality at the UN can be traced backwards from the meeting in Zagreb, a moment crucially linked to the mass genocidal failures of Rwanda and Bosnia Herzegovina. An Aide Memoire of the meeting, at which Crenshaw's paper was introduced, suggests that ethnic and racialized forms of sexual violence formed the context that gave rise to the discussion.[556] Crenshaw's paper, prepared to guide this discussion, appears to underscore that this context was

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[551] note 539.
[552] Author's conversation with the librarian at UNOG Library and Archives, Geneva, October 28, 2016, where it was also ventured that Hurricane Sandy, which flooded New York, October 29, 2012, may have been to blame.
[553] "We may have lost some of the documents in the migration from DAW to UNWOMEN". Anonymous, *Lost Files: Email to the author* (2015).
[554] I did receive a version of the paper translated into Portuguese, Monday February 09, 2015, 1:46 PM EST.
[555] Kimberlé Crenshaw, *Email to the author: UN Gender-Related Aspects of Racial Discrimination* (2015).
[556] note 539.

top of mind, and formed an impetus to clarify the concepts that, had they been in circulation earlier, might have made such horror visible to UN observers. Specifically, her work attends to the inability of observers to see the complex role played by racialized gender and gendered racism:

> the tragic events of genocide in Rwanda and Bosnia were occasioned by ethnically motivated rape and female mutilation. … Although the assault against the community represented by these abuses has been decried as ethnic genocide, this outrage does not signal any solicitude for victims of this abuse, many of whom are now ostracized as tainted and unredeemably [sic] degraded women.[557]

The paper prepared by Radhika Coomaraswamy, the Special Rapporteur on Violence Against Women, titled *Review of Reports, Studies And Other Documentation For The Preparatory Committee And The World Conference*,[558] also points to this context. She starts by setting out the main problem that intersectionality is proposed to assist with, referring back to the language of multiple discrimination:

> Gender-based discrimination intersects with discriminations based on other forms of "otherness", such as race, ethnicity, religion and economic status, thus forcing the majority of the world's women into situations of double or triple marginalization.[559]

Intersectionality is proposed to assist in making visible the forms of discrimination that increase "women's vulnerability to violence and abuse".[560]

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[557]Crenshaw, *supra* note 67 at 6–7.
[558] Coomaraswamy, *supra* note 538.
[559] *Ibid*, para 2.
[560] *Ibid*.

Coomaraswamy credits “interlinked and mutually reinforcing trends”, which include “recommendations of United Nations conferences and summits”,[561] as preparing the way for intersectionality as an approach to women’s human rights. Thus, although she paints a picture of the impetus for an intersectional turn as coming from many sources, she, like other observers noted above, specifically singles out the 4th World Conference and the resulting *Beijing Platform* as crucial building blocks to this turning tide.[562]

In Articles 12 and 13, which we explore further below, she further gestures to the context of ethnic cleansing and war as the raison d’etre of intersectionality, and the authority of the General Assembly as the anchor for its legitimacy, thereby solidifying attention on “[t]he combined effects of racial and gender discrimination on the advancement of women and their achievement of equality”.[563]

To Coomaraswamy, the General Assembly’s Special Session on Beijing +5 secured intersectionality’s place in the UN firmament through its demand “that Governments take measures to address racism and racially motivated violence against women and girls and … address all forms of violence against women and girls, including that which is race or ethnic-based”.[564] The intersectional turn, she announces, “has provided the opportunity for recognition of the multiple discrimination experienced by women”; specifically, it has allowed legal changes ensuring that “the statutes of the Ad Hoc Criminal Tribunals, as well as that of the International Criminal Court (ICC) implicitly recognize the impact of the intersection of gender and racial

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[561] *Ibid*, para 11.
[562] *Ibid*, para 11,12.
[563] *Ibid*, para 12.
[564] *Ibid*.

discrimination."[565] She continues this genealogy of the concept as a legal one by setting the context in the following way: "Historically, gender and other forms of discrimination, including racial discrimination, have been considered in parallel."[566] However, demand has increased for a "more comprehensive analysis of the dynamics of discrimination against women",[567] with particular mention of the Rwandan and Yugoslav contexts:

> Notably, the International Tribunal for Rwanda [ICTR] has concluded that rape and sexual assault committed with the specific intent of destroying, in whole or in part, a particular group constitutes acts of genocide. In February 2001, the International Criminal Tribunal for the Former Yugoslavia [ICTY], holding that rape and enslavement constituted crimes against humanity, convicted three Bosnian Serbs for the systematic rape and enslavement of Muslim women during the Bosnian war.[568]

In Coomaraswamy's reading, it was racialized sexual assault and sexualized racial assault that gave the earlier demand from international women's groups at the Beijing Conference for an intersectional approach at the UN a new persuasiveness and interest, and intersectionality in turn provided the framework for the innovations to the harms considered in the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY). In her speech introducing the background to intersectionality, Special Rapporteur Coomaraswamy again points to these links:

> In today's world where most of the wars are ethnic in dimension, the intersection of gender and race during armed conflict often has horrific consequences. In Bosnia, Kosovo, Rwanda and East Timor, the international community witnessed atrocious crimes of

[565] *Ibid*, para 13.
[566] *Ibid*.
[567] *Ibid*, para 11.
[568] *Ibid*, para 13.

> sexual violence that has shocked the system into taking effective action against the perpetrators by setting up international tribunals of justice. These tribunals and the Statute of the International Criminal Court make it clear that sexual violence during wartime is a war crime and a crime against humanity.[569]

In her paper, she specifies that the "the failure of national Governments and the international community to analyse adequately all experiences of intersectional discrimination" that ensures "discrimination faced by marginalized women [is]rendered invisible" to the very mechanisms that should be in place to address it.[570]

Coomaraswamy's paper also expressly links two events (the Gender and Racial Discrimination Expert Group Meeting of November 2000 in Zagreb, Croatia and the World Conference on Racial Discrimination and Other Forms of Intolerance, 2001 in Durban, South Africa), which together mark a decided turn toward an "intersectional" approach to multi-discriminated women within the United Nations system of agencies. To Collins and Bilge, the "importance of Durban for intersectionality's global reach cannot be overstated".[571] Through it, they state, "intersectionality gained a global platform for dissemination and development".[572] Coomaraswamy's document ascribes an expressly intersectional interpretation of the legal protections women are entitled to under the auspices of the Commission on Human Rights and through the operations of CERD, CEDAW, and related mandates and agencies.[573] Of particular note, it appears to launch an official adoption of the language of "intersectionality" at the UN

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[569] Coomaraswamy, *supra* note 398.
[570] Coomaraswamy, *supra* note 538, para 25.
[571] Collins & Bilge, *supra* note 42 at 90.
[572] *Ibid*.
[573] Coomaraswamy, *supra* note 538, para 202(f).

with the public speech by its author that introduced it setting out "intersectionality" by name as an emerging *lingua franca* of international human rights' approach to women's protections, where once there had been separate approaches.[574] At paragraph 22 she concludes her summary of the transmissions of intersectionality, and as I quoted at the start of this chapter, characterizes the intersectional approach as an expected IHRL framework, resulting in "the expanded scope of gender based human rights protection".[575]

The document directly links to the work of Crenshaw, even if it also displays a certain bafflement by its central metaphor:[576]

> The "traffic intersection metaphor", created by Professor Kimberlé Crenshaw, gives what is considered to be an effective model for the understanding of intersectional or multiple discrimination. 'In this metaphor, race, gender, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that dynamics of disempowerment travel. These thoroughfares are sometimes framed as distinctive and mutually exclusive avenues of power.' But these thoroughfares often overlap and cross each other, creating complex intersections at which two, three or four of these avenues meet. Marginalized groups of women are located at these intersections by virtue of their specific identities and must negotiate the "traffic" that flows through these intersections to avoid injury and to obtain resources for the normal activities of life. This can be dangerous when the traffic flows simultaneously from many directions. Injuries are sometimes created when the impact from one direction throws victims into the path of oncoming traffic, while on other occasions, injuries occur from simultaneous collisions. These are the contexts in which intersectional injuries occur - when multiple disadvantages or collisions interact to create a distinct and compound dimension of disempowerment.[577]

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[574] *Ibid*, paras 11–22.
[575] *Ibid*, para 22.
[576] Crenshaw, *supra* note 12 at 149.
[577] Coomaraswamy, *supra* note 538, para 24.

As Yuval-Davis noted, "the analytic attempts to explain intersectionality in the reports that came out of this meeting are confusing".[578] Nevertheless, it does appear that the "distinct and compound" dimension of "disempowerment" is a move away from *Beijing's* "multiple discrimination", and a step into a new conceptualization.

On the face of it, the work of the SRVAW played a crucial and consistent role within the institutions of the United Nations to link the failures of Rwanda to other examples of international failures to protect multi-discriminated and vulnerable women. In her review of the work of that office, Special Rapportuer Yakin Ertürk repositions, from the margins to the centre, the suppressed narrative of intersectional violence against women in war:

> Although sexual brutality, enslavement, forced prostitution and forced pregnancy have marked armed conflicts across the globe, these crimes have long remained invisible in international criminal and humanitarian law.
>
> […]The wartime slavery of "comfort women", and the conflicts in Darfur, the Democratic Republic of the Congo (DRC), Liberia, Rwanda and the former Yugoslavia, as well as accounts of scores of other conflicts around the world, conclusively demonstrate that sexual violence is not an outcome of war, but that women's bodies are an important site of war, which makes sexual violence an integral part of wartime strategy.[579]

Following this, the Special Rapporteur expressly links this to needed legal reform of the ways in which such crimes could be seen and ultimately prevented. In a surprisingly frank and

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[578] Yuval-Davis, *supra* note 43 at 196.
[579] Yakin Ertürk, *UN Human Rights Council, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, 15 years of the United Nations SR on violence against women, its causes and consequences (1994-2009): a critical review* (A/HRC/11/6/Add.5, 2009), para 42.

critical assessment of the work over 15 years of the SRVAW's office, the following summarizes some of these efforts:

> the SRVAW made recommendations to remedy the lack of capacity of the Office of the Prosecutor and the Sexual Assault Team to actively prosecute sexual violence perpetrated during the conflict in Rwanda. In addition to the focus on prosecutions of sexual violence in their mission reports, both SRVAWs also addressed the status of women in post-conflict and peace processes, notably in relation to the status of survivors of violence, women in detention, the operations of the United Nations agencies, the United Nations High Commissioner for Refugees (UNHCR) and the reconciliation processes.[580]

Given the office of the SRVAW's link with the introduction of intersectionality in Croatia through the then office holder Coomaraswamy, as noted above, we find Ertürk provides further weight to the association of violations in war and the readiness for an approach to women's rights violations as intersectional. She enumerates the visibility afforded the intersectional experiences of women in the context of war:

> … the mandate holders have continued to… [bring] out the exacerbated impact of armed conflict when combined with patriarchy, ethnic and racial marginalization, poor status of women, and the absence of gender equality in legislation and State processes.[581]

Ertürk does not shy away from explicitly naming the UN's role in perpetuating it, and ignoring the reports from the mandate holders that sexual violence was endemic to

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[580]Ertürk, *supra* note 453, para 47.
[581] *Ibid*, para 50.

"peacekeeping".[582] It is clear from the internal documents, in addition to the public ones, such as the memoires of Brigadier-General Romeo Dallaire,[583] that while the devastation in Rwanda was pronounced by members of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide to be "one of the most abhorrent events of the 20th century",[584] it also was experienced as a moral and institutional failure on the part of the UN.[585] Then Secretary General Kofi Annan called for an independent inquiry into the events of the Rwandan genocide and the complete failure of the international community as part of the institution's reckoning, declaring that the institutional healing and capacity for future prevention were of equal import to the accountability to the Rwandan people:

> These are wounds which need to be healed, for the sake of the people of Rwanda, for the United Nations and also for all those … who are at risk of becoming victims of genocide in the future.[586]

At the institutional level, the fallout from the Rwanda genocide and the subsequent legal prosecutions[587] may have been the driver for the integration of gender and race in the recognition and prediction of harms. Underscoring this, the Office of the High Commission for Human Rights in its press kit for the 2001 Durban World Conference Against Racism, at which the

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[582] *Ibid*, para 49.
[583] Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (Vintage Canada, 2004).
[584] *United Nations Security Council Letter from the Secretary-General Addressed to the President of the Security Council & Letter from the Members of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda addressed to the Secretary General*, S/1999/1257 (Dated 15 December 1999, 1999), para I.
[585] Michael N Barnett, *Eyewitness to a genocide: the United Nations and Rwanda* (Ithaca: Cornell University Press, 2002); note 584.
[586] note 584, para I.
[587] Stephanie K Wood, "Woman Scorned for the Least Condemned War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda, A" (2004) 13 Colum J Gend L 274.

concept of intersectionality was formally introduced, issued the following as part of its official statement as sponsoring host of the conference (although its assessment of the successes of the prosecution of sexual violence as a crime of war differs notably from that of the SRVAW):

> Ethnic or race-based violence against women is considered the most recognizable example of intersectional discrimination. Incidents of rape in Bosnia, Kosovo, Burundi and Rwanda represent race-based targeting of women for an explicitly gender-based violation. Additionally, ethnic conflict produces a large number of female refugees who then become vulnerable to sexual violence and gender-related issues. Rape against women picked because of their ethnic or religious origin has now been recognized as a weapon of war by both International Criminal Tribunals for Rwanda and Yugoslavia, and prosecuted accordingly.[588]

Overall, this "new" lens on the intersectional harms and deliberate targeting of racialized or ethnically profiled women during war, may have loaned previously resistant institutional frameworks the legitimacy to consider the intersections of race and gender as worthy of detection, prevention, remedy and study. Since the time of the independent inquiry, the use of sexual violence against women as a routine tactic of war has been "mainstreamed", and the requirement to understand and combat it has resulted in specific measures to address it, including the establishment of a new Office of the Special Representative of the Secretary General for Sexual Violence in Conflict (SRSG-SVC).[589] Crenshaw, in her Zagreb paper, makes it plain that the intersectional agenda is linked to the bald examples of "intersectional oppression" that are the

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[588] "Press kit: Issues - Gender and Racial Discrimination - World Conference Against Racism", online: <http://www.un.org/WCAR/e-kit/gender.htm>.

[589] The office was established in 2010. See, *http://www.un.org/sexualviolenceinconflict/about-us/about-the-office/*.

"most recognizable"—those that have taken place in the genocidal contexts we have been discussing:

> The most recognizable examples of intersectional oppression are often the most tragic: ethnic or race based violence against women. This violence might be usefully framed as intentional intersectional subordination in that the racism and sexism manifested in these rapes reflects the race or ethnic-based targeting of women for an explicitly gender-based violation. Recent tragedies in Bosnia, Rwanda, Burundi, and Kosovo sadly illustrate that the long history of ethnically based violence against women has not been relegated to the distant past. While these are the most recent and widespread examples of intersectional violence, this particular vulnerability has played out not only in armed conflict, but also in other contexts as well.[590]

Interestingly, these forms of intersectional violations are also the most easily reduced by the law to single axis discrimination, even in the face of express guidance to consider the mutual constituency of the harm. The rape of women and the prosecution of the rape of women as a form of genocide and a crime against humanity formed an important aspect of the legal process, both in its attempts to address rape in a pioneering way, and in its failures to do so, briefly considered here specifically in Rwanda.[591] Express strategies to prosecute mass rapes as intersectional harms have been critiqued for their legal erasure of women as subjects of the violence, and agents in their own narratives of harm and remedy. The dominant frameworks of criminal prosecution required an overarching adherence to ethnic identity as the targeted category; this meant in some cases, the rape of women who were not identified as part of the "targeted group", required the violation to be defined in terms of, for instance their husbands'

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[590] Crenshaw, *supra* note 67 at 9.
[591] Wood, *supra* note 587.

(acknowledged to be targeted) ethnicity; her rape becomes a (property) crime against him.[592] It is a legal strategy that practitioners might regard as inventive, creative and even ingenious, as it works to move around law's narrow conceptions to find another avenue for remedy. It is, however, ironically, the opposite of an intersectional approach. As Yuval-Davis's forewarning helps us see, such attempts to adhere to the grounds of discrimination, force an essentialization of identity. In this way, the effort of an intersectional analysis breaks apart into its constituent elements as specific forms of additive oppression. This approach,

> inevitably conflates narratives of identity politics with descriptions of positionality as well as constructing identities within the terms of specific political projects. Such narratives often reflect hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct an homogenized 'right way' to be its member.[593]

Moreover, it can also serve to reinforce the original harms. As Ertürk underscores

> violence against women in armed conflict has been couched in terms of 'protection' and 'honour'. Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War treats violence against women as a crime of honour rather than as a crime of violence. By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When

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[592] Doris E Buss, "Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law, The" (2007) 25 Windsor YB Access Just 3; Doris Buss, "Sexual Violence, Ethnicity and Intersectionality in International Criminal Law" in Emily Grabham et al, eds, *Intersect Law Power Polit Locat*, Social justice (Abingdon, England) (Abingdon, Oxon: Routledge-Cavendish, 2009) 105.

[593] Yuval-Davis, *supra* note 20 at 195.

> rape is perceived as a crime against honour or morality, shame commonly ensues for the victim[594]

It appears that the UN's adoption of intersectionality outside CEDAW is, in some important respects, cut from the narrow prosecutorial cloth of war crimes, and consequently suffers from the under-inclusion of gender. These structural shortcomings and patriarchal values embedded in the very design of the protections, instead often get represented in racist terms as shortcomings of the 'cultures'—"because they are considered tainted and promiscuous"[595]— of the communities in which women seeking redress. In this sense, "legal discussions presume rather than interrogate the processes by which conflict is deemed to be ethnic, and violence becomes sexual".[596] Within CEDAW, as I explore shortly, the tendency is to disengage gender from its mutually constituted formations along race, class and most persistently, along cultural axes. Clearly, the intersection metaphor doesn't immunize those employing it against reverting to studying the separate ontological bases of social division, tracing individual identity markers rather than the confluence of complex social formations. In this use of the term, rather than accounting for the construction of a social process of discrimination, where an individual's experience of it is unintelligible without the context of complex group disadvantage and exploitation, "intersectionality" merely restates in new words the experience of personal exclusion (or inclusion) during a one-time *event* of discrimination. This *ipso facto* characterizes discrimination as an aberration from the regular functioning of (assumedly non-discriminatory)

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[594] Ertürk, *supra* note 453, para 45.
[595] Violet K Dixon, "A Study in Violence: Examining Rape in the 1994 Rwandan Genocide" (2009) 1:12 Inq J 1.
[596] Buss, *supra* note 592 at 118.

social and institutional relations. Without analytic rigour, the radical promise of intersectionality as offering *structural* analysis of the intersectional *process* of discrimination collapses into the mutually exclusive identity-based and narrow grounds of discrimination that it superseded. Casual deployments of the term for already entrenched approaches to antidiscrimination law reduce what is essentially a radical analysis of social stratification, providing for both recognition and redistribution, to one of identity recognition only; what Crenshaw envisioned as a structural project becomes individualized.

This is what Yuval-Davis had forewarned; the UN, she feared, was conflating the "positional and discursive," remaining "on one level of analysis, the experiential, [unable to] differentiate between different levels."[597] The result, she contends, "is actually fragmentation and multiplication of the wider categorical identities rather than more dynamic, shifting and multiplex constructions of intersectionality".[598] How these analytic hazards play out in the adoption of the terminology in the human rights treaties at the primary intersection of race and gender is explored in the initial incorporation of an intersectional vocabulary at CERD and CEDAW set out below.

3.5 The "intersectionalization" of human rights treaty protections: What CEDAW owes to CERD

In her 2001 paper, Coomaraswamy refers to the adoption of the CERD GC 25,[599] which had been released that same year, as CERD's first clear statement on its self-conscious

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[597] Yuval-Davis, *supra* note 43 at 198.
[598] *Ibid* at 195.
[599] CERD, *General Recommendation 25, Gender Related Dimensions of Racial Discrimination*, UN Doc A/55/18, annex V at 152 (Fifty-sixth session, 2000 [GR 25], 2000).

obligations to consider gender within the terms of its norms,[600] although it had modified its reporting procedures in the previous Session, to incorporate information on the gendered aspects of racial discrimination.[601] General Recommendation 25 was the first statement of an intersectional position at one of the main human rights treaty bodies, although the word, again, was not used. Its framing is elegantly brief, or, in light of intervening years, maddeningly thin, depending on your perspective. In Article 2, the context of racialized sexual violence is once again expressly indicated as the definitional example of discrimination that this new directive to interpretation is trying to capture. In directing itself to account for gender, CERD is trying to better detect, protect and hold states accountable for:

> … sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.[602]

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[600] Coomaraswamy, *supra* note 538, para 15.
[601] *Revision of CERD Reporting Guidelines with particular reference to Article 5*, CERD/C/55/Misc3/Rev3 (adopted at its fifty-fifth session, 1999).
[602] CERD, *supra* note 599, para 2.

In total, the GR is a mere six paragraphs, occasioning Hilary Charlesworth's scathing dismissal of it as "brief and desultory". [603] Its brevity may be particularly noteworthy to those who, like Charlesworth and Coomaraswamy, are familiar with CERD's long and frustrating history of following "some committee members" who "suggested … gender issues did not fall within its mandate".[604] However concise and late to the game it may be, it is far from random. Modest, not properly catalogued, and still in a changeable format,[605] CERD GR 25 nevertheless has many of the core elements of an intersectional call to action, showing off the Committee as exhorting itself to operate with "a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the … obstacles … women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights…".[606] Its language lacks the convolution of some of the later UN documents, which try to grapple with the explicit language of intersectionality, but it nonetheless wrestles with the core distinctions that have preoccupied the intersectionalists I have traced through the literature.

From the foregoing, we can see that CERD sees the intersection of race and gender operating at structural as well as individual levels; below we see that CERD perceives discrimination as operating in public as well as in private, the latter being a unique insight brought into the human rights fold through the advent of CEDAW. From the very abrupt beginning of CERD's GR 25, we see the Committee describing a synergistic, mutually

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[603] Hilary Charlesworth, "Not Waving But Drowning Gender Mainstreaming and Human Rights in the United Nations" (2005) 18:1 Harv Hum Rights J 1 at 1.
[604] Coomaraswamy, *supra* note 538, para 15.
[605] Curiously, CERD GR 25 is not catalogued in the UN Treaty data base, or the standard catalogues of UN Refworld, and not in PDF format, but linked directly on the home page of CERD, in an unprotected Word document, as if it were a meeting note, rather than a guide to jurisprudence and state obligations.
[606] CERD, *supra* note 599, para 3.

constitutive form of discrimination that is not merely the additive exercise of putting two vulnerabilities together. In its opening paragraph, CERD simply posits:

> The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.[607]

Ten years later, this language is lifted almost wholesale into the guidance that CEDAW crafts for its own turn to intersectionality. While Charlesworth decries the late and miserly arrival of CERD to the gender table, CEDAW waited until 2010 to make plain its commitment to incorporating an intersectional analysis, with General Comment 28.[608]

In GC 28, the CEDAW Committee sets its jurisprudential guide to the treaty's interpretation back into the context of its *chapeau* Article 1, and the approach to discrimination and equality we explored in Chapter 2. In paragraph 5, the Committee states that:

> …identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.[609]

[607] *Ibid*, para 1.
[608] note 140, para 1.
[609] note 141, para 5.

Interestingly, however, intersectionality is expressly read back through Article 2, referencing the obligations of States parties, and the language discussed earlier of "condemn", "eliminate" and "abolish" customs or practices that discriminate against women, rather than through Article 1, governing the interpretation of discrimination itself:

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.[610]

Andrew Byrnes maintains that Article 2 has the distinction of being seen by the Committee as the "very essence of the Convention";[611] indeed we have identified it above as central to the treaty's object and purpose. However, in arguments about the changed nature of the conceptualization of discrimination as a result of an intersectional interpretation, it seems odd not to position the interpretation in that definitional Article (1). Rather than expressly expanding the definition of discrimination by reading intersectionality as the overarching meaning of the treaty and the grounds of discrimination *per se*, intersectional awareness is now to be seen as part of a suite of state obligations, or a *form* of discrimination to be likewise "eliminated" and "abolished".[612] In his excellent exploration of the jurisprudence of Article 2, Byrnes makes the

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[610] *Ibid*, para 18.
[611] Byrnes, *supra* note 307 at 72.
[612] *Ibid* at 75.

case for the use of the language of "abolish" and "eliminate" as likewise embedded in the terms set out against racism in CERD as "a powerful expression of the international community's attitude towards discrimination against women—the language of condemnation is also used in the context of racial discrimination,".[613] Thus while the denunciation may be equivalent to that articulated against racism, the specific context of culture as its location raises other important and cross-cutting rights for an intersectional approach. The difference is a subtle but revealing one: reading intersectionality through Article 2, positions "intersectional" as on par with "cultural"—part of a list of characteristics, or in Yuval-Davis' sense, identity markers—and these are lumped in with factors that are *ipso facto* infringements on the rights of women. Byrnes, one of most widely agreed upon preeminent scholars of CEDAW as a living document, has characterized the intersectional turn at CEDAW within the auspices of Article 2 in the following manner: "intersectionality [is the Treaty Committee's] approach to discrimination against particular groups of women—such as ethnic minorities or Indigenous peoples, migrant workers, and women with disabilities and other cross-cutting themes."[614]

The posture adopted by the CEDAW intersectional turn is thus, in many ways, in keeping with its core contestations with culture as the primary site of the manifestation, reproduction and experience of discrimination. In that context, "intersectional" becomes an additional event of discrimination based on multiple and specific grounds, identities or vulnerabilities. In contrast, we have seen that rather than being merely an additional ground, intersectionality is an approach,

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[613] *Ibid*.
[614] *Ibid* at 73.

a conceptualization and a frame of analysis that operates on many levels to challenge the very basis of traditional grounds-based conceptions of discrimination.

From Crenshaw we learned that an important aspect of the intersectional turn is that is requires us to consider the structural and group identity aspects of discrimination, in addition to the vulnerabilities that attract the overt discrimination and marginalization of individuals. To Crenshaw, these form the "background" systems that sustain and maintain systems of subordination in a dynamic and ongoing way. These are distinguished in her background paper for the UN as not being simply additive or "multiple" in the ways that continue to appear in the various IHRL approaches; nor, importantly, is this form of discrimination like other conceptualizations in law, the result of a one-time temporal event, as I have argued above. Instead:

> The conjoining of multiple systems of subordination has been variously described as compound discrimination, multiple burdens, or double or triple discrimination. Intersectionality is a conceptualization of the problem that attempts to capture both the structural and dynamic consequences of the interaction between two or more axis of subordination. It specifically addresses the manner in which racism, patriarchy, class oppression and other discriminatory systems create background inequalities that structure the relative positions of women, races, ethnicities, classes, and the like. Moreover, it addresses the way that specific acts and policies create burdens that flow along these axes constituting the dynamic or active aspects of disempowerment.[615]

It is this *structural* aspect of intersectionality that is the most difficult for the law to grasp and administer. Ertürk pins this down in a global context that very much includes the peacetime

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[615] Crenshaw, *supra* note 67 at 8.

structures of discrimination in Nordic democracies—considered bastions of equality—specifically “the need to address root causes, including avoidance of gender and cultural stereotypes”, as well as adherence to gender-mainstreaming agendas which produce “gender-neutral State responses to domestic violence, as well as the cultural essentialist responses to violence among immigrant communities”.[616] Crenshaw, and Yuval-Davis, might counter Fredman’s categories of discrimination that retain additive formulations of multiplicity, in all but an explanatory or lay language sense. To Crenshaw, the importance of the structural informs all considerations of temporal discrimination. For instance, she says, harms from one form of discrimination may make a person vulnerable to another form; at other times, two forms of discrimination are indistinguishable, and simultaneously occurring: in both instances, “[t]hese are the contexts in which intersectional injuries occur—disadvantages or conditions interact with preexisting vulnerabilities to create a distinct dimension of disempowerment.”[617]

As an example, Crenshaw returns to the war crimes context, and points out the important ways in which both what comes before and what comes after such violent outbreaks of atrocity are immanent to the operation of intersectional discrimination; indeed there are both structural precursors, allowing such violations to occur, as well as continuing conditions which make the remedies for intersectional atrocities impossible to achieve. This is especially so without having considered this defining feature of intersectionality’s unique analytic contribution: “Propaganda against poor and racialized women may not only render them likely targets of sexualized

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[616] Ertürk, *supra* note 453, para 36.
[617] Crenshaw, *supra* note 67 at 11.

violence, it may also contribute to the tendency of many people to doubt their truthfulness when they attempt to seek the protection of authorities."[618]

Here Crenshaw is positing a different approach to intersectional discrimination than that which has arisen out of the mass atrocity context, by pointing out that such eruptions of targeted violence "draw upon preexisting gender stereotypes" but are also based in "distinctions between women", and on "racial or ethnic stereotypes".[619] In this way, she points out, race or ethnic, as well as class and gender stereotypes work to characterize some groups "as sexually undisciplined".[620] It is precisely the intersection of these preexisting and powerful social tropes that has dire consequences for women: making them "particularly vulnerable to punitive measures based largely on who they are".[621]

The direct and deliberate nature of mass atrocity-based intersectional harms against women can make them too event-based and sensational, and therefore an inaccurate template, for the structural analysis intersectionality requires, unless a much longer view of the background to the crisis is engaged. That this eruptive set of pre-mediated violations dominated the introduction of the term and its contours is made more evident by Crenshaw's overt insistence that even "[t]argeted acts of intentional discrimination are not limited to sexual violence."[622] In Crenshaw's elaboration for the Croatia meeting, she emphasizes the particular form of "structural intersectional subordination",[623] which has been seen in intersectional theory as

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[618] *Ibid* at 10.
[619] *Ibid*.
[620] *Ibid*.
[621] *Ibid*.
[622] *Ibid*.
[623] *Ibid* at 11.

critical to its potential to assist adjudication to reach past the elaboration of additional enumerated and restrictive grounds, and reach into transformative, "counter-hegemonic", law-making.[624] This requires attention to larger structural issues, such as the uneven global power relations that leave, for instance, African migrants at a relative disadvantage to other migrants, but also so-called passive or benign forms of intersectional discrimination, which are "not in any way targeted toward women or toward any other marginalized people; [but] simply intersect… with other structures to create a subordinating effect".[625] Crenshaw cites the "burdens placed on women by structural adjustment policies within developing economies"[626] as one such example.

This pivot back to the radical roots of intersectionality's potential recalls the TWAIL critiques explored in Chapter 1; these have called into question the authority of the international systems we have in place to arbitrate forms of discrimination that grow out of the very authority being claimed to do so;[627] authority, as Orford pointed out in the text we explored in Chapter I, that found its succor in the "shadow of empire",[628] and still suffers from "the apparent inability of the international human rights system to address what many feminists see as the major human rights issue facing women in the post-Cold War era: the threat posed to human rights by economic globalization".[629] In apparent recognition of these criticisms, CEDAW's 2017 GR 35,

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[624] Henne, *supra* note 89.
[625] Crenshaw, *supra* note 67 at 11.
[626] *Ibid*.
[627] Ruth Buchanan, "Writing Resistance into International Law Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities" (2008) 10 Int Community Law Rev 445; Obiora Okafor, "Is a new 'TREMF' Human Rights Paradigm emerging? Evidence from Nigeria", in Ruth Margaret Buchanan & Peer Zumbansen, eds, *Law in transition: human rights, development and transitional justice*, Osgoode readers volume 3 (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014)79.
[628] Orford, *supra* note 337.
[629] Orford, *supra* note 188 at 171.

offers the following enhancement to its focus on gender-based violence, linking its concern with "culture" in a continuum of harms that culminate in the effects of globalization:

> An erosion of legal and policy frameworks to eliminate gender - based discrimination or violence, often justified in the name of tradition, culture, religion or fundamentalist ideologies, and significant reductions in public spending, often as part of "austerity measures" following economic and financial crises, further weaken the state responses. In the context of shrinking democratic spaces and consequent deterioration of the rule of law, all these factors allow for the pervasiveness of gender-based violence against women and lead to a culture of impunity.[630]

In the context of CEDAW, which is, of course, both text and institution, we see the struggle with the full range of intersectionality's role as both "outside" social critique and "insider" practical legal guide; it is based on a struggle built into the walls of the treaty document and arising out of the nature of the state-populated committee, which mirrors the tensions of its founding text, between the more structural approach of the USSR and newly independent nations and the more individual protection approaches of liberal western democracies.[631] CEDAW seesaws, as we have seen in the previous chapter, between its stance as a fully integrated treaty, with a view to cohering the binary formations of rights that have characterized the introduction of international human rights generally, such as de jure/de facto; civil and political/ social, economic and cultural; public/private, and one that falls prey to the old habits of colonial formulations of the oppressed "other". These layered tensions also come alive in the

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[630] *General recommendation No. 35 on gender - based violence against women , updating general recommendation No. 19 [advance unedited version]* (2017) para 1(7).
[631] Freeman, *supra* note 365.

deliberations of the Committee through the individuals who populate it, and bring to it their beliefs, influences and adherences.

Byrne fairly credits CEDAW *qua* deliberative body with operationalizing an unusually expansive definition of equality, in which "both legal and non-legal measures" lead to transformation which can "cover all fields of life", "ensure that all branches and levels of government are appropriately engaged in implementation", with "particular emphasis on the groups of women who are most marginalized and who may suffer from various forms of intersectional discrimination" are able to "participate actively in the development, implementation and monitoring of the policy", with the end-goal that all women "have access to information about their Convention rights and are able to claim them".[632] Far from a strictly legalistic approach, CEDAW demands positive equality that imposes forward-thinking public policy outcomes among its States parties:

> The Committee has also drawn on analyses of the nature of human rights obligations developed under other treaties to explicate the meaning and scope of Convention obligations. Of particular importance has been the tripartite framework developed initially in relation to economic, social, and cultural rights, but now applied to civil and political rights as well: the obligations to respect, protect, and fulfill/promote the rights guaranteed.[633]

In the next chapter, I explore, through interviews with a cross-section of current and past CEDAW and one CERD member, the ways that the individuals who help to define the operations of intersectionality as a technique of IHRL think of the concept, as well as the task of

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[632] Byrnes, *supra* note 307 at 67.
[633] *Ibid* at 74.

its application. I will do so in the context of a brief review of methodology and jurisprudence, with the benefit of the approaches and frameworks I have elaborated so far. As Crenshaw has insisted:

> the intersectional problem is not simply that one discreet form of discrimination is not fully addressed, but that an entire range of human rights violations are obscured by the failure to address fully the intersectional vulnerabilities of marginalized women and occasionally marginalized men as well.[634]

Maintaining Orford's approach, I will take the insights from the present chapter and examine the interaction of the Committee's consciousness of itself next to the decisions it has taken on individual communications and countries' concluding observations (CO). In the final chapter, I will examine the forward-looking aspects of intersectionality's social vision in the hands of the treaty body, and scrutinize the space for social agency the Committee members' vision allows for the subjects of the protective frame they administer. The foregoing analysis augurs the need to be attentive to the core paradox of intersectionality at CEDAW—that to render it fit for praxis, it simultaneously instrumentalizes the concept into a tool of law that curtails its insights, thereby impoverishing its social vision where the treaty's own expansiveness could instead be fertile ground.

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[634] Crenshaw, *supra* note 67 at 10.

4 Intersectionality and the CEDAW Committee's Consciousness of Itself

> Studying travelling ideas often requires travelling with the people who are carrying them.[635]

> It can be more revolutionary to work on the small rules than to issue thumping denunciations.[636]

> You know, that CEDAW is not so much an academic debating club [laughs]. No, you know it's important always to emphasize members have various backgrounds in CEDAW so the point is always to come up with terms that are understandable for all members in the committee.[637]

> [L]awyers theorize on the run, in response to particular problems or doctrinal dead-ends, and yet in doing so often come back to shared themes or conceptual dilemmas.[638]

4.1 Introduction

So far, in tracing intersectionality's promises, transmissions and impacts considering the Orford challenge to create a feminist reading of international law that does not simply advance imperial ambitions, I have illuminated, in a literature review in Chapter I, the promises of intersectionality's intellectual and activist contributions to feminist law and feminist governance. I held out the complex theoretical and praxis roles intersectionality is asked to occupy, and the challenges of holding its radical critique in balance with its ambitions to create positive legal and

[635] Merry, *supra* note 478, para 10.
[636] Halley, *supra* note 479 at 264.
[637] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017).
[638] Orford & Hoffmann, *supra* note 191 at 13.

social change through governance engagement. In Chapter 2, I traced the institutional, textual and normative grounding of women's IHR in the CEDAW treaty, revealing an ambiguous legacy of rights advancement in the context of fixed notions about culture that owe much to an imperial past, making it simultaneously hostile and receptive to intersectionality's insights. In Chapter 3, I explored the antecedents of intersectionality as a quasi-juridical practice while maintaining awareness of IHRL as part of the project of international law that, in Orford's sense, is embraced

> as a vehicle for wide-ranging public projects designed to reorder the world, from dividing up Africa at the end of the nineteenth century, to ending the scourge of war, managing decolonisation, humanising warfare and liberalising trade in the twentieth century.[639]

As an overarching approach, maintained throughout these chapters, I centred out Orford's use of the concept of law's "consciousness of itself" to explain my approach to the materials and texts I was analyzing. Specifically, I invoked it to indicate a methodological approach to international legal scholarship that can "develop a legal analysis that is also critical, idiomatically recognisable and politically useful".[640] In my introduction, I presented my position that despite the differences in scope between Orford's project of tracking the exercise of authority in international law generally through the rise of the concept of Responsibility to Protect, and my interest in a critical feminist view of the development of women's international human rights through the rise of the terminology of "intersectionality", applying Orford's methodology to my topic is consistent with her project of tracing law's consciousness of itself. Indeed, I traced how

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[639] Anne Orford, "Constituting Order" in James Crawford, Martti Koskenniemi & Surabi Ranganathan, eds, *Camb Companion Int Law*, Cambridge companions to law (Cambridge: Cambridge University Press, 2012) 271 at 272.
[640] Orford, *supra* note 18 at 166.

Orford's own methodological journey grew out of her early work in critical feminist international law, making my project consistent with the scope and development of her method.

In this chapter, I take the reader through the dissertation's most literal deployment of Orford's sense of consciousness of itself. Recalling that this method is principally one of embedding critique in the act of tracing origins, with a renewed emphasis on the study of actual practices, including discursive practices, rather than the abstract study of disembodied structures. Orford, we saw, specifically starts from the practices of law as they appear and operate, but at the same time as they reflect upon themselves and become rationalized. As outlined in the introduction, this chapter of the dissertation will follow Orford's distinction of an international legal method that examines the history of its own concepts and ideas, based on the authority of juridical interpretation.

In the pages that follow, I present the findings of my research into the operations of the CEDAW Committee, probing its responses to place them in the frame of the dissertation's primary concerns with the promises, transmissions and impacts of intersectionality as key aspects of women's human rights protections. As an aspect of law's consciousness of itself, the CEDAW Committee members' reflections constitute information about the transmission of the idea of intersectionality. But importantly, it shows us the key players' understanding of not just the ideas, but their relationship to the structures they work in and the authority they inhabit. The Committee's utterances for this purpose take two forms in this chapter: I analyze the documents they author as Committee members, seeing them as transmissions of the idea of intersectionality. That is, I review Committee members' statements, interpretations of the treaty and personal reflections in the public domain that bring clarity to the meaning of intersectionality primarily because it is they who are in the position to administer it as an aspect of international legal

authority. To this already available research, which I have gathered in an Orfordian manner in a method outlined above and explored further below, I add my analysis of the transcripts of original interviews I conducted with CEDAW members. The interviews fulfill a key aspect of the Orfordian project, that is to take the radical obviousness of what is said about an idea from the mouths of its main proponents, and probe what this offers to our understanding about the extension and meaning of the concept as an embodiment of international authority. In this case, of course, the interest is in intersectionality as an approach to women's international human rights protections.

The practice of this method in this chapter thus combines document analysis with the analysis of semi-structured interviews I conducted in person with particular policy experts during CEDAW's fall 2016 session in Geneva, and via video interviews with additional informants no longer part of, or situated outside of, CEDAW. Here I followed practices supported by various scholars whose work advocates for the role of such interviews in a broader exploration, where policy expert interview data complements the primary research methods.[641]

In the chapter that follows, I will place the reflections of the particular policy experts on the origins and impacts of intersectionality in combination with a review of the decisions they have made using the concept (or its proxies). Thus, their personal accounts will be examined in this chapter in advance of the next chapter, where I will examine the jurisprudence of individual representations adjudicated through Optional Protocol, and Concluding Observations of

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[641] Beth L Leech, "Asking questions: techniques for semistructured interviews" (2002) 35:04 Polit Sci Polit 665; Herbert J Rubin, *Qualitative Interviewing: The Art of Hearing Data (2nd Edition)* (Thousand Oaks, CA: SAGE Publications Inc, Sage Publications, 2004); Rosalind Edwards & Janet Holland, *What is Qualitative Interviewing?* (London: Bloomsbury Academic, 2013).

primarily CEDAW committee members, past and present, in light of insights in this and previous chapters.

My semi-structured key informant or particular policy interviews assist me to determine if and how specific aspects of "intersectionality" actually came to be instituted as aspects of women's human rights, and what they mean to the participants who are the proponents and who negotiated the texts, as well as how they are implementing these ideas at the UN level. In previous chapters, I have explored the academic, broad geopolitical and institutional factors that were pushing and impeding the use of recent developments in international human rights' protections for multidiscriminated women. I will explore the context of these emergent norms, including what causal links, if any, their proponents believe they hold to political problems the UN's turn to intersectionality might have been seen to address, and how this "back story" of intersectionality connects to implementation jurisprudentially.

4.2 CEDAW interviews as an aspect of legal method

While Orford discusses her method of gathering materials as being not dissimilar from a sociological method,[642] it is important to point out that this method is not engaged as part of a sociology dissertation, but as part of a *legal* one. In tracing the account law tells itself about the meaning it is making, it is necessary to trace proponents and adherents purposefully. Likewise, my work tracing the concept of intersectionality through the UN archives, decisions and memoirs of CEDAW members followed a deliberately selective route to the utterances of intersectionality's meaning and traced the work it was simultaneously doing throughout the

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[642] Orford, *supra* note 206 at 168.

period of its acceptance. The objective was not to see what a random selection of Committee members, or other UN authorities, might think of intersectionality, but rather to trace its authoritative pathways and appearances: in short, its decisive transmissions.

In carrying out my research, I attended the opening of the 65th Session of CEDAW (Oct 24-Nov 18 2016), from October 24 until October 28.[643] My principal reason for attending was to observe the working methods of the CEDAW Committee, and to attain access to committee members, as the opportunity presented itself, in order to conduct field interviews[644] with them while they were stationary in Geneva, since prearranging interviews had proven impractical, with the exception of one interviewee, whom I was able to prearrange a meeting with through my professional connections as a non-profit executive in Canada. While this person was not previously known to me, I was able to seek their agreement through my networks.

Once in Geneva, I attended the organizing meetings of Canadian NGOs that were there to present their findings to committee members in advance of Canada's appearance at the Committee on the first day of the proceedings, October 24, 10am to 1pm.[645] My access to Committee members to ask them about the role of intersectionality in their deliberations was facilitated by a purposive snowball technique of building on recommendations of NGO colleagues,[646] and from each of those interviews, a further recommendation of whom else on the

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[643] UN CEDAW, *Schedule of Dialogues with States Parties: Sixty-fith Session 24 October-18 November 2016 Palais des Nations – Room XVI Geneva* (2016).
[644] William Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 7th ed (Boston ; Toronto: Allyn & Bacon, 2011) at 371–373.
[645] My attendance at the Sessions and at the NGO organizing meetings was not governed by strict ethnographic methodology, but rather was a practical matter that afforded me a better understanding of the operations of the Committee through unstructured observation, and direct access to Committee members as they met with and consulted NGO representatives with whom I sat.
[646] Neuman, *supra* note 644 at 207-208;371.

Committee the interviewee would recommend or be able to connect me to.[647] If they chose to participate, an interview was set up. I developed a protocol that aimed to interview representatives on CEDAW who came from a range of geopolitical locations; while CEDAW itself is not a globally representative entity *per se*, there are members from Global South as well as Global North countries, so-called high, medium and lower income countries. Within my purposeful sample of those who were known to be or were likely to be proponents of intersectionality, I tried to ensure global representation.

As the Committee engaged in constructive dialogue with each country presenting during the week, I observed from the NGO seating area. Those most active on the files in the week I was there were most likely to be the ones to agree to be interviewed by me. Additionally, each interviewee would suggest the next interviewee I approached, offer their introduction so that the new recruit would be more likely to agree to meet with me. These recommendations were based, presumably, on a combination of the new recruit's area of expertise, and how that dovetailed with my topic, but also with their familiarity and possibly like-mindedness with the person I was already speaking with. The exception to this among the in-person interviews was my first interviewee, with whom I had a separate connection. This person elected to remain anonymous, fearing some controversy in their country of origin for their answers to the kinds of questions I would ask. (Additionally, former or non-CEDAW members who had things to add to my research were also approached; this is described further below.) The person who remained anonymous did not refer me directly to any other interviewee. The rest of the pool of current

[647] In keeping with the governing ethics protocol, recruits I had been able to contact in advance of our first actual meeting were asked to contact me once they reviewed the introduction letter with sample questions, and decided that they were interested in participating; these documents are provided in Appendix 1.

CEDAW interviewees came from the snowball technique I describe above, based on an initial introduction as part of the observing NGO delegation.

The conditions under which interviews took place were far from private, with members coming in and out of the room we used, which was a room set aside for Committee members to take breaks and make tea; although it was less than ideal, it was the only room available to us for this purpose. Three interviews were exceptions to this pattern; two interviews were conducted by video well after the week in Geneva, one with the past Chair, Cees Flinterman, about whom I make an especial notation below, and the other with past CERD member, Patrick Thornberry. Both are professors emeritus who teach and research in the areas of human rights law. Both have reflected on their work on their respective treaty committees in their publications.[648] Patrick Thornberry was also the advisor of my Masters of International Human Rights Law thesis at Oxford, and thus his interview followed from prior familiarity. The other exception was the interview with Simon Walker, a manager who oversees OHCHR's support to some of the UN human rights treaty bodies. He was interviewed in person in Geneva in the cafeteria of the Palais Wilson. I sought his views to round out the aspects of the research that had a more institutional basis, such as the institutional life of intersectionality as a concept in UN human rights discourse, and to test his view of the origins I was discovering in the mass human rights violations, as explored in previous chapters. All interviewees signed ethics reviewed consent forms (available at Appendix 1), indicating what types of questions they might be asked and allowing them to

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[648] Cees Flinterman, "Eight Years in CEDAW" (2011) 29 Neth Q Hum Rts 8; Flinterman, *supra* note 193; Cees Flinterman, "United Nations Human Rights Reform: Some Reflections of a CEDAW-Member" (2003) 21 Neth Q Hum Rts 621; Raday, *supra* note 262; Flinterman, *supra* note 382; Thornberry, *supra* note 440; Thornberry, *supra* note 424.

indicate their preferences for how their interviews would be incorporated into my dissertation. I found, without exception, the interviewees to be candid, forthright and eager to share the stories of their engagement with the complex deliberations of an intersectional approach to women's human rights at the United Nations.

In my interviews, I asked Committee members what they had read, what the precipitating events were that led to their interest in the concept, and what they understand by the keywords we have explored as building blocks to an intersectional approach, including the term intersectionality itself. Though "intersectionality" was implemented in the jurisprudence by this name and others, what did they understand by it? How did they feel about it, and how has this influenced their use of the concept? What did each participant think of the various ideas advanced in the literature (as opposed to the impetus for the contentions in the literature)?

As we have seen in the preceding chapter, the scholar Yurval-Davis traces the official emergence of intersectionality by name to the contemporaneous emergence of the framework in CERD's General Comment 25, and, she along with others[649] see it origins at the UN in the sequence of the preparatory documents to the Expert Meeting on Gender and Racial Discrimination that took place in Zagreb in November 2000 as part of the preparatory process to the 2001 UN World Conference Against Racism.[650] In these meetings, as we have explored, the American legal scholar, Kimberlé Crenshaw, was asked to introduce the notion in a special session on the subject leading up to the Durban conference. Her background paper, which I have explored extensively in the preceding chapter, thus formed one of the key documents advancing

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[649] Collins & Bilge, *supra* note 42 at 88–113.
[650] Yuval-Davis, *supra* note 43.

the intersectional turn at the international level.[651] In my interviews I have explored committee members' familiarity with Crenshaw's role and her work on intersectionality, to trace the role of the concept as originating or post hoc justification for the advancement of the concept.

4.3 Intersectionality through the eyes of CEDAW members: Originating concept or retrospective attribution?

I have stated elsewhere that my questions were in the style of semi-structured particular policy field interviews, designed to follow the thoughts of the interviewee rather than follow a standardized set of "test" questions.[652]Nevertheless, I began each interview with a version of the same framing of the project and an initiating question that went something like this: "Have you heard of/do you have a working definition of the quasi-legal concept of intersectionality"?

My interview results support and augment the line of inquiry based in Orford's insight into the centrality of consciousness of itself as the backward-facing gathering of practices into a more or less coherent account of the operations of international law, offering ex *post facto* intellectual clarity. Not one of the informants attributed the origins of intersectionality to the work of Kimberlé Crenshaw, or the paper she introduced in Croatia. Two informants seemed variously aware of other critical race scholars, referring at times to the work of Angela Davis[653] and Patricia Williams.[654]

> *Interviewer:* Have you heard of/do you have a working definition of the quasi-legal concept of intersectionality?

[651] Crenshaw, *supra* note 67.
[652] Neuman, *supra* note 644 at 371; 374–380.
[653] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016).
[654] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016).

From Committee member Patricia Schulz, I received a plain-spoken summary of the academic or conceptual basis of her understanding of intersectionality:

> No, I have no clue.
>
> *Interviewer:* Okay, but from your perspective of the Committee, it's useful and it's embedded in your work?
>
> *Schulz*: Yup.[655]

And again, from Silvia Pimentel, we see a live laboratory of Orford's characterization of international legal authority as based in the repurposing of existing concepts for the proximate justification:

> We didn't invent intersectionality. We didn't invent [it]. This term was already around … and [in] writing feminist writings so we didn't invent [it].[656]

Ruth Halperin-Kaddari articulated the Orfordian view of legal method and international legal authority as backward facing and precedent based:

> The thing is that from our view on the Committee, many of our operations are happening without attributing such, you know, deep plannings and intentions.[657]

She also characterizes it as retrospectively gathered and justified:

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[655] Interview of Patricia Schulz, CEDAW Committee (26 October 2016).
[656] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.
[657] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.

> it's the historical...the later, broad historical perspective, may attribute more to that activity than...than what really took place in real time, ok? That's what I am trying to say, so …[658]

And she adds that it is only identifiable as part of a retrospective articulation of authority's consciousness of itself:

> And it is […] not to say that this is the wrong analysis but, it may actually demand the passage of time allowing to see these broad developments and put them together. [659]

Cees Flinterman, the Committee member credited with driving the articulation of the intersectional approach at CEDAW, likewise downplays the import of any particular conceptual framework and, nonetheless, distinguishes an approach to women's human rights that articulates an intersectional approach that approximates what I have developed in previous chapters:

> At the time, it must have been influenced also by academic writing at the time. But I don't recall exactly what at the time. But still I like the term intersectional because it's maybe even clearer, in cases of multiple forms of discrimination; there I think the confusion can be that there is already gender, there is both gender discrimination and racial discrimination whereas intersectional discrimination indicates that women belonging to a particular race may be differently impacted by gender discrimination than other ways, without necessarily that they are also discriminated because of their race in a particular situation.[660]

While I have advanced a reading of these perspectives based in Orford's international critical legal method, on the face of it my informants' perspectives on the intersectional approach

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[658] *Ibid*.
[659] *Ibid*.
[660] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.

of the Committee could also be seen to support the views of, respectively, Byrnes, Campbell and Fredman. As Byrnes puts it, "although the Convention does not explicitly refer to multiple discrimination",[661] CEDAW *qua* committee, exercises a "fluid approach to intersectional discrimination",[662] making it "possible to construe existing grounds sufficiently capaciously to address the confluence of power relationships which compounds disadvantage".[663]

Where Byrnes, Campbell and Fredman justify intersectionality through fidelity to the *text* of CEDAW, Orford's method adds the element of gathering the practices and utterances of intersectionality to construct a picture of their meaning and purpose. That is, taken in its time and context, as well as in light of its travels, the focus on textual embeddedness broadens out to provide a fuller picture. The reflections of the Committee members support the view that the articulation of intersectionality is based on existing practice, not on conceptual clarity, that is, in the way of legal method as articulated by Orford, consolidating precedent and authority into a retrospective gathering and systemization of practices already underway. In the words of Patricia Schulz:

> It's [intersectionality is] a development of the reflections of the committee on multiple discrimination. ... and I sometimes have the impression that we use one or the other, without making a difference and I'm not really sure that we have to make a difference but I've, I have read some legal papers sometimes, I couldn't quote any just like that, that make a very, that make a difference [between multiple and intersectional discrimination], but, what I would think is that the committee has seen repeatedly and has addressed more and more repeatedly, the situation of

[661] Byrnes, *supra* note 209 at 68.
[662] Campbell, *supra* note 247 at 481.
[663] Fredman, Sandra, *supra* note 480 at 35.

> women who are, barred from their rights because of their belonging to various groups.[664]

What she is clarifying here is that the authority of naming an interpretation intersectional accords to the Committee's recasting of the Committee's previous decisions. Likewise, without citing any of the academic authorities I have explored in previous chapters, the Committee members operationalize approaches based in intersectional understanding:

> Some say multiple discriminations, but they are categories….the intersectional lens produces the categories—if there was not an intersectionality on the basis of health, for instance, we wouldn't name disability. The same for older women.[665]

Outside the Committee, Simon Walker likewise eschews any reliance on academic authority, and instead advances a definition that is operationalized in other UN treaty protections:

> I've always understood the notion to be a compounding effect of discrimination. ...I guess also I have a background previously to this position I was disability advisor I followed the negotiations for the CRPD [Convention for the Rights of Persons with Disabilities] that has an article on women, and women with disabilities. So in a sense, this is also, you can build on, I don't think they use the term multiple forms of discrimination, but it was very clear, even during negotiations that women with disabilities might face double or multiple forms of discrimination on the basis of sex, and on the basis of disability, and of course possibly on the basis of race... or, any other grounds... and that this was a compounding effect.[666]

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[664] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.
[665] Interview of Anonymous, CEDAW Committee (27 October 2016).
[666] Interview of Simon Walker, UNOHCHR, Chief, Section One (28 October, 2016).

And finally, in the words of Cees Flinterman, intersectionality gathers previous practices and gives them new clarity and articulation:

> Speaking for myself, I did not have a specific definition of my own [for] intersectional discrimination. But I like the term and I do think it still is a very clear indication of what we have in mind, and that is that gender discrimination may impact women in a different manner, dependent on the question of whether they belong to a certain class, or group in society, such as race and also caste.[667]

As an aspect of this retrospective enunciation, we see informants as practitioners expressly mixing the terminology that the academic literature has been so careful to parse out. Thus, the categories of multiple, compound and intersectional discrimination are being used interchangeably, and in Walker's description, the concept of grounds is still a live concept for how discrimination is being conceived of, regardless of Fredman and Campbell's view that "single ground" approach of CEDAW is distinct from the traditional grounds-based limitations of most other anti-discrimination frameworks.[668] To Schulz, "we are contributing to a, a broader view of issues of discrimination by state parties".[669]

When pushed, her views become more elaborated:

> *Interviewer*: So is it, is it, in your view, kind of a broadening of the grounds or is it a different ground? Or is it a bit of both?
>
> *Patricia Schulz*: I think it's a bit of both. … I don't, I don't see it so far as a completely separate ground I mean, I, I look at

[667] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.
[668] Campbell, *supra* note 247; Fredman, Sandra, *supra* note 480.
[669] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.

> discrimination against women and discrimination based on... race or ethnicity or, disability status or whatever and…, it helps me work that out, work that package together, put the package together. […] I think also what's interesting with the concept of intersectionality is that, is that it helped move away from women as a group vs. men as a group. I mean, which is the language of the convention which is, generally, the language of constitutions that say gender equality, between women and men. All women, all men.[670]

Here Schulz is providing a critique of the single axis criteria I named as being the textual basis of the CEDAW Treaty. She continues:

> we know that both groups [men and women] are extraordinarily diverse. What makes me nuts, is lumping women with, the poor, the young, the old, the migrants, the disabled, the elderly, whatever. As if there weren't..., whereas, apart from the group of men, women are in every other group.[671]

But in her wrap up to the question, she returns to precedent as the source of authority for a changed meaning in a new context:

> … but I really think it was a result and, and... a result of the previous work. Or based on the previous work, but it has then helped,... the continuing to develop this and our thinking on this.[672]

4.4 Cees Flinterman: Intersectionality at CEDAW

In Orford's account of international law's consciousness of itself, the Swedish diplomat Dag Hammarskjold became a central character in R2P's consolidation as an international legal

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[670] *Ibid*.
[671] *Ibid*.
[672] *Ibid*.

framework; his vision and approach shaped the outcomes that Orford traced. In the account of intersectionality that I have traced through CEDAW, Cees Flinterman, the Dutch member of CEDAW and its Chair from 2003-2010, emerges in a similar role with a smaller canvass and a less grandiose stage presence than Hammarskjold, whose vision reshaped the world order aimed at the "protection of life" and the "maintenance of order" in the decolonized world.[673] In contrast, Flinterman is humble and restrained in his ambitions, but his sense of purpose was cited by many as the impetus to the articulation and documentation of intersectionality as the official approach to women's international human rights at CEDAW. As explored in the previous chapter, Article 18 of GR 28 sets out CEDAW's express conceptualization of intersectionality as part of the Committee's interpretation of the treaty. In exploring its development with the Committee members, it became clear that Flinterman, had been its quiet proponent:

> OK, so I am 99% certain that it was in fact Cees Flinterman who started it.[674]

And, even more emphatically,

> He was the Chair, and not only a formal chair, but a **Chair!**[675]

These interviews also underscored the role a particular individual can play in the development of a direction in IHRL, a point Orford felt compelled to defend in the controversy that surrounded her choice to feature Dag Hammarskjold in her work on R2P. In the age of bureaucratic processes that may seem inherently anti-individual —" a governance by faceless

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[673] Orford, *supra* note 27; Orford, *supra* note 206 at 166.
[674] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.
[675] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.

experts"— focusing on the role of an individual in the transmission of ideas may seem anachronistic.[676] In answer to her critics, Orford states that focusing on the individuals who shaped the shifts in international law allowed her to determine "which historical figures and authors we might properly make reference in order to develop a legal analysis that is also critical, idiomatically recognisable and politically useful."[677] In this way Orford was able to determine "the ways in which those practices of governing and that form of authority had been represented".[678] My conversations with Ruth Halperin-Kaddari illuminated this methodological point about the idiomatic nature of international legal authority:

> For instance, the General Recommendation that I led was number 29, on the economic consequences of family dissolution. It was just my own specific ambition, and my own knowledge of this field, and understanding that there is a great lack in CEDAW's jurisprudence, in this area.[679]

The Committee members' emphasis on the leadership and visionary role of Flinterman led me to arrange an interview with him, which took place by video conference one year after the original interviews in Geneva. With him I explored in more detail his view of the origins and impacts of intersectionality at the Committee and through the originating GR 28. His interview underscores the accuracy of taking as the methodological starting place that the descriptive accounts of intersectionality gather more or less incoherent practises into a more coherent account of it *ex post facto*:

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[676] Orford, *supra* note 206 at 166.
[677] *Ibid*.
[678] *Ibid*.
[679] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.

> In the framework of the general recommendation we saw that it would be important to introduce a term—intersectionality—as a term for the kind of work of the committee. But I am sure that since that time, the committee has also used the term multiple discrimination and maybe even other terms.[680]

Both Foucault, and Orford following him, make a crucial decision about the role of the concept as consciousness of itself in the consolidation of bureaucratic practices: in their approach to authority's "consciousness of itself", it is the interest of power in consolidating concrete conditions that shape the advancement of the idea, rather than the (Hegelian)[681] notion of the idea shaping the conditions for practice and inviting the dialectic of transformation. Orford explains that for Foucault the "state did not appear first as an elaborated concept or idea—rather, its origin lay in the development of governmental practices and their subsequent transformation into concepts such as sovereignty or statehood".[682] Particular people (in Orford's account of the consolidation of the concept of international authority it is UN Secretary-General, Dag Hammarskjold; in this account of intersectionality, it is Flinterman) can play a central role in the transformation of practices into systematized articulations.[683] Although we have fruitfully traced both the promise and the transmission of Crenshaw's concept of intersectionality, it is not

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[680] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.
[681] The classic text on Hegel's unfolding of consciousness and its relation to the progress of history are laid out in the following two primary works, which, read together, plot the Hegelian approach to Will, Desire, Consciousness and Progress. ;The work of the late Gillian Rose, advanced this Hegelian approach through Adorno and into the observation of political life, arguing against the Foucauldian approach I track here. Georg Wilhelm Friedrich Hegel, Arnold V Miller & J N Findlay, *Phenomenology of Spirit* (Oxford: Clarendon Press, 1977); Georg Wilhelm Friedrich Hegel & J (John) Sibree, *Lectures on the Philosophy of History*, Bohn's philosophical library (London: G. Bell, 1878); Gillian Rose, *Hegel Contra Sociology* (London: Athlone, 1981); Gillian Rose, *Dialectic of Nihilism: Post-Structuralism and Law* (New York, NY: Basil Blackwell, 1984); Gillian Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno*, European perspectives (New York: Columbia University Press, 1978).
[682] Orford, *supra* note 189 at 616.
[683] Orford, *supra* note 206 at 166.

necessarily the case that her *concept* of intersectionality has opened the way for the *practice* of intersectionality. In transcriptions of my interviews with members of the Committee, we can see that the transmission of the idea of intersectionality has a more complex trajectory, both shaping practice, and in the genealogy of its legal life, naming and consolidating existing practices, and above all conferring authority. In the words of one member,

> the concept was important to consolidate the authority of the Committee to name certain forms of discrimination: Because it's named it gives us a threshold and legitimacy. There is a non-negotiable.[684]

Once named, intersectionality additionally extends that authority beyond the original frame it works to consolidate:

> And, I think that it has been helpful to discuss certain issues. For instance, issues that meet with a lot of resistance. ... like, sex workers or L[esbian]G[ay], L[esbian]B[isexual].[685]

And again:

> I mean it doesn't mean that they always agree with that, but at least to help some delegations understand what we mean and why we address those issues, also…Because, when you read the text of the convention, I mean a state party could think 'hey, I have never ratified anything that protects the rights of sex workers and/or LBTs.'[686]

In these informants' views, and emerging from below the surface of the answers from all the informants I spoke with, was the identification of the need for a definitional "non-negotiable", not so much about ensuring that the intersections of race and gender were fully

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[684] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.
[685] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.
[686] *Ibid*.

accounted for in states' obligations to the treaty's overarching non-discrimination framework, but rather that gender identity and sexual orientation were made visible and accounted for. So, although committee members classify Article 18 in GR 28 as a consolidation of existing practices, it is equally an express and deliberate articulation of a new understanding of gender identity; it took the original treaty framers' implicit social rather than scientific categorization of sex and gender, as explored in Chapter 2, and enriched it to account for sexual orientation and gender identity through the vehicle of intersectionality. In this way, we can see intersectionality as the *mechanism* for the expansion of the authority of the Committee to hold states accountable:

> …clearer terms such as lesbians or intersex or transgender, and all the other references to the LGBT LQGBTI. And most often, again, reference to them would raise a question that runs in the line of intersectionality gender protection commitments.[687]

In the treaty, we have protections based on "sex", which is represented in the final text through an implicit understanding of gender as malleable and more expansive than "sex" generally connotes; gender becomes the pertinent category not only of protection, but also of social change through changed (gender) roles, which are expressly credited as a means to achieving women's gender equality. With the introduction of intersectionality (notwithstanding other "intersections" that are also newly expressed, such as religious belief), we have gender identity and sexual orientation newly expressed as aspects of previously articulated gender protections. As we see further below, to those who opposed it, this line of reasoning represents

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[687] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.

an expanded authority for the Committee vis-à-vis States parties' obligations. "Gender", though implicit in the treaty, comes to do new work in the intersectional era.

4.5 Sexual orientation and gender identity at the intersections of International Human Rights Law

Flinterman's interview underscored other informants' view that the approach to intersectionality was organic, backward facing—a consolidation of existing legal practise—and bore only fragile connection to academic representations of the concept. His interview confirmed the legacy of the mass human rights violations in the former Yugoslavia and in Rwanda that we explored as conducive to the adoption and articulation of intersectionality at the UN generally.

> I was the head of the Netherlands government delegation to the World Conference on Human Rights in Vienna in 1993. In Vienna, not far from the war theatre, not far from the concentrations where sexual violence was used once again in the context of warfare and I am sure that what happened then, in the former Yugoslavia, has had tremendous positive impact on the recognition of women's rights to human rights; the recognition of violence against women as a general human rights issue, as an issue of discrimination. And later developments in this respect, in the context of such countries, as well the prosecutions of Bosnia/Herzegovina and the later prosecutions also in relation to Serbia, and what has happened in Rwanda certainly had an impact, at the back of our minds on also, in the formulation and the drafting of General Recommendation 28. Maybe not in an explicit manner but it was implicit that this issue should be addressed and that it should also be addressed from a human rights perspective.
>
> I think that looking back, that was one of the most important outcomes of the United Nations World Conference on Human Rights in 1993.[688]

[688] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.

While confirming this pedigree of intersectional protections at the UN, his interview and others' also indicated that the original meaning and utility of the concept at the time it was introduced, in the context of grappling with unbridled and unmanaged genocidal gender-based violence, had morphed over time. Intersectionality was now called upon to do new work in a new global context. Flinterman's interview, while confirming the time, place and meaning of intersectionality's introduction as I have traced it in previous chapters, simultaneously underscores the central role of the term intersectionality in consolidating the important and controversial expansion of the Committee's interpretation of the protections against the rapidly evolving area of lesbian, bisexual and trans rights. All the informants I interviewed pointed out to me this specific work done by intersectionality, both implicitly:

> And, ah, no problem to use the intersectionality as Angela Davis propose... and others and race, the difficulty was the other aspects... yes.[689]

And explicitly:

> And the biggest part, … which held up the adoption of the General Recommendation, was the whole issue, at the time, of gender identity and sexual orientation. Those were difficult words at the time, in the framework of introducing the term of intersectionality.[690]

In Chapter 1, I began to explore how globalized homophobia and its characterization of a globalized agenda of LGBT human rights combine to produce a complicated picture of the

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[689] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.
[690] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.

instrumental role human rights play in consolidating positions of power domestically and (human rights) superiority internationally. This is a dynamic that Flinterman, as CEDAW Committee chair was certainly alive to:

> you could say there was a certain politicization of the committee's work. In general, you hardly feel that in CEDAW but in here, in this particular issue [LGBT rights], there was certainly some, how do you say that in English, reverberations of the general discussions in the General Assembly.[691]

What Flinterman is obliquely referring to here, is that the period during which CEDAW's GR 28 was being written, between 2005 and 2010, was one of the most active periods in a rapidly expanding range of efforts in various UN settings designed to force the recognition of LGBT rights as inherent and explicit in existing IHRL protections.[692] As with the express development of intersectionality, this period of international LGBT rights development at the UN can be traced to fractious exchanges during the Beijing World Conference, singled out as "a high point for international activism on women's human rights and status".[693] Here, sexual orientation and gender identity were raised from the floor as rights that should be expressly accounted for in the resulting Platform for Action.

In both the case of intersectionality, and sexual orientation and gender identity, the official documents prepared after the event are silent on the matter; the World Conference

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[691] *Ibid*.
[692] Kelly Kollman & Matthew Waites, "The global politics of lesbian, gay, bisexual and transgender human rights: an introduction" (2009) 15:1 Contemp Polit 1; FCIL-SIS, "The Emergence of LGBT Rights in International Human Rights Law: A Historical Inquiry", (26 September 2017), online: *DipLawMatic Dialogues* <https://fcilsis.wordpress.com/2017/09/26/the-emergence-of-lgbt-rights-in-international-human-rights-law-a-historical-inquiry/>.
[693] Freeman, *supra* note 365 at 6.

however, again in both cases, played a pivotal role in galvanizing the groundswell for later achievements.[694] During the period Flinterman refers to, the Human Rights Committee and other fora were expressly grappling with the meaning and impact of recognizing LGBT rights as an aspect of international protections. Most pertinent to Flinterman's statement regarding the General Assembly, is that on the December 18, 2008, Argentina presented the General Assembly a Joint Statement on Human Rights, Sexual Orientation and Gender Identity, signed by 66 states.[695] Following this, Diane Otto[696] traces the October 26, 2009 report by Martin Scheinin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, to the General Assembly.[697] Her analysis lends itself to an underscoring of Flinterman's perception of the "reverberations" felt at CEDAW during the drafting of the Committee's direction on intersectionality.

As I explore through these documents below, the turmoil over sexuality and gender identity was at a peak of "epic transnational contestation"[698] during this period. While both events mentioned above followed the Yogyakarta Principles of 2007,[699] and the Organization of American States Statement of Sexual Orientation and Gender Identity, in 2008,[700] the latter two did not come with a challenge to the UN General Assembly to use its authority to endorse them.

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[694] United Nations, *supra* note 139.
[695] *Joint statement on human rights, sexual orientation and gender identity* (delivered by Argentina on behalf of 66 States on 18 December, 2008, 2017).
[696] Dianne Otto, "Transnational Homo-Assemblages: Reading 'Gender' in Counter-terrorism Discourses", (9 September 2013), online: *UMelbLRS 3* <http://classic.austlii.edu.au/au/journals/UMelbLRS/2013/3.html#fn7>.
[697] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/13/37 (Thirteenth session, 2009).
[698] Otto, *supra* note 696, s I.
[699] note 183.
[700] *Human Rights, Sexual Orientation, and Gender Identity*, Resolution AG/RES 2435 (XXXVIII-O/08) (General Assembly of the Organization of American States during its 38th session, 2008).

While there are important differences in weight and import between the action of states within the General Assembly presenting a statement to be endorsed by other states and a Special Rapporteur report being received by the General Assembly, both invoke the GA's authority and both actions exemplify similar operations of gender and gender identity in international human rights.

As I traced in Chapter 2, the General Assembly has primary authority to make binding legal advances in IHRL.[701] The Joint Statement presented by Argentina on December 18, 2008, provoked an immediate Arab League statement, signed by 60 countries, denouncing it.[702] Both statements—for and against— remain technically "open for signature" before the UN General Assembly, a symptom of the posturing and the impasse. This specific confrontation, referenced by Flinterman in his interview, is not taken up by Weiss and Bosia's volume, but it fits the pattern of their analysis. That is, while the Argentinian statement called for the decriminalization of same sex consensual relationships, and the end to the death penalty for homosexuality, the states responding to it decried the "social normalization … of pedophilia".[703] In Weiss and Bosia's analysis, "the pressures of globalization" come to be addressed by the consolidation of state authority through the evocation of a "spectral sexuality…where a threatening, perverted and/or sick sexualized body or group of bodies are continually incarnated in discourse but never fully instantiated in the flesh".[704] Likewise, the modest demands of ceasing criminalization and

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[701] Alston, *supra* note 287.
[702] "U.N. divided over gay rights declaration", *Reuters* (19 December 2008), online: <https://www.reuters.com/article/us-un-homosexuality/u-n-divided-over-gay-rights-declaration-idUSTRE4BH7EW20081219>.
[703] *Ibid*.
[704] Weiss & Bosia, *supra* note 157 at 4.

execution are morphed into fully-fledged western demands for equal marriage, etc., "drawing more on imported than domestically sourced language, agendas and strategies".[705] Scheinin's report, though not directly referenced by Flinterman, also falls within the same time period he cited as having influence on the development of an intersectionality GR at CEDAW. Specifically, Scheinin's definition of gender in his report on terrorism, included reference to intersectionality's transmissions, namely that

> International human rights law, including the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, requires States to ensure non-discrimination and equality (de jure and de facto) on the basis of gender, sex, sexual orientation and gender identity, as well as to address instances where gender inequality intersects with other prohibited grounds of discrimination, such as race, colour and religion.[706]

Citing the authority of CEDAW on this matter in the year before Flinterman was successful in having GR 28 completed, further entangles the transmissions of the new gender protections in the web of UN documents and processes I have been tracing. Certainly, as he cites here, Scheinin is relying on the advances made through the Yogyakarta Principles with respect to gender identity and sexual orientation. His intersectional approach to gender takes up a structural account of the violations he is concerned about in a specifically global understanding of power balances and imbalances:

> Those subject to gender-based abuses are often caught between targeting by terrorist groups and the State's counter-terrorism

[705] *Ibid*.
[706] Scheinin, *supra* note 697, para 21.

> measures that may fail to prevent, investigate, prosecute or punish these acts and may also perpetrate new human rights violations with impunity. This squeezing effect is present for example, in Algeria, where women have been arrested and detained as potential terrorists after they report sexual violence and humiliation by armed Islamists. In Nepal, the counter-insurgency campaign that was defined with reference to terrorism was characterized by attacks on meti (effeminate males or transgender persons) by both sides, with reports that the Maoists were abducting meti and the police were taking advantage of the counter-terrorism environment to attack meti as part of a "cleansing" of Nepali society. A recent report by Amnesty International exemplifies the extent to which women may be targeted by all entities, noting that in Iraq, "crimes specifically aimed at women and girls, including rape, have been committed by members of Islamist armed groups, militias, Iraqi government forces, foreign soldiers within the US-led Multinational Force, and staff of foreign private military security contractors.[707]

Otto traces the reception of Scheinin's report at the GA Third Committee through the lens of Puar's work, linking the global "queering" of "terrorism", and terrorizing queers, all in the service of global security agendas that link the authoritarianism of homophobic and sexualized counter terrorism with the terrorists such actions are meant to counter. Otto articulates, a succinct Puarian formulation of the GA's reception of Scheinin's report, which I quote at length as proxy for the events Flinterman discussed in his interview with me:

> The reception to his report can be read as a single story of an intractable divide between liberal and illiberal states, between civilisation and barbarity, and between freedom and tyranny. However, I have argued that the tale can also be read in a number of other ways, which make visible new opportunities for queering international law, as well as their attendant paradoxes. Another reading of the struggle over the meaning of 'gender' is made

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[707] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Part III, A gender perspective on countering terrorism, U. N.* ., Doc A/64/211, para 18-53 ([UNGAA/64/211], 2009), para 23.

> possible by its resonance with the imperial tropes of perversely gendered and sexualised colonial peoples used to legitimate the 'civilising mission', which would interpret illiberality alternatively as resistance to western hegemony. A different reading of the refusal of hostile states to use the identity categories of sexual pride and liberation makes visible the spaces left for gender and sexual freedoms beyond the domesticating reaches of the law. It creates another opportunity to undertake the important work of seeing how discursive and performative practices give meaning to gender and sexuality in specific social and cultural contexts, and resist the emergence of new paralysing dichotomies between the west and the rest.[708]

These same politics and proxy wars through sexuality and gender identity, as Flinterman alludes, plagued the CEDAW committee as it attempted to craft General Recommendation 28, Article 18 on intersectionality. When I asked the Committee members I interviewed for the source of the delay between the 2000 CERD General Recommendation acknowledging the gender dimensions of racial discrimination, and the 2010 CEDAW General Recommendation 28 on intersectionality, the issue of embedding lesbian and trans rights into the definition of gender protection as an imperative was invariably cited as the element that slowed the progress of the interpretation. Silvia Pimentel recalls:

> But what is important, I was from the working group, and I told Cees Flinterman and he was very open. And I told, Cees please, let's not push too much to the committee to approve this without [bangs the table] the insertion of the issue of the rights of the LGBT people.[709]

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[708] Otto, *supra* note 696, s I.
[709] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.

At the same time as the Arab League and the Argentina group of states were battling about LGBT rights at the General Assembly, and Martin Scheinin was weathering a storm of controversy over his report on the links between human rights abuses of LGBT in the name of terror as well as counter-terrorism, the small committee at CEDAW, charged with crafting its first direction on intersectionality—10 years after CERD crafted an essentially intersectional recommendation without expressly using the word—ground to a halt under the protest of a coalition of members allegedly brought together by the member of the Committee from Egypt.

> One of the most compelling opponents of an explicit reference to gender identity and sexual orientation, in the context of this particular general recommendation, was [the member] from Egypt.[710]

And:

> It was interesting maybe to note that uh a colleague, I love her a lot ... she's from Algeria … she was … she and the colleagues, the Muslim colleagues … yes, was the most most confront[ational], no doubt, no doubt… But not only them, in the beginning, also, colleagues from Europe[711]…

This account of the slow progress of the adoption of intersectionality for the legitimacy it loaned LGBT rights, underscores the microcosmic effects within CEDAW of the battles being waged globally and through the General Assembly. In one member's recollection, Egypt becomes Algeria (although there were members from both states at that time on CEDAW, the Algerian colleague was not cited by others recalling this incident), and the drama at the General Assembly between the Arab league and Argentina is seen to play out in CEDAW's midst.

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[710] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.
[711] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.

During this period, a confrontation with Committee members from Muslim majority states plays out directly mirroring the more overtly political battles waged in the General Assembly. So much so, that the final success of intersectionality as a harbinger of LGBT rights is attributed to the absence of the member ascribed responsibility for carrying on this mirrored campaign:

> She was away for some time during that last session that I attended and so she was not able then to express her opposition once again and to find any sort of coalition against the adoption of the General Recommendation or what was also being discussed at the time, to have the footnote to the recommendation on the issue, making it clear that some members of the committee opposed an explicit reference to gender identity and sexual orientation.[712]

Thus, in exploring the main tool of backward-facing consolidation at CEDAW—the General Recommendation 28, in which Article 18 outlines the Committee's approach to intersectionality—a further twist of embedding the controversially new within the consolidation of the status quo, emerges. This reflects the paradoxes I traced through the literature on intersectionality in Chapter 1—what I referred to as the *aporetic* nature of feminist engagements with the law more generally. At this level, feminist governance is by its very nature a complex and often contradictory enterprise, using the instruments of power to extend freedoms.[713] In this case, intersectionality does the work of extending gender protections to those whose identity as women challenges the very core of fixed gender identity, and yet its proponents attribute the resistance to this to part of a fixed notion of culture:

> We are seeing entrenched positions as far as gender roles and norms are concerned. It [intersectionality] names race, class,

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[712] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.
[713] Halley, *supra* note 202.

> ethnicity, gender identity, which is a flashpoint for countries and the committee as well. It names it and makes clear an obligation for the state. … We see push-back on the basis of culture and religion, from states but also within the committee.[714]

As we have seen, objections to the extension of human rights' protections of LGBT people can be usefully seen as "as a conscious political strategy often unrelated to substantial local demands for political rights",[715] and therefore a further example of how the reified and timeless notion of "culture" does the dirty work of contested temporal politics in human rights discourse, evoking "a 'spectral' sexuality" locally, "[e]mbedded in Western imaginaries, but exported and adopted alongside economic and technological practices".[716] The interviews certainly bore this analysis out:

> There [are] sometimes, also in my opinion, too ambitious proposals in the fora of the United Nations, relating to the whole issue of gender identity and sexual orientation. Which had this somewhat negative effect, as if, some of my colleagues from Islamic countries had a feeling that once again they are being told by western experts what to do in this respect.[717]

In this way, as I examined in the previous chapters, homophobia is not so much cultural, as something that "brings to mind a range of 'globalized localisms' […] that arise in the West but grow roots in the rhetoric and policies of powerful actors much farther afield."[718] Resistance to the rights of women and LGBT peoples becomes an entrenched expression of resistance to

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[714] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.
[715] Weiss & Bosia, *supra* note 157 at 2.
[716] *Ibid* at 2 & 4.
[717] Interview of Cees Flinterman, Ex-Chair, former CEDAW Committee (23 October 2017), *supra* note 637.
[718] Weiss & Bosia, *supra* note 157 at 4.

globalism, cosmopolitanism and the remaking of the world in the image of the idealized cosmopolitan western individual, while the promotion of these rights by other states (as opposed to grass roots activism, which "fosters alternatives to state-centered configurations of sexual justice"[719]) is steeped in hypocrisy inherent to the claim by the West/Global North/First World to have achieved them. In the words of one of my informants:

> and then, I find, you see this also with sexual orientation but...how much of the motivation behind protecting women's rights and protecting against discrimination based on sexual orientation in the global sphere is a cultural way of picking the weakest points, of some of these countries to say that they're superior. […] there is this cultural superiority in human rights generally......it's exactly, [a] colonial mindset… the 'civilized' and 'uncivilized' world. And also... 'well we can go and bomb you, and we can commit awful atrocities, but we have to grab hold of something to make us feel good'. [720]

Diane Otto, citing Jasbir Puar's work, observes this very same phenomenon in the pithy assessment that: "sexual liberalism has emerged as a new marker of civilisational superiority."[721]

Both Christine (Cricket) Keating, and Jasbir Puar, comment on the stance of superiority vis-à-vis LGBTI rights, and the alliance-building strategies of the states that deploy it; Keating specifically developing it under the title of State "homoprotectionsim",[722] while Puar is more interested in "homonationalism".[723] They see it not as an opposite to state homophobia we have been tracing in the literature, but rather its counterweight, deeply entwined with it, stating that

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[719] Keating, *supra* note 174 at 246.
[720] Interview of Simon Walker, UNOHCHR, Chief, Section One (28 October, 2016), *supra* note 666.
[721] Otto, *supra* note 696, s 2.
[722] Keating, *supra* note 174.
[723] Puar, *supra* note 23.

"these two approaches are closely linked and that political authorities rely on a complex interplay of both approaches in order to mobilize consent (or at least to minimize dissent)."[724]

As we saw in Weiss and Bosia's work, homophobia is one of the

> typical tools for building an authoritative notion of national collective identity, for impeding oppositional or alternative collective identities that might or might not relate to sexuality, for mobilizing around a variety of contentious issues and empowered actors, and as a metric of transnational institutional and ideological flows.[725]

For Puar, it is even more deeply implicated in the national security agendas of the dominant western states, such as the United States, (Canada, although not named by her) and Europe. In her reading, these state manufacture "queer consent", a specific form of LGBT racism founded on "queer Islamophobia", by citing the specter of the Muslim terrorist homophobe, and positioning themselves as homoprotectionist allies in their full security regalia.[726] These dramas are not just nationally orchestrated, but are played out to best effect on the world stage. Human rights protections are quite clearly the currency in circulation for these "wars". Keating argues that the notion of homoprotectionism plays a similar role—sometimes at the same time as—state homophobia, in "consolidating collaborations on which state power rests".[727] It is, like state homophobia, instrumental and purposive, serving to "legitimate political authority on both a national and transnational scale".[728]

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[724] Keating, *supra* note 174 at 246–247.
[725] Weiss & Bosia, *supra* note 157 at 3.
[726] Puar, *supra* note 23.
[727] Keating, *supra* note 174 at 248.
[728] *Ibid*.

Exploring the very dynamics my informant speaks of, Keating observes the 2011 speech by Hilary Clinton on International Human Rights Day, in which Clinton positions the US in what Keating terms “classic homoprotectionist terms”, positioning “the state as the vehicle for anti-homophobic social transformation, arguing that ‘progress comes from changes in laws. … Laws change, then people will’”. Even while criticizing states that engage in homophobic abuses, Keating argues Clinton’s speech “occludes state homophobia as a mode of governance”, redirecting responsibility to “the way that the people use ‘religious or cultural values as a reason to violate or not to protect the human rights of LGBT citizens.’”[729]

It is important to counter-weigh this cynical bartering of the protection of some vulnerable groups as pawns for the dehumanization of others in states’ larger struggles for power. Clarifying the terms of a structural approach to intersectionality and to its inclusion of religion and belief may help widen the view of what is at stake. It bears repeating here that despite, or perhaps because of the instrumental manipulation of human rights in wider economies of dominance and security, clarity about the interdependence and mutually reinforcing nature of all human rights is particularly important. In the face of world-stage posturing embedded in security agendas that in their totality undermine human rights for all, “it remains important not to turn concrete conflicts between human rights issues into an abstract antagonism on the normative level itself.”[730] Much of what is laid at the feet of religion, on both sides of the binaries that instrumentalize it, is simply not attributable to a human rights reality: “FORB is a right like any other. FORB is neither a right of ‘religion’ as such nor an instrument for support of religiously

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[729] *Ibid*.
[730] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief Addressing the Interplay of Freedom of Religion or Belief and Equality Between Men and Women.* (2013) at 2.

phrased reservations and limitations on women's [or others'] rights to equality."[731] In the view of Beilefeldt, Ghanea and Wiener, as we saw in Chapter I, intersectionality must be expansive enough in its grasp of these wider aims of states and global trends to hold the protections of FORB and sexuality and sexual identity in its grasp.[732] In her own work, Ghanea is at pains to underscore that it is "essential to (re)vitalize the synergies between FORB and women's equality in order to advance each of these rights, to be able to address overlapping rights concerns, and to adequately acknowledge intersectional claims".[733]

Keating concludes that "[b]oth homophobic and homoprotectionist approaches to governance are deeply imbricated in processes of colonialism, neocolonialism, and capitalist globalization", and that there is a "close relation of homophobia with formulations of power within and between states that continue to privilege the Global North over the Global South"; in short, "[l]ike homophobia, current homoprotectionist discourses and policies are also deeply linked to and embedded in inequitable global relations of power."[734]

In a less legalistic or scholarly context, the forgoing struggles being waged in and through LGBT rights can be seen plainly in the official UN representations of them: the opposition of culture, religion, traditions and rights; the "traditionalist" State homophobia juxtaposition of "real" human rights and these "abominations" (spectral sexuality); the global economic system of tying human rights' achievements to the support by rich states of poor states:

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[731] Ghanea, *supra* note 243 at 2.
[732] Bielefeldt, Ghanea & Wiener, *supra* note 129 at 384.
[733] Ghanea, *supra* note 243 at 1.
[734] Keating, *supra* note 174 at 248.

> The United Nations and some Western nations are urging African governments to protect lesbian, gay, bisexual and transgendered (LGBT) rights. But recent decisions by the US and UK to tie those rights to foreign funding has had unintended consequences on the continent.
>
> In reaction, homophobia is now on the rise in Africa, and much of it is state-generated. Several African leaders have instructed law makers to stiffen laws against same-sex acts and same-sex marriage.
>
> …
>
> Ambassador Fode Seck of Senegal, as leader of the Africa group at the council, refuted the notion that gay rights are part of global human rights: "We categorically reject all attempts to hijack the international human rights system by imposing social concepts or norms, in particular certain behaviours, that have no legal grounds in the human rights debate. Such an initiative would be perceived as a flagrant disrespect for the universality of human rights".
>
> …
>
> According to Navi Pillay, the human rights commissioner, such incidents constitute a grave human rights challenge that the council has a duty to address. "As always, people are entitled to their opinion," she said. "They are free to disapprove of same-sex relationships, for example … [and] they have an absolute right to believe and follow in their own lives whatever religious teachings they choose. But that is as far as it goes. The balance between tradition and culture on the one hand and universal human rights on the other must be struck in favour of human rights".[735]

This passage illustrates what Weiss and Bosia contend in their volume, that positioning the protection of LGBT people as caught in the see-saw of polarities between culture and tradition on the one hand, and human rights on the other, continues to stunt the analysis and

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[735] "Making waves: Malawi revives debate on gay rights | Africa Renewal Online", online: <http://www.un.org/africarenewal/web-features/making-waves-malawi-revives-debate-gay-rights>, accessed December 18, 2017.

accurate observation of the true vectors of power and influence; occluding state maneuvering in Keating's sense, and, in Orford's, the exercise of international authority—both of which travel along these well-worn, trope-littered pathways. In the complex history of the present, the self-representation of the most virulent forms of homophobia marshaled in national contexts (most often) have their basis in ideologies imported through western religions, in either the colonial or neocolonial contexts, and sometimes both. Neocolonial policies likewise marshal homoprotectionist narratives to consolidate both state power and international dominance, and what at first seems an opposite position, comes, in Keating's analysis, as linked:

> A first link between them is that state homophobic rhetoric and policy help shape the "traditionalist" politics that are the object of state homoprotectionist intervention. Second, although one approach or the other might be rhetorically dominant, both approaches are often concurrently pursued. Finally, both approaches help foster alliances that help to bolster state power.[736]

Keating points to the internal hypocrisy of the states that operate the agenda of homoprotectionism, in much the way one of my informants did above. As he said to me:

> And it's the mauvais foi,[737] of a lot of the arguments behind it … it's so flagrant … Because, quite frankly 20 years ago … actually, 10 years ago! I mean the US in 2004 was voting against…[738]

As Keating explains,

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[736] Keating, *supra* note 174 at 248.

[737] While my analysis of the interviews I did was not based on a discourse analysis method, I feel it is worth noting the deliberate use of the French expression from this native English speaker. It led me to consider if he was invoking Simone de Beauvoir and Jean Paul Sartre's use of the term "mauvaise foi" to mean, in essence "at one and the same time knowing something to be the case and persuading oneself that it is not". See, Terry Keefe, "Simone de Beauvoir and Sartre on Mauvais Foi" (1980) 34 Fr Stud 300 at 301.

[738] Interview of Simon Walker, UNOHCHR, Chief, Section One (28 October, 2016), *supra* note 666.

> While homophobic rhetoric and policy are geared toward engendering the collaboration of dominant groups, homoprotectionism works to garner support from those who hope to put the state in the service of reform, obscuring the ways that the state helped to generate sexual hierarchies and its own stake (sometimes submerged) in their continuation.[739]

Several members of the CEDAW Committee mentioned their own imbrication in the (global) battle between states conducted through these issues, and carried out within the discussions at committee level; most identified a layered, overlapping and ambivalent relationship with the state's positioning of itself and their indebtedness to the state for their nominations:

> All of us are government approved. My nomination was put forward by a ministry.[740]

This is played out in the tensions the Committee members experience between their role as state-approved members of what is at its core an agreement among and between states, and the potential of their role to hold states accountable to advance civil society and activist critiques of state policy and conduct. Committee members are aware of being part of the contradictory statecraft conducted through the instrumentalization of women's rights and the LGBTI human rights debate that we have explored above, and that Halley et al explore as "governance feminism".[741] As Sally Merry has noted, "[t]he human rights system challenges states authority

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[739] Keating, *supra* note 174 at 248.
[740] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.
[741] Halley et al, *supra* note 2.

over their citizens at the same time as it reinforces states power: both agent of reform and culpable if not a direct violator.[742] As Silvia Pimentel discussed with me:

> I am here just because the Brazilian NGOs indicate my name to the government. … So, what I would like to say is that really I don't know if I have, ahem, a wrong perspective because I feel myself as NGO, but I believe really that the main force, yes? here in the United Nations human rights system, that this what goes forward not only in the case of the CEDAW but the other committees on human rights...the nine committees um is the force the presence in each tied more close of the NGOs…and this is interesting. Because we know that… this received direct responses from the states. Because there are some states that really are very [uncomfortable] by the presence of the NGOs. And we listened the frequently [frequently hear that] that we should be very careful with alternative sources ... so it's interesting this how to say, tension between … The State parties … And the civil society … but of course not all state parties, not all state parties. Some state parties; it's interesting. Interesting. And this reflects of course inside the committee sometimes.[743]

Or, as one member put it, more simply:

> On the Committee, we go into blocks for and against, with those who broker the discussion between.[744]

The interviews with informants confirm that there is little doubt that intersectionality is experienced as one of the vectors along which these global dynamics travel. We have seen that those who use it reflect on its existence along multiple lines: as conceptual tool, as conduit of global debate and contention, as consolidator of existing practice and the advancement or

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[742] Sally Engle Merry, *Human Rights and Gender Violence: Translating international law into local justice* (University of Chicago Press: Chicago, 2006), at 2.
[743] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.
[744] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.

extension of the same in new ways. It is likewise a legitimation in all these contexts and put to all these uses, for the articulation of new areas of rights protections and to hold states accountable by national actors.

> Intersectionality and GR 28 give me a threshold I can push back with my government. We can use our government's ratification to say 'you must find a place within [Religion] not to exclude'. It gives us leverage.[745]

This mirrors Merry's findings that national women's groups find that international human rights "provide social movements a kind of global law 'from below': a form of cosmopolitan law that subalterns can use to challenge their subordinate position".[746] The complex chemistry between states, national civil society groups, INGOs, and the CEDAW Committee members that is evidenced during the state reporting sessions and during individual communications that I have referenced in this chapter, reveals a microcosm of the broader themes explored in the literature, including that by Merry, Orford, Weiss and Bosia, as well as Keating. The exchanges I am scrutinizing reveal the vectors of global inequality and their discontents, the instrumentalization of human rights, the identification of state homophobia and state homoprotectionism and all that this entails; in short, the reinterpretation of past obligations of the treaty, gathered under new nomenclature and put to new uses in the present. For instance, in my interview with her, Ruth Halpern-Kaddari traces some of these byways:

> I clearly remember that the critique brought by NGOs, that country which I don't remember what it was but it was exactly based on

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[745] *Ibid*.
[746] Sally Engle Merry et al, "Law from Below: Women's Human Rights and Social Movements in New York City" (2010) 44:1 Law Soc Rev 101 at 1.

> […] that the law, or even the constitution...like it demanded bringing separate cases—discrimination based on "A" discrimination based on "B"...and did not allow the concept of one claim, which is the intersection...[747]

The question that remains is what light can this complex deployment of intersectionality's life at CEDAW shed on the decisions made by committee members with respect to States parties' obligations? Are there material impacts one can point to that result from CEDAW's adoption of intersectionality? Acknowledging the imperial phantoms, facile polarities, global inequities and legal vagueness that travel along with intersectionality in its life as international human rights law, what can we expect from its implementation? In the next chapter, I turn to the decisions made by the CEDAW Committee in light of intersectionality's implementation as a framing approach to Article 2 of the treaty, which outlines states' obligations.

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[747] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.

5 Intersectionality and Consciousness of Itself in the CEDAW Jurisprudence

> Take for example the communication I sent under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. I died in court that day the rapist was acquitted. But the knowledge that there was recourse to justice outside of Philippine courts brought me back to life. … In subsequent years there was a series of exchange[s] between my lawyers and representatives of the government of the Philippines. …The official stand of the Philippine government was that it was not obligated by the views of CEDAW… .[748]

> [I]nternational law has long been a methodologically unique and theoretically engaged field of law. It articulates a horizontal, rather than vertical, normativity in which there is no universal sovereign. Its traditional sources bind it to the reality of inter-state relations, yet it is also meant to constrain and configure those relations. Dispute resolution in international law inevitably also raises questions about the grounds of jurisdiction and the particular normativity that is to apply in a given situation.[749]

> National courts continue to struggle on how to properly evaluate and take account of the qualitatively different intersectional discrimination […]. At the same time, the CEDAW Committee has quietly been transcending these challenges and pioneering a promising approach to protecting women with multiple and intersecting identities against discrimination.[750]

> For us the concept [of intersectionality] is extremely useful because it helps understand that... it's not just an addition of

[748] Karen Tayag Vertido, "Karen Tayag Vertido on using the Optional Protocol to CEDAW", (14 March 2013), online: *Optional Protoc CEDAW Karen Vertido V Philipp* <https://opcedaw.wordpress.com/category/communications/karen-tayag-vertido-v-the-philippines/>.
[749] Orford & Hoffmann, *supra* note 191 at 3.
[750] Campbell, *supra* note 247 at 483.

> problems and discrimination, I mean, you sort of add this and that [otherwise].[751]

5.1 Introduction

The extent to which a profound reworking of the limitations of women's international human rights that I have traced in previous chapters has translated into the knowledge and practice of the Committee's decision-making, is a matter for examination to which I now turn.

In order to explore the Committee's decision-making in light of intersectionality, I note its transformation from the various iterations explored in previous chapters—where intersectionality appears as discourse in UN documents (Chapter 3), as a metaphor for domestic human rights critiques (Chapter 1), as a concept in sociological and activist legal analysis (Chapter 1), and as an heuristic device for theoretical examination of the dynamics of power (Chapters 1 and 4)—to its role as a legal tool in international jurisprudence. To clarify the role intersectionality plays at CEDAW, I will briefly recapitulate and augment matters referred to in Chapters 2 and 3, regarding the decision-making powers of the Committee. The comments, pronouncements and decisions of the Committee are both circumscribed by the legal bounds of the treaty system and extend legal meaning and authority through their role as authoritative interpretations in international human rights law.

[751] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.

5.2 Background to treaty body decision-making

Like other treaties, CEDAW is constructed of a self-limiting proposition: the international human rights treaty system is an agreement among states to be held to the ratified terms of each treaty by a fraternity of mutual obligation, legally accountable to each other only by each other. As we saw in the previous chapter, international law is "a form of law conceived to represent, constitute, and govern the modern system of territorially based nation-states, [and has] has always been seen both as a function of the powers that be and as governing those powers…".[752] In this context, the treaty committees play a role as both authority on the interpretation of the treaty and an appeaser to states parties, encouraging the fulfillment of the obligations. The ultimate legal authority that binds states is one of mutual agreement between the states themselves.

In Chapter 2, I explored the limits to the universality of obligations as evidenced by the reservation system, which allows states to reserve those aspects of a treaty that it determines do not apply to its context. Despite legal limits on the nature of those obligations, recourse by the Committee to enforce those limits are circumscribed to dialogue and "constructive engagement", a notion and approach to international human rights enforcement explored further below. In the previous chapter, I explored the role of the individual committee members charged with the responsibility to administer this form of law, and, within its terms, oversee states' compliance; I outlined their relationship to

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[752] Orford & Hoffmann, *supra* note 191 at 3.

state authority and how intergovernmental and global politics affect their decision-making and independence.

Nonetheless, the Committee's pronouncements on the proper interpretation of the treaty play a quasi-judicial role, with the mechanism for individual communications in particular, creating human rights jurisprudence (if practically non-binding).[753] The Committee's interpretation of the treaty is collectively made up of the "language of the article in question and the general recommendations [GRs], concluding observations [COs] and case law under the Optional Protocol, through which the Committee has interpreted and applied the Convention".[754] While traditional legal hierarchy sees the individual communications as the authoritative or jurisprudential aspect of treaty decision-making, such legalistic valorizations obscure the central role that social context and public policy outcomes—or systemic change—play in distinguishing the advancement of intersectionality from other approaches to discrimination. Since the Committee placed its interpretation of intersectionality at the heart of state obligations as set out in Article 2 of the treaty, concluding observations and special inquiry, which lie at the heart of the "constructive dialogue" process (explained further below), will therefore form a measure of the impact of the treaty's understanding of intersectionality. Thus, it is to a mix of these pronouncements I will turn in determining the place that intersectionality now occupies at CEDAW.

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[753] "OHCHR | Glossary of technical terms", online: <http://www.ohchr.org/EN/HRBodies/Pages/TBGlossary.aspx#cd>.
[754] Freeman, *supra* note 365 at 2.

As I set out in Chapter 2, at the time of this writing, 189 countries have ratified CEDAW, while 109 have signed its 1999 Optional Protocol.[755] This latter fortification of the treaty was seen to address its relative weaknesses in comparison to other human rights treaties, and brought it in line with other human rights mechanisms, by allowing those individuals or groups of individuals residing in states that have signed, ratified or acceded it to bring forward claims once domestic remedies have been exhausted. The seven UN member states that have not ratified or acceded to the convention are Iran, Nauru, Palau, Somalia, Sudan, Tonga, and the United States (which signed the Convention on 17 July 1980).[756] Beyond the adjudication of individual cases, it additionally grants the Committee the power to conduct inquiries into situations of grave or systematic violations of women's human rights.[757]

As with all UN bodies excepting the Security Council, enforcement of its terms is restricted to the moral suasion inherent in being part of an international community, and the relative power that inheres therein.[758] Individual representations and the conclusions and recommendations the Committee draws from them, are the case law of the treaty,

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[755] "Status of Ratification Interactive Dashboard", online: *OHCHR Dashboard* <http://indicators.ohchr.org/>.
[756] *Ibid*.
[757] *Ibid*.
[758] This is augmented by the limited circumstances in which the General Assembly is able to order enforcement under the Uniting for Peace Resolution. "General Assembly resolution 377(V) is known as the Uniting for peace resolution. Adopted in 1950, the resolution resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility to act as required to maintain international peace and security..., the General Assembly shall consider the matter immediately with the view to making recommendations to Members...in order to restore international peace and security. If not in session, the General Assembly may meet using the mechanism of the emergency special session. To date, 10 emergency special sessions have been convened". See Dag Hammarskjold Library, "What is the Uniting for Peace Resolution?", (26 April 2018), online: <http://ask.un.org/faq/177134>.

although they are neither the only, nor the primary, means through which States parties are held to account for their adherence to the terms of the treaty; rather:

> Countries who have become party to the treaty (States parties) are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form of concluding observations.[759]

Put another way, "the primary role of all the committees … is to review the reports submitted periodically by State parties in accordance with the treaties' provisions".[760] In this respect, the notion of "constructive dialogue" characterizes the Committee's engagement with States parties: all signatories are obligated to send high level state representatives to the international forum overseen by the Committee of experts that administers that the treaty to attend "a rigorous, but constructive, dialogue on the state of human rights implementation in their countries".[761]

In this process with the Committee of experts, States parties submit a report in advance; "[t]he reports must set out the legal, administrative and judicial measures taken by the State to give effect to the treaty, and should also mention any factors or difficulties encountered in implementing the rights."[762] The Committee examines the report and structures its questions based on this report in relation to the past COs, which would have

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[759] "OHCHR | Introduction of the Committee", online: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>.
[760] *United Nations Human Rights Fact Sheet 1* (Office of the High Commissioner for Human Rights, 2012).
[761] *United Nations Human Rights Fact Sheet 1* (Office of the High Commissioner for Human Rights, 2012).
[762] *Ibid*.

entailed recommendations for implementation towards "progressive realization" of compliance with the treaty, testing for advances on past concerns. Progressive realization is a principle "requiring that there must be a continuous, gradual improvement in the realization of … rights by virtue of taking concrete steps to the maximum of their available resources"; its grounding as a principle is traced to Article 2 of the ICESAR.[763]

The Committee also relies on the "alternative" reports and dialogue with civil society organizations (CSOs), where active, from the national context of the reporting state. Civil society is defined as "organizations and individuals that voluntarily engage in public participation and action around shared interests, purposes or values that are compatible with the goals of the United Nations".[764] Often they are human rights defenders, NGOs, and individuals. Where there are no active civil society groups, and/or where there is repression of the same, alternate processes are put in place, for instance accepting reports through INGOs such as Amnesty International, and providing anonymity for national activists and NGOs by holding in-camera meetings without naming sources, a process I witnessed in my research during the fall 2016 session of CEDAW with the reporting process for Belarus. As mentioned in the previous chapter, I attended the opening of the 65th Session of CEDAW (October 24–November 18, 2016). The Committee's concluding observations to the Belarus report, explored below, make express reference to the dangerous context for human rights defenders and NGOs.[765]

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[763] H Victor Condé, *A handbook of international human rights terminology*, 2nd ed.. ed, Human rights in international perspective ; v 8 (Lincoln: University of Nebraska Press, 2004) at 207.
[764] *Civil Scociety Space and The United Nations Human Rights System: A Practical Guide for Civil Society* (United Nations Human Rights Office of the High Commissioner, 2014) at 3.
[765] *Concluding Observations on the Eighth Periodic Report of Belarus*, CEDAW /C/BLR/CO/8 (2016).

Meghan Campbell's work has shown that "state report and civil society organization submissions to the CEDAW Committee in the periodic reporting process are influential in ensuring an issue is included in the concluding observations".[766] Non-governmental organizations are not parties to the treaty, and so their role is restricted to contributing

> to the discussion of lists of issues, lists of issues prior to reporting, as well as to the constructive dialogue with the State party concerned, and to the adoption of recommendations. Their submissions enable committees to put the human rights situation in the State party in context. These organizations also follow up the national implementation of the recommendations of treaty bodies and can report on its success or failure.[767]

Constructive dialogue acknowledges, "the treaty bodies are not judicial bodies (even if some of their functions are quasi-judicial), but are created to review the implementation of the treaties".[768] In short, the treaty bodies have no ability to compel states to implement their recommendations except through a dialogue that can escalate in tone and record states' implementation shortcomings in concluding observations.

5.3 Method for selecting CEDAW decisions

In exploring what patterns there are to be traced through the decisions of the CEDAW Committee that relate to its adoption of intersectionality, Meghan Campbell's

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[766] Campbell, *supra* note 247; Meghan Campbell, *Gender-Based Poverty: A Study on the Relationship between Gender-Based Poverty and CEDAW* (DPhil Thesis, Oxford University, 2014) [unpublished].
[767] note 762.
[768] "Glossary of treaty body terminology", online: *Hum Rights Treaty Bodies* <http://www2.ohchr.org/english/bodies/treaty/glossary.htm>.

work is ground breaking. In her 2015 piece referenced elsewhere in this dissertation,[769] Campbell assesses CEDAW's application of intersectionality through its general recommendations, inquiry procedure, individual communications and COs. She specifically does so through examining how the Committee deals with the intersection of poverty, race and gender. She concludes, "there are a number of inconsistencies in how the CEDAW Committee applies intersectional discrimination".[770] She says by way of example that "even when the CEDAW Committee expresses concern on women's intersectional discrimination, it does not consistently follow this up with a tailored recommendation".[771] In her conclusions, she calls for, among other things, a general recommendation on intersectionality, as part of a more focused approach to directing states in this way. It is not clear why Campbell does not consider GR 28 to be "on" intersectionality; perhaps it is because of its thin theoretical grounding. Nonetheless, since she has written her piece, additional GRs, as well as COs and individual communications, have entered the record.

Given my research directly with committee members, and the augmented record of interpretation, I will turn my attention to this new terrain with questions similar to Campbell's but tempered by intervening events and information. First, as background, I will explore the embellishment of the Committee's understanding of intersectionality as revealed in the new GR 35. I will follow this with a method that uses a search-based examination of all COs and individual communications since 2010 that deal with the

[769] Campbell, *supra* note 247.
[770] *Ibid* at 498.
[771] *Ibid* at 497.

terms “intersectionality”; “multiple discrimination”; “compound discrimination” and “aggravated discrimination”.[772]

As we have seen from the literature explored in relation to the specific legal connotations of intersectionality, these proxy terms are often used synonymously with it. In light of the striking role played by the extension of gender protections to the categories of gender identity and sexual orientation in both the augmentation of intersectionality in and since GR 28, and in the minds of and dynamics between the CEDAW decision-makers, my analysis will also track the search terms “sexual minorities”, “sexual identity”, “sexual orientation” and related terms, such as “LGBTI”, “lesbian” and “bisexual”. It is worth noting that, perhaps because of the novelty of the express inclusion of these rights in the protection of women under the concept of intersectionality, sexual identity, sexual orientation and sexual minority rights were not identified in the Individual Communications of CEDAW that I reviewed; they rather come up in the COs of the Committee. This makes sense since the constructive dialogue with States parties is much more fluid and dynamic process, fed by the on-the-ground conditions identified by activist groups and NGOs, whereas individual communication, like litigation, is a multi-year process, where sometimes a decade may have passed since the original harm being identified was alleged to have taken place. As the recognition of these rights is still emerging, the infractions would not have been identified a decade earlier.

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[772] Bielefeldt, Ghanea & Wiener, *supra* note 129 at 321.

Where method and substance come together is in examining how these terms, as the Committee employs them, bear up to the conceptual, rather than purely semantic distinctions I have laid out in previous chapters. Of particular interest will be the Committee's ability to account for structural discrimination and remediation in its application of the terms, as I found this a central aspect of intersectionality's unique contribution to anti-discrimination law. In light of this core intersectional marker, I will be asking if the Committee is able to offer a focus that moves from the grounds-based and comparator-ensnared notion of additive discriminations, and instead recasts discriminations as mutually constitutive.

Following the analyses carried out throughout the other chapters of the dissertation, I additionally will be watchful for the ways that the shadow of imperialism persists in deliberations and decision-making, making special note of the work culture is made to do in the decisions I am analyzing. In this way, I will assess the degree to which intersectionality is an answer to Orford's question guiding this dissertation.

5.4 CEDAW from 2010 onward

As we have explored, the international legal method of creating precedent and building law from it shares some basic structures with the principles that inhere to common law. In the case of IHRL, the committees charged with administering the obligations under the treaty build on their prior *de facto* decisions to create guidance for the future interpretation of states obligations under the treaty document. As I cited earlier,

this has been characterized as a “broad remedial approach to interpretation”,[773] or in Orford’s less technical and more critical sense, an integration of “pre-existing but dispersed practices”[774] into “a coherent account”[775] that justify and articulate its authority in the present. I will test the employment of the concepts noted above in the individual communications that come after GR 28, which introduced intersectionality as an approach to Article 2—that is as a core aspect of state obligations. Where the interviews of committee members speak directly to the types of decisions I am examining, they too will be examined and weighed. At the conceptual level, the most express development of the Committee’s reflections on intersectionality since 2010 come in the form of an additional General Recommendation, GR 35. I will consider this first, as it articulates the Committee’s consciousness of itself in relation to its decision-making and authority, casting its own retrospective consideration of how its current decisions under the banner of intersectionality consolidate what it has always already done.

5.5 General Recommendation 35

Having had the interval since the writing of GR 28 in 2010 to reflect on the role of intersectionality in its decision-making, the Committee has issued the following summary of its self-assessment of the meaning of intersectionality in its jurisprudential deliberations within the context of an overall update on its seminal GR 19, on violence against women. The Committee’s conclusion on this matter builds on GR 28 significantly, stating that their subsequent work,

[773] Byrnes, *supra* note 209 at 61.
[774] Orford, *supra* note 27 at 189.
[775] *Ibid* at 103.

> …confirms that discrimination against women is inextricably linked to other factors that affect their lives. The Committee's jurisprudence highlights that these may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical remoteness and stigmatisation of women fighting for their rights, including human rights defenders.[776]

The elaboration of intersectionality in this GR advances and details the intersections under consideration considerably since the 2010 guidance of GR 28, recalling the questions in Chapter 1 about the ontological and epistemological scope of what is captured by an intersectional approach. This formulation of the intersections under consideration in the above-sited article risks, in the words of one of the CEDAW members, adding “this and that”.[777]

As Yuval-Davis cautioned, while it is true “that each social division has a different ontological basis, which is irreducible to other social divisions”, it is equally important to “acknowledge that, in concrete experiences of oppression, being oppressed … is always constructed and intermeshed in other social divisions”.[778] She warns against a “fragmentation and multiplication of the wider categorical identities rather than

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[776] note 282, para 12.
[777] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.
[778] Yuval-Davis, *supra* note 43 at 195.

[accounting for] more dynamic, shifting and multiplex constructions of intersectionality”.[779]

Human rights defenders and those caught up in armed conflict surely experience discrimination, but for properties that are not inherent to their natality,[780] and are therefore not experiencing discrimination that is of the same ontological inescapability and intersectional categorization as the properties of being racialized, born to a caste, or LGBTI. Does this laundry list of personal characteristics proffered in GR 35 rise to Yuval-Davis’ challenge above, to account for the “dynamic, shifting and multiplex constructions of intersectionality”?[781] Does it weaken the concept of human rights as a legal protection to expand its contextual reach? Does discrimination ultimately require a “ground” to make sense of its impact and portent, such that we can distinguish between that which is an aspirational policy outcome and that which is a legal, and therefore justiciable concept?

These matters came up in my discussion with my informants in several ways, but most precisely in the interview with Simon Walker:

> I can see the risk with the extending grounds...[but I see it] slightly differently…Obviously…the reason is, even if someone is suffering discrimination, then whatever the

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[779] *Ibid*.
[780] The concept of natality is central to Arendt’s understanding of the difference between the citizen and the ontological human, stripped of culture and thus protected in the original Universal Declaration of Human Rights. “The same essential rights were at once claimed as the inalienable heritage of all human beings and as the specific heritage of specific nations”, in essence, limiting universality to its condition of being “bound by no universal law and acknowledging nothing superior to itself”. Hannah Arendt, *The Origins of Totalitarianism*, 1st ed (New York: Harcourt, Brace, 1951) at 230.
[781] Yuval-Davis, *supra* note 43 at 195.

> grounds is then it's … that's the focus. It's a differential unjustifiable treatment… .
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> I could see the problem with the grounds … I mean I don't have a problem with including age, for example, disability has been added, sexual orientation has been added. There is a number … gender identity has been added. I worry maybe a bit more when people start adding … things which might not be inherent to the person, I know that's a wobbly concept but, I'm trying to think of an example. I mean there is a tendency, let's say, particularly in western societies that everything becomes discrimination. You know, discrimination against cyclists or something like that. It just happened that you decided to take your bike today rather than your car, you know, and that I think is weakening the concept.[782]

In the context of CEDAW, which sets a bar of human rights protections and achievement through standards of law and policy to which states essentially hold themselves and others to account, the hard line between what is a legal concept and what is a preventative or ameliorative act of public policy is less related to a discernable "ground" than it is to an overall regard for the state of human rights protection, and the ability of all to access to the benefits of society. As Walker says, this has "less to do with the grounds of discrimination" per se, and rather, with the best way to "avoid violation" of the right in the first place.[783]

In this way, CEDAW's formulation in GR 35 begins to set out the social context or "background" discrimination we saw Crenshaw draw the UN's attention to in cases of overt gross human rights violations: that is, recasting discrimination as a social process,

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[782] Interview of Simon Walker, UNOHCHR, Chief, Section One (28 October, 2016), *supra* note 666.
[783] *Ibid*.

wherein an individual's experience is unintelligible without the context of complex systemic and group disadvantage and exploitation. The concern with grounds over context characterizes discrimination as an aberration from the regular functioning of (assumedly non-discriminatory) social and institutional relations, framing it as a singular, discernable, legal phenomenon.

In Chapter 3, I characterized the formulation of intersectionality in GR 28 Article 18 as risking a neutering of the potency of intersectionality by characterizing it as an additional event of discrimination based on multiple and specific grounds, identities or vulnerabilities. In contrast, through the academic literature, we have seen that rather than being merely an additional ground, intersectionality is understood as an approach, a conceptualization and a frame of analysis that operates on many levels to challenge the very basis of traditional grounds-based conceptions of discrimination. From Crenshaw we learned that an important aspect of the intersectional turn is that it requires us to consider the structural and group identity aspects of discrimination, in addition to the vulnerabilities that attract the overt discrimination and marginalization of individuals. To Crenshaw, these form the background systems that sustain and maintain systems of subordination in a dynamic and ongoing way.

In GR 35, CEDAW sets its sights on these systems. That is, the Committee is attempting to capture, in Crenshaw's words, "both the structural and dynamic consequences of the interaction between two or more axis of subordination", as well as "the manner in which racism, patriarchy, class oppression and other discriminatory systems create background inequalities that structure the relative positions of women,

races, ethnicities, classes, and the like”. [784] As I explore below, CEDAW’s grouping of conditions in GR 35 demonstrates a more advanced reckoning with the deeper analyses possible through intersectionality employed as an analytic tool by addressing “the way that specific acts and policies create burdens that flow along these axes constituting the dynamic or active aspects of disempowerment”.[785] This is evident throughout the articles of the GR, which I explore in some detail below.

In keeping with the thematic focus of this GR, the Committee reflects on the specific integration of intersectionality into its understanding of violence against women —or what it now refers to as gender-based violence:

> Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, so appropriate legal and policy responses are needed.[786]

Despite the disconnect I previously traced between CEDAW’s development of intersectionality and Crenshaw’s, the framing of intersectionality in this article echoes Crenshaw’s early accounts of violence against women from an intersectional perspective in the national context, as explored in Chapter 1: “the location of women of colour at the

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[784] Crenshaw, *supra* note 67 at 8.
[785] *Ibid*.
[786] note 282, para 12.

intersection of race and gender makes our actual experience of domestic violence, rape and remedial reform qualitatively different from that of white women".[787]

The shift in the language from violence against women to gender-based violence in this GR, keeps pace with semantic changes elsewhere in the UN, but additionally, CEDAW specifies that this change allows them to focus attention on the structural aspects of violence. In paragraph 9, the Committee remedially expands its understanding of violence against women with the following:

> The concept of 'violence against women' in general recommendation No. 19 and other international instruments and documents has emphasised that this violence is gender-based. Accordingly, this document uses the expression 'gender-based violence against women', as a more precise term that makes explicit the gendered causes and impacts of the violence. This expression further strengthens the understanding of this violence as a social—rather than an individual—problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors.[788]

In service to a thicker definition of intersectionality, we see the pattern I have traced throughout this dissertation of putting an old concept to new purpose in CEDAW's articulation of its consciousness of itself. We have a clear articulation of violence, and therefore of the discrimination it represents, being a social, rather than individual problem, requiring comprehensive responses beyond individual events. In the following paragraph (10), this positioning of gender as a category that extends the view of structural

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[787] Kimberlé Crenshaw, "Beyond Racism and Misogyny" in M Mastuda, C Lawrence & Kimberlé Crenshaw, eds, *Words Wound* (Boulder, CO: Westview Pres, 1993) 3 at 3.
[788] note 282, para 9.

subordination is further articulated by categorizing gender-based violence as a "fundamental social, political and economic means by which the subordinate position of women with respect to men … is perpetuated".[789] Moreover, in answer to the question I posed about the relation of the "identity" traits CEDAW listed as part of intersectionality in the GR above, the following article expressly opens up the relation of women's intersectional identities to structural violence with phrasing that is worth quoting in full:

> Gender-based violence against women is affected and often exacerbated by cultural, economic, ideological, technological, political, religious, social and environmental factors, as evidenced, among others, in the contexts of displacement, migration, increased globalization of economic activities including global supply chains, extractive and offshoring industry, militarisation, foreign occupation, armed conflict, violent extremism and terrorism. Gender-based violence against women is also affected by political, economic and social crises, civil unrest, humanitarian emergencies, natural disasters, destruction or degradation of natural resources. Harmful practices and crimes against women human rights defenders, politicians, activists or journalists are also forms of gender-based violence.[790]

Here CEDAW appears to face, head on, criticisms of feminist approaches to international law that contribute to the obfuscation of global inequalities and the structural sources for women's intersectional subordination. Recalling Orford's critique that "[a] feminist analysis of international law that focuses on gender alone, without analysing the exploitation of women in the economic 'South', would operate to reinforce

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[789] *Ibid*, para 10.
[790] *Ibid*, para 14.

the depoliticized notion of difference that founds the privileged position of the imperial feminist,[791] we can be encouraged by the manner in which these wider economic issues are explicitly articulated in GR 35. The mantle of intersectionality, as it is operating in the context of GR 35, appears to be facilitating an expansion of the field of the CEDAW Committee's conceptualization of (women's) international (human rights) law such that it is beginning to glimpse "the preservation and maintenance of a deeply unjust global order,"[792] if not (yet) its own role in it. In GR 33, CEDAW recognizes the role of law in the intersectional subordination of women domestically.[793]

With these two potential building blocks framed within an elaboration of an intersectional approach to women's human rights—a recognition of an unjust global order and the recognition of the role domestic legal frameworks play in maintaining women's oppression—the Committee appears both so close and so far from a recognition of its own structural positioning within the intersectional discrimination it seeks to unearth. Despite the contested nature of the concept and its uncertain application as I have traced so far, at least one of my informants believed that GR 28 paved the way for a more fully realized understanding of intersectionality in GRs 33 and 35:

> Since I joined, 28 and intersectionality is gaining. GR 33 also reflects GR 28 article 18. [General Recommendation] 28 gives us license in the drafting of 35 for non-derogation.

[791] Orford, *supra* note 104 at 285.
[792] Buchanan, *supra* note 118 at 445.
[793] *General recommendation No. 33 on women's access to justice*, CEDAW/C/GC/33 (2015), paras 9 & 10.

> … Intersectionality compels you to do that deeper analysis.
> It helps recast the context.[794]

Citing intersectionality as authority in this way, assisted this racialized committee member to articulate concerns that both her state, and her fellow committee members had previously dismissed —in particular, the extension of protections to LBT women.

Turning to the deliberations and decisions of the Committee, we will trace this claim through the main activities of their interpretation, that is first through the concluding observations; then the individual communications, which most closely approximate what is traditionally understood in law to be jurisprudence; and then through a particular ground-breaking intersectional inquiry into grave and systemic violations which the Committee is authorized to initiate under Optional Protocol Article 8.[795]

This latter inquiry brings to bear the confluence of an intersectional approach in the service of a critical analysis of neocolonial, systemic and racialized discrimination carried out by Canada, a state from the Global North that is generally seen to be a champion of gender protections in international law. As such, it goes some distance to answer Orford's call to cease a pattern of savior white feminism implicated in the extension of empire,[796] replacing it with an international approbation of a colonial state denying basic gender protections to an oppressed Indigenous population within its

[794] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.
[795] *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP8/CAN/1 (2015).
[796] Orford, *supra* note 337.

borders. That the inquiry was expressly prompted by the request of domestic activist groups further evidences the links I traced earlier between the movement-based origins of intersectional critique and its uptake at CEDAW.[797]

5.6 Individual communications post-2010

As explored earlier in this chapter, individual communications are authorized under the Optional Protocol of CEDAW. They most closely approximate the jurisprudence of domestic systems, in that they allow for fact-specific interpretations of the treaty in comparison to claims made against State parties to the treaty by individuals claiming discrimination within the treaty's terms after having exhausted domestic remedies. Like domestic case law, these cases take on the name(s) of the claimants, or as they are known in international human rights law, their authors. Decisions issued by the committees on individual communications are considered authoritative interpretations of the treaty's articles and are most frequently categorized as its "jurisprudence".

In a broad-based approach to discerning the frequency of the terms associated with intersectional analysis in recent UN discourse explored in previous chapters, I conducted a search of the UNHROHC jurisprudence database. This indicated a broad deployment of the term "multiple discrimination", with 37 instances concentrated in the individual representation findings of CCPR, CEDAW, CERD and the newly ratified CPRD.[798] Both cases that were found to be inadmissible—that is, not considered on their

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[797] The CEDAW Committee names the Feminist Alliance of International Action (FAFIA), and the Native Women's Association of Canada (NWAC) for presenting evidence that prompted the inquiry: note 796, s II (3).
[798] Human Rights Office of the High Commission United Nations, "Jurisprudence", online: <http://juris.ohchr.org/search/results/3?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0,>.

merits but rather technically disallowed from being heard or adjudicated by the Committee—and those cases for which a full hearing and decision were rendered, were included in this count. The states represented in the data range from Canada to Uruguay. A similar search for the use of the term intersectionality in the same database turns up a mere six references, the chronological first of which is in 2000, at CPRD. In that context, it was a word repeated in the decision of non-admissibility but quoted as submitted by the claimant, who saw his situation as arising at the "intersection of political opinion, race and religion".[799]

The Committee itself provides a survey of its deployment of intersectionality post GR 28 throughout GR 35. I will engage with this catalogue as an additional window into the committee's self-understanding of its deployment of intersectionality, recalling that sometimes what at first seems a banal observation—intersectionality "might be used as its proponents were suggesting it should be used"[800]—is also a reflection of the Committee's "consciousness of itself". Put another way, CEDAW's catalogue of intersectionality's appearances in its previous decisions can reveal its method of consolidating and reassembling an intersectional approach over time and retrospectively. Taken both at face value and eyed critically, it is a glimpse into the Committee's articulation and justification of its understanding of the concept of intersectionality in relation to its authority to determine the scope of gender protection and state obligation in

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[799] *Nuri Jazairi v. Canada*, CCPR/C/82/D/958/2000 (26 Oct 2004, 2000), para 3.3.
[800] Orford, *supra* note 206 at 169.

international human rights law. This fits squarely within the Orfordian approach to critical international legal method.

With respect to individual communications, the Committee draws attention to *Jallow v. Bulgaria*, 2012;[801] *S.V.P. v. Bulgaria*, 2012;[802] *Kell v. Canada*, 2012;[803] *A.S. v. Hungary*, 2006;[804] and *R. P. B. v. the Philippines*, 2014,[805] which I will examine in relation to the earlier famous GBV case of *Karen Tayag Vertido v. the Philippines*, 2010.[806] It also draws attention to *M.W. v. Denmark*, 2016,[807] which I will explore below. I will briefly explore the decisions in these cases, before moving on to consider the concluding observations and then Special Inquiry, again following and updating those singled out by the Committee with more current decisions as well as decisions arising from reports I witnessed in 2016 during the 66th Session. As Canada's inquiry follows GR 28, I will concentrate on this from among the two inquiries the Committee has conducted.

5.6.1 Intersectionality as a factor in the individual communications decisions of the CEDAW Committee

Recalling that "jurisprudence" proper—while rightfully a contested notion[808]—is, in the international human rights context, restricted to individual communications, I

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[801] *Isatou Jallow v. Bulgaria*, CEDAW C/52/D/32/2011 (Communication No. 32/2011, 2012).
[802] *S. V. P. v. Bulgaria*, Communication No 31/2011 (12 October 2012 [CEDAW/C/53/D/31/2011], 2010).
[803] *Kell v. Canada*, CEDAW C/51/D/19/2008 (Communication No. 19/2008, 2012).
[804] *A.S. v. Hungary*, CEDAW/C/36/D/4/2004 (Communication No. 4/2004, 2006).
[805] *R.P.B v. the Phillipines*, CEDAW/C/57/D/34/2011 (Communication No. 34/2011, 2014).
[806] *Karen Tayag Vertido v. the Philippines*, CEDAW/C/51/D/19/2008 (Communication No. 19/2008, 2012).
[807] *M.W. v. Denmark*, CEDAW/C/63/D/46/2012 (Communication No. 46/2012, 2012).
[808] See especially a standard IHRL text where the editors state that "the rules and standards of contemporary human rights are expressed not only through states' constitutions, laws and practices, but also through treaties and international custom, as well as work products [...] of diverse international

began my search for authoritative interpretations of intersectionality in CEDAW through the jurisprudence database provided by the Office for the High Commission on Human Rights. Perhaps due to a cataloguing error,[809] the only instance of the term intersectionality by name in CEDAW's jurisprudence as catalogued in the UN's jurisprudence database, cropped up in a 2016 dissenting opinion (a rare occurrence), in this case by Patricia Schulz (Switzerland), in *M.W. v. Denmark*.[810] While the opinion is a dissent, it is worthy of our attention first because it is the only occurrence of the word intersectionality, and second because it articulates a desire to limit the Committee's conceptualization of intersectional discrimination. In the space between the majority opinion and the dissent, the indeterminacy of the concept and role of intersectionality at CEDAW gets traced. The dissent echoes concerns Schulz shared with me regarding the possibility for intersectionality to blur rather than sharpen the Committee's focus.

Schulz finds, in a complex custody case involving two different national legal systems (Denmark and Austria) that had made contradictory custody decisions, that intersectional discrimination was not present, and that having it as a frame of reference, far from compelling the Committee to a deeper analysis, as referenced by another committee member above, propelled them to widely miss the mark. The majority held

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institutions and organs". Henry J Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 3rd ed (Oxford: Oxford University Press, 2007) at 2.
[809] The search engine tools on the UN site traced only this one instance of the word intersectionality. However, given other cataloguing anomalies traced throughout this dissertation, it seems possible that the way the documents were saved blocked full search capacities. This made the theoretical grounding of the Committee's own catalogue not only a sound but also a practical choice for tracing the deployment of the concept.
[810] note 808, para 46.

that the author (in international human rights, claimants are called authors of the petition) "suffered discrimination as a foreign mother", citing its recollection "that discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them".[811]

In her dissent, Schulz does not hold back: she states, "not every case of poor treatment of a female claimant amounts to discrimination based on sex, or foreign nationality or the intersection of both grounds".[812] Schulz appears in this paragraph to pivot back to a grounds-based analysis in her interpretation of intersectionality. Her main objection to the majority in this case is on the grounds of admissibility or what in Common Law would be the doctrine of forum *non conveniens*. Nonetheless, while she believes the case should not have been heard at all by the Committee on legal grounds, her comments regarding the occurrence or not of discrimination can be viewed as an attempt to provide guidance as to the boundaries of an intersectional interpretation. She argues the facts in this case did not support a finding of discrimination, but rather it was a "tragic case" with bad (legal) behaviour on all sides. The majority, she argues, overstepped, and the fact that they found that "'the custody of a minor child of tender age' amounts to a case where the 'general public importance rule' should apply is disconcerting, and does not relate to sex-based discrimination".[813]

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[811] *Ibid*, para 5.8.
[812] "Opinion of Committee member Patricia Schulz (dissenting)." *Ibid* at 19.
[813] "Opinion of Committee member Patricia Schulz (dissenting)." *Ibid*.

Schulz's is the first post-2010 clear articulation from the Committee of 'what intersectionality is not', and for this it is significant. Intersectionality is thus represented as a double negative: defined in the negative in terms of what it is not, and in dissent against the majority holding of what it is. Schulz appears to be taking a stance against a notion of intersectionality as a catalogue of conditions, or as Schulz puts it,

> women and all bad things and mix and there you have it.[814]

As we saw in the previous chapter, Schulz is one Committee member who is against a "this and that" approach. It seems likely that the Committee will continue to grapple with its task of discerning limits to the laundry list of conditions and characteristics articulated in GR 35, explored above, as it evolves its working definition of intersectionality.

The cases of two individual communications against the Philippines, *Tayag Vertido v. the Philippines*, 2010, and *R. P. B. v. the Philippines*, 2011 (2014) can be treated together. Both involve gender stereotypes and myths in the treatment of sexual assault survivors by the criminal justice system. That these cases are cited in GR 35's catalogue of intersectionality decisions made by the Committee, means that we should see the treatment of matters of race, culture religion, etc., named as aspects of the Committee's own definition of intersectionality, appear in the method of case analysis and decisions rendered by CEDAW. The R.P.B. case follows *Vertido*, and the author cites *Vertido* in her communication. The author R.P.B., a Filipino national, was executive

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[814] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.

director of the Davao City Chamber of Commerce and Industry when the defendant, president of the Chamber at the time, sexually assaulted her. The judge who presided over the trial in a domestic court questioned the credibility of the victim's testimony and found it implausible, using strong gender stereotypes in the language of her decision. The defendant was found not guilty, despite the existence of corroborating evidence and a medical report. In its decision, the CEDAW Committee held that the assessment by domestic courts of the credibility of the claimant's testimony was influenced by several stereotypes about the "ideal victim" in cases of rape. The Committee found the state responsible for failure to fulfill its obligation to take appropriate measure to modify and abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women.[815]

In *R.P. B*., the communication argues for a finding with respect to the *chapeau* Article 1 on discrimination, and Articles 2 c, d and f. Article 2, which, we may recall, is the article in which GR 28 situated the mandate to interpret state obligations regarding anti-discrimination through an intersectional lens. R.P.B commenced her communication with the Committee in 2011, after the release of GR 28; the Committee rendered its decision in 2014. As such, we would expect to see intersectionality as a complication to single-axis considerations of women's human rights in this decision. I am neither the first, nor alone in tracing a tendency of the Committee to interpret Article 2(f) with a vague and thin understanding of culture.[816] As I explored in Chapter 2, the framing of this

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[815] note 807.
[816] Chow, *supra* note 186.

article takes us into the territory of the role of custom and tradition in discrimination against women, and the Committee's mandate to demand that the state abolish it. This exemplifies, and I argue roots, imperial approaches to women's human rights law at CEDAW. In *R.P.B. v. Philippines*, the Committee found that the Philippines State breached the rights of a mute and hearing-impaired girl to non-discrimination under Articles 2 and 5, in the investigation and trial of her alleged rape. The Philippines had, in investigating the crime and in the trial, they found, failed to provide a free interpreter and had used stereotypes and gender-based myths, disregarding the victim's specific situation as a girl who is disabled. Finding under Article 2, we see the Committee recasting culture as a congealing of rape myths within the legal system, rather than a pre-industrial and racialized set of vague customs. This foreshadows the application of a more structural approach to the meaning of culture as specifically patriarchal in a case I analyze below, *Jallow v. Bulgaria*.

The holding in *R.P.B*. shows the potential for the Committee to move from a view of culture still crafted in the shadow of imperialism, to one that is augmented by intersectionality's concern with systems, structures and state apparatus. In *R.P.B*, the Committee finds: "First, the court not only rendered judgement against the author using gender stereotypes and myths, but also reasoned with manifest prejudice against her as a deaf minor victim".[817] Here culture and tradition become the culture of patriarchy

[817] note 806, para 3.8.

specifically, and this view is further complicated by recognition of a clear case of intersectional discrimination based on disability.

Although this decision appears to take us into new territory with respect to intersectionality and what it opens in the interpretation of custom and tradition, the Philippines is a country that has been the subject of much imperial and globalized capitalist intervention; it is, for the purposes of the foregoing analysis, part of the third world from a TWAIL perspective, or the Global South from the perspective of the UN. It is thus necessary to balance the interest CEDAW takes in the breaches it finds here with its approach to states of the Global North. Does the interest in systems and contexts for discrimination arise from an intersectional analysis, or is the interest a proxy for its imperial predecessor, and restricted to the systems of those states located in the Global South? In *M.W. v. Denmark*, explored above, we had a mixed response, complicated by a dissent on procedural grounds. How does this new intersectional tool assist in the examination of traditionally strong states, which are part of the Global North?

In *Kell v. Canada*, the Committee appears to find its voice with intersectionality. I will argue below that the rubric of intersectionality now appears to be openly shaping subsequent jurisprudence in such decisions as *Jallow v. Bulgaria*, decided in 2012, in which CEDAW held a European state and one of its nationals responsible for the violation of the treaty rights of a migrant woman on the basis of her daughter's abuse, and for the state's subsequent lack of remedy.[818] Both decisions foreground the specific

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[818] note 802.

experiences of discrimination against multidiscriminated women, and expand both the kinds of gender discrimination states are required to prevent and the kinds of remediation imposed. Both involve fact scenarios very familiar to women's rights advocates in several national settings. I will first turn to *Kell*.

In *Kell vs. Canada*, a decision adopted in 2012 in which the Committee found against Canada, an Aboriginal woman was deemed discriminated against based on gender, in a way that may not have been so for a white woman, when her property rights were alienated after leaving an abusive relationship with a non-Aboriginal man. The facts of Kell's case are detailed below.

In 1990, William Senych applied for housing without the knowledge of his common-law partner, Cecilia Kell, an Aboriginal woman from the Rae-Edzo community in the Northwest Territories (NWT). Senych's application was denied because he was not a member of the Rae-Edzo community for which the housing was earmarked. On the advice of a Tenant Relations officer at the Rae-Edzo Housing Authority, Kell then applied for housing, listing Senych as her spouse. In 1991, the NWT Housing Corporation issued an Agreement for Purchase and Sale to Kell and Senych as co-owners of the property. Senych subjected Kell to domestic violence, including economic abuse, over the subsequent three-year period.

In 1993, following a request from Senych and without Kell's knowledge, the NWT Housing Corporation (on instruction from the Rae-Edzo Housing Authority) removed Kell's name from the Assignment of Lease, the document that certified co-ownership. The removal had the effect of making Senych the sole owner of the property. Senych was a board member of the Housing Authority at the time of his request. In 1995,

Senych changed the locks and denied Kell access to the property. He subsequently sought to evict her. While she sought protection in a shelter, Kell filed proceedings against Senych in the NWT Supreme Court seeking compensation for assault, battery, sexual assault, intimidation, trespass to chattels, loss of use of her home and consequential payment of rent and attendant expenses. She also filed a declaration that Senych had obtained the property fraudulently, aided and abetted by the NWT Government. Kell was assigned a legal aid lawyer, who advised her to comply with the letter of eviction and did not challenge the letter's validity.

Shortly thereafter, Senych was diagnosed with cancer at which time Kell's lawyer advised her to delay proceedings. Senych later died, following which Kell's lawyer initiated proceedings against his estate, the NWT Housing Corporation and another. A replacement legal aid lawyer added a claim for damages for assault and intimidation. In 1999, Senych's estate and the Housing Corporation offered Kell a monetary settlement. During negotiations, Kell's case was twice reassigned to new lawyers. Both insisted that Kell settle. She refused, however, as her key concern was regaining the property. Following her refusal, Kell's lawyer ceased acting on her behalf. Kell's case was only re-assigned to a new lawyer after she appealed to the Legal Services Board. The Supreme Court dismissed both proceedings for "want of prosecution". Costs were imposed against Kell and subsequent appeals were unsuccessful. In 2004, Kell filed a third action related to her interest in and right to the leasehold title and possession of the property. The property had then been sold and the Court dismissed the matter.

Kell subsequently submitted a communication to the Committee on the Elimination of Discrimination against Women in which she claimed that Canada had

violated articles 1, 2(d), 2(e), 14(2)(h), 15(1)-15(4), 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination against Women. Kell claimed that Canada had allowed its agents—the NWT Housing Corporation and the Rae-Edzo Housing Authority—to discriminate against her on the grounds of sex, marital status and cultural heritage and had failed to ensure that its agents provide equal treatment to female housing applicants. Kell noted Canada's failure to prevent and remedy the fraudulent removal of her name from the Assignment of Lease and the failure to ensure that its agents afford women and men equal rights in respect of ownership, acquisition, management, administration and enjoyment of property.

The Committee concluded that Kell's property rights had been prejudiced due to a public authority acting with her partner, and that she had been discriminated against as an Aboriginal woman. The Committee also found that Canada had failed to provide Kell effective legal protection when she sought to regain her property rights. The Committee established that Canada, as party to the Convention and its Optional Protocol, had failed to fulfil its obligations under Articles 1, 2 and 16 and that it should provide monetary compensation and housing matching what Kell was deprived of. The Committee also recommended recruiting and training more Aboriginal women to provide legal assistance, as well as review Canada's legal system to ensure that Aboriginal women victims of domestic violence have effective access to justice.[819]

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[819] "Case of Kell v. Canada", (2012), online: *Harv Univ Cent Hum Rights Policy Violence Women Res Database* <https://projects.iq.harvard.edu/violenceagainstwomen/publications/kell-v-canada-0>.

In *Kell*, the victory is a particularly poignant recasting of a famously different decision on similar facts. In the 1981, *Lovelace v. Canada*[820] case, predating both CEDAW's individual complaints mechanism and Canada's Charter of Rights and Freedoms, the complainant contested both the colonial state's definition of (her) culture and the Indigenous male leadership's collusion with it in an access to matrimonial property case. Importantly, the complexity of identity presented by Lovelace while named in the protections under separate articles in the Treaty (ICCPR), was not recognized in the holding by the Committee adjudicating (then, Human Rights Commission), who found in her favour but on the basis of her Indigenous status alone. In Kell, we see the operationalization of GR 28 in a holding against a state traditionally immune from international approbation:

> As an Aboriginal person, she experienced racism, and as a woman, she experienced sexism. Both of these aspects of discrimination contributed to a pattern of behaviour that was—at best bullying and at worst abusive. Poverty, unemployment, dislocation and homelessness resulting from the theft of her home played a role because she could not afford a lawyer of her own choosing[.][821]

The Committee further underscores that "[a]s the author is an Aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination".[822] Specifically, the Committee references

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[820] *Sandra Lovelace v. Canada*, UN Doc CCPR/C/13/D/24/1977 (Communication No. 24/1977: Canada 30/07/81).
[821] note 804, pt 9.3.
[822] *Ibid*, para 10.3.

GR 28 in its decision, and as justification for its articulation of state obligations and reparations in this case:

> In its general recommendation No. 28, the Committee states that intersectionality is a basic concept for understanding the scope of general obligation of States parties contained in article 2 of the Convention. …
>
> States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounding negative impact on the women concerned.[823]

In *Kell*, the Committee found that article 2, paragraphs (d) and (e), of the Convention were violated.[824]

In Jallow v. Bulgaria, 2012, referred to above, the CEDAW Committee found against the state in a case involving Isatou Jallow and her minor daughter without express use of the language of intersectionality but with use of its proxy term multiple discrimination. Isatou was an immigrant from Gambia, her husband and the father of her child, a Bulgarian national. Both mother and daughter were subjected to physical and sexual abuse at the hands of her husband. State authorities, including child welfare, who granted sole custody to the abuser, and initiated proceedings against the mother, based on only unverified assertions from the abuser, were found to have failed to provide protection, as required by Bulgaria's obligations under CEDAW and the Optional Protocol. "The State party … failed to take appropriate measures to protect women, especially mothers, from domestic violence. The law and the practice of the authorities

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[823] *Ibid*, para 10.2.
[824] *Ibid*, para 10.5.

do not recognize many forms of violence against women, resulting in inequality with men[.]"[825]

In this case as in the one against the Philippines, we see a holding that reads Article 2(f) in relation to the intersectional discrimination congealed in the legal system of the State party. The required compensation owed to the author and her daughter included specific measures aimed at the rights of migrant women to state protection for domestic violence and the right to access to translation and interpretation in the legal system, as well as a requirement that the state,

> provide for appropriate and regular training on the Convention, its Optional Protocol and its general recommendations for judges, prosecutors, the staff of the State Agency for Child Protection and law enforcement personnel in a gender-sensitive manner, having particular regard to multiple discrimination, so as to ensure that complaints regarding gender-based violence are received and considered adequately.[826]

In *S.V.P. v. Bulgaria*,[827] S.V.P. is the author of the communication on behalf of her daughter regarding alleged discrimination under several articles of CEDAW. The daughter was sexually abused by a neighbour as a child. The prosecution of the crime was pursued laxly and tardily by authorities, who brought a lesser charge than the one in evidence, according to an agreement of facts. In this case, the child's sexual abuse and subsequent mental health, developmental and trauma-related learning disabilities were

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[825] note 802, para 3.4.
[826] *Ibid*, paras 8.8–2(c).
[827] note 803.

also cited by the Committee in its holding against the state. Once again, the systemic aspect of discrimination is featured in the finding against the state, using 2(f):

> The Committee recalls that article 2, paragraphs (a), (f) and (g), establishes the obligation of States parties to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination against women and that they have an obligation to take steps to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.[828]

In *S.V.P.* we see again the pattern of ascribing to culture and tradition a less colonial and more structural understanding of the operations of discrimination. Here what Crenshaw called the "background conditions" are the concern of the treaty Committee, tracing the systemic nature of discrimination and inequality, rather than the one-time event, seen as an aberration from the norm. This is one of the fundamental aspects of an intersectional approach, and it appears the Committee is finding its way with it.

5.6.2 **Intersectionality as a factor in Concluding Observations**

> We are pretty clear on the definition of intersectionality. We come at it from the perspective of the country report: even when we use intersectionality, sometimes sexuality and sexual orientation drops out. But race, ethnicity, religion, caste, there isn't a country where those don't come out. Where it is obvious, it comes out.[829]

> I think that it actually happens routinely without devoting any concrete or planned thought. It had become integrated into our routine set of questions both … at the very first

[828] *Ibid*, para 9.4.
[829] Interview of Anonymous, CEDAW Committee (27 October 2016), *supra* note 665.

> part of the dialogue under articles 1 and 2 when, you know, the most emerging overarching issues are being laid out.[830]

Recalling the review earlier in the chapter, countries that have become party to CEDAW are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented. During its sessions, the Committee considers each state party report and addresses its concerns and recommendations to the state party in the form of concluding observations. While concluding observations do not hold the same place as ICs, it is nonetheless "the primary role of all the Committees … to review the reports submitted periodically by State parties in accordance with the treaties' provisions".[831]

I asserted above that in the context of intersectionality, viewed here as an approach to contextualized law making, the concluding observations may have an even more important story to tell about the Committee's interpretation of the concept. This is because it is where the Committee articulates states' obligations in broad public policy prescriptions (and proscriptions), by necessity addressing the background conditions of discrimination with an eye to prevention, rather than through technical interpretations of breaches only. This, I have argued elsewhere (Chapters 1 and 3), brings us closer to the potential operationalization of the radical roots of intersectionality, as articulated in Crenshaw and Yuval-Davis.

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[830] Interview of Ruth Halperin-Kaddari, CEDAW Committee (28 October 2016), *supra* note 654.
[831] "OHCHR | Introduction of the Committee", (21 December 2017), online: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>.

In GR 35, the Committee draws attention to the concluding observations of Papua New Guinea, 2010,[832] South Africa, 2011,[833] Afghanistan, 2013,[834] and Jordan, 2017[835] as exemplary of its adoption of intersectionality. I will examine these concluding observations in light of the foregoing analyses. However, because GR 35 was focused on an update of GR 19 on gender-based violence, I will expand the concluding observations considered here to those that I witnessed the reporting cycle of, and for which there are now concluding observations, taking us beyond the violations categorized exclusively under gender-based violence. Thus, I will add to my examination, a brief consideration of Canada 2016,[836] Belarus 2016[837] and Bhutan, 2016.[838]

In the concluding observations for Afghanistan, we see a return to the language of "cultural beliefs", "deep rooted patriarchal attitudes",[839] and familiar approbation with which a neocolonial, deeply contingent and emerging state such as Afghanistan has historically been regarded, with CEDAW using women's international human rights as a measure of its general acceptance into the international community. The CEDAW was ratified by Afghanistan, without reservations, as part of a spate of human rights

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[832] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women Papua New Guinea*, CEDAW/C/PNG/CO/3 (2010).
[833] *Concluding Observations of the Committee on the Elimination of Discrimination Against Women South Africa*, CEDAW/C/ZAF/CO/4 (2011).
[834] *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, CEDAW/C/AFG/CO/1-2 (2013).
[835] *Committee on the Elimination of Discrimination against Women Concluding observations on the sixth periodic report of Jordan*, CEDAW/C/JOR/CO/6 (2017).
[836] United Nations, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada* (2016).
[837] note 766.
[838] *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Bhutan*, CEDAW/C/BTN/CO/8-9 (2016).
[839] note 835, paras 22 & 28.

ratifications, all listed in the concluding observation, in keeping with the contingent nature of Afghanistan's acceptance into the global community. Yet, the litany of violations the Committee goes through indicate the *pro forma* nature of this ratification and point to CEDAW's role—and consequently women's international human rights—in disciplining a rogue state.

The CO itself does not analyze the ways in which international interests and outside pressures shape the fortunes and manipulations of a state and consequently, how the instrumentalization of patriarchy is used as a bulwark against internal challenges and external pressures. Should this have been the case, such as the ways state homophobia was analyzed in the scholarship of Puar, Weiss & Bosia, intersectionality might have emerged as potent tool in the critique of the imperial pedigree of international law.

Likewise, Bhutan's concluding observations vacillate between a colonial fascination with the state's spiritual "gross national happiness (GNH)" indicator, mentioning it six times in the concluding observations, and repugnance at its toleration of polygamy.[840] In my informal discussions with NGO representatives during the civil society meetings before the state reporting session for Bhutan, women's rights advocates expressed concern with the lack of accountability for the degree of gender-based violence in Bhutan and the soft manner in which the state was approached in this regard. Although gender-based violence is mentioned as a condition of GNH in the concluding observations, [841]there is concern among activists that a colonial fascination with the GNH

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[840] note 839, paras 16 & 17(c).
[841] *Ibid*, para 18(d).

of Bhutan distracts the Committee from the harsher realities, particularly when it is seen as a country that avoids some of the pitfalls of embracing neoliberalism in its "development" path.[842]

The tension between the "women in development" narrative and the rights agenda represented by CEDAW that I analyzed in Chapter 2 remains in play in this and the other concluding observations for countries of the Global South analyzed by the Committee. Recalling that this discourse traces its intellectual history to an often unquestioned grounding in the unequal relations of international political economy,[843] and posits a social development role for women who, rather than appearing as rights bearers, are viewed as indicators of a community's capacity to advance toward a more developed state, the Committee gestures to this context of measurement again when it states that "the State party has not yet conducted a comprehensive analysis of existing discriminatory stereotypes in order to assess their impact on the achievement of gender equality".[844]

In the concluding observations for South Africa, the Committee continues this line of observation with multiple mentions of the importance of the Millennium Development Goals. The references to development in South Africa's case, follow the strain within women's human rights I examined in earlier chapters regarding the

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[842] Johannes Dragsbaek Schmidt, "Gross National Happiness, Driglam Namzha, Kidu and Inequalities in Bhutan Today", (18 August 2017), online: *Georget J Int Aff* <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2017/9/5/gross-national-happiness-driglam-namzha-kidu-and-inequalities-in-bhutan-today>; Rieki Crins, *Religion and gender values in a changing world* (2004).
[843] Shivji, *supra* note 333.
[844] note 839, para 16.

contextualization of women's "advancement" as tethered to the very economic conditions that many argue are the source of their disenfranchisement. In keeping with this developmentalist narrative, the Committee's view of intersectionality seems additionally obscured by the imperial shadow we have traced through Orford in passages such as the following:

> The Committee is thus concerned about the inadequate implementation of effective and comprehensive measures to modify or eliminate stereotypes and negative traditional values and practices in South Africa. The Committee also expresses serious concern about the persistence of entrenched harmful cultural norms and practices, including ukuthwala (forced marriages of women and girls to older men through abduction), polygamy and the killing of "witches".[845]

As I explored in Chapter 1, such preoccupation with what Letti Volpp calls "bizarre and alien" forms of gender persecution as "traditional",[846] lifts these harms from the global context of gender-based violence and consigns them to the local and cultural, giving them status as backward spectacle. The Committee's most frequent mention of intersectionality in this CO is in relation to the intersection of gender and HIV status, along with the specific impact of gender discrimination on rural women with respect to property inheritance and ownership.[847] Given the continuing impact of Apartheid and globalization on South Africa's present, an intersectional analysis might be expected to take a step further in situating women's oppression within this context.

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[845] note 834, para 20.
[846] Volpp, *supra* note 190.
[847] Volpp, *supra* note 100.

In the CO for Papua New Guinea, 2010, the Committee finds “the State party has not taken sustained systematic action to modify or eliminate stereotypes and negative traditional values and practices”, even while it acknowledges “the rich culture and traditions of the State party and their importance in daily life”.[848] In what appears a nod to more recent understandings of the dynamic nature of culture, the Committee “invites the State party to view culture and tradition as dynamic aspects of the country’s life and social fabric and therefore as subject to change”.[849]

In Chapter 2, I explored how the language of “abolish” in Article 2(f) of CEDAW echoes the presumed right of metropolitan centres to require change in the subjugated. Despite the intervention of contemporary and critical perspectives on the textual limitation in CEDAW’s formulation of culture, the Committee continues at times to conflate culture with discrimination, or patriarchy with culture, giving an at once partial and totalizing view of a state’s culture, no less fixed in conception for the gesture to its changeability.

Earlier in the dissertation I explored how such commentary has “reinforced the notion that metropolitan centres of the West contain no tradition or culture harmful to women, and that the violence which does exist is idiosyncratic and individualized rather than culturally condoned”.[850] This theme of colonial superiority casts a pall over aspects of the Committee’s reasoning, such as the one following the passage I’ve just quoted,

[848] note 833, para 25.
[849] *Ibid*, para 26.
[850] Volpp, *supra* note 100 at 1192.

where the Committee calls upon the state to "take steps to ensure that traditional apologies are abolished" and ensure that "women and girls who are victims of violence have access to … shelters and safe houses".[851] While clearly women in Papau New Guinea have every right to find safety from violence, the prescriptive nature of the solution seems out of keeping with the nod to cultural difference in the passage before. In this instance, we see a post-intersectional CEDAW following in the footsteps of the founders of international authority studied by Orford: confidently setting out to "remake the world" in their (cosmopolitan) image.[852]

In what appears to be a blatant confirmation of this assessment of the Committee's reliance on its imperial roots, the 2016 concluding observations for Canada start out the customary constructive dialogue by praising a piece of legislation[853] that was the subject of extensive feminist resistance and activism within Canada (Bill S-7, Barbaric Cultures Act; [854] and the related Quebec Charter of Secularism),[855] specifically on the grounds that it advanced an expressly anti-intersectional analysis and racist instrumentalization of feminism. The so-called Zero Tolerance for Barbaric Cultural

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[851] note 833, para 30.
[852] ESIL Lecture Series, *supra* note 16.
[853] United Nations, *supra* note 837, para B, (a)2.
[854] *Bill S-7, An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts, introduced 2nd Sess, 41st Parl, 2014, (at 3rd reading, 16 December 2014) [Barbaric Cultures Act]*. [*Bill S-7, An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts, introduced 2nd Sess, 41st Parl, 2014, (at 3rd reading, 16 December 2014) [Barbaric Cultures Act]*.].
[855] *Bill n°60 : Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests, introduced 1st Sess, 40th Legislature, November 27, 2013 (final sitting February 20, 2014) [Quebec Charter]*. [*Bill n°60 : Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests, introduced 1st Sess, 40th Legislature, November 27, 2013 (final sitting February 20, 2014) [Quebec Charter]*.].

Practices Act, passed into law in 2015, was advanced in Canada along with a Barbaric Cultural Acts tip line, in the name of securing the gains of white feminists against the brown—literally barbarian—hordes who would bring unfiltered patriarchy with them when they emigrated. Indeed, the language itself was so blatantly colonial and egregious that there could be no clearer case of a single axis and racist feminism at work.

Domestically, the legislation became a focal point for activism,[856] comedy,[857] and may have contributed to the defeat of the previous national government.[858] It was brought to the international community as an example of the state *not* fulfilling its international obligations,[859] by taking a non-intersectional approach to rights, by stirring up anti-immigrant sentiment and by legislating these values in ways that criminalized, isolated and targeted vulnerable populations of women. Openly imperial, analytically compromised or simply ignorant of the national details and tone deaf—and quite possibly all of the above—CEDAW failed to apply its intersectional lens to this context where perhaps the state's bias confirmed and echoed its own legacy.

On other matters, the concluding observations for Canada advance an intersectional approach, specifically on Indigenous issues and core human rights'

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[856] "The country we want doesn't use fake feminism to hate", *Tor Star* (9 October 2015), online: <https://www.thestar.com/opinion/commentary/2015/10/09/the-country-we-want-doesnt-use-fake-feminism-to-hate.html>.
[857] Tyee Staff, "If '22 Minutes' Ran Tories' Barbaric Cultural Practices Tipline", (6 October 2015), online: *The Tyee* <http://thetyee.ca/Video/2015/10/06/22-Minutes-Barbaric-Cultural-Practices-Tipline/>.
[858] Kate Jaimet, "How irony killed Stephen Harper", *Tor Star* (23 October 2015), online: <https://www.thestar.com/opinion/commentary/2015/10/23/how-irony-killed-stephen-harper.html>.
[859] Amanda Dale, Deepa Mattoo & Petra Molnar, *Submissions on the Draft Update of CEDAW's General Recommendation No. 19 (1992) on Gender Based Violence against Women* (Barbra Schlifer Clinic, 2016) at 10.

protections, such as solitary confinement, more properly protected in the pre-CEDAW treaties, such the ICCPR. And, contrary to Campbell's finding of inconsistent follow up from individual communications in the concluding observations,[860] in Canada's 2016 concluding observations, the Committee expressly asks for accountability with respect to its findings in Kell:

> The Committee urges the State party: (a) To fully implement the Committee's views concerning communication No. 19/2008 regarding reparation and compensation for the author of the communication and inform the Committee without delay of all measures taken and planned as a consequence of its recommendations[.][861]

The Committee likewise follows up on its earlier recommendations in its inquiry, which we will explore below, in these concluding observations, with the following unequivocal statement: "The Committee recommends that the State party fully implement, without delay, all recommendations issued by the Committee in its report on its inquiry."[862]

Additionally, the Committee takes account of the role Canada plays in the perpetuation of international inequality through its trade and other economic dealings by requiring attention to the gendered impact of its global extractive industry and other trade activities. These intersectional aspects of the concluding observations for Canada may have more to do with the intersectional formulations of the NGOs and INGOs submitting

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[860] Campbell, *supra* note 247.
[861] note 804, para 17(a).
[862] United Nations, *supra* note 837, para 17(a).

shadow reports to the Committee than with the coherence of CEDAW's own interpretation of intersectionality.[863]

Although all UN human rights treaty bodies rely on shadow reports, CEDAW, as I explored in Chapters 2 and 3, has a long and slightly more nuanced tradition of working with women's rights NGOs due to its background as a body slightly outside the traditional UN structure, and for its reliance instead on the Commission on the Status of Women. While in the case of Canada the representation of women's rights NGOs may be more robust than most, the role of women's rights groups based in the Global South is no less important or influential.

As I explored in Chapters 2 and 3, women's groups from the Global South were present at the drafting stage of CEDAW, just as they were during the Beijing debates. As I demonstrated in Chapter 3, it was their voices that gave rise to the demand for an intersectional approach in the first place. Despite—or perhaps more accurately because of—the Committee's reliance on the shadow reports of the national and international NGOs, there is evidence of an emergent and inconsistent intersectional approach in the Committee's deliberations.

Unlike Canada, Belarus can be seen as appearing before the Committee as more of a supplicant nation, ambivalently engaging with the international treaty system as a means to attaining access to the economic benefits of globalization,[864] because, as we saw

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[863] A full list of NGOs and their submissions is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1027&Lang=en.
[864] Ineke Boerefijn, "United Nations Part B: Human Rights News" (2010) 28 Neth Q Hum Rights 78.

in Chapter 2, ratification of human rights' instruments is "seen as an essential prerequisite to the facilitation of societal, legal, economic and political progress".[865] Within this context, the intersectional approach of CEDAW under Article 2 of the Treaty, which is the textual location of states' obligations, takes on the added dimension of explicit and expanded gender protections. The attention the Committee draws to the rights of lesbian, bisexual and trangender women is striking,[866] as are of course, the corollary violations.

As previously mentioned, the persecution of human rights defenders meant that during the country report before the Committee, NGO representatives had to have their identity obscured, and required the protection of and screening by large INGOs to put forward their experiences to committee members on the floor of the session. While the criminalization of lesbians, the apprehension of the children of human rights defenders on trumped-up grounds,[867] and a variety of state suppression and repression, including executions, are indeed grounds for a strongly worded set of concluding observations, there are contextual issues to state homophobia in the global perspective that a nuanced committee approach to intersectional oppression committed by a variety of states might surface. For instance, in the case of terrorism and religious extremism, the context of globalization is often mentioned.[868]

Where state homophobia comes before the Committee to examine, it might contextualize the approbation to consider the role human rights obligations play in the

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[865] Buchanan & Zumbansen, *supra* note 91 at 13.
[866] note 766, paras 46 & 47.
[867] note 766.
[868] Coomaraswamy, *supra* note 538; Scheinin, *supra* note 707.

state's admission to the international community, and the corollary manufacture of a common enemy that appeals to homophobia and repression exemplify. It may be too much to wish for an acknowledgement of Puar's sweeping yet even-handed mapping of homophobia and its variants in the global security agenda, neoliberal promotion of human rights, establishment of militarized hyper masculinity and the deployment of sexualized racial violence against men and women under the guise of both state homoprotectivism and state homophobia. Yet the Committee seems able at times to get part way there, as the reviews of Jordan and Canada, explored below, indicate.

In *Jordan*, the Committee again finds focus on the women and development discourse, concluding: "The Committee calls for the realization of substantive gender equality, in accordance with the provisions of the Convention, throughout the process of implementation of the 2030 Agenda for Sustainable Development."[869]

Nonetheless, the Committee balances this with a sustained intersectional contextualization of the factors preventing Jordan from implementing the Treaty adequately:

> The Committee acknowledges the impact of the combined economic, demographic and security challenges facing Jordan as a consequence of the continuing conflicts in the region, in particular the crisis in the Syrian Arab Republic, which has resulted in: (a) A mass influx of refugees from the Syrian Arab Republic, estimated at 1.4 million persons; (b) A social and economic cost to Jordanian society, reflected in a sharp increase in poverty and unemployment and overstretched national health and education systems, basic services and infrastructure; (c) A deteriorating

[869] note 836, para 59.

> security situation. The Committee notes with concern that the support from the international community has been insufficient to alleviate the burden on the State party and the host community and calls upon donors to meet the humanitarian needs identified by the United Nations. The Committee is concerned about the persistent rise of fundamentalism in the country, which has a negative impact on women's rights.[870]

It is a remarkable passage that gives hope for a new perspective on the full import and meaning of intersectionality in the Committee's deliberations. Given the multitude of individual, state, geopolitical and bureaucratic determinants I have surfaced in the forgoing chapters that effect decision making at the Committee, it would be overly deterministic to conclude that this was solely the result of a further development of the Committee's understanding of intersectionality as laid out in the more robust GC 35.

5.6.3 Inquiry into Canada's Treatment of Indigenous Women: CEDAW /C/O P.8/CAN/1

> ... so being at the same time a woman, who is indigenous and has a disability means that your life is going to be extremely miserable because of the combination of the three elements. So you're always a woman, but the two others are going to really add to the problems, the legal problems, you'll be faced with. And, and, I mean the legal, the practical problems in your daily life.[871]

[870] *Ibid*, para C (7).
[871] Interview of Patricia Schulz, CEDAW Committee (26 October 2016), *supra* note 655.

Under Article 8 of the Optional Protocol to CEDAW, the Committee has authority to investigate "grave or systematic violations by a state party".[872] Since acquiring the additional authority, CEDAW has exercised it on three occasions, first in relation to Mexico,[873] subsequently on the Philippines,[874] and most recently on Canada.[875] The inquiry under consideration here, namely that of Canada, finds a country of the Global North, and a traditional darling of feminist international law, keeping company with States parties it normally sits in judgement of. In this sense, at a normative and structural level, CEDAW/C/P.8/CAN/1 evidences a shift in protagonists, as Orford characterized the position of the imperial feminist in international law, discussed in Chapter 2. This could signal a holistic intersectional approach that goes beyond the individual violations that characterize the "this and that" approach of listing sequential harms as further enumerated grounds. The format of the inquiry procedure lends itself to an intersectional approach, since the mechanism expressly deals with systemic matters, which, to be properly investigated, require a deeper contextual approach. In the Canada report, the CEDAW Committee delivers on the intersectional promise. In a tersely worded 58-page report, it holds the State to account, recalling that,

> under articles 2 (f) and 5 (a) of the Convention, States parties have an obligation to take appropriate measures to modify or abolish not only existing laws and regulations,

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[872] note 144, para 8 Optional Protocol 1999.
[873] *Report on Mexico Produced by the Committee on the Elimination of Discrimination Against Women Under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, CEDA W/ C/2005/OP 8/MEXICO (2005).
[874] *Committee on the Elimination of Discrimination against Women Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW /C/OP8/PHL/ 1 (2014).
[875] note 796.

> but also customs, practices and stereotypes that constitute discrimination against women. The Committee also notes that the intersectional discrimination suffered by Aboriginal women in the State party results in the gender stereotyping they face. It considers that gender stereotyping is persistent in the society of, and institutionalized within the administration of, the State party, including within law enforcement agencies. This stereotyping includes portrayals of aboriginal women as prostitutes, transients or runaways and of having high-risk lifestyles, and an indifferent attitude towards reports of missing aboriginal women. The Committee considers that, notwithstanding the fact that the State party has made an effort to provide gender-sensitive training for the police, the State party has failed to take sufficient and appropriate measures to address gender stereotyping, including institutionalized stereotyping, in breach of its obligations under articles 2 (f) and 5 (a).[876]

Here 2(f), the source of so much difficulty for a committee wrestling with its treaty's imperial legacy, is marshaled to the intersectional purpose that GR 28, augmented by GR 35, demands. The strong language of abolishment, so implicated in the colonial projects of international law, but importantly also referencing genocide in Canada as well as in other states, is here focused with more precision on the culture of racist and sexist stereotypes that define and condition intersectional discrimination. In this full consideration of the state's role in the murder and disappearance of thousands of Indigenous women, we can recall the words of Kimberlé Crenshaw when addressing the UN back in 2000. Here she laid out as to how harms from one form of discrimination may make a person vulnerable to another form; at other times, two forms of discrimination are indistinguishable, and simultaneously occurring: in both instances,

[876] *Ibid*, para 205.

“[t]hese are the contexts in which intersectional injuries occur—disadvantages or conditions interact with preexisting vulnerabilities to create a distinct dimension of disempowerment”.[877]

In CEDAW’s inquiry into the state’s complicity in the grave and systematic intersectional discrimination against Indigenous women in Canada, the continuing conditions that make the remedies for intersectional atrocities impossible to achieve are brought into visibility. Crenshaw’s earlier quoted encapsulation of intersectionality’s unique analytic contribution is worth quoting again here, because it fits the Committee’s insights accurately:

> Propaganda against poor and racialized women may not only render them likely targets of sexualized violence, it may also contribute to the tendency of many people to doubt their truthfulness when they attempt to seek the protection of authorities.[878]

We saw earlier that Crenshaw is positing a different approach to intersectional discrimination than that which has arisen out of the mass atrocity context, by pointing out that such eruptions of targeted violence “draw upon preexisting gender stereotypes” but are also based in “distinctions between women”, and on “racial or ethnic stereotypes”.[879] In this way, she points out, race or ethnic, as well as class, and gender stereotypes work

[877] Crenshaw, *supra* note 67 at 9.
[878] *Ibid* at 10.
[879] *Ibid*.

to characterize some groups "as sexually undisciplined".[880] It is precisely the intersection of these pre-existing and powerful social tropes that has dire consequences for women: making them "particularly vulnerable to punitive measures based largely on who they are".[881] It is this reality of intersectional discrimination that the CEDAW inquiry into the situation of Indigenous women in Canada draws out.

5.7 Assessing the Record

> [T]he law is not the text, no, it's the interpretation...And no people more than us at the CEDAW Committee can interpret with the same authoritative way.[882]

Overall, when assessing CEDAW's decision-making record, the concluding observations in particular reveal that states from the Global South or "non-western" states, as we saw in the case of Papua New Guinea, tend to be subject to greater criticism from the Committee regarding "the persistence of harmful norms, practices and traditions, as well as patriarchal attitudes and deep-rooted stereotypes".[883] Meanwhile, advanced liberal democracies, such as Canada, are subject to an inconsistent standard of accountability, at once holding the state to account for neo-colonial violations of Indigenous women's rights, and shoring up a view of the colonized and barbaric immigrant woman that belies a reliance on imperial authority vested in its status as an

[880] *Ibid*.
[881] *Ibid*.
[882] Interview of Silvia Pimentel, CEDAW Committee (28 October 2016), *supra* note 653.
[883] note 833, para 25.

international law authority. As explored above, recent legal and public policy debate in Canada, in both the common law and civil law contexts, has mobilized an essentialist notion of women's rights to limit religious and cultural rights (Bill S-7, Barbaric Cultures Act; [884] Quebec Charter of Secularism),[885] simultaneously abstracting women as rights bearers from their race, culture and/or religion, and dissolving the harms they experience into vague, colonial notions of culture—ones CEDAW does not only fail to condemn, but goes out of its way to endorse. Openly deploying the term "barbaric" in public debate, in law and in policy, has normalized aggressive colonial language, thought by many academics in a post-Edward Said[886] world to be impossible to deploy without irony,[887] and it has done so expressly in the name of protecting women's rights. Canada is not alone in this trend, and CEDAW appears unprepared to challenge it, intersectional framework or not.

As record numbers of peoples are on the move, many have identified safe migration as a top global priority. The CEDAW Committee appears inconsistently able to adhere to its own advancements in shaping a view of women and their rights that reflects this global reality. At once a hope but not an immunization against the vestiges of colonialism that continue to haunt and determine the protections offered by international

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[884] *Bill S-7, An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts, introduced 2nd Sess, 41st Parl, 2014, (at 3rd reading, 16 December 2014) [Barbaric Cultures Act].*, *supra* note 855.
[885] *Bill n°60 : Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests, introduced 1st Sess, 40th Legislature, November 27, 2013 (final sitting February 20, 2014) [Quebec Charter].*, *supra* note 856.
[886]Edward W Said, *Orientalism*, 1st ed (New York: Vintage Books, 1979) a ground-breaking exploration of the colonial legacy in western scholarship and discourse.
[887] Valérie Amiraux, "« Néo-orientalisme et conquêtes néo-impériales »" (2015) 252 Spirale 39.

law, CEDAW's engagement with intersectionality requires a rigour not yet in evidence. This rigour needs only to be based in analytic clarity, not academic purity. Recirculating problematic discourses of "cultural" behaviour oversimplifies important complexities in women's experiences of violence. Practically, victims and survivors of gender-based violence are actively discouraged from coming forward if disclosing that they have experienced, for instance, forced marriage or trafficking, will mean criminal sanctions or deportation for their own families.

Yet, while CEDAW has recently advanced cogent critiques of the effects of law on women in the global context,[888] it remains confident in the structures of legal sanction to effect gender equity and regularly advances recommendations reliant on them. When condemning violent and discriminatory practices against women, the recommendation might better focus on the particular social location, contextual specificity and lived experiences of the affected women. Broad stroke, culture-based assertions obscure the nuances and intersecting vulnerabilities of women experiencing multiple sources of marginalization, such as poverty, homelessness, racism, and discrimination on the basis of indigeneity, religion, country of origin, newcomer status, mental health, and disability—in short, the very contextual essence of an intersectional approach. Returning the role of international law in the maintenance rather than the dismantling of women's global inequality, the mirror intersectionality can turn on law to reflect its oppressive

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[888] note 794; *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, CEDAW/C/GC/29 (2013) at 16.

shortcomings is an aspect of its analytic rigour not yet fully embraced in CEDAW's contributing observations.

In other decisions, such as the individual communications and the inquiry procedure—the area of committee decision-making that rises to the level of jurisprudence—CEDAW appears more capable of a nuanced engagement with the criteria of an intersectional analysis. Here, background systems, the dynamics of historic oppressions, stereotypes, contextual power dynamics and a consideration of targeted remedy appear more readily in the Committee's deliberations. It is perhaps a prosaic, rather than grand theoretical moment that grants this clarity: the individual communications are just that—individual—which, while counter-intuitive as a bolster to a critique of individualistic liberal approaches to anti-discrimination law, also offer fact-specific instances against which to develop considered analyses.

The inquiry process is by definition, attentive to systemic and structural grounds of discrimination, and is charged with getting to the specifics of how discrimination plays out through systems. In the contributing observations, a general approach to national contexts runs the risk of imprecision, caricature, and in the case of Canada analyzed above, tone deafness to the persistence of imperial views of women and their rights in the international legal context. Although the CEDAW Committee's adoption of intersectionality fails the test of analytic precision or consistent application, there is little question that its committee members, such as Silvia Pimentel, quoted at the outset of this section, see the authority of their role as interpreters of women's international human rights bolstered, redefined and advanced by the development of intersectionality as a concept, a discourse, an heuristic device and, ultimately, as a legal tool.

6 Thinking While Acting: Conclusion

> "Feminists seek to rule for emancipatory purposes, and the tools they find in governance are among their best guesses as to how to move toward an emancipatory future. Understanding how it is working seems crucial to deciding how it should proceed going forward."[889]

At the outset of this dissertation, I repeated a gauntlet thrown down by Anne Orford, asking "[w]hat might a feminist reading [of international law] that attempts to avoid reproducing the unarticulated assumptions of imperialism look like?"[890] I proposed that intersectionality, as an approach to women's international human rights law, might be a partial answer to this challenge. Taking up her invitation at both the substantive and methodological levels, I adapted her method of critically assessing law's appearances and stories about itself, used in her account of R2P, and applied it to an account of intersectionality in women's international human rights.

I began with a curated approach to the literature on intersectionality, entering scholarly conversations that spotlight the promise of its intervention and advance a complex view of its dual roles as critic of and technician in law. Striving to recapture the heuristic, ontological and epistemological critiques that intersectionality can offer to inform an approach to law grounded in social activism, I used this exploration of the literature to sharpen the focus on intersectionality's most potent promise: to offer us a structural analysis of the intersectional process of discrimination. Moving from

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[889] Halley, *supra* note 202 at xii.
[890] Orford, *supra* note 337 at 275.

intersectionality's promise to its initial transmission to international human rights law, I spent time exploring the textual ground into which it was being introduced. To do this, in Chapter 2, I explored the nature of CEDAW as treaty. Here, by tracing the possible unarticulated implications and imbrications of imperialism in women's international human rights law to situate the intersectional turn, I compared the academic literature ascribing meaning and portent to the concept both as epistemological challenge and as legal tool, using it to trace the limitations of CEDAW *qua* text. In Chapter 2 I also provided an account of the treaty's legal capaciousness to discover and explain why its promise finds a home there. In doing so, I noted the thin understanding of culture rooted in the text and the interpretations of the text that continue to obstruct intersectionality's full reach.

Beginning in Chapter 3, I traced the unfurling of intersectionality as it advanced in relation to UN interpretations of women's human rights. In this chapter I also began to uncover the geopolitical realpolitik that gave rise to the introduction of intersectionality in the context of genocide and international criminal prosecutions. In chapter 4, I provided insights from CEDAW Committee members as to the retrospective nature of its justification for the expansion of state obligations considered under the category of sex and gender—specifically, the highly politicized introduction of LGBTI rights. From this record, there is little doubt that intersectionality holds the hope and promise of pushing against the limitations it was born of and into, at the same time as the thin application of its potential to account for the same geopolitical forces it was born of leaves it, at times, complicit in the very structural oppressions it was released on the world to right.

As an approach to international human rights law, intersectionality seeks to complicate the imperial image of the European woman as the essentialized model for receiving the protections of human rights law. The entry of the term into the discourse of international human rights bears the imprint of the radical critiques that produced it; it also still bears the mark of its role in the unjust international order it plays a part in maintaining.

An uneven grasp of intersectionality among the individuals of the CEDAW Committee, and the inconsistent record of its employment in the various decisions, does not tell a neat, teleological story of progress. The Committee's engagement with intersectionality as metaphor, sociological concept, heuristic device and legal tool remains as contingent, iterative and imperfect as the field(s) of theory from which it derives, and the economically and politically volatile and violent world it attempts to address. Moreover, the Committee context mixes progressive analysis from individual members with compromises with both state and fellow committee members, within an overarching assumption of authority granted through the international legal system. In this mix, intersectionality plays many roles.

Intersectionality in all its guises, is forged of both sincere and determined effort to reveal and ameliorate the experiences of the most marginalized and runs the real risk of fixing those experiences in a caricature of abject over-determinacy, where defiant, disruptive and contradictory experiences of identity among the intended beneficiaries of the human rights regime are flattened into a thin representation that intersectionality promised to enrich.

This dissertation tells a new story about the arrival and integration of intersectionality as a form of anti-discrimination theory and praxis in the international human rights context. It also reveals an older story about the risks inherent in any engagement with the project of governance. Throughout this work, I aspired to take the advice to "think anew about engaging with power"[891] and to probe the apparently mysterious ways in which the ideas we advance to improve the world can be traced to some of its worst moments of failure.

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[891] Halley, *supra* note 202 at xx.

Appendix 1

Research Ethics Letter/Study Interviewee Agreement

Oct 25, 2016

Geneva/ Canada

Dear

I am writing this letter to ask if you would be available to speak with me. I am conducting research on the origins of intersectionality in transnational human rights law, and its applicability to Canadian claimants. I have been working with Professors {_,_,_} at Osgoode Hall Law School.

I will be in Geneva and able to interview you during the CEDAW session beginning {Date}. I only ask you to name the time and place and I will be there.

My study is called: Women's Intersectional Transnational Human Rights: Origins and Impacts.

My understanding is that you have had experience with the roll out, deliberations and applications of intersectionality at CEDAW, as part of the CEDAW Committee. I anticipate taking no more than forty-five minutes of your time.

I do not foresee any risks or discomfort from your participation in the research.

I do anticipate that your participation will contribute to scholarship and practice, which advances and legitimates the goals of an intersectional approach to human rights both internationally and within Canada. Your specific observations and experiences will thus inform ongoing development of theory and jurisprudence.

I anticipate our discussion would revolve around the following issues and themes:

1. What do you know about the text of CEDAW General Recommendation 28 and how it was negotiated?
2. Does the Committee use this GR's definition of "intersectionality" in its deliberations?
3. What was the influence of the development of CERD's statement on intersectionality, General Comment 25, on CEDAW's work in this area?
4. What, if any, influence do you think the context of sexual violence in conflict, such as the prosecutions in Bosnia Herzegovina and Rwanda had on the development of CEDAWs intersectionality statement?
5. Do you feel the statement guides the Committee's work?
6. What pressures are brought to bear with respect to the "culture", "religion" or race of the claimants/individual representations that come to CEDAW?

Our meeting would be more like a consultation or a conversation than a formal interview. In discussing the issues noted above, I will not have a formal list of questions but rather let the discussion unfold. It should go without saying that, if you agree to meet with me, you are under no obligation to answer any question I might ask.

I may bring a recorder. If I do, the recording is only to assist my note taking. My intention is to use the notes from our discussion in connection with my dissertation in the

PhD Program at Osgoode. Dissertations are published, but not widely circulated. As well, I might later wish to publish an academic article that relies upon our discussion.

I would be pleased to speak with you either on a not-for-attribution basis or, if you prefer, to attribute comments that you make or ideas that we have discussed. If I do wish to quote you by name or in any way that could be attributed to you, I undertake to provide you with a copy of the intended quotation based on my notes. You will have the opportunity to revise any comments associated with your name. The notes (and recordings) from our discussion will be kept in my safekeeping for a period of at least two years. I will treat them as confidential to the limit allowed by law. Neither the topics we will discuss, nor any writing I do afterwards, is intended to produce a "report card" on any person or organization.

Needless to say, you are under no obligation to meet with me and you may call the session to a close at any time.

You can stop participating in the study at any time, for any reason, if you so decide. If you decide to stop participating, or to refuse to answer particular questions, it will not affect your relationship with me, York University, or any other group associated with this project. Should you wish to withdraw after the study, you will have the option to also withdraw your data up until the analysis is complete.

If you agree to meet, I look forward to hearing from you. I will be in touch with you within the next ten days to see if a convenient time for this meeting can be arranged. Do not hesitate to be in touch with me if you have any questions or concerns. I can be reached at _____________________________.

York University has a policy on research ethics. You will find this at http://www.yorku.ca/research/support/ethics/humans.html

If you have questions about the research in general or about your role in the study, please feel free to contact XX, either by telephone at _____________ or by e-mail ___________________. This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, {contact information}.

At the interview I will ask you to initial my copy of this letter to ensure that you have given me your informed consent.

When we meet, I will ask you to indicate the following. By all means, you can do so now in response to this letter if that is most convenient.

Legal Rights and Signatures:

I ___________________consent to participate in Women's Intersectional Transnational Human Rights: Origins and Impacts conducted by Amanda Dale I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature Date

Participant

Signature Date October 25, 2016

Principal Investigator

I consent to have this discussion ______________________

With Attribution ______________________________

Without Attribution ____________________________

Sincerely,

Amanda Dale, BA, MA, MSt, PhD (Cand)

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