

**Intersectionality as a tool to adjudicate
international human rights law: A case study
on the Inter-American System of Human
Rights**

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Abstract

Intersectionality is currently used in international human rights law adjudication primarily due to the influence of feminist approaches to international law. The application of intersectionality ranges from being included in soft law to being used as a tool in adjudicative processes. However, there is no clear understanding of how intersectionality is being conceptualised in human rights, nor is there any clear understanding as to how, when, and why intersectionality is being used as a tool to adjudicate rights. Nowadays, the use of intersectionality in human rights law is being developed independently of the discussions and debates of the same theory that are taking place amongst feminist scholars. Using the works of Kimberlé Crenshaw and other key contemporary intersectional feminist scholars, this thesis critically analyses the concept of intersectionality as used both in feminist theory and in international human rights law as a means through which to better understand the use of the concept in international human rights law. The concept of intersectionality currently applied in human rights law is reworked to provide a clearer understanding of what this theory can and should entail when applied at law. Seeking to understand the implications of the concept as applied, the present work proposes an operationalisation process of intersectionality to be used in adjudicative processes. With a special focus on the Inter-American System of Human Rights and drawing on two key case studies, the research demonstrates how human rights adjudicative processes can benefit from using intersectionality as a tool to assess the different qualitative experience of harm of a victim oppressed by different systems simultaneously. This thesis contributes to knowledge through its analysis of intersectionality as understood in both human rights law and within applied feminist theory and provides a model of how intersectionality can be better understood and used to better deliver justice.

*A mis padres, Alma y Guillermo. Gracias por alentarme
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to be heard, seen and recognised in their individuality kept me going, they are the light that has guided me for the last 31 years.

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Chapter 1. Introduction

Gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; sexual orientation folds on top of race [...] everything finally piling into a single human body.¹

1.1 Intersectionality: the gaps in its operationalisation in international human rights law

Legal systems have traditionally been seen as neutral and objective, operating in an abstract, logical, and rational manner. However, this apparently genderless view of legal systems has been contested by feminism and feminists all over the world,² using feminist approaches as a disruption of the so-called genderless legal system.³ Over the past few decades, feminist approaches to international law have gained much greater legitimacy and attention, as illustrated by the emergence of the women, peace, and security agenda⁴ and the gains made in the recognition of the arms of sexual violence globally. Feminism has challenged and changed international law, particularly in the realm of human rights, for example, acknowledging that sexual violence can amount to torture.⁵

¹ Eli Clare, *Exile and pride : disability, queerness, and liberation* (SouthEnd Press 1999) 123.

² Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *The American Journal of International Law* 613.

³ For example, see Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law'; Hilary Charlesworth, 'What are 'Women's International Human Rights'?' in Rebecca J. Cook (ed), *Human rights of women : national and international perspectives* (Human rights of women : national and international perspectives, University of Pennsylvania Press 1994).

⁴ Examples of this can be found in Sahla Aroussi, *Women, peace and security: repositioning gender in peace agreements* (Law and cosmopolitan values, Intersentia 2015); 'Funmi Olonisakin, Karen Barnes and Eka Ikpe, *Women, peace and security : translating policy into practice* (Contemporary security studies, Routledge 2011); Sarah Hewitt, 'The Possibilities of Alignment between the Responsibility to Protect and the Women, Peace and Security Agenda ' (2016) 8 *Global Responsibility to Protect* 3.

⁵ Discussion on this can be found in Iveta Cherneva, 'Recognizing Rape as Torture: The Evolution of Women's Rights Legal Protective Techniques' (2011) 6 *Intercultural Human Rights Law Review* 325; Katharine Fortin, 'Rape as Torture - An Evaluation of the Committee against Torture's Attitude to Sexual Violence ' (2008) 4 *Utrecht Law Review* 145; Carla Ferstman, 'Reparation for Sexual Exploitation and Abuse in the (Post) Conflict Context: the Need to Address Abuses by Peacekeepers and Humanitarian Aid Workers.' In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Carla Ferstman and Mariana Goetz (eds), Leiden: Brill Nijhoff, 2020, 271-97.

The more feminist approaches have permeated into international law, the more the heavily gendered nature of international law has been revealed.⁶ '[W]hen the issue is gender, men are treated but never acknowledged, as the norm, while women are considered the deviation'.⁷ Feminist scholars have not only noticed this exclusion but have attempted to give a platform to those voices, experiences and epistemologies⁸, and this can only be achieved by a constant review of international law.⁹ Feminist legal theory critiques the concepts and theories that currently exist in international law, including within the laws that seek to protect the individual.¹⁰

With regards to International Human Rights Law (IHRL), feminist scholars have been concerned with revising and challenging current practices not only to ensure the protection of women but also to highlight the exclusion endured by other marginalised individuals.¹¹ As a result, legal feminism has focused on how legal systems operate to simultaneously relegate and essentialise multiply-burdened¹² individuals.¹³ Feminist approaches to

⁶ Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: a feminist analysis* (Melland Schill studies in international law, Juris Pub. : Manchester University Press 2000) 49.

⁷ Arlene S. Kanter, 'The law: What's disability studies got to do with it or an introduction to disability legal studies' (2010) 42 *Columbia Human Rights Law Review* 403, 406.

⁸ Hilary Charlesworth, Gina Heathcote and Emily Jones, 'Feminist Scholarship on International Law in the 1990s and today: An Inter-Generational Conversation' (2019) 27 *Feminist Legal Studies* 79 and Gina Heathcote, *Feminist dialogues on international law : successes, tensions, futures* (First edition. edn, Oxford University Press 2019).

⁹ Anna Carline and Zoe Pearson, 'Complexity and Queer Theory Approaches to International Law and Feminist Politics: Perspectives on Trafficking' (2007) 19 *Canadian Journal of Women and the Law* 73, 85.

¹⁰ Carol Smart, *Feminism and the power of law* (Sociology of law and crime, Routledge 2002) 139.

¹¹ Carline and Pearson, 'Complexity and Queer Theory Approaches to International Law and Feminist Politics: Perspectives on Trafficking', 85 and Smart, 'Feminism and the power of law', 139.

¹² The term multiply-burdened, as used in this thesis, corresponds to the use and content given by Kimberlé Crenshaw in her work Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum*. Multiply-burdened individuals are those whose burdens (marginalisation/oppression) cannot be described, addressed and redressed within single axis-frameworks because they do not emanate from a single source. Their burden is comprised of different sources of oppression which operate simultaneously.

¹³ Brittney C. Cooper, 'Intersectionality' in Lisa Jane Disch and Mary Hawkesworth (eds), *The Oxford handbook of feminist theory* (Oxford University Press 2016).

international law have an immediate effect on the rights of those who are marginalised.¹⁴

For example, feminist theory has helped broaden the scope and reach of certain rights and has provided processes to better adjudicate rights.¹⁵

This is the context in which intersectionality has been inserted into international law. Intersectionality can be broadly defined¹⁶ as: “the complex, irreducible, varied, and variable effects which ensue when multiple axis of differentiation – economic, political, cultural, psychic, subjective and experiential -intersect in historically specific contexts”.¹⁷

Kimberlé Crenshaw first used the term intersectionality to discuss the shortcomings of discrimination law that assumed individuals suffered discrimination due to one ground, and how it did not account for those who experienced discrimination due to two or more grounds, such as black women.¹⁸ Crenshaw coined the term using a metaphor of a roundabout where the intersections represented discrimination as multi-directional, and a possible crash as the result of injury attributed to multiple sources. Crenshaw’s work:

‘was instrumental in analysing the ways in which U.S. antidiscrimination law took a “but for” approach 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 her complex social identity and only in negative relief against the putative norm of white males could a claimant have her situation addressed.’¹⁹

¹⁴ Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509, 513.

¹⁵ Doris Buss and Ambreena Manji, *International law: modern feminist approaches* (Hart Publishing 2005) and Daniela Nadj, *International criminal law and sexual violence against women : the interpretation of gender in the contemporary international criminal trial* (Routledge 2018).

¹⁶ These definitions will be expanded on in Chapters 2 and 3.

¹⁷ Avtar Brah and Ann Phoenix, 'Ain't I a woman? Revisiting Intersectionality' (2004) 5 *International Women's Studies* 75, 76

¹⁸ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics' and Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

¹⁹ Amanda Dale, 'International Women’s Human Rights and the Hope for Feminist Law: Intersectionality as Legal Framework'. *Canadian Woman Studies/Les Cahiers de la Femme* (2018-2019) 33, 1-2, 40.

Crenshaw's work aimed at bridging the discourse between anti-racist and feminist activists,²⁰ with the purpose of eradicating the atomized analysis of racism and sexism that contributed to further marginalizing Black women.²¹

Intersectionality is starting to be used by international human rights adjudicative bodies to decide cases. In the last half-decade, the use of intersectionality has been a slow yet constant practice in human rights adjudication.²² However, the use and application of intersectionality are still not widespread. This provides an opportunity to explore and maybe revise how adjudicative bodies use intersectionality.

The growing presence of intersectionality in the different functions of international human rights bodies signals an acceptance of the theory as an approach to human rights,²³ shifting the concern from the need to justify its presence to that of ensuring that intersectionality is used and applied clearly and comprehensively. IHRL practitioners should reflect on the objectives, analyses, and practices of intersectionality so it can reach its true potential.²⁴ One of the best vehicles for this is, as Lutz notes, a better 'dialogue between jurisprudence and other social sciences on intersectionality'.²⁵

²⁰ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics' 140

²¹ Dale, 'International Women's Human Rights and the Hope for Feminist Law: Intersectionality as Legal Framework', 40-41

²² See the genealogy of intersectionality in human rights law in this thesis.

²³ Such as Georgina Vargas Vera, 'Interseccionalidad de la discriminación, formas agravadas de vulnerabilidad. El caso Gonzales Lluy y otros vs. Ecuador' (2016) 18 *Iuris Dictio* 139; Charlotte Helen Skeet, 'Intersectionality as theory and method: human rights adjudication by the European Court of Human Rights' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *The Routledge Handbook of socio-legal theory and method* (Routledge 2019) and Andrea Catalina Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos' (2015-2016) 9 *Eunomía Revista en Cultura de la Legalidad* 67.

²⁴ Patricia Hill Collins, *Intersectionality as Critical Social Theory* (Duke University Press 2019), 4.

²⁵ Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik, *Framing intersectionality : debates on a multi-faceted concept in gender studies (The feminist imagination : Europe and beyond, Ashgate 2011)* 7.

Intersectionality has gained traction in international human rights law and activism, and it is being used as a tool to analyse the experiences of people who have suffered human rights violations.²⁶ Adjudicators have demonstrated an increased interest in using intersectionality. Former President of the Inter-American Court of Human Rights, Judge Ferrer Mac-Gregor stated:

This approach is important because it underscores the particularities of the discrimination suffered by groups that, historically, have been discriminated against for more than one of the prohibited reasons established in various human rights treaties.²⁷

In the same vein, Judges Pinto de Albuquerque and Vehabović of the European Court of Human Rights expressed that:

the concept of ‘intersectional discrimination’, which represents a reality that has been virtually disregarded to date by the European system, whereas it has been increasingly acknowledged in international law. It is now indispensable to take this phenomenon into consideration in order to reach a global and comprehensive understanding of the various discrimination situations and thus guarantee the effectiveness of the Convention rights.²⁸

These quotes illustrate a growing interest and tendency from adjudicative bodies to incorporate intersectionality into their decision-making procedures.²⁹

²⁶ Mara Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación' (2016) 52 Debate Feminista 1, 5.

²⁷ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No.298. Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot para 12.

²⁸ European Court of Human Rights. Garib v The Netherlands. App. No(s). 43494/09. (ECHR, 06 November 2017). Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Vehabović para 34.

²⁹ For an example on how intersectionality has been incorporated into international human rights law see Maria Caterina La Barbera and Marta Cruells López, 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v Spain' (2019) 53 Law & Society Review 1167 and Skeet, 'Intersectionality as theory and method: human rights adjudication by the European Court of Human Rights'.

The theoretical framework of human rights fragments rights into separate strands³⁰ that deal separately with, for example, class and race and cannot cope with addressing racialised class oppression. As Bond argues, it ‘does not permit a nuanced human rights analysis that would account for multiple forms of human rights abuses occurring simultaneously’.³¹ Therefore, it is important to have a stronger conceptual foundation of intersectionality that could be used as the basis of the application of this theory in international human rights law.

While much of the literature has focused on the use of intersectionality in international human rights law, the conceptualisation of intersectionality in the context of IHRL largely remains weak, not having been subjected to extensive debate.³² Furthermore, the existing research has explored the role of intersectionality more often when discussing women’s rights.³³ For example, the literature includes the work of Truscan and Bourke-Martignon who focused on assessing the extent to which intersectionality has been used in general comments and concluding observations of the United Nations Treaty Bodies. As they observed, grounds of discrimination have been recognised in IHRL as mutually exclusive creating a normative and institutional fragmentation that has impacted the way individual cases have been decided. Truscan and Bourke-Martignon’s article examines the current practice, within international human rights mechanisms, to take steps to respond to forms of intersectional discrimination more fully. They conclude that one of the main issues

³⁰Johanna Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations' (2003) 52 Emory Law Journal 71.

³¹ *Ibid* 74.

³² Skeet, 'Intersectionality as theory and method: human rights adjudication by the European Court of Human Rights' and Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos'.

³³ This is just a preview of the discussions that will come in the next chapter.

currently faced using intersectional theory in IHRL is the challenge it represents to translate the responses to individual cases to transformative remedies that will help bring down oppressive structures. Their work mostly focuses on the work of the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and recognise that as much as this Committee has contributed to mainstream intersectionality, the “Committee’s application of intersectionality as a method of analysis has not followed a linear path”.³⁴ One of the most significant findings of this article is the need for greater clarity and consistency in the Treaty Bodies’ reasoning on intersectionality, the authors further argued that there are no clear or common definitions of intersectional discrimination.³⁵ Similarly, this thesis will explore venues to contribute to the use of intersectional analysis in human rights adjudication and will examine the possibilities of establishing a better definition of intersectionality to be used in IHRL.

Chow uses the tensions between cultural and religious practice and certain identities to illustrate the limits of intersectionality in the context of, once more, the Treaty Bodies. She explores if intersectionality can accommodate the shifting and conflicting subjectivities of minority women. Furthermore, her article tries to dismantle the idea that intersectionality is the solution to better capture the ambivalence of individuals’ identities when dealing with legal issues. She concludes that the juridical effectiveness of intersectionality remains uncertain, the uncertain understanding of the concept of intersectionality might prevent intersectional analysis to produce their intended results. Chow also explores whether the

³⁴ Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 *The Equal Rights Review*, 103.

³⁵ *Ibid*

theory of intersectionality has reached its limits while also questioning how IHRL can properly accommodate multiply-burdened individuals. One of the most important conclusions reached by Chow for the purposes of this thesis is the fact that she recognises that:

the way intersectionality is currently applied seriously limits the potential of intersectionality. In particular, there is a real concern that intersectionality may be reduced to a form of ‘additive exercise’ owing to a misperception that multiple identities necessarily contribute to an accumulative form of oppression. [...] international law and discourse are still far from exhausting the potentials of intersectionality.³⁶

In the same vein Campbell’s research also concentrates on the inconsistent application of intersectionality specifically in the work of CEDAW Committee. She first recognises that adding two kinds of discrimination do not accurately describe the vulnerability multiply-burdened women face. Nor is additive discrimination effectively to explain their qualitatively different experiences of discrimination. Campbell also criticises in detail the current gaps in discrimination law as they do not capture the more nuanced ways multiply-burdened women experience marginalisation. Her article recognises, as do many of the sources included in this thesis, the work CEDAW Committee has done to overcome these challenges even when the Treaty they oversee has no specific provisions recognising women’s intersectional identity. Campbell finds that CEDAW Committee has not comprehensively and coherently approached intersectional discrimination in their different functions so, similarly to the objective of this thesis, a refined understanding of intersectionality theory is needed. Campbell’s other significant contribution is the argument she builds around the legal basis for intersectional discrimination in CEDAW,

³⁶ Pok Yin Chow, ‘Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence’ (2006) 19 Human Rights Law Review.

as she concludes that in order to fully integrate intersectionality into the work of the CEDAW Committee one must think in terms of transformative equality.³⁷

Aisha Nicole Davis proposes to incorporate intersectionality to IHRL and international humanitarian law (IHL) to better address the human rights violations that affect multiply-burdened women. According to Davis, the frameworks of IHRL, IHL and international criminal law think of women as a monolithic category where race or ethnicity is just a variant to a category and not part of women's identities. She calls for the incorporation of intersectionality to better recognise women's rights and more accurately address and redress the human rights abuses they experience. She finds that human rights mechanisms do not provide the same type of protection to people that are discriminated but for one ground. Davis find that intersectionality should be applied across all IHRL instruments and international criminal tribunals. So, as it will be argued in this research, intersectionality must be recognised in the discourse and adjudication of women who belong to several minority groups. Davis is also concerned with exploring within her article how can intersectionality be adapted so the international women's rights movement can make use of the core international human rights mechanisms to achieve their goals.³⁸

Smith seeks to expand the application of intersectionality beyond the double jeopardy formula of race and gender. He also argues that the intersecting and co-existing identities of an individual create a qualitatively different experience of discrimination. Smith explains that despite the ever-growing use of intersectionality, it is still working within

³⁷ Meghan Campbell, 'Cedaw and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 *Revista Direito GV* 479, 496.

³⁸ Aisha Nicole Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Human Rights Journal*.

“single-axis” models of discrimination law, reinforcing homogenous and monolithic understandings of social categories. Smith explores the role liberalism has had on understandings of equality, thanks to this influence the legal subject has been seen as abstract and atomistic. He expresses the disadvantages of using comparator and comparison as central to discrimination law and emphasises how substantive equality must be the goal of international and national legal systems. Smith believes that ‘by developing an understanding of intersectionality, particularly through the recognition of intersectional discrimination, law will be able to better identify and eliminate the power dynamics perpetuating patterns of privilege and disadvantage.’³⁹ Smith firmly believes that intersectionality will help law overcome the problems that arose with single-axis models and through it the realities of discrimination will be responded more effectively by courts. He thus concludes that recognising intersectional discrimination and how privilege and oppression intersect to form qualitatively different experiences of discrimination is very important to achieve substantive equality for all. Smith also warns that intersectionality is not the all-mighty answer for discrimination law’s failings.⁴⁰

Finally, Bouchard and Meyer-Bisch, in contrast, question the capacity intersectionality must deal with human rights violations⁴¹ and Nguyen and Davis’s research was narrowed down to the use of intersectional discrimination concerning women’s rights.⁴²

³⁹ Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *The Equal Rights Review*.

⁴⁰ *Ibid*

⁴¹ Johanne Bouchard and Patrice Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?' (2016) 16 *The Equal Rights Review*.

⁴² Athena Nguyen, 'Through the Eyes of Women? the Jurisprudence of the CEDAW Committee' (2014) 30 *Outskirts* 1, 7 and Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global. Stage'.

The articles and texts analysed, preliminarily highlighted a tension among the intention of applying intersectional analysis in international human rights law, the theoretical discussions undertaken by those adjudicative bodies (as in members of regional human rights courts and the Treaty Bodies). and the theory developed in feminist theory. With this in mind, it was crucial to explore the manner in which intersectional theory and analysis had been implemented in international human rights law.

Intersectionality has travelled at remarkable speed. Some feminist authors are calling for a more theoretical refinement of the concept of intersectionality, creating a base that is common to all uses.⁴³ Thus, according to Collins, it is time to explore new definitional dilemmas ‘the time seems right to analyse what intersectionality is, what it is not and what it might become’.⁴⁴

Of course, some authors are not so convinced about the use of intersectionality as an approach to international human rights law. Yuval-Davis believes that intersectionality still needs to prove its value and meaning by providing a clearer process of operationalisation that accounts for all the tensions, debates, inconsistencies, and complexities of the inequalities it seeks to dismantle.⁴⁵ Valentine sees a need for further

⁴³ Mercedes Krause and Matías Salvador Ballesteros, 'Interseccionalidad en desigualdades en Salud en Argentina: Discusiones Teórico-Metodológicas a partir de una Encuesta Poblacional' (2018) 23 *Hacia La Promoción de La Salud* 13, 15, 16 and 17 and Sirma Bilge, 'Recent feminist outlooks on intersectionality' (2010) 57 *Diogenes* 58.

⁴⁴ Collins, 'Intersectionality as critical social theory' Page 22.

⁴⁵ Nira Yuval-Davis, 'Intersectionality and feminist politics' (2006) 13 *European Journal of Women's Studies*.

research and analysis into the possibility of operationalising intersectionality before actually proposing how to use it as a methodology.⁴⁶

Noting the concerns of these authors, this thesis will seek to address them by providing an analysis of intersectionality as used in feminist theory [chapter 2 and 3] and how these theories can or cannot be applied to international human rights law [chapter 4]. This analysis will be later used to propose a framework for its operationalisation [chapter 4] which will then be applied to two case studies [chapter 5].

With the ever growing presence of intersectionality in IHRL, many scholars have discussed its role in the adjudication of human rights,⁴⁷ and by doing so have recognised, with concern, that IHRL still attaches monolithic, static and unified identities to social categories.⁴⁸ That means that people will behave ‘in essence’ based on a fixed notion of their identities.⁴⁹ IHRL adjudication, through its anti-discrimination tools, assumes that individuals belonging to a social category will experience discrimination in the same way.⁵⁰ Believing there is a unifying lived experience amongst the members of a social group does not account for the experience of those who are multiply-burdened and

⁴⁶ Gill Valentine, 'Theorising and Researching Intersectionality: A Challenge for Feminist Geography' (2007) 59 *The Professional Geographer* 10.

⁴⁷ For example, see Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations'; Colin Clark, Dee Matthew and Vicki Burns, 'Power, privilege and justice: intersectionality as human rights?' (2018) 22 *The International Journal of Human Rights*; Marco Emignani and Yolanda Hernández-Albújar, 'Critical Reflexivity and Intersectionality in Human Rights: Toward Relational and Process-Based Conceptualizations and Practices in Psychology' (2019) 24 *European Psychologist, Human Rights and Psychology* 136; Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17 *The International Journal of Children's Rights* 345.

⁴⁸ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 72.

⁴⁹ *Ibid* 71.

⁵⁰ Tracy E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89, 100.

excludes the voices of the marginalised within the marginalised.⁵¹ Feminist scholars Charlesworth and Chinkin have expressed in the past that, *mutatis mutandi*, treaty bodies that deal with marginalised individuals such as CEAW Committee create the illusion of giving them the power to access the centre of human rights protection. The reality, according to these authors is the creation of an adjudication system that further marginalises multiply-burdened individuals from the mainstream.⁵²

Considering the use of intersectionality is becoming more widespread it is necessary to clarify its content and scope to ensure that intersectional analysis produces a significant result that justifies its use in adjudicative processes. The manner in which intersectionality is referenced in IHRL adjudication is not clear, the literature review does not paint a very clear picture of the way in which intersectionality is theorised, conceptualised nor operationalised. Thus, a more systematised, structured, and unified understanding of the theory will help build a stronger vehicle for intersectional analysis.

Currently it is not clear if when intersectionality or intersectional analysis is used in human rights law, the results are effective in achieving any difference; the practice has shown that intersectionality has only produce partial results as it has only been partially incorporated,

⁵¹ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 107 and Anna Carastathis, '“Racism” versus “intersectionality”? Significations of interwoven oppressions in Greek LGBTQ+ discourses' (2019) *Feminist Critique East European Journal of Feminist and Queer studies*, 12.

⁵² Charlesworth and Chinkin, 'The boundaries of international law: a feminist analysis', 218.

as will be argued here.⁵³ As Thomas and Bunch put it, the idea is not to ‘add [intersectionality] and stir’ but rather to ‘add [intersectionality] and alter’.⁵⁴

The use of intersectionality as a method, as will be explained in subsequent chapters, is the least clear and agreed aspect of the theory in feminist debate. Naturally, this same gap was translated into the use of intersectionality in the adjudication of human rights. For the successful application of intersectionality – that is, not just as a buzzword or a trend – one must consider how can intersectionality be operationalised in the adjudication of human rights to ensure that the harm suffered by a victim is adequately addressed and therefore redressed.

This idea is reinforced by Nura Taefi who further point that the lack of consistency in the approaches taken by Treaty Bodies result in a lack of protection of those who are placed in the intersections of marginalization.⁵⁵ Moreover, references to intersectionality tend to be limited to brief commentaries on the issue with a narrow scope of discussion, sometimes lacking any proposal to overcome the single-axis approach that permeates human rights.⁵⁶ In contrast to them, this thesis seeks to expand beyond the scope of existing analyses which focus on the UN Treaty Bodies and move onto regional systems, in particular the Inter-American System of Human Rights (IASHR), and to take the discussion beyond a theoretical one proposing an operationalisation process that could contribute to filling the

⁵³ Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' , 454-455.

⁵⁴ Dorothy Q. Thomas, 'Conclusion' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Approaches* (Routledge 1995) 358 and Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486, 494.

⁵⁵ Taefi 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalization of the Girl-Child'.

⁵⁶ Clark, Matthew and Burns, 'Power, privilege and justice: intersectionality as human rights?' 110.

gaps identified by these authors. Bond has argued that further analysis and a proposal on how to apply intersectionality to international human rights law and the work of their institutions and organisation is needed.⁵⁷

In the same vein Bouchard and Meyer-Bisch whose work has heavily influenced this thesis, argue that even the joint general comments/recommendations that exist and could exist in the future are not the solution to the protection of multiply-burdened individuals.⁵⁸

What all these authors have in common, is that they see intersectionality as a mechanism to redesign human rights protection. Their proposals are of particular relevance to the present work because one of the bases to explore how intersectionality can improve international human rights adjudication is precisely to mainstream the protection of multiply-burdened individuals attending to their intersections.

Guaranteeing that intersectionality is adapted to IHRL without losing its central concerns can also contribute to the delivery of a more comprehensive justice. One of the motivations for revising the way intersectionality is conceptualised is the need to use intersectionality as a tool to understand harm in international human rights adjudicative processes. Therefore, there will also be a focus on determining how adjudicators and human rights practitioners can better understand harm and its manifestations, putting the intersecting characteristics of the victims at the centre of any analysis. This translates to human rights adjudication where a lack of intersectional approach or the wrong use of it might entail justice being denied either because there is a finding of a partial breach or because the

⁵⁷ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations'.

⁵⁸ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 201-203

breach is not even acknowledged.⁵⁹ This thesis aims to show that the more adjudicative bodies exalt the differences between the individuals that bring cases to their courts via intersectionality, the more justice can be truly achieved. Furthermore, according to Clark, Matthew and Burns “by adopting an intersectional perspective, we can [...] ensure that justice prevails over vested interests of power and privilege”.⁶⁰

Intersectionality has been considered by Leslie McCall as the most important contribution made by women’s studies,⁶¹ and she has argued that intersectionality has proved so influential in social sciences because it provides the tools to better understand and address simultaneous forms of oppression.⁶² Intersectionality has been so significant because, in the words of Patricia Hill Collins, it is a knowledge project that engages with social problems and tries to problematise the complexity of our ever-changing societies.⁶³ It provides a novel approach from which to study old issues surrounding power and domination,⁶⁴ producing a tool to understand the experiences of marginalised groups and the different positions where individuals can be located.⁶⁵

Intersectionality could contribute to ensure that multiply-burdened individuals are properly protected by general human rights norms contained in the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and

⁵⁹ Skeet, 'Intersectionality as theory and method: human rights adjudication by the European Court of Human Rights' 278.

⁶⁰ Clark, Matthew and Burns, 'Power, privilege and justice: intersectionality as human rights?', 109.

⁶¹ Leslie McCall, 'The complexity of Intersectionality' (2005) 30 *Signs* 1771, 1771.

⁶² Ibid also see Jill C. Humphrey, 'Researching Disability Politics, Or, Some Problems with the Social Model in Practice' (2000) 15 *Disability and Society* 63.

⁶³ Collins, *Intersectionality as Critical Social Theory*, 287.

⁶⁴ Kathy Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful' (2008) 9 *Feminist Theory* 67, 73.

⁶⁵ María José Magliano, 'Interseccionalidad y Migraciones: Potencialidades y Desafíos' (2015) 23 *Revista Estudios Feministas* 691, 695.

Cultural Rights (ICESCR), and their cases can be adjudicated in, for example, the Human Rights Committee of the UN (HRC) instead of being dealt with almost exclusively in special mechanisms such as CEDAW Committee thus giving thematic human rights treaties a status that resembles that of *lex specialis*.⁶⁶

Therefore, it is a perfect moment to question if the ways in which intersectionality is being referenced in adjudicative process is the most appropriate one to respond to the method and message of intersectionality. Not only does it force adjudicators, to rethink the way oppression and marginalisation are conceptualised, but it also brings the victim to the forefront. Thus, multiply-burdened individuals and their voices, individuality and even suffering become central to the process of adjudication.⁶⁷

Echoing Judges Ferrer Mac-Gregor, Pinto de Albuquerque and Vehabović, intersectionality must be taken into consideration to reach a comprehensive understanding of the harm endured by multiply-burdened individuals. Justice cannot be partial or insufficient, adjudicators cannot deny the intersectional nature of some violation because if they do, those human rights violations will be left unremedied or inadequately remedied. Inappropriate responses to human rights violations can and do lead to further violations that continue to oppress and marginalised those who are already multiply-burdened.⁶⁸ With

⁶⁶ Binion, 'Human Rights: A Feminist Perspective', 513 and Michael O'Flaherty and Claire Methven O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper of the High Commissioner's Proposal for a Unified Standing Treaty Body,' 7 Human Rights Law Review, 2007,141–172.

⁶⁷ Loveday Hudson, 'A feminist approach to Alynne da Silva Pimentel Teixeira (deceased) v Brazil' in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds), Research methods for international human rights law: beyond the traditional paradigm (Routledge 2019) 55

⁶⁸ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 197-198.

this in mind, this thesis seeks to address how intersectionality can be operationalised in a way that would allow judges to deliver justice more comprehensively.

This thesis does not intend to reject what has already been theorised about intersectionality in IHRL. Instead, it seeks to reflect on how well ideas from intersectionality theory have been conceptualised and implemented to ensure that it is used to its full potential within adjudication, seeking to pave the way to a future where intersectionality in IHRL may more fully contribute to the understanding of the complexities of lived experiences. Furthermore, a doctoral thesis seems to be the best scenario to push the boundaries of what an adjudicative body could do, unlike a policy document that needs to envision their proposals within the existing constraints of the adjudicative bodies' functions. The thesis will go beyond the existing literature because it seeks to contribute to the delivery of justice focusing on adjudicative processes. As Hodson reminds us, 'the possibility of the feminist transformation of rights' and not 'the improved enforcement of rights as they currently exist' should be one of the concerns of legal feminists.⁶⁹

With all these debates in mind, this thesis seeks to answer the following questions:

- How should intersectionality be understood in International Human Rights Law adjudication?
- What is the importance of including the theory of intersectionality in Human Rights adjudication?

⁶⁹ Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25 *European Journal of International Law* 561, 567.

- How can we operationalise intersectionality to apply it in the adjudication of Human Rights?
- How can intersectionality contribute to the delivery of justice?

The present thesis will have three objectives: a) to explore the relationship between intersectionality and IHRL; b) to determine if intersectional analysis in IHRL properly operationalises the objectives and elements of intersectionality theory; c) explore if a more structured and systematised use of intersectional analysis produces any significant results in the protection of human rights.

Intersectionality is widely accepted at least from a theoretical point of view⁷⁰ yet this incorporation has not been free of issues. According to authors such as Charleston, Engle and Fraser to name a few, when it comes to incorporating feminist theories into law, there is still a dissonance between the theory that encapsulates the ideas and how these ideas are used in practice.⁷¹ The possibility of feminist ideas travelling to other disciplines just to be re-signified to the point that they are stripped of their content, becoming a ‘shadowy version’ of what was originally intended, is very real.⁷² When law functions as a ‘transmission vehicle [...] for feminism’, these feminist theories and ideas are adapted to different areas of engagement.⁷³ They do not remain an immutable feminist approach

⁷⁰ Yuval-Davis, 'Intersectionality and feminist politics'

⁷¹ Hilary Charlesworth, 'Talking to ourselves? Feminist scholarship in International Law' in Sari Kouvo and Zoe Pearson (eds), *Feminist perspectives on contemporary international law : between resistance and compliance?* (Hart 2011) 17.

⁷² Nancy Fraser, 'Feminism, Capitalism and the Cunning of History' (2009) 59 *New Left Review* 97 and Dianne Otto, 'Contesting Feminism's Institutional Doubles: Troubling the Security Council's Women, Peace and Security Agenda in Governance Feminism' in Janet E. Halley and others (eds), *Governance feminism : notes from the field* (University of Minnesota Press 2019) 22.

⁷³ Janet E. Halley and others, *Governance feminism: an introduction* (University of Minnesota Press 2018) 23.

created by and for feminists alone. The so-called mainstreaming of feminist legal theory in international law does not mean in practice that legal theorists accept the same message and aim for the same objectives as feminists intended.⁷⁴

These same concerns might exist in international human rights adjudicative bodies as they too have incorporated feminist theories and ideas into their work, as it will be demonstrated across this research with regards to intersectionality. However, these theories and ideas might have almost become mandatory empty references without any nuanced understanding of them.⁷⁵ Kantola and Lombardo argue that a considerable number of adjudicative bodies seem to be mentioning intersectionality without a strong understanding of the concept or its operationalisation.⁷⁶ ‘Intersectional analysis must not be reduced to a mere catalogue of the multiple ways that [interlocking systems of oppression] victimise a community’.⁷⁷

Hence, this thesis seeks not only to contribute to the ongoing debates but also to fill some of the gaps in the literature on how to ensure better use of intersectional human rights analysis. One of the objectives of this thesis is to demonstrate that intersectionality in international human rights law can have a strong theoretical foundation with a practical

⁷⁴ Karen Engle, 'Feminist Governance and International Law: From Liberal to Carceral Feminism' in Janet E. Halley and others (eds), *Governance feminism : notes from the field* (University of Minnesota Press 2019) 3 and 22.

⁷⁵ Charlesworth, 'Talking to ourselves? Feminist scholarship in International Law' 23.

⁷⁶ Johanna Kantola and Emanuela Lombardo, 'Feminist Political Analysis: Exploring Strengths, Hegemonies and Limitations' (2017) 18 *Feminist Theory* 323, 332.

⁷⁷ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 159.

application that seeks to contribute to justice.⁷⁸ Consequently, intersectionality is proposed as a vehicle to achieve a more comprehensive delivery of justice.

This thesis will also focus, within the search for a more structured use of intersectional analysis in IHRL, on seeking to understand the broader structures that contribute to the marginalisation of individuals. Intersectionality can contribute to the wider analysis of the individual as situated within complex power dynamics. Seeking to understand the harm in question in relation to the context of oppression that allowed for the violation to take place and underscoring the particularities of the violation suffered in those cases in which the victim belong to groups that have been historically marginalised.

To ensure that human rights tribunals and courts use intersectionality more in line with the current debates, this study also includes as novel elements a proposal on how to operationalise intersectionality that tries to open a more effective channel of communication between feminism and human rights law. Judith Butler affirms that all the processes of re-signification that feminist theories undergo are constantly changing and can constantly be contested.⁷⁹ That is what this thesis seeks to do. The thesis aims to examine a way to ensure that intersectionality as a feminist approach to international law is adapted to the complex dynamics of law, without being co-opted by international law and modified to the point of losing content and having little interaction or relevance to theories of intersectionality. It is also the intention of the present research to assess which

⁷⁸ Collins, *Intersectionality as critical social theory*, 275.

⁷⁹ Otto, 'Contesting Feminism's Institutional Doubles: Troubling the Security Council's Women, Peace and Security Agenda in Governance Feminism' 22 and Judith Butler, 'Contingent Foundations: Feminism and the Question of 'Postmodernism'' in Judith Butler and Joan Wallach Scott (eds), *Feminists theorize the political* (Routledge 1992) 3.

points are dissimilar in the previously mentioned uses in order to understand why these differences exist and whether these changes are necessary for the proper implementation of intersectional analysis in IHRL. Bearing this in mind, how to facilitate the dialogue between international human rights law and feminist theory in the context of the operationalisation of intersectionality will be explored.

Additionally, one of the main contributions this thesis makes is in proposing a base concept of intersectionality that could be used in adjudication to help achieve greater clarity and efficiency in the application of intersectionality within international human rights law. When the term “base concept” is mentioned in this research, it does not entail that one definition should, will or must be reproduced throughout all adjudicative bodies. The purpose behind it is centred around the idea of a base definition with elements in common. For example, in the same fashion as the term ‘enforced disappearances’ has several definitions depending on the instrument where it is defined or the adjudicative bodies, certain elements will always be present⁸⁰ and as a minimum, everyone will be able to have a similar idea of what enforced disappearances are. This is exactly what the proposed thesis will try to achieve; to provide a base concept of intersectionality from which adjudicative bodies can add their own specificity if they so wish. This will clarify how intersectionality is understood in human right adjudication and provide a method that would allow adjudicative bodies to apply it across all areas of international human rights law.

⁸⁰ An example of this baseline concept can be found in Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers 2007) Chapter 3.

At the same time, and as this thesis notes throughout the following chapters, some feminist theories of intersectionality cannot be appropriately applied to the law as their overtly theoretical nature makes them difficult, if not impossible to apply through existing legal frames. This thesis seeks, therefore, to understand what parts of intersectional theory can be applied to the law and which cannot. Although human rights and feminist theory might have different purposes and feminist approaches need to be adapted to the needs of human rights law for them to be able to be operationalised, this does not justify the selected take-up of certain aspects of intersectionality by human rights law at the expense of ignoring the other aspects with little to no justification as to why some elements have been used and others not.⁸¹ For example, one of the hypotheses that emerge from the literature review in the following chapter⁸² is that feminist theory is already focusing on new ways to expand the boundaries of intersectionality while in international human rights law, intersectionality is still understood and used in a more limited manner.

Before moving to the outline, and notwithstanding the following discussion will be further developed in the upcoming chapters, it is important for explore the type of individuals that could benefit from the discussions and conclusion in this thesis. Currently, the determination of which identities can intersect is still not widely determined in either IHRL or feminist theory. On one side of the debate, scholars such as Atrey argue that all individuals inherently have intersectional identities. White, middle-class, Christian,

⁸¹ See below Chapter 3.

⁸² The literature includes authors such as Clark, Matthew and Burns, 'Power, privilege and justice: intersectionality as human rights?'; Truscan and Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination'; Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' and Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective'.

heterosexual, able-bodied men also experience their identities as intersectional. Based on certain characteristics, each intersection will create experiences of privilege or disadvantage.⁸³ However, this approach has not been presented without contestation. Some authors mention that marginalised people have been displaced even from the discussions of intersectionality and European neoliberal women have been credited for the mainstreaming of intersectionality.⁸⁴ Opening intersectional analysis to the extent that a white, straight man can be the subject of study⁸⁵ is, according to May, an apparent attempt to whitewash intersectionality and remove its original recipients from the centre of the discussions.⁸⁶

Therefore, the subject of intersectional analysis proposed by this research will be those that are deemed as multiply-burdened subjects, meaning victims that: a) have only identities that are oppressed; b) individuals with a majority of identities that are oppressed but also interact with some identities that are considered privileged; and c) individuals with mostly privileged identities but also have two or more oppressed identities. It will focus not on every instance of oppression nor cover the effect of human rights violations in every single interaction, such as cases where a white, heterosexual, cisgender, rich man is the victim.⁸⁷

⁸³ Shreya Atrey, 'Realising Intersectionality in Discrimination Law', Oxford University 2015).

⁸⁴ Barbara Tomlinson, 'Colonising intersectionality: Replicating racial hierarchy in feminist academic arguments' (2013) 19 *Social Identities* 254.

⁸⁵ Devon W. Carbado, 'Colorblind intersectionality' (2013) 38 *Signs* 811.

⁸⁶ Vivian M. May, '“Speaking into the void”? Intersectionality critiques and epistemic backlash' (2014) 29 *Hypatia* Border Crossings: Multicultural and Postcolonial Feminist Challenges to Philosophy (Part 2) 94.

⁸⁷ An example of a case with a victim that is privileged see I/A Court H.R., Case of *Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184.

1.1.1 Latin America as case study.

Finally, an additional goal that relates less to IHRL and intersectional analysis and more to whose narrative this thesis will amplify, the discussions presented will try to include the voices of individuals traditionally ignored by hegemonic feminist discourses.

‘Hegemonic feminism’ is white led, marginalizes the activism and world views of women of colour, focuses mainly on the United States, and treats sexism as the ultimate oppression. Hegemonic feminism deemphasizes or ignores a class and race analysis.⁸⁸

For this reason, the following chapters will have a particular focus on Latin America and the Inter-American System of Human Rights. In both instances the voices of women will be prioritised although it is inevitable that, when using the resources from the IASHR, some of the ideas reproduced will be that of men. However, even the cases used will either have one victim that is a woman, or the case refers exclusively to the protection of women’s rights.

Despite this goal, Chapter 2 is heavily influenced by the work of feminists from the US and Europe. The international voices of feminism come mostly from the Global North precisely because they are the hegemony. To combat this there is special mention of the development of intersectionality in Latin American feminisms as a way to move beyond the Eurocentric tendencies. As a woman from Latin America, there is an imperative not to reproduce the silencing that voices from the Global South have endured. The use and acceptance of intersectionality, in those specific terms, have not been as popular in Latin America as in the US or Europe because it is seen by some feminists as a concept that does

⁸⁸ Becky Thompson, 'Multiracial Feminism: Recasting the Chronology of Second Wave Feminism' (2002) 28 *Feminist Studies* 336, 337.

not add anything new to their discussions.⁸⁹ The historical and social context of the region has forced many women to understand their lives as intersectional and the oppression they have endured has been interpreted as simultaneous and intersecting.⁹⁰ Hull explains how Chicana and Latina feminists have always constructed their stories as intersectional, if not using that name, because their history of colonialism has always played a role in how gender or geographical locations have been politicised.⁹¹ Thus, Latina and Chicana feminists have analysed topics that affect them through the intersections of class, race, gender and sexuality⁹² represented in discussions and theorisations of *mestizaje* and borderlands.⁹³ However, hegemonic feminism has relegated their contributions and as a consequence, they have had a less significant development of intersectionality in their scholarship.

Intersectionality has not reached the status that was given to it in Europe and the US⁹⁴ and this is one of the main reasons why there is limited literature on the subject coming from the region. Nonetheless, it is still an emerging field of study as the lives of women of colour in Latin America are usually presented, by outsiders, in single-axis frameworks; gender,

⁸⁹ Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 8 and 9; Peter Wade, *Race and Sex in Latin America* (Pluto 2009).

⁹⁰ *Supra* note 57

⁹¹ Sonia Saldívar-Hull, *Feminism on the border : Chicana gender politics and literature* (University of California Press 2000) 55.

⁹² Gabriela F. Arredondo and others, *Chicana feminisms: a critical reader* (Post-contemporary interventions, Duke University Press 2003) 5.

⁹³ Gloria Anzaldúa, *Borderlands : the new mestiza = La frontera* (1st edn, Spinsters/Aunt Lute 1987).

⁹⁴ Krause and Ballesteros, 'Interseccionalidad en desigualdades en Salud en Argentina: Discusiones Teórico-Metodológicas a partir de una Encuesta Poblacional', 15.

race, class and coloniality are all presented individually with an assumption of women being a homogenous category.⁹⁵

Chapter 3 does a comprehensive exploration of the case-law on intersectional analysis, and as such other systems were included, like the European Court or the Treaty Bodies, this does not contradict the intent to have a closer look onto the work of the Inter-American System. Furthermore, it was also thought as crucial to this work to try and grasp the widest picture possible of how intersectionality is used when adjudicating human rights. Hence, anyone consulting this thesis will notice that on certain sections of chapters 2 and 4 there are sections that explore only what *feministas latinoamericanas* have said and how it has impacted the socio-political context of the region.

In sum, the IASHR was chosen because their jurisprudence is much more detailed than the case-law from the other regional and universal systems in topics of equality and oppression. Therefore, focusing on this context allows for a much more fertile ground on which to build an operationalisation process for intersectionality. Moreover, the judgements that are issued by the Inter-American Court of Human Rights tend to be quite heavy on IHRL theory than the materials from other systems, which consequently gives a better canvas from where to dissect the findings of the judges in order to question their findings and propose new ways to approach intersectional analysis.

⁹⁵ Lucía Busquier, '¿Interseccionalidad en América Latina y el Caribe? La experiencia de la Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora desde 1992 hasta la actualidad' (2018) 4 Con X Revista científica sobre estudios de género, 4.

1.2 Selection of cases

The data was analysed qualitatively instead of quantitatively, there was no interest in the amount of times intersectionality was used nor the frequency of its implementation. The thesis centres on exploring if it is being used, the terms under which intersectional analysis is implemented and the effects of such implementation. For that reason, whenever possible, all documents related to the adjudication of rights were examined, with the purpose of identifying:

a) when intersectionality is explicitly mentioned by any of the parties and a level of operationalisation of the theory exists by the adjudicative body. This data is the most comprehensive and consequently, the most beneficial for the thesis as it would provide clear proof of whether or not intersectionality was used, how it was used and what difference it made to use intersectionality. It was very valuable to look for the explicit use of intersectional analysis as it would allow the research to provide more accurate conclusions.

b) when intersectionality is explicitly mentioned by any of the parties but there is no operationalisation of it; while it might seem like this category of cases overlaps with the first one, the results are different. It is important to have only the definitions even without an operationalisation because there might be some adjudicative bodies that have developed the concept and theory of intersectionality extensively without using it in a case, this still gives a glimpse into how it can be applied in the future or how the adjudicators are trying to incorporate it.

c) when none of the parties have mention intersectionality but the body still applies it. This set of data will differ from the first one because unlike the first set, the implementation of intersectionality is only done by the Court, therefore, the information that is expected to be obtain from it will inform this research on the arguments the Courts use to apply intersectional analysis when the victims are not arguing for said analysis to be applied, and;

d) any related keyword (higher vulnerability, special measures, double, compounded, or multiple discrimination, intersectional discrimination, double, compounded, or multiple vulnerabilities and higher risk). This set of data was particularly important because as it will be described in Chapter 3, IHRL took longer to use the term intersectionality, so while using related terms or keywords some adjudicative bodies still conducted their analysis by way of intersectionality. This is often the case in, for example, the earlier work of the Inter-American Court of Human Rights and the committee on the Right of the Child.

The selection of cases started with a couple of hypotheses regarding the gaps that would be identified; firstly, and maybe the most important gap was the lack of operationalisation of intersectionality through intersectional analysis in the merits and reparations stages of a case, this gap was quickly made apparent as most of the cases selected lacked any clear process of operationalisation. Secondly, from the conclusions reached by the authors mentioned in the literature review, one of the gaps that were expected to show up as a result of chapter 3 was the lack of intersectional analysis in other Treaty bodies besides CEDAW Committee and the regional systems. However, it was not until the analysis of cases was completed that new gaps were discovered. These gaps ranged from the different manners in which the tribunals used intersectional analysis, some of them were the result

of their limited mandate like CEDAW Committee but others like the Committee against Torture (CAT) used it inadequately the moment they limited its use to case where women were the victims. Another surprise was the constant use of intersectional analysis in the regional systems but for example in the case of the ECtHR they would refer to it without any impact on the case or it would be part of the dissenting opinions of the cases. Similarly, through chapter 3 it was noticed how, having an interpretation of intersectional analysis in the mainstream adjudicative bodies as being part of the protection of women's rights while having a completely different interpretation in the bodies that deal with special categories of rights, further emphasises the protection of multiply-burdened individuals as *lex specialis*. These differences were not the result of the different topics, mandates, and functions of the adjudicative bodies as they were considered when analysing the case-law.

1.3 Thesis outline

To address the current issues with intersectionality, this thesis will pay attention to feminist theory and international human rights law. Each of these disciplines will be examined and compared to understand how the theory of intersectionality has been conceived within each. The result of such comparison will later be used to illustrate the gap that exists between the understanding of intersectionality in international human right law and feminist theory. Considering that the aim and goal of this thesis is to bring the use of intersectionality in international human rights law closer to the conceptualisation that exists in feminist theory, a proposal will be made regarding the way in which it can be operationalised.

Chapter 2 focuses on Intersectionality in feminist theory. This Chapter will dissect the message, objective and aims of intersectionality to provide the basis that will later be adapted to international human rights law. For that purpose, a genealogy of intersectionality theory will be outlined followed by a description of which individuals can benefit from intersectional analysis, the use of structures and systems that are part of intersectional analysis and the criticism surrounding intersectionality in general.

Chapter 3 has the purpose of understanding how intersectionality is being used in international human rights law. Analysing the decision-making processes of adjudicative bodies will improve the understanding of the circumstances under which human rights adjudicative bodies employ an intersectional lens. It will also explore how and when has the theory been implemented in international judicial processes. It will map the use of intersectional analysis in IHRL to distinguish its development, implementation, and possible effects in the adjudicative processes of the universal and regional systems of human rights protection. The objective is to determine the points of convergence of both disciplines (feminism and human rights) in order to understand whether feminist debates on intersectionality, have informed human rights adjudicative processes. The Treaty Bodies, the European Court of Human Rights, the Inter-American System of Human Rights, and the African System of Human Rights have all incorporated intersectionality one way or the other, so it is possible to determine if there is a concept of intersectionality in any of these systems and how exactly is this concept operationalised or implemented.

The theory of intersectionality used by IHRL adjudicative bodies varies so much, even within the same system, that it could create a confusion as to what a specific adjudicative body might understand as intersectional analysis, when can they apply it and what elements

does it cover. Additionally, this Chapter will also include an analysis on how the definition/definitions that exist in international human rights law compares to the ones used in feminist theory. The pros and cons of using one concept or the other will also be explained as it is important to recognise the good practices of both disciplines in the exploration of a more refined concept. From this examination, it will be possible to determine if IHRL fulfils the purpose and message of intersectional theory and if not, what are the steps needed to ensure that intersectionality as understood in feminist theory and its implementation in IHRL is sufficiently aligned so that the latter fulfils the objective of intersectional analysis. With regards to the subject of intersectionality, the thesis will try to determine if intersectionality can be applied to cases where the victim is not a woman or a child. This will allow intersectionality to include in its analysis any individual with more than two oppressed identities and it will rely on the use of social positioning to make this determination, not undertaking such analysis will, consequently, ignore or improperly deal with other intersecting characteristics that play a role in the harm.

The findings on this chapter will significantly contribute to the operationalisation process that shall be proposed in two ways; firstly, understanding how intersectionality has been incorporated into IHRL will provide a picture of when adjudicative bodies are failing and when are they succeeding in properly embracing the method and message of intersectionality. Secondly, those problems identified will be evaluated to determine how can these theoretical elements be refined to ensure that adjudicative bodies achieve a better use of intersectional analysis that will produce the intended results. Some of the scenarios that will be discussed that have been already identified as issues in the use of intersectional analysis in IHRL are; a) the suitability of using intersectional analysis in cases were the

alleged victim identifies as women and not in those violations were the alleged victim is a man; b) how certain elements that feminist theory has used in intersectional analysis are not included in the implementation of intersectionality in IHRL and c) the tendency to use intersectionality to analyse the violation and not the consequences of said violation. As it will be explained in chapter 4, limiting the use of intersectional analysis to the exact moment the violation took place fails to address the entirety of the harm experienced by the victim and prevents adjudicative bodies from comprehensively addressing and redressing the human rights violation.⁹⁶

Chapter 4 will outline how to operationalise those elements of intersectionality as explained in Chapter 3. Furthermore, the introduction of the chapter will quickly map how intersectional analysis is currently using the tools devised by single-axis anti-discrimination frameworks and why it is necessary to reject those tools and use more adequate operationalisation processes. However, its focus will be mainly on determining how intersectionality can be operationalised to help understand how the presence of intersecting identities creates a unique qualitative experience of harm suffered by the individual who is multiply-burdened.

When dealing with the facts, the first step for such an analysis would be to interpret and assess the harm cause by a violation using the available sources of information (*amicus*, testimonies, expert witnesses, etc.). These sources of information will allow the adjudicator to determine if the violations manifest differently because of the intersection of two or more characteristics of the victim. In particular, the adjudicator will be able to

⁹⁶ See Chapter 4. Specifically the discussions by Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?.'

determine how did the intersection of different characteristics render the violation different than cases in which those characteristics were not present. The operationalisation of the theory will concentrate on using intersectionality as an interpretation tool to establish the merits in the judgement.

The operationalisation of intersectionality will also include a process to incorporate analysis of context as a tool to determine the broader structures of oppression that play a role in the violation. As part of this analysis the adjudicator should determine if there is any broader context of oppression or marginalisation against the group the individual belongs due to their intersecting characteristics. The section of the thesis that deals with the operationalisation of intersectionality seeks to establish how the interlocking systems of oppression interact with the harm endured by the individual in their personal capacity. This understanding of harm would allow the adjudicative body to determine how the State failed to guarantee the human rights of the victim who is multiply-burdened.

Finally, two cases of the Inter-American Court of Human Rights will serve as case studies. The purpose of Chapter 5 is to use the judgements as a concrete and practical exploration of the process of operationalisation of intersectionality as describe in Chapter 4. First, the case of *Gonzáles Lluy et al. v Ecuador* which deals with the human rights violations perpetrated against the victim Talía Gonzáles Lluy and her family as a result of Talía getting infected with HIV at age 3. The second case, *Cuscul Pivaral et al. v Guatemala* explores the violations endured by 49 people living with HIV/AIDS who were denied medical service by the state. These two cases will first help illustrate how can the theoretical elements presented in the previous chapters deal with the challenges that are typical to the adjudication of cases in real life. Secondly, the cases will also be used to

illustrate how intersectional analysis could produce a more comprehensive judgment that addresses and redresses the harm endured by multiply-burdened individuals in comparison to the decisions made by the adjudicative bodies relying in single-axis frameworks. The Inter-American Court of Human Rights was chosen because in contrast to the feminist literature that stems from Latin America on intersectionality, out of all the human rights regional systems, intersectionality has been most developed in the Inter-American System of Human Rights. Additionally, at a theoretical level, there is a limited body of literature that focuses on intersectionality on the Inter-American System.⁹⁷ While the arguments and recommendations on how to use intersectionality developed in this thesis can be applied to all human rights adjudicative bodies, most of the examples included will relate to cases decided by the Inter-American Court of Human Rights. The decisions from the Inter-American Commission and the Court have consequently informed this research, particularly in the selection of the case studies.

Finally, it could be argued, the most significant contribution of the thesis is the operationalisation process. This process is not reworked from any previous proposal, but it rather uses a series of steps that are unique to ideas put forward in this thesis. The operationalisation process requires an active participation of judges, with some interventions of the victims, that highlight the identities that make up the individual while

⁹⁷ At the time of the submission of the thesis the literature was mostly limited to the following articles: Zota-Bernal. Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos. *Eunomía. Revista en Cultura de la Legalidad*. N° 9, octubre 2015 – marzo 2016, pp. 67-85; Gebruers, C. (2021). La noción de interseccionalidad: desde la teoría a la ley y la práctica en el ámbito de los derechos humanos. *Revista Perspectivas de las Ciencias Económicas y Jurídicas*. Vol. 11, N° 1 (enero-julio) Vargas Vera, 'Interseccionalidad de la discriminación, formas agravadas de vulnerabilidad. El caso Gonzales Lluy y otros vs. Ecuador'; and Rodríguez, V. (2019). La discriminación interseccional en el discurso Jurídico. *Revista Nuevo Derecho* 15(25):70-87.

analysing the context in which inequality, oppression and marginalisation occur. The operationalisation process is proposed in a way that rejects the tools of discrimination as they are not appropriate for intersectional analysis and provides a broader set of resources from where obtain information that could potentially paint a more precise picture of the harm endured by multiply-burdened victims.

It is proposed that intersectionality be understood as a tool to understand the different qualitative experience of harm endured by an individual due to the interaction of two or more marginalised identities. This concept brings together ideas put forward by several feminist scholars, while its elements are not new, it is a novel proposal for the realm of human rights. This concept proposes a more systematised approach to the understanding of intersectionality.

In short, this thesis concludes that to achieve a more comprehensive justice that properly addresses and redresses the harm of multiply-burdened victims, adjudicators should not only incorporate intersectionality into their judicial functions but also, they should start looking at the discussions surrounding intersectionality that are taking place in feminist theory to ensure that the method and message of intersectionality are not getting lost in translation from a feminist language to a legal one.

Chapter 2. Feminist theories of intersectionality

‘Feminism and intersectionality are closely aligned but they are not synonymous’.¹

2.1 Introducing intersectionality

The genealogy of intersectionality will demonstrate how this concept was conceived as a response to the homogenisation of women; that presented the problems of one specific group of women as the problems of all women.² As María Lugones explains, feminism tended to concentrate on the issues of white women. This meant that white feminist ideas and issues became universal issues common to all women.³ Considering all women were seen as having a white body, feminism focused on dismantling the ideas surrounding conceptualisations of the ‘weaker sex’ and the rejection of the private sphere as being the domain of women, amongst other things.⁴ Because of this, the aspirations of women were presented in a single-axis manner; their struggles and subordination were only constructed with regards to sex and not the other systems of oppression such as capitalism or religious intolerance.⁵

Intersectionality would serve as a method to locate women of colour in the simultaneous subordination they experienced as a consequence of their race and gender and the neglect

¹ Collins, Intersectionality as critical social theory, 107.

² For example, Amanda Dale refers to ‘hegemonic notions of women’s rights’ that stem from the experiences of people in the Global North. See Dale. ‘International Women’s Human Rights and the Hope for Feminist Law: Intersectionality as Legal Framework’ 32, 36.

³ María Lugones, ‘Colonialidad y género’ (2008) 9 *Tabula Rasa* 73.

⁴ *Ibid.*

⁵ Anna C. Korteweg and Triadafilos Triadafilopoulos ‘Gender, Religion, and Ethnicity: Intersections and Boundaries in Immigrant Integration Policy Making, *Social Politics: International Studies*’ (Spring 2013) 20 *Gender, State & Society*, 1, 109–136.

of their issues by anti-discrimination, feminist and antiracist frameworks that operated in isolation from each other.⁶ This double layer of invisibility further marginalised women of colour in the debates surrounding equality.⁷

Intersectionality allows us to unveil multiple and complex dynamics of privilege and oppression,⁸ shining a light into how power relations, marginalisation, structural systems, and lives intersect to create a particular reality for individuals, each different from the others,⁹ thus showing that individuals do not possess fixed immutable attributes but rather changing identities that are shaped by experiences.¹⁰

In feminist theory, the concept of intersectionality is being debated to this day and opinions vary, some authors praised its vagueness while others criticised it for being an ambiguous and open-ended concept.¹¹ Contrary, some scholars argue that intersectionality has not been properly developed as a theory and thus is not the promised answer to anti-discrimination frameworks.¹² In the upcoming sections, it will be demonstrated how on one hand intersectionality has been considered a highly influential concept that, at least in the area

⁶ Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos', 68.

⁷ *Ibid* 70.

⁸ Vivian M. May, *Pursuing intersectionality, unsettling dominant imaginaries* (Contemporary sociological perspectives, Routledge 2015) 82 and Barbara A. Arrighi, *Understanding inequality : the intersection of race/ethnicity, class, and gender* (2nd edn, Rowman & Littlefield Publishers 2007).

⁹ May, *Pursuing intersectionality, unsettling dominant imaginaries*.

¹⁰ Darren Lenard Hutchingson, 'Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2001) 6 *Michigan Journal of Race and* and Tina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 *Berkley Journal of Gender, Law and Justice* .

¹¹ The following statement can be extracted from the discussions available in Chapter 2.

¹² Jennifer C. Nash, 'Re-thinking intersectionality' (2008) 89 *Feminist Review* 1

that concerns this thesis, ‘offers the future possibility for feminist dialogue within the law’.¹³

This chapter will focus on intersectionality as understood by feminist theory. It is divided into the following sections: a brief description of how feminist theory has conceptualised intersectionality and its different elements; the subject of intersectional analysis, the different definitions given to intersectionality and its operationalisation. Furthermore, its objective is to demonstrate why an intersectional analysis requires to avoid an oversimplification of complex concepts such as identity, human rights violations, and oppression.

2.2 Intersectionality before Crenshaw.

Before addressing the nuances of intersectionality, this first section will provide a brief genealogy of the concept, focusing on the important changes that took place within feminist scholarship during the so-called ‘second wave’ of feminism and how they contributed to the inception of intersectionality. This is not an exhaustive account, nor will it address the development of feminism as a whole. However, it will briefly illustrate the path that led Kimberlé Crenshaw to coin the term intersectionality in 1989.

Intersectionality, as Crenshaw envisioned it, was by no means a new idea within feminism and before the term was introduced some feminist scholars had already started to theorise the complexity and intersecting points of identities.

¹³ Kathryn Henne; ‘From the Academy to the UN and Back Again: The Travelling Politics of Intersectionality’ 33 (2013), *Intersections: Gender and Sexuality in Asia and the Pacific*. December, 33

As early as 1851, Sojourner Truth, in her famous speech *Ain't I a woman?* tried to deconstruct the categories of women and black by challenging the homogenisation of women and that of black people. This in turn made her understand her harm as neither that of the black man nor of a white woman.¹⁴ Some years later, Anna Julia Cooper wrote that black women occupied a unique yet unexplored position as they were faced not only with the oppression of being women but also with what she termed 'the race problem'.¹⁵ Cooper sees how, being marginalised simultaneously by both racism and sexism, black women were excluded as members of both groups as the fight for women's equality was a movement for white women and the liberation of black people was a movement for black men.¹⁶ Mary Church Terrel described her life story as the 'story of a coloured woman in a white world'. She also claimed that a white woman only has to overcome one *handicap*;¹⁷ her gender and black men needed only to defeat the oppression of their race, while she had to overcome her gender *and* her race.¹⁸

These really early accounts demonstrate that for black feminists, the intersection of their race and their gender was central to their understandings of oppression and inequality, they understood from empirical knowledge that their blackness could not be separated from their womanhood and thus neither the racial nor feminist movement was really fighting to redress their harm.

¹⁴ Sojourner Truth, 'Ain't I a woman' speech delivered at the Women's Convention in Akron, Ohio' May 29, 1851) <<https://www.thesojournertruthproject.com/compare-the-speeches/>> accessed .

¹⁵ Anna J. Cooper, 'The Status of Women in America ' in Anna J. Cooper (ed), *A voice from the South* (A voice from the South, Oxford University Press 1988).

¹⁶ *Ibid* 135.

¹⁷ This is the term Mary Church Terrel used to referred to the different systems of oppression.

¹⁸ Mary Church Terrell, *A colored woman in a white world* (Ransdell inc. 1940).

Feminist scholars took the traditional concept of inequality of men and women and challenged the narrow idea that groups are fixed in homogenous categories.¹⁹ The black feminist movement from the US and UK during the 1970s and 1980s criticised the homogenous discourse of ‘all the women are white and all the blacks are men’.²⁰ This phrase encompasses the same issues brought out by women of colour in the past, although it was done with a more nuanced understanding of intersecting oppressions.

The Combahee River Collective coined the term ‘interlocking systems of oppression’ in 1977, a term that can be understood as the different forms of oppression, such as racism, able-bodism, amongst others, that intersect. They tried, to their work, to recognise the simultaneous marginalisation of the individual. The Collective saw racial, sexual, heterosexual and class oppression as systems of oppression that interlock and that could not be compartmentalised into individual strands.²¹ As women disposed of ‘racial, sexual, heterosexual or class privilege’ the Combahee River Collective aimed to fight systems of oppression simultaneously. The term ‘interlocking systems of oppression’ will be extensively used throughout this thesis as it encompasses a very important component of intersectional analysis; the interaction of the broader structures of inequality not only with the individual but also amongst themselves.

¹⁹ Chilla Bulbeck, *Re-orienting western feminisms : women's diversity in a postcolonial world* (Cambridge University Press 1998).

²⁰ Gloria T. Hull, Patricia Bell-Scott and Barbara Smith, *All the women are White, all the Blacks are men but some of us are brave : Black women's studies* (Feminist Press 1982).

²¹ Combahee River Collection, 'A Black Feminist Statement' in Cherríe Moraga, Gloria Anzaldúa and Toni Cade Bambara (eds), *This bridge called my back : writings by radical women of color* (Second edition. edn, Women of Color Press 1983).

Frances Beale argued that femininity and manhood were preestablished categories that every individual needed to subscribe to, leaving black women in a sort of limbo.²² Beale saw black women as the slaves of slaves ignored by the fight for racial equality as it was assumed by black men that black women had received, on account of their womanhood, less discriminatory treatment.²³ The oppression women endured due to their race and their womanhood was referred to by Beale as the double jeopardy of blackness and femininity and only by recognising their unique problems as black women would they be able to overcome their marginalisation.²⁴ It will be later argued that Crenshaw's critique to discrimination law shares some ideas with Beale's concept of double jeopardy. As it will further be explained intersectionality can be interpreted as a tool that allows black women, for example, to overcome their marginalisation through the recognition of their intersections or their double jeopardy, to use Beale's language.

Audre Lorde argued that 'there is no such a thing as a single-issue struggle because we do not live single issue-lives',²⁵ and feminism should focus on combining class interest with gender and race to explain multiple oppressions. She criticised the idea of global sisterhood and rejected the notion of a homogenous grievance. She did not agree that women were

²² Frances Beale, 'Double Jeopardy: To be Black and Female' in Beverly Guy-Sheftall (ed), *Words of fire: an anthology of African-American feminist thought* (Words of fire: an anthology of African-American feminist thought, New Press : Distributed by W.W. Norton 1995) 167.

²³ *Ibid.* 168

²⁴ *Ibid.*

²⁵ Audre Lorde, "Learning from the 60s," in *Sister outsider: essays and speeches* by Audre Lorde (The Crossing Press feminist series, Crossing Press 2007) 138

being oppressed due to their sex exclusively and warned against ignoring the differences within the category of 'woman'.²⁶

In the late 1980s, Deborah King recognised that while black women share certain commonalities with other women on account of their gender and with men on account of their race, they also experience oppression differently.²⁷ These oppressions of racism and sexism were also compounded by class inequalities.²⁸ As can be seen, King already included a third intersection; that of class to her analysis, making an implicit statement that even within the category of black women they endured different struggles depending on their socioeconomic status. She refused the use of additive approaches that include one oppression on top of the other, meaning isolated instances of discriminatory acts against one single person, and used the term 'multiple jeopardy' as it better captured the severe and simultaneous oppression that emerged from what she called interdependent control systems of race, gender and class.²⁹ King believed that the experiences of black women have always, erroneously, been seen as synonymous with the experiences of black men and that their plights and needs have been deemed irrelevant to be discussed separately.³⁰

Feminists of race, gender and class were among the first to claim that women of colour suffered from 'triple oppression' (race, gender, and class) and argued that one cannot be

²⁶ Audre Lorde, 'Age, Race, Class, and Sex: Women Redefining Difference' in Paula S. Rothenberg (ed), *Race, class, and gender in the United States: an integrated study* (Race, class, and gender in the United States: an integrated study, 4th edn, St. Martin's Press 1998) 445–451.

²⁷ Deborah King, 'Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology' (1986) 14 *Signs* 42, 42.

²⁸ *Ibid* 43.

²⁹ *Ibid*.

³⁰ *Ibid* 45.

reduced to being a woman, black, or poor.³¹ They emerged as a response to the universalisation of the concerns of women of privileged classes. According to bell hooks, the reason behind the exposure of middle-class women's issues had to do with the 'attraction' mass media felt for them.³² This resulted in a fractionalised movement that was characterised by its lack of diversity, focusing mostly on the needs and issues of straight white women from the Global North.³³ According to Nash, critical race studies deconstructed the universality of law and criticised how the neutrality and objectivity of it resulted in a prejudicial idea of colour-blindness.³⁴

Feminists of class, as with feminists of race, acted in response to the lack of diversity within the movement. Because class was considered an influencer of behaviour and a source of oppression, this sort of social structure permeated into the feminist movement. Middle-class feminists began to show patterns of behaviour associated with patriarchy, while at the same time fighting to overcome their oppression.³⁵ Therefore, feminist from working-class or poor backgrounds, who were subjected to the double oppression of class and gender, brought new issues into the discussions of feminism.

Critical feminism emerged in response to the new challenges faced by women in an ever-changing society.³⁶ The rejection of the white heteronormative³⁷ feminism that

³¹ Floya Anthias and Nira Yuval-Davis, 'Contextualizing Feminism: Gender, Ethnic and Class Divisions' (1983) 15 *Feminist Review* 62 and Yuval-Davis, 'Intersectionality and feminist politics'.

³² bell hooks, *Feminism is for everybody: passionate politics* (South End Press 2000) 37.

³³ Elisabeth V, Spelman, *Inessential woman: problems of exclusion in feminist thought* (Beacon Press 1988).

³⁴ Nash, 'Re-thinking intersectionality'.

³⁵ Charlotte Bunch, *Passionate politics: essays, 1968-1986: feminist theory in action* (1st edn, St. Martin's Press 1987) 97-98.

³⁶ Barbara Findlen, 'Introduction' in Barbara Findlen (ed), *Listen up: voices from the next feminist generation* (Listen up: voices from the next feminist generation, Seal Press 1995) 9.

³⁷ Heteronormativity assumes heterosexuality as the norm.

characterised the beginning of the feminist movement allowed for a recognition of the diversity of women within it and the importance of having a critical approach to it.³⁸ More and more the scholarship started to move away from the idea of a single feminism and towards feminisms that included as many voices as possible. As Moraga and Anzaldúa believe, only if people understand the context, the history, the language, and the culture of women around the world will they be able to understand how patriarchy manifests.³⁹

Critical feminists tried to envision new theories, methods, and approaches to render the movement more inclusive and racially diverse.⁴⁰ Acknowledging the differences between women, either because of religion, class, or any other ground, permits critical feminists to recognise the different identities that live within a single person.⁴¹ They also tried to recognise the complexity of human lives by understanding and accepting the multiple identities of women around the world. Critical feminists made inclusion real, and it is the celebration, understanding and acceptance of different experiences and standpoints that creates an integrated approach to feminism.⁴² By doing so, they recognised that the inclusion of the experiences of women as a whole and not in a single, standardised way was necessary.⁴³

This revision of the literature review prior to Crenshaw's work is focusing mainly in US black feminism, this is not because other areas of the world do not matter but the reason

³⁸ Chris Beasley, *What is feminism? : an introduction to feminist theory* (SAGE 1999).

³⁹ Cherríe Moraga, Gloria Anzaldúa and Toni Cade Bambara, *This bridge called my back : writings by radical women of color* (Second edition. edn, Women of Color Press 1983).

⁴⁰ Miriam Schneir, *Feminism in Our Time: The Essential Writings, World War II to the Present* (Vintage Books 1994).

⁴¹ *Ibid.*

⁴² Chris Bobel and Judith Lorber, *New blood : third-wave feminism and the politics of menstruation* (Rutgers University Press 2010).

⁴³ John Charvet, *Feminism (Modern ideologies, Dent 1982)* 20.

behind concentrating so much in the work of US black feminists is because a lot of the accepted academic work stems from this region of the world. However, due to the fact the present thesis has a special focus on Latin America, it is important to explore how has intersectionality been incorporated into the different feminist movements of Latin American countries.

In Latin America in the 1980s, the so-called *feminismos disidentes* or dissident feminisms start to question why, in such a diverse region, it was still the white straight woman who the main subject of feminist theories and ideas was.⁴⁴ In Vigoya's recount of Latin-American feminist history, it is possible to notice that the work of postcolonial and transnational feminism, made possible to map how gender, sexuality, race and class oppressions overlapped in terms of power distribution. One example of the different way intersectionality was claimed in Latin America was via indigenous and Afro-descendant women's movements which started to challenge the urban and white or mestizo feminism that dominated the discourse of the time.⁴⁵ Thus, intersectionality began to address issues of race in the context of coloniality. Brazilian feminists were among the first to use the triad of oppression (sexism, racism, and classism) to reveal the differences amongst Brazilian women.⁴⁶ Intersectionality developed significantly because gender, class and coloniality studies had always been important in understanding the social, political, and historical context in which colonial dynamics of power still affect Latin America.⁴⁷

⁴⁴ Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 5.

⁴⁵ *Ibid* 13.

⁴⁶ *Ibid* 5.

⁴⁷ Magliano, 'Interseccionalidad y Migraciones: Potencialidades y Desafíos' 696.

Mirroring the criticism that black feminists in the US were making of the feminist movement, in Latin America, the *feminismo Latinoamericano* was also full of contradictions and practices that concealed the subordination of, in particular, black and indigenous women.⁴⁸ The school of feminism that was prevalent in the region, was not including a racial and ethnic perspective and was reproducing the power relations (or coloniality power, as Aníbal Quijano calls it) of Eurocentric and neo-colonial views; feminism for the white or *mestizo* Latinas only.⁴⁹

Latin American approaches to feminism recognise the intersection of race, gender and class but also consider sexuality as an axis of difference.⁵⁰ Sexuality has become prominent in their feminist discourse because of the region's social context. Sexuality thus permeates the narratives of social class, national identity, and even national history.⁵¹ For example, while the sexuality of the white woman was constructed under the term of purity and submission, that of the non-white women was built on opposition as an amoral and hypersexualised individual. The same can be said of masculinity; it is constructed not in opposition to femininity but in terms of race and ethnicity.⁵²

⁴⁸ Lélia Gonzáles, 'Por um feminismo afro-latinoamericano' (1988) 9 *Mujeres, Crisis y Movimiento Ediciones de la Mujer del ISIS Internacional* 133 and Raquel da Silva Silveira and Henrique Caetano Nardi, 'Interseccionalidade Gênero, Raça e Etnia e a Lei Maria Da Penha' (2014) 26 *Psicologia & Sociedade* 14, 17.

⁴⁹ Aníbal Quijano, 'Colonialidade do poder, eurocentrismo e América Latina' in Edgardo Lander (ed), *A colonialidade do saber Eurocentrismo e ciências sociais Perspectivas latino-americanas (A colonialidade do saber Eurocentrismo e ciências sociais Perspectivas latino-americanas, CLACSO 2005)*.

⁵⁰ Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos', 72.

⁵¹ Ochy Curiel, *La Nación Heterosexual. Análisis del discurso jurídico y el régimen heterosexual desde la antropología de la dominación* (Impresol Ediciones 2013); Yuderkys Espinosa, *Escritos de una lesbiana oscura, reflexiones críticas sobre feminismo y política de identidad en América Latina*. (En la Frontera 2007) and Breny Mendoza, 'La epistemología del sur, la colonialidad del género y el feminismo latinoamericano' in Yuderkys Espinosa Miñoso (ed), *Aproximaciones críticas a las prácticas teórico-políticas del feminismo latinoamericano (Aproximaciones críticas a las prácticas teórico-políticas del feminismo latinoamericano, En la Frontera 2010)*.

⁵² Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 11.

The first time Kimberlé Crenshaw coined the term 'intersectionality' she was criticising how anti-discrimination frameworks were mostly concerned with the issues of straight white western women and on tackling issues as envisioned by men of colour. Consequently, women of colour and other multiply-burdened subjects were invisible.⁵³ Despite her critique being similar to that of the feminist scholars that preceded the term intersectionality, Crenshaw's work was also very distinct because she was using feminist thoughts to challenge the way law dealt with discrimination. Using the case of the black employees of General Motors that were women, Crenshaw tried to exemplify how black women were exposed to oppression stemming from their race and their gender, and as such anti-discrimination law needed to be retheorise to account for those who were multiply-burdened.⁵⁴ Crenshaw suggested that this narrow view of discrimination law created a distorted analysis of racism and sexism as two separate types of systems of oppression when in reality it represented just one population of a complex phenomenon.⁵⁵ Furthermore, she argued that black women⁵⁶ cannot benefit from anti-discrimination laws that force them to determine themselves as either black or women.⁵⁷ Feminist and anti-racist theories ignore how certain identities are considered privileged and this helps cover the complex effects sexism and racism have on multiply-burdened individuals. Ignoring the intersections that create qualitatively different experiences of sexism and racism allows

⁵³ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

⁵⁴ Crenshaw, 2000 P.25 and Seyedeh Sougand Hessamzadeh Villamagua, and Gustavo Marcerlo Silva Cajas, Género e interseccionalidad, análisis desde los márgenes in Subía, A. and Hessamzadeh, S. (Eds). Género, derechos humanos e interseccionalidad (Universidad de Otavalo, Ecuador), 2021, 521

⁵⁵ Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality'.

⁵⁶ Her work addressed the issues of black women in particular but her critique is applicable to every subject with complex identities.

⁵⁷ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

feminism to focus on the issues of white women and racism on those of black men. Black women are seen as too much like women or too much like black people, reducing their subordination to a 'but for their race' or 'but for their gender'⁵⁸ formula instead of acknowledging that they will only be able to overcome their inequalities if all of their identities are considered.

This is because the experience of oppression and inequality of black women cannot be reduced to discrimination on the grounds of their sex or their race; thinking that the harm experienced by black women because they are black women can be understood by thinking in an additive way, meaning racial discrimination + gender discrimination is inaccurate.⁵⁹ In the words of Hessamzadeh and Silva, those who are not the ideal subject or '*sujeto/sujeta ideal*', are treated with a very distinct type of violence that seeks to keep them in an inferior position to that of the hegemony.⁶⁰

Intersectionality challenges the idea that black people suffer only because of their skin colour and women suffer only because of their gender, Crenshaw tries to explain her idea with an analogy of a road intersection:

This apparent contradiction is but another manifestation of the conceptual limitations of the single-issue analyses that intersectionality challenges. The point is that Black women can experience discrimination in any number of ways and that the contradiction arises from our assumptions that their claims of exclusion must be unidirectional. 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 travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Hessamzadeh Villamagua and Silva Cajas, 'Género e interseccionalidad, análisis desde los márgenes', 17

in the intersection, her injury could result from sex discrimination or race discrimination.⁶¹

This analogy has been heavily criticised, for example some of the sources in this thesis focus exclusively in explain why this analogy is not successful in explaining the complexity of identities that intersect to create an aggravated form of harm.⁶² However, in the case of this thesis, this analogy is presented included in the discussions not because it is ideal to illustrate the objectives of the research but because it is part of intersectionality's legacy and needs to be mentioned.

The single-axis approach that limits the experience of the subject to a sum of its grievances or to an isolated analysis of identities does not acknowledge the intersectional experience and contributes to the marginalisation of some individuals.⁶³ Complex grievances that are the result of a multiplicity of identities that manifest simultaneously are not properly addressed.⁶⁴

What Crenshaw, and many other feminist before her, tried to do was to establish how different systems of oppression would create, interlock (using the language of the Combahee River Collective), and give meaning to each other rather than the traditional idea of additive or compounded systems of oppression.⁶⁵ In the following years, scholars of intersectionality would thus try to turn Crenshaw's metaphor into a robust theoretical

⁶¹ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', 149.

⁶² Maria Rodó-Zárate and Marta Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal' (2020) *XX European Journal Of Women's Studies* 1

⁶³ Nash, 'Re-thinking intersectionality'.

⁶⁴ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

⁶⁵ Lisa Bowleg, 'When black + lesbian + woman ≠ black lesbian woman: the methodological challenges of qualitative and quantitative intersectionality research.' (2008) *Sex Roles*, 59(5–6), 312–325 and Lisa Bowleg, 'Once you've blended the cake, you can't take the parts back to the main ingredients: Black gay and bisexual men's descriptions and experiences of intersectionality' (2012) *Sex Roles*, 68(11-12), 754–767.

framework and into several operationalisation processes to be used in different disciplines. All of this with the aim of understanding how systems of oppressions cross paths in the lives of individuals.⁶⁶

Crenshaw distinguishes between two types of intersectionality: structural and political. Structural intersectionality refers to the social interventions created to ameliorate dominations based on multiple identities that are conceived in a single-axis manner, resulting in the insufficiency of the efforts to tackle the subordination of individuals that are multiply-burdened.⁶⁷ In practice, this would translate into policies set by the state to tackle sexism, xenophobia and ableism separately and therefore would be inadequate to address the issues of, for instance, disabled, migrant women. Political intersectionality shows how women of colour, or any multiply-burdened subject, are usually located within two groups that frequently pursue conflicting political agendas and that forces the individual to split their identities to combat those interlocking systems of oppression. This is an issue that white women who are disempowered because of their gender and black men for their ethnicity do not experience as they are not required to compartmentalise their marginalised identities.⁶⁸ While this division might be efficient for other disciplines, when it comes to the operationalisation of intersectionality in legal processes, such as the one that will be proposed in the following chapters, the political agendas of feminist or racial equality groups is helpful to understand the context or the theory of these movements but

⁶⁶ Hessamzadeh Villamagua and Silva Cajas, 'Género e interseccionalidad, análisis desde los márgenes', 20

⁶⁷ Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', 1245-1251.

⁶⁸ *Ibid*, 1251-1282.

it less useful to understand how a State failed to guarantee the human rights of an individual in an international human rights legal procedure.

From Sojourner Truth to Crenshaw, intersectionality theory was envisioned as a theory that uncovers the suffering of the marginalised within the marginalised.⁶⁹ At the core of the theory is the objective of making visible those individuals whose identities placed them in several marginalised social groups and the recognition of the distinct experiences of harm that result from the simultaneous sources of oppression.⁷⁰ The genealogies of intersectionality placed at the centre of the discussion marginalised women of colour.⁷¹ However, as intersectionality travelled from black feminist debates in the US to Europe, it has been argued that the individual for whom the theory was created has been displaced.⁷²

While this transformation and adaptation could be celebrated, Crenshaw, who coined the term ‘intersectionality’, has warned against its dangers. She has said that what she intended to convey⁷³ in her two influential articles *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* and *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color* has been sometimes ignored, misinterpreted and even

⁶⁹ The genealogy of Intersectionality can be found on Chapter 2.

⁷⁰ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

⁷¹ Kathy Davis, 'Who owns intersectionality? Some reflections on feminist debates on how theories travel' (2019) 21 *European Journal of Women's Studies* 1, 6.

⁷² Gail Lewis, 'Unsafe travel: Experiencing intersectionality and feminist displacements' (2013) 38 *Signs* 869.

⁷³ An extensive analysis of Crenshaw's work is included in Chapter 2. However, as a summary intersectionality was a term coined by Kimberlé Crenshaw with the purpose of understanding how the identities of certain individuals, particular black women, created unique experiences of discrimination that are not accounted for in anti-discrimination frameworks. They are neither protected against racial nor sex discrimination.

distorted⁷⁴ and there is a need for a revisit to the origins of intersectionality.⁷⁵ As Kathy Davis argues, intersectionality has been used either as a tool to claim attention to diversity or is used as a buzzword.⁷⁶ This has prompted scholars to debate the purpose and tools of intersectionality in order to decide what it means to use intersectional analysis. In order to answer this question in the context of IHRL, first one needs to check the current debates in the field of feminism and intersectionality.

2.3 Current conceptualisation of intersectionality in feminist theory

By providing a tool to reveal the power relations that are fundamental to everyday life,⁷⁷ intersectionality addresses the exclusion perpetuated by the idea that issues of white Western feminists of the Global North are the issue of all women and provides a universal platform to understand and analyse any social practice, individual or collective, without taking into account its structural or cultural configuration.⁷⁸ ‘Intersectionality may not have started out as a core conceptual metaphor for understanding social inequality but over time, it has increasingly functioned as one’.⁷⁹ Thus, intersectionality provides a tool to listen to non-dominant or marginalised voices. It then uses that legacy of exclusion to acknowledge

⁷⁴ Michele Tracy Berger and Kathleen Guidroz, 'A conversation with founding scholars of intersectionality: Kimberlé Crenshaw, Nira Yuval-Davis, and Michelle Fine' in Michele Tracy Berger and Kathleen Guidroz (eds), *The intersectional approach : transforming the academy through race, class, and gender* (University of North Carolina Press 2009) 65.

⁷⁵ Kimberlé Crenshaw, 'Postscript' in Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (eds), *Framing intersectionality : debates on a multi-faceted concept in gender studies* (Ashgate 2011) 223.

⁷⁶ Davis, 'Who owns intersectionality? Some reflections on feminist debates on how theories travel'.

⁷⁷ Ann Phoenix, 'Intersectionality' (2006) 13 *European Journal of Women's Studies* 187, 192.

⁷⁸ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

⁷⁹ Collins, 'Intersectionality as critical social theory', 30.

the differences between women,⁸⁰ and is a bridge between the multiplicity of identities and group politics.⁸¹

At the same time, it recognises the differences of the subjects that have been categorised within a certain identity and focuses on the experiences that cross over from one category of identity to another. The subordination of a person based on the intersection of their identities does not necessarily require an act that simultaneously oppresses all intersecting identities. Oppression may also occur when the harmful act is aimed at only one identity but because of the close interactions that the identities have, the harm affects all the other identities, triggering other pre-existing systems of oppression that create a new more damaging dimension of disempowerment.⁸² For example, if a person suffers a racist violent attack on the basis of their skin colour, it could be argued that the oppression is aimed at one identity. However, even if that initial attack was not on the basis of intersecting characteristics, it could impact their language rights if when the person tries to access justice, they are denied a translator or because of their immigration status they are then sent to the immigration authorities, etc. This example is just one of the many ways in which interweaved notions of identity and power allows intersectionality scholars to reject the single-axis tools used in anti-discrimination frameworks, the idea of isolated identities and the analysis of only one form of oppression.⁸³

⁸⁰ Naomi Zack, *Can Third Wave Feminism be inclusive? Intersectionality, its problems and new directions* (The Blackwell guide to feminist philosophy, Blackwell Pub. 2007).

⁸¹ Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

⁸² Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

⁸³ Patricia Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33 *Social Problems* S14.

Intersectionality's aim is not to fragment and multiply an individual's identity to the point they are isolated from each other.⁸⁴ Rather, it seeks to uncover the dynamic and interactive nature of these identities that require more than an 'add gender and stir' approach.⁸⁵ It is not concerned only with identities as they are understood by the individual that has them but also with the interaction of social divisions. For example, Anne McClintock argues that to understand colonialism and postcolonialism one must first analyse the contradictory and conflictual relationship between race, gender, and class as they intersect and share some similarities.⁸⁶

Intersectionality criticises, to a certain extent, notions of essentialism, identity, power relations, exclusion, oppression, and discrimination.⁸⁷ According to Crenshaw, the identity of a group cannot be constructed by the identities of a few members. This level of covert marginalisation present in group politics requires a change of paradigm that acknowledges the differences that exist within social groups and allows for their visibility.⁸⁸ Incorporating this theory into different areas of study would require challenging the understandings and assumptions made with regards to an identity. Intersectionality serves as a response to the legacy of exclusion that has characterised feminism⁸⁹ and permits feminist scholars and human rights adjudicators to unmask the hidden forms of subordination by asking the 'other question':

The way I try to understand the interconnection of all forms of subordination is through a method I call 'ask the other question'. When I see something that looks

⁸⁴ Yuval-Davis, 'Intersectionality and feminist politics'.

⁸⁵ *Ibid.*

⁸⁶ Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality'.

⁸⁷ Nash, 'Re-thinking intersectionality'.

⁸⁸ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics'.

⁸⁹ Zack, 'Can Third Wave Feminism be inclusive? Intersectionality, its problems and new directions.'

racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'⁹⁰

Because Crenshaw never provided a definition herself, some authors have tried to define intersectionality. Two definitions will be used to illustrate the diversity of meanings given to the term but there are many more offerings in the literature. According to Laura Cecilia López, intersectionality can be understood as:

[revealing]what is not seen when categories such as gender and race are conceptualised separately. As an analytical perspective, intersectionality allows a conceptualisation of social problems, capturing the structural and dynamic consequences of complex intersections between two or more axes of subordination, which intertwine and strengthen one another.⁹¹

Meanwhile from Kathy Davis' understanding of intersectionality we can see the use of the theory as a methodology that contributes to the nuanced analysis of gender and other configurations of power.⁹² She believes that intersectionality:

refers to the interaction between gender, race and other categories of difference in individual lives, social practices, institutional arrangements and cultural ideologies and the outcomes of these interactions in terms of power.⁹³

Olena Hankivsky's definition encapsulates some of the most reproduced elements of the theory and also explains its aims and objective:

Intersectionality promotes an understanding of human beings as shaped by the interaction of different social locations (e.g., 'race'/ethnicity, Indigeneity, gender, class, sexuality, geography, age, disability/ability, migration status, religion). These interactions occur within a context of connected systems and structures of power (e.g., laws, policies, state governments and other political and economic unions, religious institutions, media). Through such processes, interdependent forms of

⁹⁰ Mari J. Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition' (1991) 43 Stanford Law Review 1183.

⁹¹ Laura Cecilia López, 'A mobilização política das mulheres negras no Uruguai. Considerações sobre interseccionalidade de raça, gênero e sexualidade', 44.

⁹² Davis, 'Who owns intersectionality? Some reflections on feminist debates on how theories travel', 115.

⁹³ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

privilege and oppression shaped by colonialism, imperialism, racism, homophobia, ableism and patriarchy are created.⁹⁴

With regards to the conceptualisation of intersectionality, the term has been identified as ambiguous, open-ended and in desperate need of a narrower and better definition.⁹⁵ Some authors including Purdie-Vaughns and Eibach have argued that the openness of the concept of intersectionality runs the risk of creating hierarchies of inequality. By cataloguing the multiple group identities, there is a possibility that discrimination will become a points-based phenomenon in which more characteristics of vulnerability grant the individual more 'points' to support their claims of discrimination.⁹⁶ Purdie-Vaughns and Eibach's argue that intersectionality should not be concerned with determining that people who are multiply-burdened generally suffer more harm than others for simply existing in society.

In contrast, Phoenix and Davis have both argued that the open-endedness and imperfection of intersectionality contribute to the expansion and possible application of the theory beyond the confinements of how it was originally determined. They believe that the possibility of including as many sources of intersection as one might desire allows scholars to uncover hidden and understudied aspects of identity.⁹⁷ Deconstructing macro groups such as race and gender and reconstructing them into other categories of intersecting identities does not negate the necessity to implement policies intended to support particular groups. Hence, while the arguments presented by Purdie-Vaughns, Eibach, Phoenix, and

⁹⁴ Olena Hankivsky, 'Intersectionality 101' (2014) The Institute for Intersectionality Research & Policy, SFU Vancouver, 2.

⁹⁵ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

⁹⁶ Valerie Purdie-Vaughns and Richard P. Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities' (2008) 59 *Sex Roles: A Journal of Research* .

⁹⁷ Phoenix, 'Intersectionality' and Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' 77.

Davis should be considered they are not reasons strong enough to disregard intersectionality as a whole, they are arguments for the refinement of the theory, and attempt that will be made in this thesis.

Intersectionality has suffered from a lack of definition and its conceptualisation is still debated amongst scholars To illustrate this point, there is still a question over whether intersectionality is a theoretical framework or a methodology.⁹⁸ The goals of intersectionality have also been considered ambiguous because, depending on the author, it is possible to frame it as a process to theorise about identity, as a tool to explain social structures or simply to provide a voice to the narrative of individual experiences.⁹⁹

Cho et al. have stated that the conceptualisation of intersectionality should deal less with what intersectionality is and pay more attention to what it does by, for example, understanding identities as fluid and mutable, or examining the dynamics of power and its ability to challenge discrimination law.¹⁰⁰ This view is shared by Jennifer Jihye Chun, George Lipsitz and Young Shin who claim that intersectionality is much more concerned with the way things work rather than with questions about who people are.¹⁰¹ A middle ground can be seen in the work of Patricia Hill Collins, who argues that intersectionality should use a two-tier analysis: the micro-level of analysis looks at the effect social inequalities have on the lives of individuals; and at the macro level it looks at the dynamics of power and broader structures that oppress and support those social inequalities.¹⁰²

⁹⁸ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

⁹⁹ *Ibid.*

¹⁰⁰ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' 795.

¹⁰¹ *Ibid* Page 797.

¹⁰² Collins, Black feminist thought : knowledge, consciousness, and the politics of empowerment.

Intersectionality rejects the idea of analysing the oppression multiply-burdened subjects endure using single-axis social categories. These categories will hide the intersecting experiences of oppression of multiply-burdened individuals in favour of the collective suffering of the groups.

Intersectionality has also benefitted from its adaptability to other contexts. While its use in Europe also sought to make visible individuals that were multiply-burdened, it was also adopted as a theory to understand the complexities of gender and multiple identities and as a tool to give meaning to the dynamics of domination particular to the European context.¹⁰³

This is also the purpose adopted in other contexts such as in Latin American¹⁰⁴ where intersectionality can encompass the multiplicity of identities that exist within one individual while simultaneously understanding the dynamics of power.¹⁰⁵ *Feminismos Latinoamericanos* use intersectionality as a tool to understand the intersections between coloniality and gender.¹⁰⁶ They do so by using the elements envisioned by Crenshaw and feminists of colour in the US in combination with the perspective of '*colonialidad del poder*' or coloniality of power.¹⁰⁷ María Lugones proposes that intersectionality helps make visible the intersections of race and gender in a modern colonial system that has

¹⁰³ Ibid 6.

¹⁰⁴ Busquier, '¿Interseccionalidad en América Latina y el Caribe? La experiencia de la Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora desde 1992 hasta la actualidad', 6.

¹⁰⁵ Carbado, 'Colorblind intersectionality'.

¹⁰⁶ Lugones, 'Colonialidad y género'; Rita Segato, 'Género y colonialidad: en busca de claves de lectura y un vocabulario estratégico decolonial' in Karina Bidaseca and Vanesa Vázquez (eds), *Feminismos y poscolonialidad Descolonizando el feminismo desde y en América Latina* (Ediciones Godot 2011) and López, 'A mobilização política das mulheres negras no Uruguai. Considerações sobre interseccionalidade de raça, gênero e sexualidade', 40.

¹⁰⁷ Quijano, 'Colonialidade do poder, eurocentrismo e América Latina' and López, 'A mobilização política das mulheres negras no Uruguai. Considerações sobre interseccionalidade de raça, gênero e sexualidade', 43.

burdened non-white women as a result of their gender and their race or ethnicity.¹⁰⁸

Supporting Gloria Anzaldúa's argument, Castellanos and Baucells see intersectionality as a method to understand the symbolic borders that are experienced by multiply-burdened women and argue that this feminist approach will make visible the subordination and/or acceptance that women endure in a differentiated manner.¹⁰⁹

Nonetheless, it is possible to find some common understanding of the concept or at least some traits that are shared amongst scholars. This will be further elaborated in the upcoming sections, yet it would be important to look for certain key aspects such as: the rejection of notions of homogenic groups of people, the social locations of individuals that inform the power they inherit from those systems and the consequences that can stem from the intersecting identities that are greater than the sum of the identities of the person.¹¹⁰

This of course represents a challenge in and of itself, as intersectionality has not been given a clear definition by Crenshaw and concepts are going to vary from scholar to scholar. However, it is possible to distinguish the different elements that will be considered by this research as the robust or "thick" version of intersectionality theory; the presence of multiple axis of differentiation, analysis of context (economic, political, cultural, psychic, subjective, experiential and historical), the indivisibility of the different dimensions of social life and the complex, irreducible, varied, and variable effects that result from the

¹⁰⁸ Lugones, 'Colonialidad y género'.

¹⁰⁹ Rosa Castellanos and Olga Baucells, 'Interseccionalidad del género y mercado de trabajo postfordista' (2017) 5 *La ventana* and Marianela Scocco, 'La Interseccionalidad del Trabajo. Las Transformaciones en el Trabajo de las Mujeres en Argentina' (2018) 97 *Revista Reflexiones* 77, 79.

¹¹⁰ Ramaswami Mahalingam and Jana Haritatos, *Cultural Psychology of Gender and Immigration*. In R. Mahalingam (Ed.), *Cultural psychology of immigrants* (Lawrence Erlbaum Associates Publishers, 2006) 326.

intersections of social categories.¹¹¹ As might be expected, once other definitions are explored the robust conceptualization of intersectionality will vary slightly and other terms like oppression will be included.¹¹² On the contrary, qualifying the concept of intersectionality as “thin” means applying intersectionality theory partially or ignoring some of the current debates/state of the art in the field. A great example of this can be how IHRL uses intersectional analysis for every case even those that require a single-axis approach. These two concepts are not adopted in this frame of language by the literature that will be used here. However, it is a way to differentiate what is currently being done in feminist theory and the current state of the application of intersectionality in IHRL.

2.3.1 Intersectionality as an anti-essentialist tool

Intersectionality has an anti-essentialist tendency because it encourages the study of difference within the social categories of identity.¹¹³ The theory of intersectionality refuses the idea that there is a universal individual that possesses a neutral set of essentialised values¹¹⁴ and acknowledges the differences between members of a social group. It rejects the concept of a universal right holder, seeking to deconstruct social categories such as race, gender and class.¹¹⁵

¹¹¹ An extensive discussion of these elements are included in chapter 2 of this thesis.

¹¹² On the topic see Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'; Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality' and Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación'

¹¹³ Teri A. Mcmurtry-Chubb, 'There Are No Outsiders Here: Rethinking Intersectionality As Hegemon-ic Discourse In The Age Of #Metoo' (2019) 16 *Legal Communication & Rhetoric: JALWD* 1, 15-17.

¹¹⁴ María Luisa Femenías, 'From Women's Movements to Feminist Theories (and Vice Versa)' in Andrea J. Pitts, Mariana Ortega and José Medina (eds), *Theories of the flesh : Latinx and Latin American feminisms, transformation, and resistance* (Oxford University Press 2020) 45.

¹¹⁵ Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality', 82 and Chandra Mohanty, 'Bajo los ojos de occidente. Academia Feminista y discurso colonial' in Liliana Suárez Navaz and Aída Hernández (eds), *Descolonizando el Feminismo: Teorías y Prácticas desde los Márgenes* (Cátedra 2008). 13-20

Single-axis models conceive the individual as an abstract entity stripped of any characteristic that makes them different. For members of one group to be analysed in comparison to members of another, all individuals within those groups need to share a ‘sameness’.¹¹⁶ This produces a fake uniformity where the problems of the most dominant will be considered a problem shared by the group as a whole. Fake uniformity is also present in the law, where the legal subject is constructed by one dominant characteristic or identity, leaving no room for the protection of those who are multiply-burdened.¹¹⁷

Essentialist frameworks not only imply that a social category manifests in isolation but that it is also fixed and unchangeable:¹¹⁸ ‘[i]t is assumed that everyone in a particular pocket [i.e. protected ground] has no other relevant characteristics, it is not possible to articulate differences between those within a pocket’.¹¹⁹ As a response to this, intersectionality has sometimes been interpreted and conceptualised as an anti-essentialist theory because recognises the axis of differentiation between individuals of the same social category.¹²⁰

Despite the effort to give intersectionality an anti-essentialist and anti-categorical theoretical framework, its operationalisation -particularly when it comes to subjects such as law- uses categories and fixed conceptualisations of identity in order to explore, expose,

¹¹⁶ Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective', 81.

¹¹⁷ *Ibid.*

¹¹⁸ Sarah Hanne, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65, 66.

¹¹⁹ Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993-1994) 19 Queen's Law Journal, 193.

¹²⁰ For a debate surrounding how intersectionality contributes to anti-essentialist theories but cannot be interpreted as both being one of the same see Devon W. Carbado and Cheryl I. Harris, 'Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory' (2019) 132 Harvard Law Review 2193.

explain and dismantle inequality.¹²¹ Intersectionality scholars try to find a middle ground between recognising the individuality of the self, avoiding generalisations of oppression and acknowledging the common experience of marginalisation that could emerge from a shared identity.¹²² It is more than an ‘anti-essentialist’ tool that deconstructs the categories of the individual to the extent that no common ground between multiply-burdened individuals can be found.

Social categories that group individuals based on their identities are not rejected in their entirety. Their partial acceptance helps see the systematic oppression of people and how broader contexts of harm operate. In that sense, intersectionality should ‘link the law to the lived experience of complex individuals with claims, and its status as an expository tool to check law’s tendency to instrumentalize social identity and categorize remedy in discrete baskets of entitlements that cannot be added together or compounded [...]’¹²³

Dorothe Staunæs considers that is important to work with fixed social categories to dismantle systems that privilege some fixed identities and social categories as the normal (white, heterosexual, from the Global North, etc.) at the expense of others. When dealing with the individual¹²⁴ using both flexible and fixed tools ensures that those undertaking intersectional analysis remember that ‘social categories are not the cause of certain

¹²¹ Dale, ‘International Women’s Human Rights and the Hope for Feminist Law: Intersectionality as Legal Framework’, 45

¹²² Bond, ‘International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations’, 108-109; Lisa A Crooms, ‘Indivisible Rights And Intersectional Identities Or, What Do Women’s Human Rights Have To Do With The Race Convention’ (1997) 40 *Howard Law Journal* 619, 621-622.

¹²³ Dale, ‘International Women’s Human Rights and the Hope for Feminist Law. Intersectionality as Legal Framework’, 40

¹²⁴ Dorothe Staunæs, ‘Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification’ (2003) 11 *Nora: Nordic Journal of Women's Studies* 101.

behaviour but rather the effect of certain behaviour'.¹²⁵ Individuals belonging to the same social category, such as 'people with disabilities', are recognised in their individuality, and how they experience their membership of that social category is not limited to a generalised understanding of it. Therefore, identities receive their content from the individuals and not just the social group as a whole.¹²⁶

Therefore privilege, hierarchy and prejudice need to be understood as always changing and mutating based on the context under examination.¹²⁷ For these reasons, it is necessary to explore who intersectionality has assigned as the object of intersectional analysis. This analysis will include the role positionality and dynamics of power play in the theory of intersectionality.

2.4 The individual in intersectional analysis according to feminist theory

Intersectionality as part of the feminist movement considers that the concept of universalism,¹²⁸ used in social and political theory presents the experiences of men as common to the whole of humanity. Particularly, feminist theory rejects the idea that universalism manifests itself in dualisms (i.e., culture/nature or public/private) which tend

¹²⁵ *Ibid* 103.

¹²⁶ Daniel Kergoat, as cited in Vigoya, 'La interseccionalidad: una aproximación situada a la dominación'.

¹²⁷ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 109; Delano Cole van der Linde, 'Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of Social Justice Coalition v Minister of Police 2019 4 SA 82 (WCC)' (2020) 23 Potcheftersroom electronic journal 1, 16; Crooms, 'Indivisible Rights And Intersectional Identities Or, What Do Women's Human Rights Have To Do With The Race Convention', 622.

¹²⁸ Understood as what can be seen as normal through a process of normalization in which the analytical procedure focuses on similar experiences in order to determine the common situation as seen Elizabeth Grosz, 'Conclusion. A note on essentialism and difference' in Sneja Marina Gunew (ed), *Feminist knowledge : critique and construct* (Feminist knowledge : critique and construct, Routledge 1990) 334-335

to be organized in hierarchies such as men over women or reason over emotion.¹²⁹ This manifest through an analysis of identity which will be explored in order to determine whose identities are subject to intersectional analysis.

Intersectionality was conceived as a way to theorise identity.¹³⁰ It recognises the existence of much more complex identities that have fallen into the margins of social divisions such as gender, race and social class. Most scholarship on intersectionality focuses on the marginalised individuals.¹³¹ Crenshaw used black women as the prototypical intersectional subject whose complex identities push them to the margins. She argued that the most pressing issue is not the categories themselves but the values that those categories are imbued with which allows for social hierarchies.¹³² The membership to a social category can thus produce negative effects such as acts of discrimination, inequalities and oppression.¹³³ It has been criticised, even by Crenshaw herself, that, by using black women as opposed to black men and white women the experiences of women of colour in relationship to other identities, for example social class or language, were neglected.¹³⁴ Nonetheless, the theory has evolved to the point that it is now seen as a crucial contribution to theories of identity.

¹²⁹ Beasley, 'What is feminism? : an introduction to feminist theory', 8-9

¹³⁰ Nash, 'Re-thinking intersectionality', 2.

¹³¹ Anne Ferguson, 'Resisting the Veil of Privilege: Building Bridge Identities as an Ethico-Politics of Global Feminisms' (1998) 13 *Hypatia* 95.

¹³² Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

¹³³ Rodó-Zárate and Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal', 5.

¹³⁴ Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' and Nash, 'Re-thinking intersectionality'.

2.4.1 Race, gender, class and all that is in between.

The axes of social categories and personal identities that have been an integral part of the concept of intersectionality have been interpreted in different ways. While the race, class and gender model was widely accepted for a time, it was later considered to fall short of reflecting the complex dynamics of multiple forms of oppression.¹³⁵ Nowadays, theorists have included age,¹³⁶ disability,¹³⁷ sedentarism¹³⁸ and sexuality.¹³⁹

The most reproduced ‘list’ of identities subjected to intersectionality was drawn up by Helma Lutz who uses the term ‘basic dualisms’ to determine more axes beyond the traditional race, class and gender, resulting in a list of 14 lines of difference which include: ‘gender, sexuality, ‘race’/skin-colour, ethnicity, nation/state, class, culture, ability, age, sedentariness/origin, wealth, North–South, religion and stage of social development.’¹⁴⁰ Lutz’s list is not definitive and she warns about the dangers of keeping a closed concept that risks neglecting the spaces in between these lines of difference.¹⁴¹

Another approach to intersectionality is to apply it to everyone regardless of whether or not they are being marginalised. In intersectionality all identities are possible receptors of oppression which results in the marginalisation of the individual, even when the individual possesses one identity that could be deemed privileged.¹⁴² This means that intersectionality

¹³⁵ King, 'Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology'.

¹³⁶ Harriet Bradley, *Fractured identities : changing patterns of inequality* (Polity Press 1996).

¹³⁷ Yuval-Davis, 'Intersectionality and feminist politics'.

¹³⁸ Pnina Werbner and Nira Yuval-Davis, *Women, citizenship and difference* (Postcolonial encounters, Zed; Distributed in the USA exclusively by St. Martin's Press 1999).

¹³⁹ Yuval-Davis, 'Intersectionality and feminist politics'.

¹⁴⁰ In the opposite side, Meekosha and Dowse have referred to disability as one of the axes of social division.

¹⁴¹ Helma Lutz, 'Intersectional Analysis: A way out of Multiple Dilemmas?' (International Sociological Association Conference).

¹⁴² Naomi Zack, *Inclusive feminism : a third wave theory of women's commonality* (Rowman & Littlefield Publishers, Inc. 2005).

should also focus on those intersecting identities that include a certain degree of privilege; for example, straight, white maleness.

According to Puar, intersectionality theorises that all identities are lived and experienced in an intersectional manner; all subjects are intersectional regardless of them being conscious of it and identities are not rigid concepts. Therefore, no individual is a member of only one group but rather of several intersecting ones.¹⁴³ She argues that the focus on women of colour as the subjects of intersectionality has emptied the category of meaning and has produced a narrative of an essentialised 'other'.¹⁴⁴ Hence, intersectionality could essentialise individuals in the very same way as that which it tries to challenge and overcome. This can be seen most clearly with the constant struggle between certain feminist schools and multiculturalism in which the fight for women's equality is seen as superior to the need to protect cultural practices such as the use of the hijab.¹⁴⁵ This could be resolved by avoiding static concepts of identity that would indicate what it is to be female or to be religious and adopt a flexible approach so the individual can construct how they live their femaleness or their religiousness. This would allow the individual to conceptualise their womanhood as intersecting and indivisible to her religion and not treat both identities separately. This would remove the idea of competing identities as one would be experienced through the other one.

¹⁴³ Jasbir K. Puar, 'I would rather be a cyborg than a goddess': Becoming-Intersectional in Assemblage Theory' (2012) 2 *philoSOPHIA* 49.

¹⁴⁴ *Ibid.*

¹⁴⁵ For a discussion on the topic see Chapter 4: Alterity, gender equality and the veil in Ratna Kapur, *Gender, alterity and human rights : freedom in a fishbowl* (Elgar studies in legal theory, Edward Elgar Publishing 2018).

The solution to this essentialisation and reification of the intersectional subject, according to Puar, is in the incorporation of assemblage theory into intersectional analysis. This would prevent the simplification of an identity category and assemblage could then allow intersectional analysis to see the complexity of identities not as static concepts but as moving parts producing different outcomes and meanings depending on when and how they interact, and with what.¹⁴⁶

What Puar suggests is similar to what other authors have referred to as an analysis of context, whether social, historical, political, cultural or institutional.¹⁴⁷ It is agreed by most scholars that intersectionality cannot be used just with regards to the individual but must focus on the interaction of the identities of the person with the broader structures that oppress the individual.¹⁴⁸ Refusing to include a closed list of identities recognises context as crucial to understanding how social categories are given meaning and content. These ‘historically formed processes of power’¹⁴⁹ will provide intersectional scholars with an idea of how the social position an identity has depends on the context in which it operates.¹⁵⁰ How life and identities are experienced vary in time and space.¹⁵¹

That there are no exhaustive lists of identities is not a flaw of intersectionality; on the contrary, this unlimited list of identities allows those who are using intersectional analysis

¹⁴⁶ Puar, ‘I would rather be a cyborg than a goddess’: Becoming-Intersectional in Assemblage Theory’.

¹⁴⁷ Brah and Phoenix, ‘Ain’t I a woman? Revisiting Intersectionality’.

¹⁴⁸ Floya Anthias, ‘Transnational Mobility, migration research and intersectionality’ (2012) 2 *Nordic Journal of Migration Studies* 102.

¹⁴⁹ Lena Gunnarsson, ‘Why we keep separating the ‘inseparable’: Dialectizing intersectionality’. (2017) 24 *European Journal of Women’s Studies* 114, 122.

¹⁵⁰ María Rodó-Zárate, ‘Developing geographies of intersectionality with Relief Maps: Reflections from youth research in Manresa, Catalonia’ (2014) 21 *Gender, Place & Culture* 925 and Valentine, ‘Theorising and Researching Intersectionality: A Challenge for Feminist Geography’.

¹⁵¹ Rodó-Zárate and Jorba, ‘Metaphors of Intersectionality: Reframing the Debate with a new Proposal’, 12.

to determine which identities are relevant on a case-by-case basis. Crenshaw, for example, sees the value of social categories but warns about the importance that it is afforded them as this is the justification used to create hierarchies.¹⁵² Not having an exhaustive list of identities will allow the use of intersectional analysis to determine the simultaneous constructions of social categories without limiting the scope to, for example, race, class and gender.¹⁵³

According to some authors, intersectionality treats identities and social divisions as interchangeable concepts and does not separate issues regarding individual identities and those issues concerning social divisions to the point that an intersectional approach could potentially overlook some identities in favour of others.¹⁵⁴ Intersectionality is not a mere listing and adding of different identities; it is the outcome those listed identities produce when intersecting in one person.¹⁵⁵ 'The fluid, expansive and integrated approach to intersectionality inherently examines all identity characteristics, experience and problems that contribute to [people's] disadvantage'.¹⁵⁶ These authors argue that intersectionality should be used strategically, recognising which intersections are relevant to a specific individual or group in the context in question.

¹⁵² Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', 22.

¹⁵³ Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 12.

¹⁵⁴ Patricia Hill Collins, *Fighting words: Black women and the search for Justice* (University Of Minnesota Press 1998) and Ann Phoenix, 'Interrogating intersectionality: Productive ways of theorising multiple positioning' (2006) 2-3 *Kvinder, Køn & Forskning* .

¹⁵⁵ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

¹⁵⁶ Campbell, 'Cedaw and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination', 490.

Rodo Zárate and Jorba thus propose to think of identities as properties of a person that cannot be physically separated from the person in their totality, or from each other. A change in one identity does not imply a change in relationship to another; what changes are the effects that are produced by the interaction between them.¹⁵⁷ One person might be marginalised because of the interaction of their nationality and their skin colour, yet they might be privileged in the interactions of their sex with their sexual orientation. Thus, identities will constitute, reinforce and give meaning to one another.¹⁵⁸ This concern can be linked to Crenshaw's political intersectionality, where multiply-burdened individuals must disaggregate themselves to a point where they need to demonstrate how each social category to which they are part of experience oppression and thus are forced to pursue competing agendas to demonstrate how much worse off they are. Certain demands are examined to determine their 'merit' when they come into conflict with one another.

There is still much debate regarding which social divisions and identities are subject to intersectional analysis; whether it is everyone who has more than two identities interacting, or whether the subject must be a marginalised individual, or whether intersectionality is seeking subgroups within subgroups. Some authors believe that the social divisions that matter to intersectionality are those which have women of colour as the centre of the analysis,¹⁵⁹ while others believe that the subject of analysis is the multiply-burdened subject or members of social categories that are marginalised.¹⁶⁰

¹⁵⁷ Rodó-Zárate and Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal', 7 and 8.

¹⁵⁸ Stephanie A. Shields, 'Gender: An Intersectionality Perspective' (2008) 59 Sex Roles 301, 302.

¹⁵⁹ Sandra G. Harding, *Whose science? Whose knowledge? : thinking from women's lives* (Cornell University Press 1991)

¹⁶⁰ Nash, 'Re-thinking intersectionality'.

This last approach is the one to which this thesis adheres: women of colour were only the starting point of the analysis, but intersectionality has moved on and is now a tool that covers all social divisions. The use of gender as the default identity for the application of intersectionality is problematic as intersectionality becomes a ‘stir-gender’ tool in which gender discrimination is the focus of intersectionality and all other intersecting identities become what Bond refers to as ‘add-ons’, meaning identities that are only relevant when they intersect with gender or more specifically with being a woman, which only aggravate the marginalisation.¹⁶¹ Thus, gender cannot be the starting point where other systems of oppression attach. Instead, a good understanding of intersectionality would entail seeing the different systems of oppression as equally relevant.¹⁶²

2.4.2 Intersectionality, positionality and the dynamics of power

In intersectionality, identity axes are the points of reference from which social hierarchy is considered. Groups of individuals tend to be positioned within a single axis identity, so all people located in that axis will share an essential trait that unites them. Based on their location along that axis, the person can be considered as oppressed or as dominant.¹⁶³ Intersectionality theory argues that axes do not exist in isolation, but they are constantly engaging with one another, complexifying social relations.¹⁶⁴ On some occasions, one characteristic might dominate the marginalisation, nonetheless, the social location of the

¹⁶¹ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 145.

¹⁶² Crooms, 'Indivisible Rights And Intersectional Identities Or, What Do Women's Human Rights Have To Do With The Race Convention', 619-621.

¹⁶³ Hadar Dancig-Rosenberg and Noa Yosef, Crime Victimhood and Intersectionality, 47 Fordham Urb. L.J. 85 (2019).

¹⁶⁴ *Ibid.*

individual will be determined by the combination of that ‘salient’ identity with other factors. These intersections will also affect the way individuals enjoy equality.¹⁶⁵

Mapping the social location of an individual via positionality is associated with structural intersectionality.¹⁶⁶ Since the position of the person in the social hierarchy affects their lived experience, intersectionality focuses on the structural circumstances that might contribute to the oppression or discriminatory treatment.¹⁶⁷ Positionality can be defined as ‘the place that a person occupies within a set of social relationships’.¹⁶⁸ Each individual is located in the social spectrum and the position of the individual is constructed in relationship to other individuals’ positions. The social location given to a person is the result of a combination of various identities and social categories.¹⁶⁹ Social location affects how individuals experience life and has a significant influence on how those experiences are interpreted. Historical, political, cultural, social and geographical contexts are all systems that shape those understandings.¹⁷⁰ Positionality also locates the individual in a level within the hierarchies of power and feeds the lenses from which experiences are interpreted.¹⁷¹ Hence, individuals who are multiply-burdened will experience

¹⁶⁵ Association for Women's Rights in Development (AWID), 'Intersectionality: A Tool for Gender and Economic Justice'

¹⁶⁶ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' 797-800

¹⁶⁷ Skeet, 'Intersectionality as theory and method: human rights adjudication by the European Court of Human Rights', 276 and Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

¹⁶⁸ Pepi Leistyna, Arlie Woodrum and Stephen A. Sherblom, *Breaking free : the transformative power of critical pedagogy* (Harvard educational review Reprint series, Harvard Educational Review 1996) 340.

¹⁶⁹ Mark Chung Hearn, 'Positionality, Intersectionality, and Power: Socially Locating the Higher Education Teacher in Multicultural Education' 4 *ulticultural Education Review* 38, 40, 43 and 45.

¹⁷⁰ Kathryn Sorrells and Sachi Sekimoto, *Globalising Intercultural Communication: A Reader* (SAGE Publications) 85.

¹⁷¹ *Ibid* 93.

subordination more intensely than those who are burdened within one single category of subordination.¹⁷²

The connection between intersectionality and positionality is also found in how the latter is analysed via the former. Positionality is heavily concerned with dynamics of power, those who are positioned in the highest levels of the hierarchy of power are the ones that will dictate how the world operates.¹⁷³ When the discussions explored to this point are properly heard and considered, it is easy to trace how positionality and intersectionality intersect. According to Dorothe Staunæs, intersectionality is used:

to integrate these people into the legal system and to draw attention to the fact that people with certain social categories (such as female, black, Turkish, Muslim and so on) are positioned without the privileges held by others. It is a structural system that favours wealthy, heterosexual, white, male, Christian, young and slim people.¹⁷⁴

Part of the macro-analysis of intersectionality, proposed by Patricia Hill Collins, is to understand how social categories are constructed and understood in relation to others; to one's own positionality.¹⁷⁵ Individuals are categorised and ordered based on the social categories they belong to. The membership of those categories tends to be the result of possessing certain traits or identities.¹⁷⁶ Each individual is a member of different social categories and this simultaneous positioning in, for example, class, sexuality or religion

¹⁷² Laura M. Padilla, 'Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue' (1997) 66 *Fordham L Rev* 844, 848.

¹⁷³ Inken Carstensen-Egwuom, 'Connecting Intersectionality and Reflexivity: Methodological approaches to social positionalities' (2014) 68 *Erdkunde Bd* 265, 266.

¹⁷⁴ Staunæs, 'Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification', 102.

¹⁷⁵ Butler, *Gender trouble : feminism and the subversion of identity*; Judith Butler, *Bodies that matter : on the discursive limits of 'sex'* (Routledge 1993) and Candace West and Don H. Zimmerman, 'Doing gender' (1987) 1 *Gender and Society* 125.

¹⁷⁶ Staunæs, 'Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification', 104.

prevents the study of social categories in isolation, regardless of whether the focus is on one social category or not.¹⁷⁷ The interaction between different social categories allows intersectionality to examine the differences and similarities between and within groups.

The theory of intersectionality has been criticised for focusing exclusively on multiple marginalisation and multiple privileges without analysing the way they intersect with each other thereby creating the unique experience of the subject.¹⁷⁸ This is particularly important for this study because it considers the multiplicity of positionings an individual can have and illustrates the complexity of oppression. ‘Recognition of the importance of intersectionality has impelled new ways of thinking about complexity and multiplicity in power relations as well as emotional investments’.¹⁷⁹ It is necessary to recognise that dynamics of power, either from a marginalised or privileged point of view, are constantly changing, manifest simultaneously and can intersect to create a subject that is at the same time marginalising and being marginalised.

However, the identification of the positioning of the victim cannot be interpreted as creating an Olympics of oppression¹⁸⁰ referring to ‘the practice of determining who is the “most oppressed” by creating hierarchies of disadvantages between and among differently marginalized communities’.¹⁸¹ Carbado argues that intersectionality is not a ‘race to the

¹⁷⁷ Phoenix, 'Interrogating intersectionality: Productive ways of theorising multiple positioning' and Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality'.

¹⁷⁸ Nash, 'Re-thinking intersectionality'.

¹⁷⁹ Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality', 82.

¹⁸⁰ For a discussion on the topic see Purdie-Vaughns and Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities'; Fiona Williams, 'Good Enough Principles for Welfare' (1999) 28 *Journal of Social Policy* 667.

¹⁸¹ Xhercis Méndez, 'Decolonial Feminist Movidas. A Caribeña (Re)Thinks ‘Privilege,’ The Wages Of Gender, And Building Complex Coalitions' in Andrea J. Pitts, Mariana Ortega and José Medina (eds), *Theories of the Flesh: Latinx and Latin American Feminisms, Transformation, and Resistance* (Oxford University Press 2020) 86.

bottom' but that it should encompass those who are privileged and those who are marginalised.¹⁸² He suggests that not including those who are the most privileged, such as white people, in the analysis of intersectionality will result in an epistemic universe where the experiences of whiteness (or privilege) exist as an unchallenged neutral reality.¹⁸³ Colour-blind intersectionality, as Carbado has named it, pays attention to the privileged intersectionalities.¹⁸⁴ Intersectionality becomes a theory that focuses on the interaction of identity categories.¹⁸⁵

Unfortunately, there is yet to be a permanent solution to prevent individuals from being categorised according to their identity traits. The best that intersectionality scholars can aim for is to understand that those who experience oppression from multiple and simultaneous sources experience harm differently, but this does not mean that the more sources of oppression one has, the more entitled or deserving of protection one is. The best way to ensure that all multiply-burdened individuals will be subjected to intersectional analysis is by not including a detailed list of identities. Limiting the analysis to the mantra of race, class and gender¹⁸⁶ would limit the scope of application of intersectionality to new identities that could intersect, creating unexplored forms of inequality and oppression.¹⁸⁷

However, intersectionality cannot be considered a theory of identity despite the heavy focus it places on individuals and their characteristics.¹⁸⁸ The concepts and metaphors

¹⁸² Carbado, 'Colorblind intersectionality', 814.

¹⁸³ *Ibid.*

¹⁸⁴ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxi' 801-802.

¹⁸⁵ Stefan Bird-Pollan, 'Constitutive tension: A dialectical reading of intersectionality' (2020) *Constellations* Wiley 1, 1.

¹⁸⁶ Wendy Brown, *States of injury: power and freedom in late modernity* (Princeton University Press 1995).

¹⁸⁷ Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 15.

¹⁸⁸ Collins, *Intersectionality as critical social theory*, 37.

associated with intersectionality show how to argue about oppression and its resistance as it, for example, allows individuals to understand how the racism they so visibly face interacts with sexism.¹⁸⁹ If identity and the politics of identity become the defining elements of intersectionality, it is valid to ponder why the most privileged individuals are not being taken into account.¹⁹⁰ Intersectionality is more than a matter of identity because it is also an engagement with power. Tomlinson warns that if analyses of power are not present, individuals will not be able to ‘see which differences make a difference’.¹⁹¹ Cho et al. believe that ‘recognition of marginalised identities is essential for addressing the exclusions of subjugated communities’.¹⁹²

Crenshaw argues that focusing exclusively on the needs of those who are the less marginalised members of a social group further marginalises those who are multiply-burdened as it ignores the most subtle and discrete forms of discrimination.¹⁹³ The multiplicity of identities is not a concept that can only be attached to marginalised individuals; everyone has multiple identities that influence their experience of life. Sara Hannet argues that even the so-called neutral subject – a white, straight, western male – is itself a manifestation of a multiplicity of identities.¹⁹⁴

¹⁸⁹ Anna Carastathis, 'The Concept of Intersectionality in Feminist Theory' (2014) 9 *Philosophy Compass* 304.

¹⁹⁰ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxi', 798.

¹⁹¹ Barbara Tomlinson, 'To Tell the Truth and Not Get Trapped: Desire, Distance, and Intersectionality at the Scene of Argument' (2013) 38 *Signs* 893.

¹⁹² Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxi' Page 797-800 as cited in Daiva Stasiulis, Zaheera Jinnah and Blair Rutherford, 'Migration, Intersectionality And Social Justice - Guest Editors' Introduction' (2020) 14 *Studies In Social Justice* 1, 11.

¹⁹³ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

¹⁹⁴ Hannet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' 69.

Most individuals have both dominant and oppressed traits which, depending on the context, can be used to target or benefit the individual.¹⁹⁵ Positionality is very important to understanding why and how an individual can be subject to marginalisation or benefit from an unfair advantage, as the role someone will play depends on the particular configuration of the traits in a given context.¹⁹⁶ Positionality can also contribute to establishing anti-discrimination policies and norms that are much more effective in combating inequality by mapping the interactions of identities and recognising the different positionalities a subject can have. These policies and norms will be able to allow the recognition of the relationships of subordination and oppression that allowed inequality to take place.¹⁹⁷

This positioning in social division is also a concern for intersectionality in its political and geographical dimensions as social categories do not exist independently of the societies in which they are embedded.¹⁹⁸ Social divisions stem from preconceived ideas that have been adopted by society based on the concept of differences (biological, physical, genetical, etc.).¹⁹⁹ These differences will change depending on the time and context; either political, social or cultural. However, these social classes tend to be treated as homogenous, and all their members sharing traits that either exclude them from or include them in the group.²⁰⁰

Intersectionality is concerned with understanding how different social locations that interact within one individual can shape their life experiences. It is also interested in

¹⁹⁵ Beverly Daniel Tatum, 'Why are all the Black kids sitting together in the cafeteria?' : and other conversations about race (Basic Books 2003).

¹⁹⁶ Lynn Roseberry, 'Multiple discrimination' in Malcolm Sargeant (ed), Age discrimination and diversity: multiple discrimination from an age perspective (Age discrimination and diversity: multiple discrimination from an age perspective, Cambridge University Press 2011) 33.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Philip Cohen, The Perversions of Inheritance (Multi-racist Britain, Macmillan Education 1988).

²⁰⁰ Nash, 'Re-thinking intersectionality'.

understanding how the context of systems and structures of power creates a hierarchy of social locations that allows for privilege and oppression.²⁰¹

Verloo believes that intersectionality does not pay enough attention to the political, cultural and religious reasons behind social divisions and neglects the differences between those divisions.²⁰² Thus, contextualising identities is also a very important characteristic of intersectionality. Instead of thinking of identities as fixed and unchangeable, certain scholars writing about intersectionality propose that they change from one context to another.²⁰³ The individual goes through a ‘shifting process of positioning’²⁰⁴ where the understanding of one’s identities is never complete and cannot be reduced to an essential quality or a fixed attribute.²⁰⁵

Anthias suggests that intersectionality should be framed in connection with structures, such as economic systems and to processes such as social relations.²⁰⁶ Systems as identities is a distinct element in the Chicana feminism proposed by Gloria Anzaldúa. According to her, borders define the identities of individuals. These can be physical, geopolitical, cultural or sexual and their very existence influences the identities of the subject, complexifying them to the extent that the experience of the individual cannot be analysed in a fragmented

²⁰¹ Hankivsky, 'Intersectionality 101'.

²⁰² Mieke Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211.

²⁰³ Butler, *Gender trouble : feminism and the subversion of identity*.

²⁰⁴ Stuart Hall, *Familiar stranger: a life between two islands* (Stuart hall : selected writings, Duke University Press. 2017) 16

²⁰⁵ *Ibid*; and Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 201.

²⁰⁶ Magliano, 'Interseccionalidad y Migraciones: Potencialidades y Desafíos', 699 and Anthias, 'Transnational Mobility, migration research and intersectionality'.

manner.²⁰⁷ The systems and structures that produce and reproduce multiple disparities are also the forces that constitute the complexity of multiply-burdened individuals.²⁰⁸

This also relates to how intersectionality has contributed to understanding more complex dynamics of power; everyone can be positioned at both ends of the spectrum of power and thus dynamics of power are neither neutral nor static.²⁰⁹ This includes a revision of the structures and systems that oppress individuals. For example, structural disadvantage is also envisaged from a single-axis perspective as it is sometimes analysed in a homogenous manner. This means that the study of the institutions that help perpetuate inequality and disadvantages assumes that all members of a social group experience structural disadvantage in the same way and the differentiated experience of multiply-burdened individuals is overlooked.²¹⁰ Institutions, structures and systems have a central role in creating the perfect conditions for oppression because they are used by social groups to impose their culture and values on minorities. In the cycle of injustice, institutions not only act as the oppressive source but also as the mechanism to perpetuate the oppression through the unequal treatment of individuals.²¹¹

On the ladder of privilege and marginalisation, individuals who are oppressed or are multiply-burdened will be able to move according to how many identities or characteristics

²⁰⁷ Anzaldúa, *Borderlands : the new mestiza = La frontera*.

²⁰⁸ Shahin Kassam and others, 'Applying Intersectionality With Constructive Grounded Theory As An Innovative Research. Approach For Studying Complex Populations: Demonstrating Congruency' (2020) 19 *International Journal Of Qualitative Methods* 1, 1.

²⁰⁹ Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment*.

²¹⁰ Nicola Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society*, 413-414.

²¹¹ Ann E. Cudd, *Analyzing oppression (Studies in feminist philosophy, Oxford University Press 2006)* Chapter 6.

they share with the most privileged individuals.²¹² Intersectionality can be used as a tool to understand those dynamics of social mobility,²¹³ in order to understand that a white man can, in certain circumstances, be at the top of the power ladder while at the same time existing in a less powerful position when it refers to, for example, their sexuality and age. Intersectionality tries to map the similarities within groups without neglecting the differences between its members; hence power dynamics are seen as complex and multi-dimensional.²¹⁴ This means that, to successfully operationalise intersectionality, there must be a shift from categories and identities to the contexts and dynamics of power that provide them with content.²¹⁵

However, just pointing at the positionality of an individual and the content of their identities is not enough. It must be accompanied by a practical element; an understanding of how structures of power, acts of discrimination and other manifestations of inequality operate.²¹⁶ Only then can one start considering one's work as intersectional. As Rodó Zárata and Jorba claim, a 'black woman is not the intersection to be considered but rather a black woman is in an intersection of gender and race discrimination'.²¹⁷

²¹² Dancig-Rosenberg and Yosef, 'Crime Victimhood and Intersectionality', 91-92.

²¹³ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis'; Catharine A. MacKinnon, 'Intersectionality as Method: A Note' (2013) 38 *Signs* 1019, 1020; Carbado, 'Colorblind intersectionality', 811.

²¹⁴ Dancig-Rosenberg and Yosef, 'Crime Victimhood and Intersectionality'.

²¹⁵ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis', 807.

²¹⁶ May, 'Pursuing intersectionality, unsettling dominant imaginaries', 15.

²¹⁷ Rodó-Zárata and Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal', 5.

2.4.2.1 Intersecting in Privilege or intersecting in marginalization? Analysing which identities are subjected to intersectional analysis

The conceptualisation of intersectionality should depart from women and the triple oppression model to include as many multiply-burdened individuals as possible. If we do not address each intersection with the same determination, we run the risk of either focusing on a limited number of intersections or inadvertently creating a hierarchy between ‘new’ and ‘old’ intersections.

When making the selection of cases, one of the keywords identified as relating to intersectionality was that of ‘vulnerable person’²¹⁸, as the research advanced the conclusion was reached that by using the term ‘vulnerable person’ it could be understood as removing an individual who, despite their marginalisation or oppression, would not be traditionally seen as vulnerable, thus this modification in the narrative presented in IHRL is also one of the contributions of the proposed refinement of intersectional analysis.

Intersectionality could, for example, provide an answer to the way certain men that are multiply-burdened construct and interpret their experience based on understandings of masculinity, race and class.²¹⁹ Smith argues that, when it comes to its application in law, intersectionality could offer a theory of identity to address and redress oppression.²²⁰ A comprehensive understanding of intersectionality should include individuals that have certain privileged identities and not limit it to individuals whose entire catalogue of identities are vulnerable or marginalised.

²¹⁸ See introduction

²¹⁹ Mauricio Menjivar Ochoa, 'Interseccionalidad de masculinidad, raza y clase: Apuntes para un concepto de masculinidades neocoloniales' (2017) 27 *Tabula Rasa* 353, 361.

²²⁰ Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective', 78.

Rejecting a closed list of identities allows adjudicators to identify areas that are overly emphasised such as gender mainstreaming and at the same time highlights areas which are under emphasised that require more attention;²²¹ for example, how gender diversity affects men with disabilities. This brings into the spotlight new systems of oppression and new dynamics of power that go beyond the traditional sex, gender, race and class.²²² However, the lack of specificity in which identities can be included as part of an intersectional analysis does not mean that understanding one system of oppression implies understanding them all. The intersection of identities does not imply homogenisation and to assume the contrary is to limit the potential of intersectionality.²²³ ‘The combination of categories is what matters, not that particular categories must always be present in order for an analysis to be intersectional’.²²⁴

However, this thesis will be limited to multiply-burdened individuals,²²⁵ this decision is partially based on Crenshaw’s own concerns with the application and use of intersectionality. According to Crenshaw, intersectionality is a concept to be used in juridical analysis and she intended to use it as a practical tool that would highlight the gaps in law and in studies of inequality, not as a general theory of oppression.²²⁶ This means that intersectional analysis should not be used to understand the inequality experienced by those individuals that suffer marginalisation on the basis of one identity because there is

²²¹ Collins, Intersectionality as critical social theory, 36.

²²² H. J. Kim-Puri, ‘Conceptualising Gender-Sexuality-State-Nation: An Introduction’. (2005) 19 Gender and Society 137.

²²³ Collins, Intersectionality as critical social theory, 40.

²²⁴ *Ibid*, 270.

²²⁵ The introductory chapter to the present thesis includes an extensive explanation on the use of multiply-burdened subjects as the focus of the research.

²²⁶ Vigoya, ‘La interseccionalidad: una aproximación situada a la dominación’, 5.

no intersection to speak of. Instead, intersectionality should be used as a feminist theory associated with multiple identities that produce simultaneous inequalities.²²⁷

As Elsa Dorlin points out, assuming that all domination is intersectional would assume that both rich white women and poor women of colour give content to their experiences through the intersection of their race, class and gender. However, this approach is flawed as rich white women are not aware of nor do they experience the intersection of those identities due to the privilege they enjoy as a result of their race and class. They experience subordination in a single-axis manner.²²⁸

This is similar to what Ehrenreich called hybrid intersectionality where individuals have at least one oppressed identity status and at least one privileged status.²²⁹ The question of which identities are oppressed and marginalised does not have a fixed answer and will be decided on a case-by-case basis. The only requirement is that at least two or more of the identities the individual has are considered marginalised and oppressed on a given context.

Despite the growing use of an intersectional approach, certain identities that could have been neglected by feminist and human rights discourse (for example, pansexualism) would still require a more detailed study in their individuality to be able to understand their effect when intersecting with other identities. The reality is that intersectionality should encompass not only the interaction of different categories of oppression but also recognise how, when and why individuals who have privileged identities can also be subjected to marginalisation due to their non-privileged identities. If social categories and identities are

²²⁷ Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality'

²²⁸ Elsa Dorlin in Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 7 and 8

²²⁹ Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems' (2002) 71 University of Missouri-Kansas City Law Review 251.

only subject of analysis when they interact with other marginalised traits, many individuals could not be subjected to intersectional analysis.

Another debate regarding identities seeks to determine whether or not intersectionality would make it impossible to adopt norms or public policies as a result of the over disaggregation of identities. Conaghan believes that intersectionality should limit itself to mapping and identifying the groups that are oppressed and those who suffer more because of the intersecting grounds of discrimination but does not agree with an open-ended list of intersectional identities.²³⁰ Bordo, however, suggests the acknowledgement of the differences between women should not be understood as the absence of a common battleground for women's struggle.²³¹ Butler points out that there is an existing fear amongst feminist scholars²³² that intersectionality will produce an infinite number of identity categories.²³³ Intersectionality has been said to sit between the need to understand intersecting identities in their individuality and group politics.²³⁴ Thus, intersectionality will cover the processes of differentiation between individuals and the systems of oppression that marginalises some and privileges others.²³⁵

²³⁰ Joanne Conaghan, 'Intersectionality and the Feminist Project in Law ' in Emily Grabham and others (eds), *Intersectionality and beyond : law, power and the politics of location* (Routledge-Cavendish 2009).

²³¹ Susan Bordo, 'Feminism, Postmodernism, and Gender-Scepticism' in Linda J. Nicholson (ed), *Feminism/postmodernism* (Feminism/postmodernism, Routledge 1990) 149.

²³² An example of this discussion can be found in Sandra Fredman, 'Double Trouble: Multiple Discrimination And EU Law' (2005) 2 *European Anti-Discrimination Law Review*, 14.

²³³ Judith Butler, *Gender trouble : feminism and the subversion of identity* (Thinking gender, Routledge 1990) 143.

²³⁴ Diamond Ashiagbor, 'The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-discrimination Law' in Anne Morris and Thérèse O'Donnell (eds), *Feminist Perspectives on Employment Law* (Cavendish 1999).

²³⁵ Hajer Al-Faham, Angelique M Davis and Rose Ernst, 'Intersectionality: From Theory to Practice' (2019) 15 *Annual Review of Law and Social Science* 247, 253-254.

One of the criticisms of intersectional analysis is that the individualisation of the person does not seem to have a limit.²³⁶ This creates an infinite list of identities and experiences that compartmentalise the person to the point of creating subgroups within the subgroups of social categories.²³⁷ Intersectionality does not eliminate the common traits or sufferings of groups. Rather, it recognises the common situations experienced by individuals and digs deeper to determine their differences.²³⁸ It recognises the existence of patterns of oppression and repression, but its application should not create subgroups within the subgroups to the point of rendering any anti-discrimination or equality policy irrelevant.

One reason to contest intersectionality is that, for some scholars, the different axes of discrimination have multiple meanings to different people. For example, Yuval Davis believes that trying to define concepts such as disability or age is too complicated because there is no consensus about what each of them entails.²³⁹ Therefore, in order to tackle this lack of agreement that Yuval-Davis warns about, it is important that people using intersectionality do not construct the meaning of identities based on their own understandings and narrative but that they keep an open mind to prevent any sort of generalisation of how an identity is experienced. For that purpose, it is necessary to think of the individual as a whole rather than individual identities, bringing intersectionality scholars a step closer to understanding how different contexts create unique experiences

²³⁶ See Chapter 2.

²³⁷ For further discussions Chapter 3. Also, Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality' and Yuval-Davis, 'Intersectionality and feminist politics'.

²³⁸ Dimitrina Petrova, 'Equal Rights Review: Special Focus: Intersectionality' (2016) 16 Equal Rights Review.

²³⁹ Yuval-Davis, 'Intersectionality and feminist politics'.

in each individual.²⁴⁰ Analysing the interactions within these unlimited categories will also contribute to the understanding of the content individuals give to their intersecting identities and how they modify, limit or develop that content.²⁴¹ Although the scope of the process is narrowed to multiply-burdened individuals, it cannot be interpreted as limiting their identities. Responding to the concerns of Davis and Carbado, adjudicators cannot assume that an identity or identities are oppressed in all contexts; depending on the time and space the social categories that may be deemed as oppressed will vary.²⁴²

2.5 The attempts to operationalise intersectionality

Although intersectionality has been considered one of the most important contributions to feminist theory, there is still debate regarding its application at a practical level.²⁴³ Intersectional methodology is perhaps one of the most underexplored aspects of the theory and in comparison, to other discussions, the operationalisation of intersectionality has developed slowly.²⁴⁴

Operationalisation is a concern that is still very much discussed within feminist theory. Scholars argue that operationalising intersectionality is difficult because there is no method flexible enough to respond to the ever-changing nature of identities.²⁴⁵ They also recognise the problem of operationalising a theory that deals with power relations. The shifting

²⁴⁰ Jazmín Mora-Ríos and Natalia Bautista, 'Estigma Estructural, Género e Interseccionalidad: Implicaciones en la Atención a la Salud Mental' (2014) 37 *Salud Mental* 303, 304.

²⁴¹ Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 12.

²⁴² Carbado, 'Colorblind intersectionality' and Davis, 'Who owns intersectionality? Some reflections on feminist debates on how theories travel'.

²⁴³ McCall, 'The complexity of Intersectionality'.

²⁴⁴ Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5 *Perspectives on Politics* 63, 74.

²⁴⁵ Robert S. Chang and Jerome McCristal Culp Jr., 'After Intersectionality' (2002) 71 *University of Missouri-Kansas City Law Review* 485.

nature of inequalities in power relations affects different groups and individuals differently and, as with identity, the grounds of inequality mutate depending on the context.²⁴⁶ Consequently, to operationalise intersectionality, intersectional scholars have to devise a flexible and abstract process. Despite these concerns, some authors such as MacKinnon have tried to provide an answer:

Method concerns the way one thinks, not what one thinks about, although they can be related. Intersectionality both notices and contends with the realities of multiple inequalities as it thinks about 'the interaction of' those inequalities in a way that captures the distinctive dynamics at their multidimensional interface.²⁴⁷

However, as the above quote shows, there is still very little information as to how this flexible and abstract process is or could be.

Intersectional research does not have a precise way of being operationalised and it is challenging to propose a single methodology²⁴⁸ for a theory that travels through vastly different fields of study. For example, it is said that the complexity of certain elements of intersectionality pose a challenge for the courts as they might struggle to deal with litigation that incorporates intersectional analysis.²⁴⁹ Intersectionality has at its core subjective elements such as positionality, identity and experience.²⁵⁰ All these elements are also translated in the operationalisation process of intersectionality and consequently,

²⁴⁶ Candace West and Sarah Fentersmaker as cited in Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación'

²⁴⁷ MacKinnon, 'Intersectionality as Method: A Note', 1019.

²⁴⁸ Jenny K Rodriguez, 'Intersectionality And Qualitative Research' in Catherine Cassell, Ann L. Cunliffe and Gina Grandy (eds), *The SAGE Handbook of Qualitative Business and Management Research Methods: History and Traditions* (SAGE Publications Ltd 2018).

²⁴⁹ Petrova, 'Equal Rights Review: Special Focus: Intersectionality'

²⁵⁰ Rita Kaur Dhamoon, 'Considerations on Mainstreaming Intersectionality' (2011) 64 *Political Research Quarterly* 230, 241; Yuval-Davis, 'Intersectionality and feminist politics'; Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment* and Unwin Hyman and Floya Anthias, 'Rethinking social divisions: Some notes towards a theoretical framework' (1998) 46 *Sociological Review* 557.

some disciplines will have to face the challenge of operationalising a theory which is in essence subjective.²⁵¹

The fact intersectionality has a big component of identity theory also brings very subjective aspects that might not be easily translated into an operationalisation process.²⁵² As Diane Otto argues, it is important 'to take stock of what has been achieved in terms of promoting a transformative feminist logic on the one hand'.²⁵³ Feminist theory and international human rights law, particularly adjudication, are not necessarily aligned to the point that their purposes, objectives and methodologies are the same. Hence it might not be possible to transfer the concepts, theories and tools from one discipline to another without some adaptation.

Intersectionality could be the tool that directs how to think about oppression to address and redress the harm experienced by individuals. The operationalisation of intersectionality is not an easy task as it seeks to challenge how it is currently being used. However, using it as a tool that helps understand the unique experience of harm that results from the inequality endured by multiply-burdened subjects will contribute to delivering a more comprehensive equality than what is currently being achieved.²⁵⁴

²⁵¹ Mary Hawkesworth, 'Contending conceptions of science and politics: Methodology and the constitution of the political' in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and method : empirical research methods and the interpretive turn* (2nd edn, M.E. Sharp, Inc. 2014).

²⁵² Nash, 'Re-thinking intersectionality' and Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Theory and Antiracist Politics'.

²⁵³ Otto, 'Contesting Feminism's Institutional Doubles: Troubling the Security Council's Women, Peace and Security Agenda in Governance Feminism' 202 and Janet Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender*.

²⁵⁴ This in line with some of the claims made by adjudicative bodies such as the European Court of Human Rights in *Case of Garib v The Netherlands* or the Inter-American Court of Human Rights in *I/A Court H.R., Case of I.V. v Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No.329.

The main aim of operationalising intersectionality is to find a more precise recognition of the inequalities, oppressions and discriminatory acts experienced by multiply-burdened individuals; in simpler terms it helps understand harm. Harm cannot be explained as being felt the same way by everyone who has endured that same discriminatory act and such thinking would trivialise the harm experienced by each victim and could prevent appropriate redress.²⁵⁵ Failing to do so will treat the suffering of individuals who are multiply-burdened as similar to the suffering of a person who is marginalised for only one identity.²⁵⁶ Those who are marginalised within the marginalised would be subsumed to the needs and plights of those most privileged within their social groups, further oppressing them.²⁵⁷

Intersectionality, as a tool to understand harm, will uncover the negative spaces that have left multiply-burdened subjects without an appropriate recognition of their needs. Instead of determining their grievances on the basis of what other individuals, much better positioned than the victim, experience, the operationalisation of intersectionality will provide better tools to identify and properly respond to the complex experiences of multiply-burdened individuals.²⁵⁸

²⁵⁵ Dancig-Rosenberg and Yosef, 'Crime Victimhood and Intersectionality'.

²⁵⁶ Dara Z. Strolovitch, *Affirmative advocacy : race, class, and gender in interest group politics* (University of Chicago Press 2007) 205–207.

²⁵⁷ Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House'; Phillips, 'What's wrong with Essentialism?'; Joan C. Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory' (1991) 1991 *Duke Law Journal* 296 and Linde, 'Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)' 19.

²⁵⁸ Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global. Stage', 209

2.6 Conclusion

Intersectionality theory is the culmination of years of work and self-reflection by black feminists in the US and feminists of colour around the world; a theory to change the paradigm of how marginalisation is lived. Intersectionality is not, by any means, a new feminist idea but it is one of the most important developments of feminism. The lack of diversity in the feminist movement pushed critical feminists to think about different ways to theorise experiences, identities and oppression. A new understanding of what it is to be a woman paved the way for intersectionality to emerge and to change the narrative of feminist ideas.

Crenshaw coined the term, not as a general feminist theory of oppression where everyone and anyone could be the subject of intersectional analysis but as an anti-discrimination tool. Intersectionality challenges how anti-discrimination frameworks were created and used because they could not deal with the effect that oppression has on individuals that are multiply-burdened. She saw the gaps in the way multiply-burdened individuals were being protected by the law and attempted to create tools that would respond to the discrimination they endured. She took into account the simultaneous identities that are harmed by acts of discrimination, marginalisation and oppression and urged legal scholars and practitioners to remove the single-axis frameworks that permeated anti-discrimination discourses. It is also interesting that, from a feminist perspective, Crenshaw rejects the approaches used in multiple discrimination, something that will be further explored in Chapter 4.

The fact that intersectionality is disrupting the tools available in discrimination discussions says that the message of intersectionality goes beyond those frameworks. However, this

same message should not be diluted so much that the aims and objectives of intersectionality become unrecognisable from those envisioned by Crenshaw and other intersectionality scholars. This does not mean that all debates in feminism have been resolved; the fact that feminists keep challenging and questioning intersectionality also means that, as a theory, it is constantly being refined, reworked and reimagined. The only concern for this thesis is that in applying intersectionality, its method, message, aims and objectives are not lost. As it has been demonstrated, intersectionality has the potential to disrupt discussions of oppression, marginalisation and dynamics of power.

The discussions surrounding the conceptualisation of intersectionality in feminist theory are rich. They move from authors claiming that intersectionality is too vague, too abstract and too ambiguous to others who propose ways to define it. Part of the success of intersectionality is the flexibility in its components that allows it to travel to different fields of study. For example, intersectionality is being used to challenge current theories of law such as analysing the androcentric aspects of concepts like the Nation-State.

One of those aspects which is constantly being reviewed surrounds identity and who should benefit from the application of intersectional analysis. Thus, in the road ahead it is very important to determine whose case, in the practice of the theory of intersectionality, has been examined under intersectional analysis or if there is an argument that claims that some individuals cannot be subjected to it. For Crenshaw, women of colour were the initial subjects of her analysis and are still central to most discussions. However, as Crenshaw and many other authors have expressed, there is a fine line between acknowledging the role that women of colour had on the development of intersectionality and the need to bring to the centre of the discussions other individuals that are also multiply-burdened. Which

identities should be considered in intersectional analysis is an on-going debate in feminist theory. An initial assessment shows that it is important to keep the conversation going as more unexplored multiply-burdened identities could benefit from intersectionality but requiring the condition of marginalisation in order for the identity to be taken into account is fundamental. More discussions on the topic will follow in Chapter 3 when the practice of adjudicative bodies is examined in this regard.

To avoid falling into the default application to cases of race, gender and class, the best approach to intersectional analysis is not to have a list of all the possible intersections. Many intersectional scholars describe their scope of application without limiting their use of intersectionality to a few identities, and the same approach will be adopted here. This could require deepening the discussions on positionality and dynamics of power that are already taking place in intersectionality scholarship.

The focus on positionality requires a complex analysis as the information cannot be collected from one single source. Social divisions are composed of heterogeneous members, and any essentialisation of its members does not provide an accurate picture of oppression. What is necessary is to consider how the individual simultaneously belongs to different social divisions which need to be understood in their relationships and interactions with each other.

The same social divisions cannot be taken out of context. Understanding how the environment and society contribute to the oppression of certain groups will help in the eradication of the homogenisation of social groups. Positioning in privilege and marginalisation is also fundamental to recognising the complexity of the subject. None of these levels of analysis implies that particular patterns will not emerge. What is important

to recognise is that experiences of oppression, marginalisation and even the positioning of the individual in the social ladder are unique to individuals, societies and groups. Consequently, the analysis of the dynamics of power is a useful approach to tackling issues of intersectional oppression.

Chapter 3. Intersectionality as a feminist approach in international human rights law

‘One must always take into consideration multiple axes of oppression to do otherwise presumes the whiteness of woman, the maleness of people of colour and the heterosexuality for everyone’¹

3.1 Intersectional analysis and the law.

The literature review done in the previous chapters allowed to conclude that, within the discipline of feminist theories, it was considered that single-axis frameworks were not appropriate to address all instances of discrimination and intersectionality was proposed to overcome this gap.² Now is time to turn the attention to law in order to understand if, when intersectionality was incorporated as a tool in the adjudication of rights, the same critiques that Crenshaw had were taken into consideration or if it was rather the buzz intersectionality was generating in other disciplines what played a vital role in its mainstreaming in IHRL.

The previous chapter provided an overview of how intersectionality is conceptualised, debated and used in feminist theory. However, intersectionality has not remained in the context of feminism and has travelled to different disciplines. One of these is international human rights law (IHRL). This chapter will explore how feminist theories have been incorporated into IHRL and what specific elements from intersectionality have been

¹ Barbara J. Risman, 'Gender As A Social Structure: Theory Wrestling With Activism' (2004) 18 *Gender And Society* 429, 442.

² See pages 60 to 100 from this thesis. Also see Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'; Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'; Patricia Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33 *Social Problems* S14; Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective'.

adopted, and how they have been adapted, in human rights law adjudication. The diagnosis made in this chapter will also help construct a proposal to better implement intersectional analysis.

3.1.1 Discrimination in IHRL before intersectionality.

Anti-discrimination law was created having in mind the unequal treatment given to a person or group based on one identity and has struggled to keep up with the growing tendency to acknowledge the intersecting and complex exclusions and disadvantages suffered by individuals.³ ‘At the root of discriminatory treatment lies the recognition that individuals are treated differently’ because of the characteristics others perceive on them.⁴ Discrimination has not been eradicated as a result of the resilient nature of power relations and the prejudices and biases that make up the collective imaginary.⁵ This means that anti-discrimination frameworks interpret identities as single-axis ones and consequently fail to understand the dynamics of social hierarchies.⁶ Grounds for discrimination are conceptualised and endowed with static characteristics that are not necessarily accurate.⁷ For example, a quick internet search demonstrates that the collective narrative tends to put disability in opposition to able-bodied, as if disability was only relating to a physical disability, yet mental disability exists and is a protected characteristics in many legislations.

³ Hannet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination',

⁴ Kanchana N. Ruwanpura, 'Multiple identities, multiple-discrimination: A critical review' (2008) 14 *Feminist Economics* 77, 79.

⁵ Samuel Bagenstos, 'Implicit Bias, Science, and Antidiscrimination Law' (2007) 1 *Harvard Law and Policy Review* .

⁶ MacKinnon, 'Intersectionality as Method: A Note', 1023.

⁷ Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145.

When Crenshaw conceptualised intersectionality, she criticised the single-axis framework as it not only requires the individual to compartmentalise themselves into a specific class or category,⁸ but also any significant variation in the discriminatory treatment given to members of a single category is proof that the group is not being discriminated against.⁹ For example, if an immigrant woman is denied social housing on the basis of her immigration status but the State can prove that men who are also immigrant or that women who are nationals have accessed social housing then the victim's claim could be dismissed. Selecting one ground to be the only cause for discriminatory treatment creates an 'atomised' application of anti-discrimination law that favours one ground to the exclusion of others that are also relevant to the treatment endured.¹⁰ The grounds that exist in anti-discrimination law also tend to be too broad in their application.¹¹ It is expected that a ground such as disability will be able to cover the entire experience of discrimination, even when this discrimination only took place because the victim was a poor woman with disabilities. Legal equality regimes that present themselves as neutral (usually as gender- and race-neutral) reproduce the hierarchy of social categories that marginalises some and privileges others. Single-axis frameworks conceived to dismantle this hierarchisation will fail to do so because they do not account for the intersection of identities and the complexity of lived experiences.¹²

⁸ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'.

⁹ *Ibid.*

¹⁰ Hanneet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', 67.

¹¹ *Ibid.*

¹² Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis', 798.

Ignoring multiple grievances can and does result in further marginalisation of oppressed individuals and at greater risk of having their human rights breached.¹³ IHRL and anti-discrimination law more generally have had created tools to tackle what has now been considered a very limited understanding of discrimination. Believing that all cases of discrimination should focus on the comparison of social groups which are sorted by certain properties (personal identities),¹⁴ produces skewed knowledge of what it means to be discriminated against. The single-axis approach also favours the isolation of grounds and thus any attempt to redress inequality is done considering one social category at a time.¹⁵

Discrimination law has been described as fragmentary and ill-equipped to translate the experiences of individuals into legal issues.¹⁶ Although more individuals could argue multiple discrimination as a consequence of the expansion of the discriminatory grounds, anti-discrimination law does not have an appropriate structure or procedure that would respond to situations in which an individual has suffered discriminatory treatment due to the interaction of two or more grounds.¹⁷ In most cases, individuals need to bring cases that frame the discriminatory treatment within one single ground, or each ground in isolation if many are present, before a tribunal or court specialised on only one ground, regardless of whether or not the individual perceived the discriminatory treatment as based on one ground.

¹³ Colleen Sheppard, 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach' (2001) 80 Canadian Bar Review 893, 2.

¹⁴ Lena Halldenius, 'Dissecting Discrimination' (2005) 14 Cambridge Quarterly of Healthcare Ethics 455.

¹⁵ Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity'.

¹⁶ Anastasia Vakulenko, 'Gender and International Human Rights Law: The Intersectionality Agenda' in Sarah Joseph and Adam McBeth (eds), *Research handbook on international human rights law* (Edward Elgar 2010) 228.

¹⁷ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'. 66.

Using additive approaches instead of intersectional ones produces a ranking of differences where certain types of harm or struggles are considered more important than others, causing privilege and oppression to be analysed inaccurately.¹⁸ Even though intersectional discrimination and other types of multiple discrimination try to address the experiences of those who are multiply-burdened, the fact that the law still uses single-axis tools and frameworks to all cases regardless of the type of discrimination renders anti-discrimination theory an inappropriate field of work.¹⁹

This single-axis approach is usually referred to as the ‘but-for’ analysis, as it is believed that an individual would not be discriminated against but for having that identity. However, the ‘but-for’ analysis hinders the understanding of discrimination in general as only the most privileged ‘victims’ can say they would not be discriminated against but for one ground.²⁰ Furthermore, the notion of formal equality that relates to the Aristotelian notion of treating likes alike²¹ has resulted in the need for what has been called “a comparator test” to demonstrate discrimination. A comparator is a social group that possesses the same relevant circumstances as the individual who is claiming unfavourable treatment and is

¹⁸ Hae Yeon Choo and Myra Marx Ferree, 'Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequality' (2010) 28 *Sociological Theory* 129.

¹⁹ Iyiola Solanke, 'Infusing The Silos In The Equality Act 2010 With Synergy' (2011) 40 *Industrial Law Journal* 336, 330.

²⁰ Roseberry, 'Multiple discrimination', 24.

²¹ Jess Bullock and Annick Masselot, 'Multiple discrimination and intersectional disadvantages: Challenges and opportunities in the European Union legal framework' (2012-2013) 19 *Columbia Journal of European Law* 57, 61.

used to compare both social groups to determine if unfair or disadvantageous treatment has occurred.²² The ‘neutral’ comparator par excellence is a white straight, western man.²³

As a response to the shortcoming in single-axis discrimination, the term of multiple discrimination was developed to respond to all instances of discrimination due to several grounds,²⁴ or when a person belongs to several disadvantaged groups and consequently the discrimination experienced is more complex and severe than that endured by those who experienced discrimination on one ground.²⁵

Despite the creations of these new forms of discrimination, subcategories of multiple discrimination still use the tools available for single-axis models. As Makkonen explains:

Multiple discrimination is an apt term to describe this kind of situation, as the term ‘multi-ple’ has mathematical connotations and as this type of situation is one in which a person suffers discrimination on the basis of e.g. gender + disability + age. Exactly because of these mathematical connotations, the term ‘multiple’ (or double, triple and so on) should not be used in connection with situations in which different grounds operate simultaneously and not separately.²⁶

²² Hannet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination'.

²³ Roseberry, 'Multiple discrimination', 19; Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory'; Crooms, 'Indivisible Rights And Intersectional Identities Or, What Do Women's Human Rights Have To Do With The Race Convention', 620; Skeet, 'Intersectionality as theory and method. Human Rights Adjudication By The European Court Of Human Rights', 277.

²⁴ Bullock and Masselot, 'Multiple discrimination and intersectional disadvantages: Challenges and opportunities in the European Union legal framework'.

²⁵ M^a Ángeles Cea D'Ancona, 'Measuring multiple discrimination through a survey-based methodology' (2017) 67 Social Science Research, 239.

²⁶ Tino Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalised to the fore' (2002) Åbo Akademi University Institute for Human Rights

Legal scholarship has recognised three types of multiple discrimination – additive,²⁷ compounded²⁸ and intersectional²⁹ – each representing a different manifestation of discrimination. Multiple discrimination is, in practice, assumed to be an additive process in which the grounds of discrimination are isolated, later to be added to or multiplied³⁰ and consequently reproduces the tools of operationalisation of single-axis frameworks into multiple and intersectional discrimination.

In practice this would mean that if a transgender man, who is pregnant and has a mental disability is discriminated against because his name assigned at birth is used by the government, later he is fired from his job due to the fact he is pregnant and finally in his new job he is not given proper accommodation for his mental needs, could benefit from the tools of multiple discrimination as the instances in which he was discriminated against do not intersect and as such might not need an intersectional analysis but a multiple one. These attempts to reject the single-axis approach via multiple discrimination have still

²⁷ Additive discrimination specifically deals with separate instances of discrimination that either at distinct times or concurrently focuses on one ground at the time, the nature of the discrimination does not change even if the discrimination increases in size. Additive discrimination is the first attempt to break free from single axis approaches while still using single axis events as its foundation. According to Patricia J. Williams, *The alchemy of race and rights* (Harvard University Press 1991) and Paola Uccellari, 'Multiple discrimination : How law can reflect reality' (2008) 1 *The Equal Rights Review* 24, 26.

²⁸ Compounded discrimination can be understood as the situation in which two grounds of discrimination meet without interacting with each other at a determined instance, they rather merge 'one on top of the other' to create an intense effect on the person. There is an accumulative process of distinct discrimination experiences. This type of discrimination is referred to as compounded because the unequal treatment becomes an increase burden as a result of the two grounds that meet. As explained in Supreme Court of Canada. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; Roseberry, 'Multiple discrimination', 27 and Ontario Human Rights Commission, 'An Intersectional approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims' <http://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addresssing_multiple_grounds_in_human_rights_claims.pdf> accessed.

²⁹ De Beco describes intersectional discrimination as 'a situation in which people are discriminated against on different grounds which, taken together, result in a level of prejudice that is higher than if these different grounds were taken separately' in Gauthier de Beco, 'Intersectionality and disability in international human rights law' (2020) 24 *The International Journal of Human Rights* 593, 593.

³⁰ Bowleg, 'When Black + lesbian + woman ≠ Black lesbian woman: The methodological challenges of qualitative and quantitative intersectionality research'.

fallen short of addressing the harm endured by multiply-burdened individuals, even in cases where intersectional discrimination is being applied.³¹ The tools that have been developed to tackle discrimination were not formulated for these scenarios.³² As a consequence of these issues, legal and feminist scholars went on to seek a new approach that properly incorporates intersectionality into discrimination law.³³

According to Fredman, intersectionality will achieve legal recognition when it distances itself from the use of comparison and starts addressing the marginalisation and overall negative effects endured by individuals that belong to certain social categories.³⁴ Discrimination is usually understood as event-oriented; this translates into legal regimes seeing discrimination as a single event. However, intersectional analysis understands discrimination as part of a larger process of exclusion.³⁵

The aforementioned 'comparator test' that was used in the operationalisation of discrimination was also used in cases of multiple discrimination, including intersectional discrimination and intersectional analysis creating a summative experience (one ground on top of another) of discrimination rather than an intersectional one.³⁶ In situations of

³¹ Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23 *South African Journal on Human Rights* 317, 323.

³² Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalised to the fore'.

³³ Campbell, 'Cedaw and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination', 483.

³⁴ Sandra Fredman, 'Positive Rights And Positive Duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds), *European Union non-discrimination law : comparative perspectives on multidimensional equality law* (Routledge-Cavendish 2009) 81.

³⁵ Rikki Holtmaat, 'Article 5' in Beate Rudolf, Marsha A. Freeman and Christine Chinkin (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women : a commentary* (Oxford University Press 2012), 150 and Makkonen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalised to the fore'

³⁶ Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment* and Lynn Weber and Deborah Parra-Medina, 'Intersectionality and Women's Health: Charting a Path to Eliminating Health Disparities' (2003) 7 *Advances in Gender Research* 181.

intersectional discrimination, using a comparator is problematic. The case of R.B.P v. The Philippines from CEDAW Committee is a good example of this situation, even though she was a child with disabilities whose age, gender and disability made her particularly vulnerable to sexual violence, the CEDAW Committee analysed the rights of people with disabilities separately from women's right. Furthermore, her age was barely recognised as a contributing factor of heightened vulnerability.³⁷

Unfortunately, because these types of limited tools are still at the heart of anti-discrimination law,³⁸ it is necessary to rethink the tools from anti-discrimination frameworks that are being used in intersectional analysis as they do not fully address such a complex phenomenon. Not creating tools that are specific to the needs of multiply-burdened individuals can obscure the historical and systematic inequalities multiply-burdened individuals have endured throughout history.³⁹ Practices such as homophobia or ableism do not manifest in the real world as independent systems; the harm they produce is often interrelated, intersecting and invisible.⁴⁰ Instead of understanding discrimination as dualisms between the oppressed and the oppressor, it is also important for legal systems to understand that the dynamics of discrimination are complex.⁴¹

³⁷ UN Committee on the Elimination of Discrimination against Women. R.B.P. v The Philippines. Communication No.34/2011, Merits, UN.Doc. CEDAW/C/57/D/34/2011, 12 March 2014.

³⁸ Hannet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', 83.

³⁹ Sheppard, 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach'.

⁴⁰ Clark, Matthew and Burns, 'Power, privilege and justice: intersectionality as human rights?', 111.

⁴¹ Ruwanpura, 'Multiple identities, multiple-discrimination: A critical review', 77.

3.2 Understanding intersectionality in IHRL

3.2.1 Brief history of intersectionality in IHRL.

Zota-Bernal argues that most of the development of intersectionality in human rights law has occurred via soft law.⁴² As such, it is important to quickly revise how intersectionality has been included in documents outside of the case-law of the different human rights bodies as it is important to situate intersectionality in the broader structures of IHRL.

In the Universal System, there are two significant dates that are often referred to as the moments in which intersectionality started to be incorporated to IHRL. Firstly, 1995 in the Beijing Declaration at the Fourth World Conference of Women, the idea of intersectionality (the theory not the name) was already circulating albeit in the shape of multiple discrimination. This declaration states that, to achieve the equal enjoyment of all human rights and fundamental freedoms, states had to intensify their efforts to extend them to women and girls who faced ‘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’.⁴³

However, it was not until 2001 when the UN World Conference against Racism, also known as the Durban Conference, was held that the actual term of intersectionality made its way into IHRL.⁴⁴ This moment marks the first explicit use of the theory of intersectionality as a feminist approach to IHRL and since then, its presence has been

⁴² Zota-Bernal, ‘Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos’, 73.

⁴³ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

⁴⁴ *Ibid.*

growing. For example, Kimberlé Crenshaw was invited to organise a workshop and present a position paper so that intersectional analysis could be part of human rights as a tool to address social inequalities.⁴⁵ Crenshaw's contribution is considered the turning point of the inclusion of intersectional theory and the tenets of black feminism in the international arena.⁴⁶

That same year, the Division for the Advancement of Women, the Office of the High Commissioner for Human Rights and the United Nations Development Fund for Women held an expert meeting on gender and racial discrimination, amongst the attendees were Johanna Bond and Nira Yuval-Davis who tried to engage with intersectionality in an international human rights context.⁴⁷ However, it is considered that the explicit mention of intersectionality, and thus its official recognition in IHRL, came by way of CERD Committee's General Comment 25.⁴⁸ This General Comment is so significant in the fight against racial discrimination because it recognised that racism or racial discrimination affects women and men differently and certain forms of racial discrimination may be directed towards women only because of their gender.

In 2001, former Special Rapporteur on Violence against Women, Yakin Ertürk stressed the need to raise awareness of the multiple discrimination experienced by marginalised

⁴⁵ *Ibid.*

⁴⁶ Grazna, Intersectionality: A foundations and frontiers reader.

⁴⁷ Dale, 'International Women's Human Rights and the Hope for Feminist Law: Intersectionality as Legal Framework'

⁴⁸ Yuval-Davis, 'Intersectionality and Feminist Politics.' a more detailed analysis of this general comment is made on the section below where the work of CERD Committee is examined.

women and highlighted that intersectionality needed to be mainstreamed both in the theory and the practice of the bodies that combat violence against women.⁴⁹

The Convention on the Rights of Persons with Disabilities also includes in its Preamble an implicit use of intersectionality as it reads:

States Parties are [c]oncerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of to race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.⁵⁰

Another example of intersectionality being included in a binding document is article 9 of the Belem Do Pará Convention which states:

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.⁵¹

Intersectionality is not mentioned explicitly, yet it can be implied in the language of article 9 additionally this demonstrates how a few years after the term intersectionality was coined, one of the now considered basic Documents in the Inter-American System had envisioned gender as intersecting with other identities.

⁴⁹ UN Human Rights Council, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk: addendum: 15 years of the United Nations SR on violence against women, its causes and consequences (1994-2009): a critical review, 27 May 2009, A/HRC/11/6/Add.5 para 87 and Commission on Human Rights, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, 13 April 2005, E/CN.4/2005/72/Add.1/Corr.1.

⁵⁰ UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106. Preamble.

⁵¹ Organisation of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994. Article 9.

However, these examples also demonstrate the slow pace at which intersectionality has been making its way into international law. Almost 10 years after the ground-breaking article by Crenshaw, she was invited to provide guidance on how to incorporate intersectionality in human rights law.⁵² Even if the Beijing Declaration of 1995, and not the Durban conference, is considered as the first introduction of intersectionality in the realm of human rights, the same conclusion can be reached; intersectionality has taken too long to be mainstreamed in IHRL. Its operationalisation in adjudicative processes has been even slower, particularly in judicial functions where its development is relatively new; within the last 5-7 years. Thus it seems that feminist theory has spent more resources into developing a much more complex understanding of intersectionality in feminist theory than IHRL.

3.3 Intersectionality in adjudicative processes.

The discussion of the use of intersectionality will begin with an analysis of the available case-law of the international human rights adjudicative bodies in both treaty bodies and regional systems. This section aims at determining where do adjudicative bodies stand when it comes to the concept of intersectionality, which cases and to which victims have the human rights adjudicative bodies given an intersectional analysis, and whether there is any operationalisation process already in place. It is necessary to make a diagnosis of how and when adjudicative bodies incorporate intersectionality in their resolutions as

⁵² Collins and Bilge, 'Intersectionality. Key concepts.'

determining what these judicial and quasi-judicial bodies understand as intersectionality, if they apply it and how they apply it, is important.

In order to do so, the data was drawn firstly from international tribunals that adjudicated human rights law. The data chosen to be part of the analysis that will be presented below was limited to case-law and some reports depending on the relevance of those reports. The first criteria was selected because the research questions focused on how intersectional analysis could change the way cases were being decided. Regarding thematic reports, they were added to the analysis when they specifically addressed intersectionality, or the subject of the report made reference to certain intersections of identities such as “members of the LGBTTTI+ community”.

Based on the fact that the thesis limits itself to the understanding of how international human rights law adjudicative bodies understands and uses intersectionality, the adjudicative bodies are selected from the regional and universal systems, this meant that the Treaty Bodies and the three regional systems are part of the analysis in order to obtain the most comprehensive diagnosis possible. It could have been possible to use only one adjudicative body for the entire thesis, such as the Inter-American System, however based on the fact that one of the premises of this proposal is that the proposed concept and operationalisation method can be applied to all adjudicative bodies and should be applied so extensively, it was fundamental to know the points of convergence and difference between as many systems as possible

3.3.1 Treaty bodies

The Universal System of Human Rights has a wide range of mechanisms that ensure the protection of human rights in the world all of which might include intersectionality explicitly or implicitly. However, only the Treaty Bodies are included in the present research, not only because the volume of data that would need to be examined would make impossible this research but also because the objective is to make a diagnosis of the adjudicative functions when deciding human rights cases.

To determine the incorporation of the theory of intersectionality within the practice of the Treaty Bodies, all General Recommendations and Comments have been analysed. However, since this section serves more of an illustrative than exhaustive analysis, documents that were excluded from this section include those that do not mention intersectionality, intersecting characteristics, multiple discrimination or any other related term (since at times, intersectional analyses may have been applied through different frames of language). Additionally, the Committee on Enforced Disappearances is not subject to analysis because it has not, to the date of the submission of this work, published any General Recommendation or Comment nor has its communication process been activated. Johanna Bond has pointed that the structure of the United Nations is currently frustrating any effort to use intersectionality as a tool in the adjudication of human rights.⁵³ Treaty Bodies operate with isolated categories and have rarely and only recently worked

⁵³ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' 137.

with each other,⁵⁴ thus limiting the intersections that they can study. Many of the conclusions achieved here were reached bearing in mind that the use of intersectionality may be limited and inconsistent as a result of the legal structures in which it is being used or because the available sample of data is too small to make a solid determination.

3.3.1.1 CEDAW Committee

CEDAW Committee is, arguably, the treaty body that has used intersectionality the most.⁵⁵ CEDAW Committee has defined intersectionality as a basic concept for understanding the scope of the general obligations of the state included in Article 2 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).⁵⁶ CEDAW Committee sees intersectionality as an interpretation tool. This entails that the content of the provisions of CEDAW containing the general obligations of the State need to be interpreted based on the intersectional identities of women. This definition was reaffirmed in *Cecilia Kell v Canada*, a case where CEDAW Committee had to determine if an indigenous woman who was stripped of the ownership of a house in an indigenous territory to be passed onto her abusive non-indigenous husband had experienced discrimination on the basis of her indigenusness, her gender or both.⁵⁷ This case, unfortunately, only contributes to advancing intersectionality in the sense that it provides a concept, however

⁵⁴ *Ibid* 138; Association for Women's Rights in Development (AWID), 'Intersectionality: A Tool for Gender and Economic Justice' <https://www.awid.org/sites/default/files/atoms/files/intersectionality_a_tool_for_gender_and_economic_justice.pdf>, 2004 #2730) 4 and Emma Buxton-Namisnyk, 'Does an intersectional understanding of international human rights law represent the way forward in the prevention and redress of domestic violence against indigenous women in Australia?' (2014/2015) 18 *Australian Indigenous Law Review*, 119.

⁵⁵ Beco, 'Intersectionality and disability in international human rights law', 600.

⁵⁶ 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, 16 December 2010, CEDAW/C/GC/28. para 18.

⁵⁷ UN Committee on the Elimination of Discrimination against Women. *Cecilia Kell v. Canada*. Communication No.19/2008, Merits, UN.Doc. CEDAW/C/51/D/19/2008, 27 April 2012 paras 2.1-3.6.

because CEDAW Committee did not find that the victim had been discriminated against as an indigenous woman, intersectional analysis was not used thoroughly.⁵⁸

CEDAW Committee is exceptional because its purpose is, first and foremost, to deal with one identity; being a woman, although it recognises the heterogeneous nature of that identity. Consequently, it is safe to assume that the Committee applies intersectional analysis to women and what needs to be explored is not whether women are subjects that benefit from an intersectional analysis but rather which other identities intersect with that of being a woman.⁵⁹ One of the major contributions of CEDAW Committee to determining who could benefit from intersectional analysis is that the Committee does not limit identities to preconceived notions of them and rejects the idea of a static identity: ‘The Committee also recognizes that these categories remain fluid and overlapping and that therefore it is sometimes difficult to draw clear distinctions between the various categories’.⁶⁰

⁵⁸ *Ibid.* 10.2-10.6

⁵⁹ Considering CEDAW Com deals with women, the term sex or gender will not be used as a synonym to women, this is because sex/gender does not imply women but also includes men. Womanhood will be used instead to refer to all kinds of women.

⁶⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 26 on women migrant workers, 5 December 2008, CEDAW/C/2009/WP.1/R. para 4.

As examples of identities that might intersect, CEDAW Committee expressly mentions the girl child,⁶¹ a woman's choice of employment,⁶² women who are activists,⁶³ women with health issues, migrant women, internally displaced women, indigenous women, women subjected to female genital mutilation, women in a polygamous marriage, female children in prostitution or the sex industry,⁶⁴ women with disabilities,⁶⁵ lesbian women, victims of human trafficking,⁶⁶ rural women,⁶⁷ marital status and the role of women in the household.⁶⁸ It is worth mentioning that CEDAW Committee includes menstruation as a differentiating factor.⁶⁹ It has also constantly recognised age as an identity that creates

⁶¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 1 November 2013, CEDAW/C/GC/30 para 7; UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap. I para 6.

⁶² UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27. para 12; UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32 para 3.

⁶³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women para 31.

⁶⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) para 6.

⁶⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 18: Disabled Women adopted at the Tenth Session, 1991 (contained in Document A/46/38), 1991, A/46/38; UN Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No.24: Article 12 of the Convention (women and health) paras 5, 6 and 18; UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 25, on article 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004 para 12.

⁶⁶ UN Committee for the Elimination of All Forms of Discrimination against Women, 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. para 31.

⁶⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations paras 51, 52, 57.

⁶⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994.

⁶⁹ Committee on the Elimination of Discrimination against Women General recommendation No. 36 (2017) on the right of girls and women to education. 27 November 2017. CEDAW/C/GC/36 para 18(d). para 30.

different life experiences when it intersects with gender.⁷⁰ For example, states are asked to enact legislation that provides education throughout the ‘life cycle’ of women and girls, particularly those who are disadvantaged.⁷¹ In General Recommendation No.28 and General Recommendation No.33, a similar list can be found.

General Comment No.36 also has an extensive list of identities that could benefit from an intersectional analysis. For example, regarding the right to education, it states that equal access should be ensured for ‘the vulnerable’ which includes persons with disabilities, indigenous peoples and children in vulnerable situations.⁷² It also recognised that certain factors disproportionately prevent girls and women from enjoying their right to education. These include the membership women and girls have to disadvantaged and marginalised groups, such as those mentioned above.⁷³ In this same General Comment, new identities were included as factors that make women multiply-burdened such as language, being a refugee or asylum-seeker, being stateless, being an undocumented migrant, being older or from a culture that is not shared by the majority in the state.⁷⁴

This list was later expanded to include groups of girls at a higher risk of suffering violence in an educational context, those who are discriminated due to their HIV status, caste, race and religion, girls with disabilities, lesbian, bisexual, transgender and intersex children, socioeconomic status, location, gender identity and religious persuasion.⁷⁵ Finally, the

⁷⁰ For example, see UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 27 on older women and protection of their human rights. para 38.

⁷¹ Committee on the Elimination of Discrimination against Women. General recommendation No. 36 (2017) on the right of girls and women to education. para 18(d).

⁷² *Ibid.* para 3.

⁷³ *Ibid* para 4.

⁷⁴ *Ibid* para 41.

⁷⁵ *Ibid* para 66 and 30(b).

CEDAW Committee recognises that in educational settings, girls experience inequality due to the intersection of several identities including appearance and language patterns.⁷⁶

CEDAW Committee's General Recommendation No.37 deals with the disproportionate effect climate change and natural disasters have had on women and includes an ever-growing list of intersecting forms of discrimination, which are also referred to as higher degrees of vulnerability or factors that limit the enjoyment of their rights. These groups of women are those living in poverty, indigenous women, women belonging to ethnic, racial, religious and sexual minority groups, women with disabilities, refugee and asylum-seeking women, internally displaced, stateless and migrant women, rural women, unmarried women, adolescents and older women, lesbian, bisexual and transgender women and girls, intersex people, female heads of household, women and girls in situations of conflict, indigenous peoples, local communities, widows, women and girls living in poverty in both rural and urban settings and women in prostitution.⁷⁷

In one of its most recent general comments, the Committee reaffirmed that many women and girls do not access education because of the intersection of multiple forms of discrimination.⁷⁸ Thus, amongst other things, the Committee has required states to identify women that are members of groups that are more marginalised and suffer from intersecting discrimination.⁷⁹ The Committee confirmed that discrimination against women was

⁷⁶ *Ibid* para 64.

⁷⁷ Committee on the Elimination of Discrimination against Women General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. 13 March 2018. CEDAW/C/GC/37 paras 2, 3, 5, 21.

⁷⁸ UN Committee for the Elimination of All Forms of Discrimination against Women, General Recommendation No. 36 (2017) on the right of girls and women to education. para 40.

⁷⁹ UN Committee for the Elimination of All Forms of Discrimination against Women, 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 para 26.

inextricably linked to other factors that affected their lives, and highlighted the fact that such factors include:

women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty and being in prostitution as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defender. 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, meaning that appropriate legal and policy responses are needed.⁸⁰

Because CEDAW Committee deals with cases of discrimination its conceptualisation of intersectionality is framed within anti-discrimination theory and norms. The obligations of the state with regards to women's rights are also established within this same notion of discrimination. For example, in the analysis of the rights of women migrant workers, the Committee determined that they experience intersecting forms of discrimination as a result of xenophobia and racism.⁸¹ The special measures established in the General Recommendation require states to consider the characteristics of certain social groups to properly apply the principle of non-discrimination:

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women [...] States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.⁸²

⁸⁰ Committee on the Elimination of Discrimination against Women General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. 26 July 2017. CEDAW/C/GC/35 paras 12, 29(i), 30(e).

⁸¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 26 on women migrant workers. para 14.

⁸² *Ibid* para 18.

CEDAW Committee affirms that states should take all measures necessary to identify and combat intersectional discrimination.⁸³ Specifically, in their communications process CEDAW Committee has established that ‘[s]tates parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned’.⁸⁴

Context also influences the violation of the rights of women, as demonstrated in General Comment No.35 where it was determined that gender-based violence affects women throughout their lives, and the presence of certain contexts⁸⁵ often exacerbates the violence they face.⁸⁶ CEDAW Committee is one of the few that recognise external factors as interlocking systems of oppression and incorporates them into their intersectional analysis. In General Recommendation No.30, the existence of conflict and post-conflict was used as broader context of oppression that put women at risk of having their human rights violated.⁸⁷ In their General Recommendation on older women,⁸⁸ CEDAW Committee

⁸³ UN Committee for the Elimination of All Forms of Discrimination against Women, General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. para 30(a).

⁸⁴ UN Committee on the Elimination of Discrimination against Women. Cecilia Kell v. Canada. para 10.2.

⁸⁵ According to CEDAW: ‘cultural, economic, ideological, technological, political, religious, social and environmental factors [...] among other things, in the contexts of displacement, migration, the increased globalisation of economic activities, including global supply chains, the extractive and offshoring industry, militarisation, foreign occupation, armed conflict, violent extremism and terrorism [...] political, economic and social crises, civil unrest, humanitarian emergencies, natural disasters and the practices, destruction or degradation of natural resources’ make women more vulnerable.

⁸⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. para 14.

⁸⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations..

⁸⁸ UN Committee for the Elimination of All Forms of Discrimination against Women, General Recommendation No.27 on older women and protection of their human rights

highlighted how discrimination varies depending on socio-economic factors, socio-cultural environments and personal characteristics.⁸⁹

In General Comment No.36, systems and structures such as residence are once again relevant. According to the Committee, girls and women see their right to education limited because of distance from school in rural areas, domestic work and parental responsibilities, child marriage and adolescent pregnancy, combining work and domestic responsibilities, and low levels of literacy. Particularly this was the first time it addressed the risk of expectant mothers, mothers of children under the age of 7 and women internees. As well as being the first time that CEDAW mentions caste and women's rights defenders. Additionally, this General Recommendation has to be read in conjunction with the legal framework that protects refugees, stateless and displaced women and girls. The intersectional approach taken by CEDAW on this General Recommendation was used to assess the situation of rural women, to determine the particular needs of displaced women, refugees and asylum seekers and, to recognise the role statelessness and nationality play in conflicts⁹⁰.

This has materialised in their communications procedure where CEDAW Committee did a brief analysis of wider contexts of systematic oppression. In *LC v Peru*, the Committee determined the refusal of the state to perform an abortion had a particular effect on the victim, a child who was raped, on the grounds of her age, sex and economic status.⁹¹ The economic status was seen as a broader context of oppression and not only as an identity. Similarly, in *Alyne da Silva Pimentel Teixeira v Brazil*,⁹² her death as a consequence of medical negligence was considered to be rooted in the systemic discrimination suffered by

⁸⁹ *Ibid* para 12.

⁹⁰ Committee on the Elimination of Discrimination against Women General recommendation No. 36 (2017) on the right of girls and women to education. paras 33 and 33(c).

⁹¹ UN Committee on the Elimination of Discrimination against Women. *L.C. v. Peru*, Merits, UN Doc CEDAW/C/50/D/22/2009, 4 November 2011. para 8.18.

⁹² UN Committee on the Elimination of Discrimination against Women. *Alyne da Silva Pimentel Teixeira v. Brazil*, Merits, UN Doc CEDAW/C/49/D/17/2008, 10 August 2011.

women of African descent who lived in isolated poor areas in which access to health was deficient.⁹³The Committee on the Rights of Persons with Disabilities (CRPD Committee) The CRPD Committee became the first committee to incorporate an understanding of intersectionality similar to the one given by Crenshaw in her earlier work⁹⁴. In General Comment No.3 that addresses the situation of women and girls with disabilities, the CRPD Committee defined intersectionality as ‘a situation where several grounds [of discrimination] interact with each other at the same time in such a way as to be inseparable’.⁹⁵ According to the Committee, intersectionality or intersecting discrimination recognises the differentiated impact discrimination has on individuals which are considered multiply-burdened. In 2018, CRPD Committee issued General Comment 6 that includes a more detailed definition of intersectional discrimination. Echoing General Comment 3, CRPD Committee states that intersectional discrimination occurs when disability, as the primary ground, interacts with other grounds exposing the individual ‘to unique types of disadvantage and discrimination’.⁹⁶

Although CRPD Committee is relatively new and does not have a very wide list of General Recommendations, it has made several references to intersectionality and intersectional analysis. The Committee refers to ‘the diversity of people with disabilities’, establishing how different disabilities affect the enjoyment of human rights differently.⁹⁷ However, the

⁹³ *Ibid* paras 2.1-2.12, 3.10, 3.16, 5.2, 5.4, 5.55 and 10.

⁹⁴ See Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'; Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

⁹⁵ UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3 (2016), Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3 para 4 (c).

⁹⁶ UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018, CRPD/C/GC/6. para 19.

⁹⁷ UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 1 (2014) Article 12: Equal recognition before the law, 11 April 2014, CRPD/C/GC/1 para 18.

only two identities explicitly recognised as intersecting with others are women and children,⁹⁸ an approach that unfortunately was reproduced in other General Recommendations.⁹⁹ General Recommendation No.7 of CRPD Committee acknowledges that some identities can be transversal to the social category of disabilities and so people with disabilities should be considered as a heterogeneous and diverse group.¹⁰⁰ This recommendation does not explicitly recognise intersectionality, however, it does state that states have to:

Guarantee and support the participation of persons with disabilities reflecting a wide diversity of backgrounds, including birth and health status, age, race, sex, language, national, ethnic, indigenous or social origin, sexual orientation and gender identity, intersex variation, religious and political affiliation, migrant status, impairment groups or other status.¹⁰¹

Most of the available data shows a focus on the social categories of women, girls and children with disabilities.¹⁰² However, in the communications process, CRPD Committee incorporates intersectional analysis in order to assess the situation of men with disabilities. *X v Argentina* illustrates how intersectionality can successfully be applied in cases of male detainees that have a disability.¹⁰³ The complaint referred to the alleged mistreatment experienced by the victim Mr. X whom, while incarcerated, underwent spinal surgery and a plate was incorrectly inserted at the cervical level. The mistake during surgery caused him to suffer a stroke and was considered as disabled. However, the conditions of his prison cell were unsuitable for his disability. The CRPD Committee held that the human

⁹⁸ *Ibid* paras 35 and 36.

⁹⁹ UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 4 (2016), Article 24: Right to inclusive education, 2 September 2016, CRPD/C/GC/4 para 46 and UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 5 (2017) on living independently and being included in the community, 27 October 2017, CRPD/C/GC/5 para 72.

¹⁰⁰ UN Committee on the Rights of Persons with Disabilities General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention. 9 November 2018. CRPD/C/GC/7 para 11.

¹⁰¹ *Ibid* para 94 (g).

¹⁰² *Ibid* para 24, 42 and 72-75.

¹⁰³ UN Committee on the Rights of Persons with Disabilities. *X v Argentina*, Merits, UN Doc CRPD/C/11/D/8/2012, 11th April 2014.

rights of Mr. X where being breached because he was not given reasonable accommodation as a person who is detained and has a disability.

The same situation can be seen in *Marlon James Noble v Australia*.¹⁰⁴ The CRPD Committee, without explicit mention of intersectionality, analysed the rights of detainees and due process in the light of disabilities, which resulted in a more comprehensive understanding of the obligations of the state concerning people under their control. It can be concluded with certain degree of certainty that women, children and detainees have been subjected to intersectional analysis. Nonetheless, based on this meagre evidence, it is not possible to conclude with absolute certainty if the CRPD Committee only applies intersectional analysis to these three different groups of individuals or if in the future the Committee will expand the list of characteristics. Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee)

The CERD Committee has included the term intersectionality in cases were women, children¹⁰⁵ and individuals belonging to certain religions which differ from the state majority, were victims.¹⁰⁶ A first attempt to apply intersectional discrimination in their work, was in 2000 in General Recommendation No. 25, as mentioned in the introduction of this chapter, where the gender dimensions of discrimination illustrated the effects on women who are subjected to discrimination based on factors such as their indigenesness, race, ethnicity or place of work, and the particular consequences that affect them as a result.¹⁰⁷

¹⁰⁴ UN Committee on the Rights of Persons with Disabilities. *Marlon James Noble v. Australia*, UN Doc CRPD/C/16/D/7/2012, 10 October 2016.

¹⁰⁵ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 34 adopted by the Committee: Racial discrimination against people of African descent, 3 October 2011, CERD/C/GC/34 paras 22-26. While CERD Com does mention people living in poverty, it is done as a sub identity included in womanhood and childhood and does not analyse as a separate social division belonging to social class.

¹⁰⁶ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35: Combating racist hate speech.

¹⁰⁷ UN Committee on the Elimination of Racial Discrimination, General Recommendation 25 on Gender Related Dimensions of Racial Discrimination. 20 March 2000. U.N. Doc. A/55/18, annex V para 2.

In General Recommendation No.33, the Committee applauded the acknowledgement by the Durban Review Conference of multiple or aggravated forms of racial discrimination as fundamental elements of the concept of racial discrimination.¹⁰⁸ This is not an explicit acknowledgement of intersectionality, but the content of the General Comment seems to imply that intersectionality is part of multiple and aggravated forms of racial discrimination. The Committee established that individuals who are discriminated against because of two intersecting characteristics are consequently put in a situation of higher vulnerability.¹⁰⁹ CERD Committee included a conditionality element, for lack of a better term, to the operationalisation of intersectionality which establishes that it will only be used when a discrimination ground exists in combination with a ground or grounds listed in Article 1 of the Convention on the Elimination of All forms of racial Discrimination (CERD), namely race, colour, descent, or national or ethnic origin.¹¹⁰

Another reference to intersectionality can be seen in General Recommendation No. 35 dealing with combating racist hate speech. The Committee stated that due to the current criticism experienced by some religious leaders, doctrines or tenets of faith to the extent that it has given way to the prohibition or punishment of such expression of faith, intersectionality would guide the Committee's attention to examine the manner in which

¹⁰⁸ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 33, Follow-up to the Durban Review Conference, 29 September 2009, CERD/C/GC/33 Preamble.

¹⁰⁹ UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation No. 30 on Discrimination Against Non-Citizens, 1 October 2002, CERD/C/64/Misc.11/rev.3 para 20. In this particular case the Committee was analysing the cases of individuals that are being accused of terrorism in a State where they are not citizens.

¹¹⁰ These grounds are race, colour, descent, or national or ethnic origin.

hate speech targets persons belonging to certain ethnic groups who profess or practice a religion different from the majority.¹¹¹

As for the use of intersectionality in the quasi-judicial function, none of the individual complaints examined had a reference to intersectionality that could have provided a more extensive knowledge of how intersectionality is operationalised and/or defined in the CERD Committee.

3.3.1.2 Committee on the Rights of the Child (CRC Committee)

The CRC Committee does not use the term intersectionality in any of its General Comments but it has used the concept of multiple discrimination in several occasions.¹¹²

General Comment No.5 takes the obligation enshrined in Article 2 of the Convention on the Rights of the Child (CRC) and reminds states of the importance of identifying vulnerable and disadvantaged groups of children that suffer from discrimination as a result of one or more personal identities.¹¹³ It includes a detailed list of children that are vulnerable due to their ‘intersecting’ identities¹¹⁴ which reflects not only the importance

¹¹¹ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35 para. 6

¹¹² Such as UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15 para II.B. and UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9.

¹¹³ UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5 paras 8 and 30.

¹¹⁴ The identities recognised by CRC Com are girls, girls with disabilities, children living with HIV/AIDS, children with racial, ethnic, religious or linguistic characteristics different from the majority of the Country, children living in poverty, street children, children with special needs with regards to language, health and education, indigenous children or refugees, those in conflict with the law, adopted children, children living in poverty, asylum-seeking and refugee children, children in street situations, nomadic groups, migrant or internally displaced children, children of indigenous origin and from minority groups, working children, children without parents, children subjected to significant pressure for academic attainment, children living in inadequate, overcrowded or insecure conditions and children who have experienced neglect, exploitation, abuse or other forms of violence, child victims of physical or sexual violence, children affected by armed

of analysing personal characteristics but also the systems that render them more vulnerable to having their rights violated. Conflict, humanitarian disasters and insecure conditions are all systems of oppression that work regardless of the identities of the individual but play a role in the way the individual experiences their identities.¹¹⁵

The CRC Committee understands the best interest of the child as a flexible and ever-changing principle that must be adjusted on an individual basis taking into account the specific situation of the child and the collective effect of the situation of the group to which the child belongs.¹¹⁶

48. Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical,

conflict or asylum-seeking children, those who have been witness to a crime, children working at a young age, children in situation of violence and children in emergency situations, adolescents, unaccompanied and separated children outside their country of origin, former child soldiers, children who are separated or unaccompanied because of the persecution of their parents, children victims of torture or ill treatment and children who are victims of sale or sexual trafficking, children whose caregivers are disable, children in juvenile systems, children with diverse sexual orientation, children who have HIV/AIDS.

¹¹⁵ UN Committee on the Rights of the Child (CRC), General comment No. 1 (2001), Article 29 (1), The aims of education, 17 April 2001, CRC/GC/2001/1 paras 10 and 11; UN Committee on the Rights of the Child (CRC), General comment No. 2 (2002): The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, 15 November 2002, CRC/GC/2002/2 para 15; UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12 paras 4, 32, 77, 78 and 116-126; UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20; UN Committee on the Rights of the Child (CRC), General comment No. 7: Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1; UN Committee on the Rights of the Child (CRC), General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child], 12 February 2009, CRC/C/GC/11; UN Committee on the Rights of the Child (CRC), General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6; UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10 para 6; UN Committee on the Rights of the Child (CRC), General comment No. 3 (2003): HIV/AIDS and the Rights of the Child, 17 March 2003, CRC/GC/2003/3 and UN Committee on the Rights of the Child (CRC), General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), 17 April 2013, CRC/C/GC/17 paras 16 and 53

¹¹⁶ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14 paras 32-35.

sensory or intellectual disability as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.¹¹⁷

Apart from the extensive recognition of groups of children who are more vulnerable because of their intersecting characteristics, CRC Committee stresses the importance of the experiences of growth, development, gender, living conditions, family organisation, arrangements and education systems as integral to fully understanding how children's rights are realised in early childhood.¹¹⁸

This is the second time that CRC Committee has emphasised that understanding the needs and issues that affect children requires one to understand the identities of the child and the context in which they exist, be it political, social, economic or cultural. From all the adjudicative bodies, CRC Committee has one of the most detailed lists of identities and although childhood is their core identity, the Committee tries to recognise as many identities that aggravate the oppression of children as possible. While the rights are applicable in a general manner, the heterogeneous nature of children as a group translates in different expressions of their needs.

In Comment No.13, CRC Committee adopted a gender perspective to explain how violence affects boys and girls differently. Instead of using an intersectional approach to

¹¹⁷ *Ibid* para 48

¹¹⁸ UN Committee on the Rights of the Child, 'General Recommendation No.7 Implementing child rights in early childhood' paras 6(f) and 7.

describe acts of discrimination, the Committee used intersectionality to explain how the harm produced by violence manifest uniquely to the child who is experiencing it.¹¹⁹

CRC Committee also uses structures as part of its analysis. General Comment No.17 identified several groups of children who require special attention to fulfil their right to play, leisure and rest, and used the environments and housing arrangement of the children as identities. Among the examples of how the macro analysis of intersectionality can be included, the committee mentioned children living in poor or hazardous environments, children in penal, health-care or residential institutions, children in situations of conflict or humanitarian disaster, children in rural communities,¹²⁰ children in charge of a household because both parents work and children involved in the informal economy, as categories in need of special attention.¹²¹

3.3.1.3 Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW Committee)

The CMW Committee, much like the practice of other treaty bodies, has references to categories of individuals whose intersecting characteristics render them more susceptible of having their rights violated¹²² but they depart from the practice of the others because

¹¹⁹ UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13 paras 19 and 72(b).

¹²⁰ UN Committee on the Rights of the Child (CRC), General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) para 16.

¹²¹ UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16 paras 13, 14, 35-37.

¹²² UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General comment no. 1 on migrant domestic workers, 23 February 2011, CMW/C/GC/1 and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August 2013, CMW/C/GC/2.

they create subgroups within subgroups.¹²³ While it recognises a wider list of individuals that can benefit from intersectional analysis, it is still possible to recognise an inclination towards highlighting womanhood and childhood as quintessential identities intersecting with migration status.

The CMW Committee is another treaty body that uses multiple discrimination as an umbrella term: ‘The Committee notes that migrant children may suffer from multiple forms of discrimination due to race, ethnicity, gender and disability, for example’.¹²⁴

The joint General Comment of the CRC and CMW Committees, although recognising children and migration as identities that intersect, stressed the diversity within the category of migrant children when they included an even bigger list of points of intersection that render children more vulnerable such as their national, ethnic or social origin, gender, sexual orientation, gender identity, religion, disability, migration or residence status, citizenship status, age, economic status, political or other opinions, being unaccompanied migrants, being born to migrant parents and children who remain in their country of origin while one or both parents have migrated to another country.¹²⁵

¹²³ Such as women and the girl child, domestic workers who are HIV positive, are pregnant, are non-documented or in an irregular situation, women migrants with irregular status who are pregnant, women at increased risk of ill-treatment or other forms of violence including sexual violence; children and unaccompanied or separated children; migrants who speak a language different from the one of the State they have migrated to; Accused juveniles; detained and imprisoned migrant workers, pregnant women, breastfeeding mothers and mother with young children; migrants who belong to a particular religious groups, migrants who are victims of torture; unaccompanied older persons; persons with disabilities and persons living with HIV/AIDS.

¹²⁴ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families para 76.

¹²⁵ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/2 para 3.

Unlike previous General Comments issued by the CRC Committee alone, that did not include express mention of intersectionality, on this occasion, a paragraph was devoted to the recognition of intersecting forms of discrimination. In particular, the joint General Comment recommends states adopt all necessary measures to protect children from multiple and intersecting forms of discrimination and even goes to the extent of mentioning measures that states can take to fulfil their obligations to protect children in the context of migration.¹²⁶ The list of children that are considered as multiply-burdened by both Committees is extensive,¹²⁷ but there seems to be especial attention put on the migrant girl child,¹²⁸ migrant children with disabilities,¹²⁹ and migrant children who do not speak the language of the receiving state.¹³⁰

3.3.1.4 The Committee Against Torture (CAT Committee)

The CAT Committee is one of three committees examined here that deals with complaints regarding a violation different from discrimination. CAT Committee has used personal identities as grounds that make someone more vulnerable to torture.¹³¹ The Committee

¹²⁶ *Ibid* para 23.

¹²⁷ The list includes undocumented children, whether unaccompanied and separated or with families, and to the protection of asylum-seeking children, stateless children and child victims of transnational organised crime, including trafficking, sale of children, commercial sexual exploitation of children and child marriage. States should also consider the specific vulnerable circumstances that could face migrant children due to their gender and other factors, such as poverty, ethnicity, disability, religion, sexual orientation, gender identity or others, that may aggravate the child's vulnerability to sexual abuse, exploitation, violence, among other human rights abuses, throughout the entire migratory process.

¹²⁸ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration para 24.

¹²⁹ *Ibid* para 25.

¹³⁰ *Ibid* para 36.

¹³¹ Such as race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disabilities, health status, economic or indigenous status, reasons for which a person is detained, asylum-seekers, persons accused of terrorism and refugees. UN Committee Against Torture (CAT), General Comment No. 2 (2008):

does incorporate the term intersectionality but, based on the amount of work they have issued so far, CAT Committee has mentioned intersectionality only relating to women:

State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasises that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status, etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof.¹³²

3.3.1.5 *The Committee on Economic, Social and Cultural Rights (CESCR)*

CESCR is a treaty body that has quite a broad mandate; to observe the respect of the provisions contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). In some General Comments, it has used identities¹³³ that cause a group to be ‘vulnerable’ or ‘marginalised’ as part of the grounds of discrimination.¹³⁴ It has also implemented a list of broader topics of application in several General Comments which

Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2 and UN Committee Against Torture (CAT), General Comment No. 3 (2012) Implementation of article 14 by States parties, 13 December 2012, CAT/C/GC/3.

¹³² *Ibid* para 22.

¹³³ Some of the identities mentioned are: children with disabilities, older persons irrespective of age, sex, gender, racial or ethnic background, disability or even work, women, minorities or indigenous peoples as important identities that need to be taken into account to ensure the right to education to everyone without discrimination, landless persons, impoverished people, infants and young children, physically vulnerable individuals, terminally ill, people with persistent medical problems, the mentally ill, workers inadequately protected by social security, workers belonging to informal economy, minority groups, non-nationals, internally displaced persons and internal migrants, people living in rural areas or deprived urban areas, orphans and unemployed people and victims of natural disaster.

¹³⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities, 9 December 1994, E/1995/22 para 32; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22 para 17; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10 paras 24, 50 and 55; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999 para 13 and N Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19 paras 32-39.

includes personal identities in need of special measures of protection.¹³⁵ Yet, it is unclear which identities can intersect to create aggravated forms of oppression in the eyes of CESCR. This could be because there is no constant use of intersectionality.

CESCR seems to use the theory of intersectionality as a tool to understand ‘distinct forms of discrimination due to the intersection of sex with such factors’.¹³⁶ The same conclusion can be drawn from General Comment No.5, in which the intersection of sex and disabilities was understood as double discrimination because of the genderless treatment given to people with disabilities when their needs as women are not properly recognised.¹³⁷

In a subsequent General Comment, No. 22,¹³⁸ Paragraphs 30 to 32 are titled ‘Intersectionality and multiple discrimination’ and, amongst other things, state that:

Individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health. As identified by the Committee,[30] groups such as but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities,

¹³⁵ Such as: UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), 10 May 1999, E/1992/23; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11; UN Committee on Economic, Social and Cultural Rights (CESCR), 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), 21 December 2009, E/C.12/GC/21 and UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 12 January 2006, E/C.12/GC/17.

¹³⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4 para 5.

¹³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities para 19.

¹³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). 2 May 2016. E/C.12/GC/22.

adolescents, LGBTI persons and people living with HIV/AIDS are more likely to experience multiple discrimination. [...] Measures to guarantee non-discrimination and substantive equality should be cognizant of and seek to overcome the often-exacerbated impact that intersectional discrimination has on the realization of the right to sexual and reproductive health.¹³⁹

This quote and General Comment No.24 seem to reveal that CESCR includes an acknowledgement that certain segments of the population suffer intersectional and multiple discrimination.¹⁴⁰

CESCR also included the term intersectional discrimination in some of its most recent decisions. In *Marcia Cecilia Trujillo Calero v Ecuador*¹⁴¹ the CESCR determined that:

The Committee notes that the author is an older person who is in a critical economic situation and has health problems and that the intersection of the alleged gender and age discriminations makes her particularly vulnerable to discrimination in comparison with the general population.¹⁴²

A very significant aspect of intersectional discrimination as applied by CESCR is that its current practice limits the application of intersectional discrimination to cases where the discrimination is based due to sex but exclusively women.¹⁴³ Yet the Committee did not provide any explanation of why or how intersectional analysis should be used when dealing with the violation of the human rights of a multiply-burdened individual.

¹³⁹ *Ibid* para 30.

¹⁴⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24 para 9.

¹⁴¹ UN Committee on Economic, Social and Cultural Rights. *Marcia Cecilia Trujillo Calero v. Ecuador*. Communication No. 10/2015. Merits. 14 November 2018. paras 3.3-3.5. The facts of the case dealt with the refusal of Ecuador to pay the retirement pension of an elderly woman which amounted to a violation of the right to social security.

¹⁴² *Ibid* para 19.2.

¹⁴³ For example, see UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23 para 47 (a).

¹⁴³ UN Human Rights Committee (HRC), CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10 para 30.

3.3.1.6 *The UN Human Rights Committee (HRC)*

The HRC has made references to intersectionality as a theory applicable to women, as General Recommendation No.28 states ‘discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status’.¹⁴⁴ However, the Committee briefly departs from this formula when addressing the right to life. According to the Committee, legal protection to the right to life must apply to everyone against all forms of intersectional discrimination. Particular mention is made of femicide as an aggravated form of assault on the right to life, making the gender of women and girls a salient category of intersectional analysis.¹⁴⁵

More recently, intersectionality has featured in a series of communications decided by the Human Rights Committee. In *Sonia Yaker v France*, *Seyma Türkan v Turkey* and *F.A. v France*, the Committee decided whether the bans on garments that conceal the wearer’s face in public constituted discrimination based on gender and religion as it disproportionately affected women.¹⁴⁶

In *Yaker*, the Committee concluded that the ban in France constituted a form of intersectional discrimination based on gender and religion,¹⁴⁷ yet there was no explanation of what intersectional discrimination meant to the Committee nor any distinguishable step

¹⁴⁴ *Ibid.*

¹⁴⁵ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 para 61.

¹⁴⁶ UN Human Rights Committee. *Sonia Yaker v. France*. Communication No. 2747/2016. CCPR/C/123/D/2747/2016 7 December 2018. Paragraph 2.1; UN Human Rights Committee. *Seyma Türkan v. Turkey*. Communication No. 2274/2013. CCPR/C/123/D/2274/2013/Rev.1. 22 October paras 1 and 3.3.; and UN Human Rights Committee Views. *F.A. v. France*. Communication No. 2662/2015. CCPR/C/123/D/2662/2015 24 September 2018. paras 1 and 8.10.

¹⁴⁷ UN Human Rights Committee. *Sonia Yaker v. France*.

by step process of operationalisation that could explain how intersectional discrimination is used. In *Seyman v Turkey*, a similar situation can be seen. The Committee mentions how the ban imposed by Turkey disproportionately affected Muslim women and concluded that the ban was discriminatory on the grounds of religion and gender.¹⁴⁸ However, the reference to intersectionality was still reduced to a couple of lines in the final paragraph of the merits.¹⁴⁹ Finally, in *F.A.* there is a much more extensive analysis of discrimination but most of the analysis was done within the realm of single-axis anti-discrimination frameworks.¹⁵⁰ The mention of intersectional discrimination was also confined to one paragraph and one single explicit use of the term ‘intersectional discrimination’.¹⁵¹

3.3.2 Regional Systems

The regional systems are also using intersectionality in their judicial and quasi-judicial functions and, just as the Treaty Bodies, they have also tried to conceptualise intersectionality.

In the European Court of Human Rights, considering the massive volume of cases that exist and the impossible task it would be to examine each one of the decisions, it was decided to use the Human Rights documentation database (HUDOC). The European Commission is not included in the present analysis as it became obsolete in 1998 when the European Court of Human Rights was restructured, and individuals were allowed to take their cases directly to the Court.¹⁵² The totality of the cases in the Inter-American and

¹⁴⁸ UN Human Rights Committee. *Seyma Türkan v. Turkey*. para 7.7.

¹⁴⁹ *Ibid* para 7.8.

¹⁵⁰ UN Human Rights Committee. *F.A. v. France*. paras 8.11 and 8.15.

¹⁵¹ *Ibid* para 8.13.

¹⁵² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 19 January 2022]

African Courts were examined. In all three systems the terms intersectionality or related key-words (such as higher vulnerability, special measures, double, compounded or multiple discrimination, intersectional discrimination, double, compounded or multiple vulnerabilities and higher risk) were used to choose which cases would be incorporated into this chapter. The documents of the Inter-American Commission will relate only to their thematic reports as the Commission uses intersectionality in cases that were later decided by the Court and thus the case at the Court stage has been used. Taking into account that the Commission is not the last stage in the Inter-American System and that the decisions and positions from the Inter-American Court are binding, including on the Commission, it makes more sense to address the latter. With regards to the African Commission, cases are not included because the term intersectionality is only present in reports.

3.3.2.1 Inter-American System of Human Rights

The Inter-American System of Human Rights has included intersectionality in several documents issued by both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Apart from cases and thematic reports, judge's opinions have also served as spaces to explore the implications of intersectionality as a tool to adjudicate human rights.

The first time the term intersectionality or intersectional discrimination appeared before the IACtHR was in *Rosendo-Cantú et al. v Mexico* in 2006, the case referred to the rape and torture of Mrs. Valentina Rosendo Cantú, an indigenous girl, at the hands of military

personnel.¹⁵³ The representatives of the victim claimed that Mrs Cantú suffered an extreme form of aggravated discrimination as a result of the intersection of her gender, social class and age which rendered her ‘a victim of an intersection of discriminations’.¹⁵⁴ However, the Court did not examine the case under intersectional discrimination. Thus, it is not possible to determine from this case how the IACtHR approached intersectional discrimination. In the case of *Lluy v Ecuador*, despite the court made a reference to intersectionality, Judge Eduardo Ferrer Mac-Gregor included an opinion that examined the theory of intersectionality in more detail than what the court did in the merits of the case.¹⁵⁵ One of his arguments in favour of including intersectionality more often in the decisions of the Court was that it would allow the Tribunal to deepen the case law on discrimination.

10. Meanwhile, the intersectionality of discrimination not only describes a discrimination for different reasons but also relates to a meeting or simultaneous concurrence of different reasons for discrimination. In other words, during the same event, discrimination occurs owing to the concurrence of two or more prohibited factors. This type of discrimination may have a synergetic effect that exceeds the simple sum of several forms of discrimination or may activate a specific form of discrimination that only operates when several reasons for discrimination are combined. Not all multiple discrimination will be intersectional discrimination. Intersectionality relates to a meeting or simultaneous concurrence of different reasons for discrimination. This activates or underlines a discrimination that only occurs when the said reasons are combined.

11. Thus, intersectional discrimination refers to multiple reasons or factors that interact to create a unique and distinct burden or risk of discrimination. Intersectionality is associated with two characteristics. First, the reasons or the factors are analytically inseparable because the experience of discrimination cannot be disaggregated into different reasons. The experience is transformed by the interaction. Second, intersectionality is associated with a different qualitative experience, creating consequences for those affected in ways that are different from the consequences suffered by those who are subject to only one form of

¹⁵³ I/A Court H.R., Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 31, 2010. Series C No. 216.. para 1.

¹⁵⁴ *Ibid* para 82.

¹⁵⁵ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs.

discrimination. This approach is important because it underscores the particularities of the discrimination suffered by groups that, historically, have been discriminated against for more than one of the prohibited reasons established in various human rights treaties.¹⁵⁶

The definition provided by the Judge was later reproduced in the merits section of several cases. In *Lluy v Ecuador*, the victim suffered the intersection of multiple factors of vulnerability and risk of discrimination as a result of her age, sex, social class and health. If any of these elements had not existed, the Court held, the discrimination would have manifested differently.¹⁵⁷ Apart from including a definition of intersectionality in Judge Ferrer Mac-Gregor's opinion, the case also recognised broader structures of oppression, such as poverty, that allowed the violation to take place.

Judge Ferrer Mac-Gregor is clear that multiple discrimination is not always intersectional because the intersection of factors in a discrimination case constitutes multiple discrimination that could at the same time be intersectional.¹⁵⁸ According to him, for an adjudicator to use intersectional analysis they must first establish that the discrimination is multiple, meaning that it happened because of the confluence of two or more grounds and only then can adjudicators argue that the grounds for discrimination are not only several but that they also intersect.¹⁵⁹ Similarly, in his opinion in *Fazenda Brasil Verde v Brazil*, existing case law regarding multiple, compounded and intersectional discrimination associated with poverty was incorporated.¹⁶⁰ Although the case focused on rural slave labour and human trafficking in Brazilian plantations, poverty was considered by Judge

¹⁵⁶ *Ibid* paras 10 and 11

¹⁵⁷ I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 290.

¹⁵⁸ *Ibid* Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot. para 7.

¹⁵⁹ *Ibid* para 9.

¹⁶⁰ I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318. para 1.

Ferrer Mac-Gregor to be part of the principle of non-discrimination, and must be considered a protected characteristic per Article 1.1 of the American Convention to determine if discrimination on the grounds of poverty is isolated, multiple or intersectional.¹⁶¹

The IACtHR understands intersectionality as comprising the confluence of factors that result in a discriminatory experience that is different from an additive or cumulative discrimination, these factors are understood as vulnerability factors or grounds of discrimination and without these intersecting factors, the nature of the discrimination would be different.¹⁶² The IACtHR recognises that intersectionality is important to determine the unique experience of the victim and understand that human rights violations are different depending on the ‘factors’ a person has.¹⁶³

In the 2016 case of *I.V. v Bolivia*, the IACtHR argued that certain groups of women suffered discrimination throughout their lives on the grounds of more than one factor and were consequently more vulnerable to violence and violations of their human rights.¹⁶⁴ The Court started its analysis by establishing that their first role was to decide whether the case referred to multiple or intersectional discrimination, distinguishing between the two. It recognised that certain groups of women suffer discrimination on one or more grounds combined with their sex. An important aspect was that the Court felt the need to state that

¹⁶¹ *Ibid* para 50.

¹⁶² I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No.359.

¹⁶³ I/A Court H.R., Case of I.V. v Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No.329. para 321

¹⁶⁴ *Ibid* para 136.

if any of the factors that describe I.V. had not existed, the discrimination would have had a very different nature.¹⁶⁵

The IACHR refers to intersectionality in a similar manner as CEDAW Committee, intersectionality is an interpretative tool to understand the scope of the general obligations of the State parties.¹⁶⁶ The IACHR in its thematic reports has used intersectionality linked to womanhood to, for example, establish all the identities that intersect with indigenusness and gender.¹⁶⁷ The thematic report on the rights of members of the LGBTTI+ community recognised that violence suffered by its members is the result of the intersection of sexual orientation, gender identity and sexual characteristics with ethnicity, race, gender, migration status, the situation of human rights defenders and poverty.¹⁶⁸ In the same manner, the IACHR has argued that the status of ‘preventative detention’ could create a disproportionately more grave effect when intersecting with other marginalised social categories such as afro descendants, indigenous peoples, LGBTTI+, the elderly and people with disabilities.¹⁶⁹

In *Chinchilla Sandoval et al. v. Guatemala*, the IACtHR did not analyse the case under the light of intersectionality. However, Judge Ferrer Mac-Gregor did in his concurring opinion

¹⁶⁵ *Ibid* para 321.

¹⁶⁶ Edison Lanza. 2017. Silenced Zones: Highly Dangerous Areas for the Exercise of Freedom of Expression. Office for the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. para 38.

¹⁶⁷ Inter-American Commission on Human Rights, Indigenous Women and their Human Rights in the Americas para 40.

¹⁶⁸ Inter-American Commission on Human Rights, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, OAS/Ser.L/V/II.rev.1 Doc. 36, 12 November 2015 para 15.

¹⁶⁹ Inter-American Commission on Human Rights, Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.163 Doc. 105, 3 July 2017 para 17.

which focused on the intersection of detention and disability.¹⁷⁰ The judge considered that the situation experienced by Mrs Chinchilla, which resulted in her death, created problems that cannot be compared to those of people without a disability deprived of their liberty and without the need for constant medical attention.¹⁷¹ *Duque v Colombia* was another paradigmatic case of the IACtHR, focusing on the right of Mr Duque to access the pension of his partner which had been denied to him on the basis that the law did not recognise homosexual couples.¹⁷² The Commission argued before the Court that Mr Duque had been affected by multiple factors of vulnerability: his medical condition, economic situation and sexual orientation. The Court reproduced the argument that these identities could intersect to create more disadvantaged situations for the victim.¹⁷³ It can be concluded that the IASHR includes all identities as possible axis of intersection. There is no emphasis on women nor is there an exhaustive and closed list of intersectional identities.

Similarly, the IACHR has included intersectionality in areas of discrimination and violence. The importance of acknowledging the differences between women and their particular vulnerability has resulted in the obligation on states to consider intersectionality in their efforts to understand, prevent and eradicate violence against women.¹⁷⁴ The Commission also argues that intersectional discrimination is an important tool to assess how women experience discrimination as a group and how their experiences manifest

¹⁷⁰ I/A Court H.R., Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016. Series C No. 312. Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor.

¹⁷¹ Ibid

¹⁷² I/A Court H.R., Case of Duque v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310. para 1.

¹⁷³ Ibid para 182.

¹⁷⁴ Inter-American Commission on Human Rights. Access to Information, Violence against Women, and the Administration of Justice in the Americas. OAS/Ser.L/V/II.154 Doc. 19. 27 March. para 41.

differently from one woman to another.¹⁷⁵ In their reports on violence against the LGBTTI+ community, and children and violence, the IACHR used intersectionality to understand violence more generally and not only violence in the context of the violation to the non-discrimination principle.¹⁷⁶ What can be concluded is that the IACHR mostly uses intersectionality in cases of discrimination but also as a tool to assess pre-existing relationships of oppression and marginalisation in the violation of other human rights.

3.3.2.2 African System of Human and Peoples' Rights

The African Court on Human and Peoples' Rights has not included intersectionality, intersectional analysis or any related concept in its judgements. However, the African Commission on Human and Peoples' Rights (ACHPR) has. In the text of the 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' the ACHPR included intersectional discrimination in the list of terms that contribute to the interpretation of the Guidelines and stated that intersectional discrimination occurs 'when a person is subjected to discrimination on more than one ground at the same time, e.g. race and gender'.¹⁷⁷

As part of the communal activities between the African Commission and the African Union, the ACHPR emphasised the need to establish and reinforce intersectional approaches in areas that interact with certain groups of individuals, such as women, young

¹⁷⁵ Inter-American Commission on Human Rights. *Indigenous Women and their Human Rights in the Americas*. paras 38-41.

¹⁷⁶ Inter-American Commission on Human Rights. *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OAS/Ser.L/V/II.rev.1 Doc. 36. 12 November 2015 para 262 and Inter-American Commission on Human Rights. *Violence, Children and Organized Crime*. OEA/Ser.L/V/II. Doc. 40/15. 11 November 2015.

¹⁷⁷ African Commission on Peoples' and Human Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted at their 48th sessions. November 2010. para 1.

people and human rights defenders.¹⁷⁸ With regards to cases of torture, the African Commission quoted CAT Committee and emphasised that gender, specifically being a woman, intersects with other characteristics or statuses in the context of reproductive health and torture.¹⁷⁹ In the context of health and, in particular, HIV/AIDS, the Commission stated that:

[i]ndividuals from key populations similarly [to women] are more vulnerable to human rights abuses because of the intersectionality between their HIV status and other forms of discrimination and stigmatisation.¹⁸⁰

The available data suggests that when it comes to the African System, there is no set list of identities that could be subjected to an intersectional analysis, but womanhood tends to appear often linked with the term intersectionality.

From the documents examined, it was possible to identify that the ACHPR has at least two different uses of intersectionality. The first as the overarching duty of states to recognise and take steps to combat intersectional discrimination.¹⁸¹ This recognises that intersectional or multiple discrimination that a vulnerable group suffers impairs the enjoyment of their rights and puts them at a disadvantage.¹⁸² However, the ACHPR also recognised that intersectionality could be a useful concept when trying to understand how human rights, other than the prohibition to be discriminated, can be enjoyed and ensure. An illustration of this is how the ACHPR used intersectional analysis to understand the

¹⁷⁸ African Commission on People's and Human Rights. Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.

¹⁷⁹ African Commission on People's and Human Rights. HIV, the law and human rights in the African Human Rights System: key challenges and opportunities for rights-based responses. 31 January 2018 Page 60 para 77.

¹⁸⁰ *Ibid* Page 83 para 4.

¹⁸¹ African Commission on People's and Human Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights. para 38.

¹⁸² African Commission on People's and Human Rights. HIV, the law and human rights in the African Human Rights System: key challenges and opportunities for rights-based responses. Page 31 para 64.

different forms multiply-burdened individuals can be prevented from enjoying their rights to freedom of assembly specifically and any other human rights violations in the context of policing assemblies.¹⁸³

It is also worth noting that The Maputo Protocol that deals with women's rights uses different categories of women such as women with disabilities to assess the measures States should take to ensure that their intersecting identities are accounted for.¹⁸⁴

3.3.2.3 *European Court of Human Rights*

The European Court has very little cases where intersectionality is expressly used by the Court itself or members of it.¹⁸⁵ This resulted in very little material to analyse, particularly because in the case of *Garib*, the detailed examination of intersectionality is made by a couple of judges in the context of their dissenting opinions and not as part of the judgement.

In *Garib v The Netherlands*,¹⁸⁶ Judges Pinto de Albuquerque and Vehabović submitted a dissenting opinion which defined intersectionality, as 'the "intersection" or crossover between forms of discrimination' to explain the importance of using intersectional analysis to decide cases, instead of using single-axis tools, allowing the adjudicator to consider the effects of such intersections in a more comprehensive manner.¹⁸⁷ *Garib v The Netherlands* deals with housing rights, the victim Mrs. Garib requested a housing permit which would allow her to live in a more suitable house than the one she was currently staying at.

¹⁸³ African Commission on People's and Human Rights. Policing Assemblies in Africa. Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. 04 March 2017. para 7.2.8.

¹⁸⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa "Maputo Protocol". Adopted by the African Union on 01 July 2003.

¹⁸⁵ European Court of Human Rights. Case of *Garib v The Netherlands* and European Court of Human Rights. *Cînța v Romania* (Application no. 3891/19) (ECHR, 18 February 2020).

¹⁸⁶ European Court of Human Rights. Case of *Garib v The Netherlands*.

¹⁸⁷ *Ibid* Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Vehabović. para 35.

However, the permit was denied on the basis that Mrs. Garib was on welfare and the area which she intended to move on was considered a ‘welfare hot-spot’. According to the State the discrimination that took place was justified because allowing Mrs. Garib to move to this new house would contribute to the already imbalanced distribution of housing amongst people that are part of the welfare scheme. The victim argued that, because the measure applied by the government was linked to the source of income of the persons affected it was also implicitly connected to their gender, social origin and/or race and thus the ECHR should analyse the case under article 14 of the Convention, regardless of such claim have not been brought up before. The Court struck down the request, however, and the intersection of class, parenthood, gender and social origin was never touched upon within the analysis of the merits of the case.¹⁸⁸ The judges also distinguished between intersectional discrimination and multiple forms of discrimination, the first being a phenomenon in which there is a simultaneous effect on all the grounds of discrimination.¹⁸⁹ The definition proposed by Judges Pinto de Albuquerque and Vehabović tries to include more elements from Crenshaw’s theory and their definition adds the results or consequences of these intersections as an element of analysis.

In the same dissenting opinion, Judges Pinto de Albuquerque and Vehabović devoted an entire section to discussing intersectionality and multiple discrimination.¹⁹⁰ Both judges urged the Court to incorporate intersectional discrimination into their legal protection system.¹⁹¹ They explained that:

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid*

¹⁹⁰ *Ibid* Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Vehabović.

¹⁹¹ *Ibid* para 34.

It is precisely this consideration of the additional harmful effects produced by the combination of factors of discrimination which has proved indispensable in addressing complex situations of discrimination. It is not always sufficient to add together the multiple factors of discrimination, especially where the intersection between them exacerbates their consequences. Such synergy does not necessarily result in an accumulation of forms of unitary discrimination but in a new form of multidimensional discrimination. In view of the significance of the phenomenon, its consequences in terms of the effectiveness of the guaranteed rights and the international consensus obtaining at the present time, the Court must today include this aspect in its scrutiny under Article 14 of the Convention.¹⁹²

They interpreted intersectionality as an effective analytical tool that allows multidimensional discrimination to be addressed holistically. This tool not only focuses on how intersectionality manifests in cases of discrimination but can also help in obtaining a more accurate assessment of the consequences for the victims.¹⁹³ During their deliberations, Judges Keller and López Guerra also referred to intersectionality, focusing not on the definition but on the effect an intersectional approach has in uncovering hidden patterns of discrimination.¹⁹⁴ The case of *S.M. v Croatia*, also has a mention of intersectionality. However, this explicit reference to intersectionality is not done by the Court but by a third-party intervener, the *Clinique doctorale de droit international des droits de l'homme (Faculté de droit d'Aix-en Provence)* stated that considering the victim, a young woman, was forced into prostitution she thus belonged to a vulnerable group, particularly because the exploitation she was subjected to was further exacerbated by her economic constraints.¹⁹⁵

¹⁹² European Court of Human Rights. Case of Garib v. The Netherlands. para 39.

¹⁹³ *Ibid* para 36.

¹⁹⁴ *Ibid*. Joint Dissenting Opinion of Judges López Guerra and Keller appended to the Chamber judgment. para 18.

¹⁹⁵ European Court of Human Rights. *S.M. v Croatia* (Application no. 60561/14). (ECHR, 19 July 2018), para 268

B.S. v. Spain is another case where the Court included a brief summary of the considerations made by third-party interveners but did not incorporate this analysis to their actual judgement. In *B.S.* a Nigerian woman who migrated to Spain was working as a prostitute in Mallorca when two police officers started harassing her and hitting her allegedly because she resisted to be inspected by them. Due to the intersecting characteristics that the victim had (race, national origin and her type of work), the European Social Research Unit at the Research Group on Exclusion and Social Control at the University of Barcelona argued that

‘[...] studies that had been carried out into intersectional discrimination, that is, discrimination based on several different grounds such as race, gender or social origin. Those studies showed that an analysis of the facts taking account of only one of the grounds was approximate and failed to reflect the reality of the situation.’¹⁹⁶

Similarly, the AIRE Centre ‘invited the Court to recognise the phenomenon of intersectional discrimination, which required a multiple-grounds approach that did not examine each factor separately.’¹⁹⁷ None of these arguments were taken into consideration on the Court’s own assessment of the case.

3.4 Re-thinking intersectionality in IHRL

During the review of the adjudicative bodies’ practice of incorporating intersectionality into their work, two main things were being looked at: the conceptualisation of intersectionality and the use of it in their individual complaints procedures. Consequently,

¹⁹⁶ European Court of Human Rights. *B.S. v. Spain* (Application no. 47159/08). (ECHR, 24 July 2012), para 56

¹⁹⁷ *Ibid.* para 57

many of the findings from this exercise are grouped in either the conceptualisation of intersectionality or its operationalisation.

The conclusions reached in this chapter will tell us where exactly IHRL adjudicative bodies have been falling short, and the ways in which they can move forward in the use of intersectionality. Nonetheless, not everything that will be discussed below will refer to shortcomings, there are some instances where the conclusions reached by the adjudicative bodies not only were good, but they also provided a nuanced understanding of intersectionality similar to the one seen in feminist theory.

One of the first things that can be concluded from the previous examination is that adjudicative bodies, either from the Universal or the Regional systems have not developed their own understandings of intersectionality thoroughly. The table below summarizes the definitions provided by each adjudicative body when they have one.

Adjudicative body	Definition
CEDAW Committee	Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2
CERD Committee	The “grounds” of discrimination are extended in practice by the notion of “intersectionality” whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention.
CRPD Committee	“Intersectional discrimination” refers to a situation where several grounds interact with each other at the same time in such a way as to be inseparable
CESCR	No definition
HRC	No definition
CAT	No definition

CRC Committee	No definition
CMW Committee	No definition
Inter-American System of Human Rights	intersectional discrimination is the result of the confluence of different factors of vulnerability or sources of discrimination associated with certain conditions of an individual.
European Court of Human Rights	No definition
African System of Human Rights	No definition

It is significant that only four adjudicative bodies have clear definitions which tells how they understand intersectionality and how do they approach its operationalisation; for example, CEDAW Committee uses intersectionality as an interpretative tool, while CRPD Committee, CERD Committee and the IASHR refer to intersectionality as the actual act of grounds of discrimination crossing. These differences actually mirror some of the debates in feminist theory where intersectionality was identified as ambiguous, open-ended and in desperate need of a narrower and better definition¹⁹⁸.

From the table *supra* it is possible to notice that the definitions from the four adjudicative bodies tend to be limited. One can either choose to see intersectionality in its micro level thinking of the identities that intersect in a given individual or in a broader sense, including what the State must do to protect groups of individuals. Neither definition is wrong, the

¹⁹⁸ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'; Purdie-Vaughns and Eibach, 'Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities'; Conaghan, 'Intersectionality and the Feminist Project in Law '.

problem is that currently, one must choose between either of them, when in reality a better definition of intersectionality needs more flexible and open-ended characteristics.

When the mapping of the concept of intersectionality in IHRL was being carried out, one of the things that was noticed is the lack of a consistent language that has resulted in a lack of consensus as to what intersectionality entails and how is it different from multiple discrimination. This was particularly noticeable with the CRC Committee where, with exception to the joint general comment issued alongside the CMW Committee, they use multiple discrimination to address issues that are clearly intersectional, even their definition of multiple discrimination is similar to the definition given by CEDAW Committee when it comes to intersectionality. The same issue, but maybe even graver, is recognised with CESCR because while this Committee does use intersectionality, albeit very little, they also use double discrimination to refer to intersectional discrimination. In them, it is possible to detect other terms associated with anti-discrimination frameworks such as compounded negative effect.¹⁹⁹ The term ‘vulnerability’ or ‘higher degree of vulnerability’ is also a constant term associated with intersectionality in human rights adjudication.²⁰⁰

With regards to the definitions given, there is no standardised concept of intersectionality even within the same adjudicative body. These definitions all use terms along the lines of intersectional discrimination, grounds for discrimination that intersect, the differentiated

¹⁹⁹ UN Committee on the Elimination of Discrimination against Women. *Cecilia Kell v. Canada*. para 10.2

²⁰⁰ Such as Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities; I/A Court H.R., *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs.

impact of discrimination, the subtype of multiple discrimination and a tool to uncover hidden patterns of discrimination.²⁰¹ Likewise, the remaining treaty bodies do not incorporate a concept of intersectionality but rather they tend to use the term as if there was a clearly established and agreed definition, so those bodies are implementing intersectionality without explaining what the theory means to them. This has resulted in intersectionality being incorporated in all treaty bodies but mostly without a definition.

For this reason it is hard to claim that IHRL, as a whole, has a fully developed theory of intersectionality and the available information it is not enough to understand how intersectional analysis contributes to the advancement of human rights. For example, Campbell argues that, at least when it comes to the CEDAW Committee, it is not clear whether the Committee has ‘comprehensively and coherently approached intersectional discrimination in the Concluding Observations, Individual Communications or Inquiry Procedure’.²⁰² She cites as examples, the fact that CEDAW is not very consistent with reports regarding the same state, let alone when it comes how it approaches intersectional analysis between states. Secondly, when it comes to the use of intersectional analysis in communications, while it sometimes uses it in the merits part it rarely follows with reparations that indeed take into account intersectionality.²⁰³ As a result their

²⁰¹ For example, see *Ibid*; African Commission on People’s and Human Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights; European Court of Human Rights Case of Garib v. The Netherlands. Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Vehabović; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 33, Follow-up to the Durban Review Conference, 29 September 2009, CERD/C/GC/33; 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.

²⁰² Campbell, 'Cedaw and Women’s Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' 499.

²⁰³ *Ibid*, 496-497

conceptualisation and theorisation is problematic. The most conservative definitions will address intersectionality as a subcategory of discrimination while the broadest ones see it as a tool to interpret the obligations of the State.

Some of the judges at the IACtHR and the ECHR have been careful enough to try and provide a comprehensive debate on why intersectionality should be a tool for IHRL, but this does not necessarily translate to the actual decisions that emanate from the adjudicative bodies. For example, in the judgments of *González Lluy* from the IACtHR and *B.S. v. Spain* in the ECHR the opinions of the judges or even the third-party interventions have much more detailed discussions of intersectionality than the actual judgements. In the specific case of the IACtHR, intersectionality follows the practice of understanding intersectional analysis to examine either a violation of a provision against discrimination and to ensure rights are guaranteed to everyone equally. Despite these good practices, they are not widespread and some adjudicative bodies such as the ASHR or the CRC Committee, do fall short in providing a solid theoretical foundation.

The lack of refinement in the theorisation and conceptualisation of intersectional analysis could open the possibility of a case being decided by, for example, the IACHR which argues that intersectional analysis is the only appropriate tool to judge the petition only to be later submitted to the Court, and the IACtHR does not see the point of using intersectionality, as it happened in cases such as *Cuscul Pivaral*²⁰⁴. Moreover, this could result in one case benefiting from intersectional analysis, and a similar one not, the problem

²⁰⁴ I/A Court H.R., Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs

then lies not in the different outcomes but rather in the lack of justification from the courts that prevents individuals from understanding when intersectional analysis will be used.

As for the use given to intersectionality by adjudicative bodies. The results were slightly more complex. To begin with, there was the assumption that every adjudicative body would implement intersectionality in cases where there was an express violation of the right not to be discriminated against. This hypothesis came to be as a result of Crenshaw's critique to discrimination law, so it made sense to think that adjudicative bodies would translate this critique to cases where a discriminatory act was taking place. Nonetheless, the result was different, and it was possible to notice that some regional systems and some Treaty Bodies took intersectionality and tried to operationalise it in violations to other rights.

The review of the case-law demonstrated that intersectionality it is in fact being used when there is a violation of an autonomous norm not to be discriminated against,²⁰⁵ which means that a victim can benefit from intersectional analysis when the norm breached has standing in and of itself. Examples of this norm can be Article 26 ICCPR, Articles 2 and 5 ICERD, Article 24 ACHR, and Article 3 ACHPR, all these norms guarantee the right to not be discriminated against.²⁰⁶ Yet, as the case-law was being reviewed there was a clear pattern where adjudicative bodies were starting to use intersectional analysis to understand how other rights, such as the right to housing, could be linked to the right to enjoy human rights equally. Thus, some adjudicative bodies use intersectionality in non-discrimination cases and as part of the equality framework. This is particularly relevant because legally, there

²⁰⁵ For a more detailed analysis of this conclusion see chapter 3 of this thesis.

²⁰⁶ Moeckli. 'Equality and non-discrimination', 153

is a significant difference between non-discrimination and equality as autonomous or subordinate norms. For example the HRC states that article 2 of ICCPR prohibits de jure or de facto discrimination while article 26 of the same instrument deals with the obligations imposed to the States regarding the legislation and application of all the other rights.²⁰⁷

Adjudicative body	Operationalisation
CEDAW Committee	Use in the prohibition not to be discriminated against
CERD Committee	Use in the prohibition not to be discriminated against
CRPD Committee	Use in the prohibition not to be discriminated against
CESCR	Use in the prohibition not to be discriminated against
HRC	Use in the prohibition not to be discriminated against Use as part of the equality framework.
CAT	Use as part of the equality framework.
CRC Committee	Use in the prohibition not to be discriminated against Use as part of the equality framework.
CMW Committee	Use in the prohibition not to be discriminated against Use as part of the equality framework.
Inter-American System of Human Rights	Use in the prohibition not to be discriminated against Use as part of the equality framework.
European Court of Human Rights	Use in the prohibition not to be discriminated against
African System of Human Rights	Use in the prohibition not to be discriminated against Use as part of the equality framework.

What the different regional systems have done in practice points towards a violation to the right to non-discrimination being the most constant scenario in which they apply

²⁰⁷ Gillian MacNaughton, ‘Untangling Equality and Non-Discrimination to Promote the Right to Health Care For All’, Health and Human Rights 11(2009) 2, 47-63, 51

intersectionality. Precisely because there is not a step-by-step process that could clearly explain how intersectionality can be operationalised in IHRL this is inferred from the wording of the adjudicative bodies, the previous sections illustrated that all adjudicative bodies, one way or another linked intersectionality and discrimination. Their practice indicates that the application of intersectionality is done in a manner that allows them to understand the unique experience of discrimination that each victim endures on the grounds of their intersecting identities. This by itself is not a problem, however the lack of a clear operationalisation process of intersectionality indicates that the tools use in intersectional analysis are those of intersectional discrimination, which consequently means that the tools available for single-axis discrimination frameworks are transferred to intersectionality frameworks. As explained in the introduction of this chapter, examining how the use of intersectionality as part of the theory of discrimination renders its application limited as the theory of discrimination does not have the tools to deal with the harm endured by multiply-burdened individuals²⁰⁸.

In some instances, intersectionality has also been used to determine the manifestation of violations beyond an autonomous violation to the right not to be discriminated again, such as violence. In these instances, it has been operationalised to demonstrate how each victim suffers a differentiated effect based on their intersecting identities. What is rescued from

²⁰⁸ *Cfr.* Truscan and Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination'; Yin Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence'; Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?'; Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective'; Campbell, 'Cedaw and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination'; Nguyen, 'Through the Eyes of Women? the Jurisprudence of the CEDAW Committee' and Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global. Stage'.

the practice of the Treaty Bodies is that they do not limit the use of intersectional analysis to cases where there was an implicit violation of the autonomous right not to be discriminated against (as CRPD Committee suggest) and use it as an overarching tool for the understanding of the state's obligations, whatever these might be (such as in the context of CEDAW). A similar understanding is included in General Comment 31 of HRC where it states that all persons within the territory of the State should enjoy their rights regardless of their personal characteristics.²⁰⁹

Thus, the second major conclusion that can be reached through the collected data is that there is a lack of clarity as to when, why and how intersectionality should be used. This is particularly problematic because intersectionality is currently being applied to help decide cases. In some communications or judgements, it is unclear when, if and why the judges have used intersectional analysis.

The way in which intersectionality is operationalised in IHRL is unclear; none of the adjudicative bodies explain the necessary steps or elements to apply it. However, it is possible to extract some elements of its implementation. They all seem to use intersectionality as a tool to decide cases of discrimination, and within those cases, the perfect scenario to apply it seems to be multiple discrimination.

Bearing this in mind there is a clear need to rethink the tools that are being used to operationalise intersectionality not because anti-discrimination frameworks are inherently problematic but rather because the tools created to explained discrimination were proposed

²⁰⁹ UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant.

with discrimination based on one ground. As a result of it, this chapter will explore how intersectionality operates in IHRL in order to determine if a new operationalisation process is needed with the objective of providing more effective ways for intersectionality to produce its intended purpose or the current use of intersectional analysis in IHRL has reached its maximum potential.

As for the good practices, intersectionality was used at moments as a tool to understand the context of disadvantage that puts the victim in a position of heightened vulnerability. This also translates into using intersectionality as a tool to assess the factors that influence how the victim suffers the violation. For example, the IACHR sometimes conceptualises intersectionality as a tool to understand how intersecting identities create a unique experience of harm.²¹⁰ A similar approach is taken by CERD Committee, the ASHR and the CMW Committee, they all acknowledge that intersectionality can be used to understand how human rights should be enjoyed by everyone equally but also how the violation of that right impacts multiply-burdened individuals differently. On the other hand some adjudicative bodies have a more restrictive use, as they explicitly recognise intersectionality as a tool to set special measures taken by states to ensure multiply-burdened individuals enjoy their rights. The favoured approach should be the most extensive one, hence why in the upcoming chapter, the way intersectionality should be used by adjudicative bodies takes into account both approaches.

²¹⁰ Inter-American Commission on Human Rights, *Indigenous Women and their Human Rights in the Americas*, OEA/Ser.L/V/II, 17 April 2017 and Edison Lanza. 2017. *Silenced Zones: Highly Dangerous Areas for the Exercise of Freedom of Expression*

What the examination of the different Treaty Bodies and Regional Systems has showed is that in IHRL, like feminist theory²¹¹, there is a recognition of the importance of understanding how structures and systems operate to allow human rights violations to take place. This can be clearly seen, for example, in the analysis of structures as relevant factors that enhanced the harm endured by the victim which CEDAW has done in several of their General Comments. As previously pointed out, that sort of analysis correlates to what feminist scholars such as Patricia Hill Collins referred to with the macro analysis of intersectionality.

Since the dynamics of power play a role in the inequality experienced by the individual, a complete use of intersectionality in the analysis of any phenomenon should include the study of the subject within its social context. It is within the competencies and possibilities of adjudicative bodies to use the interlocking systems of oppression to understand how the intersecting identities of an individual create a differentiated experience of harm. Yet, because its use is not widespread, it is hard to determine if the more nuanced application of intersectional theory in IHRL is due to a conscious effort to create a solid theoretical framework or if it was just the result of the influence of one person sitting in the adjudicative body or a natural consequence of IHRL theory, either way it is one of the practices that are

²¹¹ For example, see Carstensen-Egwuom, 'Connecting Intersectionality and Reflexivity: Methodological approaches to social positionalities'; Staunæs, 'Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification'; Butler, *Gender trouble : feminism and the subversion of identity*; Butler, *Bodies that matter : on the discursive limits of 'sex'*; West and Zimmerman, 'Doing gender'; Magliano, 'Interseccionalidad y Migraciones: Potencialidades y Desafíos'; Anthias, 'Transnational Mobility, migration research and intersectionality'; Anzaldúa, *Borderlands : the new mestiza = La frontera*; Kassam and others, 'Applying Intersectionality With Constructive Grounded Theory As An Innovative Research. Approach For Studying Complex Populations: Demonstrating Congruency'; Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment*; Dancig-Rosenberg and Yosef, 'Crime Victimhood and Intersectionality'; Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis'; Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective' and Cudd, *Analyzing oppression*.

not going to be argued against but rather recognised and incorporated in the subsequent operationalisation of intersectionality.

One of the unintended conclusions reached when the analysis was done was that of a lack of a clear, nuanced and precise theoretical framework of intersectionality that creates a confusion as to whom can benefit from an intersectional analysis. It was expected for everyone to consider the same grounds in order to use intersectionality, however, most adjudicative bodies apply it to different types of victims, while the two most prominent identities are women and children. Even when the bodies argue for more heterogeneous understandings of identity, the most common examples are those related to gender and age.

Feminist theory and other areas of critical thinking have moved past the understanding of identities as biological characteristics and have favoured social construction theories.²¹² However, when the conclusions reached on chapter 2 and that of the collected data in this chapter are compared, it is interesting to notice that feminist theory tends to have a slightly more conservative view of which identities can intersect.²¹³ In IHRL almost all adjudicative bodies tend to link intersectionality to women and children but they did not limit themselves to just those categories nor are they debating whether or not should the categories broaden, as is being done in feminist theory.²¹⁴

The one thing that seems to be almost universally accepted is the diversity of the type of individuals that can be subjected to intersectional analysis. In some instances, the

²¹² Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 118-119.

²¹³ See section 2.4 of chapter 2.

²¹⁴ The previous sections of this chapter explain the identities recognised as intersecting, according to the different adjudicative bodies.

adjudicative bodies had included lists of identities that could intersect, and these data was quite broad, such as CEDAW Committee and CRC Committee. It appeared as if these adjudicative bodies were trying to expand the implementation of intersectional analysis to as many victims as possible. This makes sense as having a closed list of identities prejudices the application of intersectionality in the adjudicative process because adjudicators would already be imposing which identities intersect and how. The solution is to have a non-exhaustive list with some identities as examples of intersections.

The theory of intersectionality that currently exists in IHRL demonstrates how despite their many successes, it is still inadequate to respond to the needs and experiences of multiply-burdened individuals. For this reason, a baseline concept of intersectionality that takes into account the harm endured by multiply-burdened individuals is proposed as foundation for the proposed operationalisation process, this refined concept includes all the nuances discussed and identified by both feminist and legal scholars. Even when adjudicative bodies have not developed a very extensive nor detailed theory of intersectionality to be used in IHRL, it was possible to note that some of them tried to implement the idea of differentiated impact into their understandings of intersectional analysis, the IACtHR is a great example of this and once again this is a practice that should be rescued. Adjudicators should see intersectionality as a tool to determine the harm a person has experienced and the contexts of oppression that allowed for that unique experience of harm to take place.²¹⁵

The understanding of how human rights are violated must be nuanced enough to recognise that different groups of victims experience these abuses in unique ways, even if the human

²¹⁵ See I/A Court H.R., Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Chapter 3.

rights violations are exactly the same.²¹⁶ To do so, the ideas and messages central to intersectionality need to be translated into IHRL. Using intersectionality as an analytical tool in their decision-making processes, will help adjudicators assess the different and interdependent sources of oppression that affect the life of multiply-burdened individuals²¹⁷ and how harm produces a different qualitative experience to each of them due to their intersecting identities.²¹⁸ If this examination is not done and a limited understanding of intersectionality is reproduced, then the interlocking systems of oppression that permit human rights violation to take place will not be transformed; the harm endured by the victims will not be appropriately addressed nor redressed.²¹⁹ That is why this thesis will demonstrate the need for an operationalisation of intersectionality that is removed from the tools of single-axis types of discrimination, and it is given its own methods and processes, because constraining intersectionality to single-axis anti-discrimination tools, limits its potential.²²⁰

The conclusions reached in this chapter allow for a more comprehensive and clear understanding of intersectional theory that could be used in all processes of adjudication in international human rights courts and tribunals. The concept proposed to be used from now on is the following: intersectionality will be understood as a theory that uncovers the

²¹⁶ Johanna Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights' (2004) 5 *Georgetown Journal of Gender and the Law* 897, 901-902

²¹⁷ European Court of Human Rights. Case of *Garib v The Netherlands*. Joint Dissenting Opinion of Judge Pinto de Albuquerque and Judge Vehabović and Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition'.

²¹⁸ I/A Court H.R., Case of *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs.

²¹⁹ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006) and Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights', 916

²²⁰ Sumi Cho, Kimberle Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 *Signs Journal of Women in Culture and Society* 785, 793.

different qualitative experiences of harm that results from the interactions of two or more marginalised identities.

Chapter 4. Operationalising intersectionality

Regardless of the particular intersections involved, structural, disciplinary, hegemonic and interpersonal domains of power reappear across quite different forms of oppression.¹

4.1 The implementation of intersectionality in IHRL

Intersectionality in the context of IHRL has primarily been used to address intersectional discrimination. This is because intersectionality and discrimination have been historically linked.² Adjudicative bodies, whether quasi-judicial or judicial, tend to operationalise intersectionality only in cases where the autonomous right to not be discriminated against has been violated to the detriment of the victim.³

According to feminist theory, intersectionality should not be seen as a theory that explains oppression only, one of its aims is to understand the interactions between those interlocking systems of oppression and the mechanisms that allow them to exist.⁴ Therefore, it focuses on the linkages between axis of differentiation and the discriminatory acts attached to them.⁵ Developing a process of operationalisation of intersectionality will help to apply the law better, to tackle the dynamics of power that produce inequality.⁶ However, to successfully operationalise intersectionality, one needs to look into a varied

¹ Al-Faham, Davis and Ernst, 'Intersectionality: From Theory to Practice', 249.

² Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence', 467.

³ See table in pages 157 and 158 of this thesis.

⁴ Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos', 71.

⁵ Cristián Carrère Álvarez and Michelle Carrère Álvarez, 'Inmigración Femenina en Chile y Mercado de Trabajos Sexualizados: La Articulación entre Racismo y Sexismo a partir de la Interseccionalidad' (2015) 14 Polis (Santiago) 33, 36 and 37.

⁶ Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' 75.

range of theories that could provide better-suited tools than those available in anti-discrimination frameworks.⁷

The theory of intersectionality keeps coming back to the analysis of those broader structures of oppression that cause differentiated qualitative experiences between individuals that are multiply-burdened.⁸ Intersectionality is concerned with how racism, biphobia, ableism, to name a few, intersect to create interlocking systems of oppression and that is its space of operation; the broader structures of oppression. Legal systems need to be able to adapt their analysis of inequality to the historical and social realities of a context instead of assuming a fixed and similar manifestation of these issues.⁹

In IHRL, a clear process of how to operationalise intersectionality so it can be better used in human rights cases is long overdue. Intersectionality theory has been theorised as a critique to discrimination law, but as it was demonstrated early in the previous chapter, intersectional discrimination was incorporated into law through the category of multiple discrimination.¹⁰ However, as Makonnen explains, multiple discrimination was theorised as having separate instances of discrimination that pile up¹¹, this means that multiple discrimination does not account for the intersection of grounds for discrimination.¹²

⁷ Aviah Sarah Day and Aisha K Gill, 'Applying intersectionality to partnerships between women's organisations and the criminal justice system in relationship to domestic violence' (2020) 60 *The British Journal of Criminology* 830, 4.

⁸ See current conceptualization of Intersectionality in Feminist theory

⁹ Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective', 80.

¹⁰ Bullock and Masselot, 'Multiple discrimination and intersectional disadvantages: Challenges and opportunities in the European Union legal framework'; D'Ancona, 'Measuring multiple discrimination through a survey-based methodology'; Makonnen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalised to the fore'.

¹¹ Makonnen, 'Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalised to the fore'.

¹² Bullock and Masselot, 'Multiple discrimination and intersectional disadvantages: Challenges and opportunities in the European Union legal framework'.

Consequently, multiple discrimination and intersectional discrimination, as used in IHRL, use the tools available for single-axis models.¹³ Thus, there is still a need for an operationalisation process outside the tools of single-axis anti-discrimination law, a process that it is tailored to the actual message and method of intersectional analysis.

There have been some attempts to operationalise intersectionality but they have been created for purposes other than adjudication, such as the one proposed by Yuval-Davis where she argues that intersectionality theory requires several levels of analysis to be operationalised; first one, is the analysis of social divisions, secondly understanding the power and affective relation between people acting informally as individuals and in representation of the organization or institution they act on behalf of, thirdly establish how social divisions exist on the experience of daily life interpreted through inclusion, exclusion, discrimination, disadvantage, aspirations and specific identities. The last level of analysis deals with representation through symbols, ideologies or even laws.¹⁴

Yuval-Davis' work, as significant as it might be, is not adequate to the purposes of this thesis as her levels of analysis were not always relevant nor necessarily practical for IHRL adjudication. For example, not everyone who appears before IHRL courts and tribunals act on behalf of an institution, this could be relevant in relation to the acts of the state's agents but even then, their behaviour acting outside of their institutions are rarely relevant. As for the last level, understanding symbols and ideologies could help adjudicators in certain cases, for example cases where advocacy of national, racial or religious hatred constitutes

¹³ Solanke, 'Infusing The Silos In The Equality Act 2010 With Synergy', 330.

¹⁴ Yuval-Davis argues that intersectionality requires separate and several levels of analysis in order to be operationalised as argued in Yuval-Davis, 'Intersectionality and feminist politics'.

incitement to discrimination, hostility or violence. However, this could not necessarily be relevant in for example cases where a person suffers indirect discrimination on the basis of an apparently neutral law that discriminates only in practice.

As it has been extensively discussed in the previous chapters, intersectionality scholars¹⁵, IHRL practitioners, and adjudicators¹⁶ have paid little attention to the methodological aspects and difficulties of analysing the lives of multiply-burdened individuals.¹⁷ Intersectionality theory continues to be operationalised within the framework of multiple discrimination which is ill-suited. Voicing the concerns of authors such as Verloo, Yuval-Davis and McCall,¹⁸ intersectionality in IHRL requires more solid understandings of the theoretical implications of intersectionality and, of course, a structured methodology for its application. To achieve that, it is fundamental to use the debates already available in feminist theory to construct an operationalisation process that holds to the ideas, methods and messages envisioned by Crenshaw and other intersectional feminists.

Despite the current mainstreaming of intersectionality in different disciplines, there is still a long road to go in order to properly recognise and remedy the harm endured by multiply-burdened individuals. The current mechanisms, for example the adjudicative bodies, are not properly equipped to deal with the oppression and marginalisation of multiply-

¹⁵ See Chapter 2, “The attempts to operationalise intersectionality”, particularly the discussions by Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'; McCall, 'The complexity of Intersectionality'; Chang and Culp Jr., 'After Intersectionality' and, Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación'

¹⁶ See Chapter 3 section “Re-thinking intersectionality in IHRL”.

¹⁷ For example, the only methodology identified by most feminist scholars on the application of intersectionality in International human rights law can be found in Working Group on Women and Human Rights of the Centre for Women’s Global Leadership as cited in Nash, 'Re-thinking intersectionality'.

¹⁸ Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

burdened individuals. As Bengtson et al. argue, ‘The Court[s] [have] failed to pay sufficient attention to the harm that results’ from maintaining these structures that further oppress the victim.¹⁹

Considering all this, the present research proposes a better way to use intersectional analysis in the adjudication of human rights. The operationalisation process of intersectionality as proposed in this chapter, will try to incorporate the good practices that feminist theory, anti-discrimination frameworks and IHRL have established for the implementation of intersectional analysis in a series of steps that will guide adjudicators as to how intersectionality could be better applied in human rights litigation. A stronger theoretical foundation of intersectionality based on feminist legal scholarship could ensure that ‘law lives up to its promise of justice’,²⁰ adjudicative bodies need to abandon a ‘one-size-fits-all’ approach, instead, they need to recognise the diversity of experiences.²¹

The first part of this chapter will propose a series of actions that adjudicators can follow which include analysing the parties’ submissions, the determination of facts, obtaining additional information ‘to better judge’ and any other activity related to the decision-making process. The second will relate to the application of the information gathered and focus on how the state fails to ensure that multiply-burdened individuals could enjoy their human rights and how their actions produced a qualitatively different experience of harm. From those two discussions, three sub-sections will be the main focus of the

¹⁹ Sara Bengtson and others, ‘Christine Goodwin v the United Kingdom’ in Loveday Hodson and Troy Lavers (eds), *Feminist judgments in international law* (Hart Publishing 2019) 199

²⁰ Hilary Charlesworth, ‘Prefiguring Feminist Judgment in International Law’ in Loveday Hodson and Troy Lavers (eds), *Feminist judgments in international law* (Hart Publishing 2019), 480

²¹ Crooms, ‘Indivisible Rights And Intersectional Identities Or, What Do Women's Human Rights Have To Do With The Race Convention’, 634-635.

operationalisation: the actions of the state that constitute a violation of the human rights of multiply-burdened subjects, an analysis of the interlocking systems of oppression via the analysis of context and the analysis of the individual harm experienced by the victim or victims. Human rights adjudicative bodies include structures and systems as part of the identities of the victims, and so they are already part of the adjudicative processes. Hence, this approach will be integrated to the analysis of the individual harm and the intersectional context of oppression.

The process of operationalisation can be applied during the decision-making process and at the delivery of the judgement. Ideally, adjudicators would implement intersectional analysis as an integral part of the analysis of the violation. Regardless of the manner in which the adjudicative body works, they could look at the facts intersectionally at the same time that they are deciding if there was a violation.

4.2 Intersectionality as a tool for the adjudication of human rights

Human rights exist for everyone regardless of their social position or their identities, and most human rights treaties confirm this.²² However, the human rights framework is heavily focussed on male, able-bodied, western heterosexual subjects. This prompts the need to recognise the intersecting identities of the individual that were affected by the violation of their human rights, understanding that the differences in intersectional oppression and harm endured should be within groups and between groups.²³ As described earlier, IHRL

²² Nazombe and Blagojevic, *Women At The Intersection: Indivisible Rights, Identities, And Oppressions A Study Guide*, 15.

²³ Charlesworth and Chinkin, *The boundaries of international law: a feminist analysis*; Kanter, 'The law: What's disability studies got to do with it or an introduction to disability legal studies'; Charlesworth,

has evolved in a manner which forces the individual to fractionalise their identity to fit particular categories.²⁴ These categories are usually provided by treaties that are group-specific like CEDAW or CERD. The supposedly neutral language that is present in many human rights documents forces individuals to demonstrate their abuses in segmented ways. Human rights will only be protected when the experience of multiply-burdened individuals is similar to the experiences of white, straight, middle-class men from the Global North.²⁵ Thus, to establish if a violation had a uniquely grave effect on a victim that is multiply-burdened, the idea of using a neutral subject and a comparator envisioned for single-axis frameworks must be eliminated.²⁶ Consequently, institutions and laws should move away from formal equality and the idea of symmetry in cases where intersectional analysis is relevant. Otherwise, human rights cases will not challenge the structures that support intersectional inequality because these structures are also conceived as single-axis standards.²⁷ If using intersectionality is to give a more comprehensive understanding about how multiply-burdened individuals experience human rights violations, its operationalisation process requires a conceptual restructuring,²⁸ one that would result in ‘a

Heathcote and Jones, 'Feminist Scholarship on International Law in the 1990s and today: An Inter-Generational Conversation'; Heathcote, 'Feminist dialogues on international law : successes, tensions, futures'; Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis'

²⁴ Binion, 'Human Rights: A Feminist Perspective', 513 and Michael O'Flaherty and Claire Methven O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper of the High Commissioner's Proposal for a Unified Standing Treaty Body,' 7 *Human Rights Law Review*, 2007

²⁵ Berta Esperanza Hernandez-Truyol, 'Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution' in Kelly Dawn Askin and Dorean M. Koenig (eds), *Women and international human rights law* (Transnational 1999).

²⁶ Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory'; Joanne Conaghan and Louise Chudleigh, 'Women in Confinement: Can Labour Law Deliver the Goods?' (1987) 14 *Journal of Law and Society Critical Legal Studies* 133; Cook, 'Women's International Human Rights Law: The Way Forward', 11 and Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective', 416. To quote a few.

²⁷ Cook, 'Women's International Human Rights Law: The Way Forward', 239.

²⁸ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 152.

more complete or “universal” recognition of human rights’.²⁹ While some groups that have been historically marginalised are constantly included in the human rights discourse, those who are multiply-burdened are not given full consideration.³⁰ However, as noted in the genealogies of intersectionality this fractionalisation needs to be rejected.³¹

4.2.1 Intersectional analysis: violation to the right not to be discriminated against or to the right to equality?

The understanding of discrimination in human rights has been fragmented into isolated strands or ‘grounds of discrimination’ protected by treaties that also treat identities as isolated, results in analysis and determinations that ignore the realities of individuals that suffer human rights abuses at the intersections of marginalisation.³² Intersectional discrimination does not exist just when the actual discriminatory act takes place, it is more often than not the consequence of deeply embedded systems of inequality.³³ As such, the operationalisation process of intersectionality proposed in this chapter will contribute to help promote, guarantee, and secure equality by addressing the harm that results from the broader structures of disadvantage and exclusion.³⁴

In the tables included in the previous chapter, one of the most common ways to operationalise intersectionality in IHRL is in cases where there was a violation of the right to not be discriminated against.³⁵ While in some instances intersectionality was applied to

²⁹ Ibid 155 and 161.

³⁰ Beco, 'Intersectionality and disability in international human rights law', 595 and Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 190.

³¹ Pages 46 to 60 of this thesis

³² Bond, 'International Intersectionality: A Theoretical And Pragmatic Exploration Of Women's International Human Rights Violations'.

³³ Moeckli. 'Equality and non-discrimination', 160

³⁴ Ibid.

³⁵ See pages 151 and 157 of this thesis

analyse violations to other human rights, it was usually constrained to the norms that regulated non-discrimination.³⁶ But as it will be developed in this chapter, it can also be operationalised to analyse the violation of all other rights, including the right to equality. Using the subordinate right to equality would simultaneously recognise that ‘rights are at once universal and different as experienced by different groups of [people] in different places at different historical moments’.³⁷ On the contrary, this research will argue that to focus its operationalisation only when an explicit violation of the prohibition to discriminate is argued has slowed the development of intersectional analysis. Intersectionality can and should be used to adjudicate violations of the prohibition of non-discrimination but should not be constrained by the autonomous right of non-discrimination.

Furthermore, confining the implementation of intersectional analysis to those cases in which the victims are expressly invoking a violation of the prohibition to discriminate, falls short of explaining the inequality that allowed for those violations to take place. Understanding intersectional analysis as a tool to examine only one type of violation and not as a tool that can be used across all human rights issues ignores the broader purpose of the theory, which is to ‘identify the complexity in which members of social groups that have experienced historical exclusion and disadvantages are situated’.³⁸

³⁶ See page 157 and 158 of this thesis

³⁷ Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights', 902

³⁸ The quote is an approximate translation from Jorge Rodríguez Vignoli, 'Vulnerabilidad y grupos vulnerables: un marco de referencia conceptual mirando a los jóvenes' (2001) Serie Población y Desarrollo Fondo de Población de las Naciones Unidas .

The instruments that regulate the adjudicative bodies included in this research have a provision of equality in the instruments they oversee.³⁹ For example, the ICCPR and ICESCR contain in their respective article 2 the obligation imposed on states to guarantee that every right within their texts is exercised without discrimination, these treaties also have specific provisions prohibiting discrimination against certain populations.⁴⁰ In the specific case of the ICCPR also has an autonomous right to equality and non-discrimination.⁴¹

All other treaties featured in this thesis also have similar provisions. CEDAW has multiple references to equality and non-discrimination, it can be highlighted that its article 2 is homologous to the articles already mentioned in the ICCPR and ICERCS. CRC article 2 and the Preamble address equality and non-discrimination, CRPD has an article devoted just to equality and non-discrimination⁴² and equality of opportunity is also part of the principles that rule the convention.⁴³ The CMW, CERD, CAT, in article 1 of their respective texts, they also include a provision of equality in the enjoyment of the rights they ensure. When it comes to the regional systems, similar provisions can be seen in articles 1(1) and 24 of the ACHR, articles 1 and 14 from the ECHR and finally articles 2

³⁹ For example, Articles 2, 3, and 26 of ICCPR and ICESCR, Articles 2(2) and 3 of ICERD, CEDAW and CRPD. Articles 2 and 28 of CRC and Arts 1(1), 7, 18, 25, 27, 28, 30, 43, 45, 54, 55, and 70 of the CRMW. Articles 2, 3, 18(3)–(4), and 28 of the Banjul Charter, Articles 1 and 24 of the Pact of San José and ECHR, Article 14 and Protocol No 12. There is not explicit mention of equality or non-discrimination in CAT and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

⁴⁰ Such as article 3 of ICCPR and ICESCR regarding gender discrimination

⁴¹ Article 26 ICCPR

⁴² UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, Article 5

⁴³ *Ibid*, Article 2

and 3 from the Banjul Charter. Thus adjudicative bodies should rescue what CESCR states and also consider equality as ‘a cross-cutting obligation’ that affects all other rights.⁴⁴

According to Meghan Campbell ‘the equality framework, particularly transformative equality, is a powerful analytical tool to [...] fully [incorporate] an intersectional perspective.’⁴⁵ This idea is also supported by Bond who through her idea of ‘qualified universalism’ argues that intersectionality could be applied to all violations because it is the violation, not the substantive right, the one that creates a qualitatively different experience.⁴⁶ According to Bond, both the terms of qualified universalism and international intersectionality are the ideal framework to better account the harm endured by multiply-burdened individuals and provide a more complete redress for their suffering.⁴⁷ Using intersectional analysis in IHRL, also gives a way to recognise that human rights are unequally protected and guarantee, as such IHRL must put the effort into changing the social, institutional and legal structures that allow inequality.⁴⁸ Adjudicative bodies must bear in mind ‘the deeply embedded structural and systemic ways in which [historically marginalised people] have been discriminated against and in doing so,

⁴⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) para. 7.

⁴⁵ Campbell, 'Cedaw and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination', 484-485

⁴⁶ Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', 76

⁴⁷ *Ibid.*

⁴⁸ Goldschmidt 'New Perspectives on Equality: Towards Transformative Justice through the Disability Convention?', 4

articulate a stronger position in relation to the protection and advancement of equality[...].⁴⁹

4.2.2 Mapping intersectional identities

The present section will use the concepts and debates laid out in previous chapters and will seek to operationalise them in the adjudicative processes of international human rights bodies. Derived from the concept, method and message of intersectionality in IHRL described in earlier chapters⁵⁰, a series of steps have been drawn up to guide the adjudicator on the operationalisation of intersectionality. Precisely because intersectionality is based on abstract notions, Moelckli argues there is a need to translate those concepts into legal terminology that would inform the State or their obligations.⁵¹

The academic discussions on intersectionality rely heavily on the intersection of race and gender, and similarly, this intersection is the most common scenario in which the use of intersectionality in human rights is applied.⁵² Yet because it has been argued that intersectionality has the potential of going further,⁵³ and indeed the conclusions on the previous chapter tell how adjudicative bodies share the same vision, intersectionality

⁴⁹ Fredman, Campbell, Atrey, Brickhillm Ramalekana and Samtani, 'Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities', 9

⁵⁰ See the conclusions reached on chapter 2 and 3

⁵¹ Daniel Moeckli, 'Equality and non-discrimination' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds) *International Human Rights Law* (Oxford University Press, 20017), 149.

⁵² See the discussions presented by Davis, 'Who owns intersectionality? Some reflections on feminist debates on how theories travel'; Lewis, 'Unsafe travel: Experiencing intersectionality and feminist displacements'; Gail Lewis, 'Celebrating intersectionality? Debates on a multi-faceted concept in gender studies: Themes from a conference' (2009) 16 *European Journal of Women's Studies* 203; Tomlinson, 'Colonising intersectionality: Replicating racial hierarchy in feminist academic arguments'; May, 'Speaking into the void'? Intersectionality critiques and epistemic backlash' and Carbado, 'Colorblind intersectionality'.

⁵³ Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective', 74.

should be applied to all identities that are relevant to the harm and no limitations on this topic should exist⁵⁴. Hence, adjudicators need to consider which intersectional identities are relevant to the case, and how do they interact? This will reduce the possibility of adjudicators using intersectionality only in issues relating to women or those in which gender, class and race intersected. By not having a preconceived idea of which identities can be deemed intersectional, adjudicators could open the door to other unexplored identities. Since individuals can be located in different positions of domination and oppression, the intersectional identities that are relevant to the case should be conceived in a case-by-case manner.⁵⁵ As the theory of intersectionality tells us, identities change with time, space and context.⁵⁶ The recognition of the identities of the victims that have intersected to create a uniquely grave experience of harm reinforces the idea that the individual is at the centre of human rights adjudication.⁵⁷

Of particular relevance to the operationalisation process is the proper recognition of harm, this entails that adjudicative would bodies need to order specific measures that are tailored to the reality of the multiply-burdened individual, in order to realise equality.⁵⁸ The participation of the victims will be crucial as only with the inclusion of multiply-burdened

⁵⁴ In page 82 of this thesis, Crenshaw similarly argued that the harmful act is aimed at only one identity but because of the close interactions that the identities have, the harm affects all the other identities, triggering other pre-existing systems of oppression that create a new more damaging dimension of disempowerment. An idea that resembles the chain reaction of violations. Cfr. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

⁵⁵ For in-depth discussions on the topic see section 2.4.2, chapter 2 of this thesis

⁵⁶ One example of this argument can be found in Cynthia Anderson, 'Understanding the Inequality Problematic: from Scholarly Rhetoric to Theoretical Reconstruction' (1996) 10 *Gender and Society* 729, 734.

⁵⁷ Charlesworth and Chinkin, 'The boundaries of international law: a feminist analysis', 218.

⁵⁸ *Ibid*, 8

individuals in the processes that affect them, another step on the operationalisation process that is proposed here, the changes will be significant.

The reason why it is so important to have a new operationalisation process of intersectionality that also considers equality is because focusing only on one identity in isolation will not be able to fully comprehend the complexity of the harm endured, nor will the adjudicative bodies be able to properly ask the state to implement measures that will correct said inequality.⁵⁹ When multiply-burdened people are given a space to express themselves, it is possible for adjudicators to understand their needs in the terms the victims articulate it reducing the risk of ordering measures that do very little or nothing at all to address their suffering.⁶⁰ In other words, ‘stakeholders in an alleged injustice have an opportunity to discuss its consequences and what may be done to right the wrong’⁶¹

Furthermore, by contrasting the assumptions adjudicators have with the manner in which individuals see and interpret their own identities, adjudicators can recognise and avoid the biases they might be imposing when using intersectional analysis in a case. It will be for the individual to explain how they experience being part of a social category and not for the adjudicator to assume that, because a victim has x or y identity, they will experience life under fixed terms. This intends to create a space where the victim provides the information to the judges and prevents adjudicators from interpreting the life experiences of the victims as they see fit.

⁵⁹ Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights', 909

⁶⁰ Bob Hepple, 'Transformative Equality: The Role of Democratic Participation.' Labour Law Research Network. Inaugural conference. Pompeu Fabra University, Barcelona, 2013, 3

⁶¹ John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Better* (Edward Elgar Publishing, 2008) 76

Without the appropriate tools to implement intersectional analysis into the work of adjudicative bodies the power dynamics might change in composition but it will not contribute to dismantle the interlocking systems of oppression.⁶² The identities of multiply-burdened individuals are, amongst other things, lived and constructed through their experiences of subordination and oppression.⁶³ To avoid generalising or essentialising,⁶⁴ the different qualitative experiences of harm should be accounted for. In the case of adjudication, one of the objectives of creating the process of operationalisation of intersectionality is to help understand the way victims that are multiply-burdened experience harm.

Currently, international human rights adjudicative bodies use analysis of context, albeit in slightly different terms to those described in this chapter, what is different is that the analysis of context proposed to be used in intersectional analysis will be adapted to pay attention to how those isolated categories interact with each other in a specific context. The analysis of context which some adjudicative bodies currently undertake⁶⁵ looks at how a specific category interacts with the historical, political and cultural scenarios, however this type of analysis does not account for other social categories, as they tend to be perceived in isolation. In other words, the analysis of intersectional context tells how the context of a state demonstrates the existence of certain systems, traditions, structures or institutions

⁶² Hepple, 'Transformative Equality: The Role of Democratic Participation', 2

⁶³ Silveira and Nardi, 'Interseccionalidade Gênero, Raça e Etnia e a Lei Maria Da Penha', 16.

⁶⁴ The debates surrounding how intersectionality can serve as an anti-essentialist theory can be found in the two previous chapters. For an example on the discussion see Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory'.

⁶⁵ A discussion on the subject is included further below.

that allow interlocking systems of oppression to operate and survive⁶⁶. However, the analysis of context is not adapted to the needs of intersectional analysis then there is a risk of framing the experiences of inequality in isolation.⁶⁷

Specific contexts will determine which identities are going to render an individual multiply-burdened as they will affect the location of people in the social hierarchy,⁶⁸ thus adjudicators could use this space to think how this location is relational, as the only reason individuals are positioned lower in the social hierarchy is the relation it exists between them and the people who possess the dominant identities.⁶⁹ Therefore while victims can be oppressed, they are not permanently fixed in those categories, this is because the status of a victim can easily change from being marginalised to becoming multiply-burdened or privileged.⁷⁰

The proposed process of operationalisation places a higher burden of identifying intersectional identities on the adjudicators as a result of the nature of the adjudicative process. Bearing this in mind, and despite the role the victim will have in this operationalisation process, the decision-making process still rests with the adjudicators and thus they will have the final say on the incorporation of intersectional analysis in the judgement.

⁶⁶ The discussion on intersectional context analysis is further down. However, on the topic of systems and structures see section 2.4.2, chapter 2

⁶⁷ Ana Inés Mallimaci, 'Localizando el sentido de las desigualdades. Inclusiones y exclusiones de los/as bolivianos/as en Ushuaia' in Gabriela Karasik (ed), *Migraciones internacionales Reflexiones y estudios sobre la movilidad territorial contemporánea* (Migraciones internacionales Reflexiones y estudios sobre la movilidad territorial contemporánea, CICCUS 2013) 92.

⁶⁸ Magliano, 'Interseccionalidad y Migraciones: Potencialidades y Desafíos', 697 and 698.

⁶⁹ Collins, 'Intersectionality as critical social theory', 46.

⁷⁰ Camila Esguerra Muelle and Jeisson Alanis Bello Ramírez, 'Interseccionalidad y políticas públicas LGBTI en Colombia: usos y desplazamientos de una noción crítica' (2014) 49 *Revista de Estudios Sociales* 19.

4.2.3 Intersectional harm of the individual: understanding the intersectional identities of the victim and their interaction

Considering judges are, as a result of their functions, in charge of determining the harm suffered by the individual, the effect of this harm and the ways to remedy it, in the proposed process of intersectionality it is very important that adjudicators ask themselves who the victim is, and which intersectional identities are relevant for the victim and the case. Margaret Davies argues that human life, the actual person, needs to be the primary focus in the construction of any legal system.⁷¹ IHRL is no different, by placing the use of intersectionality on the individual and their suffering it is possible to create a dialogue between the law and the people it impacts instead of having adjudicative bodies produce decisions that only focus on the law.⁷² The idea is that adjudicators analyse the information submitted to them to determine to what extent the identities of the victim played a significant role in the violation. i.e. if a black, poor, transgender woman who is a sex worker is taken into police custody and disappears, the adjudicators would need to assess the degree to which the victim was targeted because she was a transgender woman in the sex industry and how her race and class contributed to her human rights being violated. In the words of Sandra Fredman, intersectional discrimination only occurs when ‘a group experiences discrimination from several different directions’, creating something new.⁷³

⁷¹ Margaret Davies, 'Feminism and the Idea of Law' (2011) 1 *feminists@law*

⁷² Dale, 'International Women's Human Rights and the Hope for Feminist Law. Intersectionality as Legal Framework' and Sara Bengtson and others, 'Christine Goodwin v the United Kingdom' 201

⁷³ Fredman, 'Double Trouble: Multiple Discrimination And EU Law', 14.

This exercise seeks to recognise the multiple identities of that particular victim that interact simultaneously to create a heightened vulnerability.⁷⁴

In order for the intersectional analysis to produce the most robust result, the operationalisation process will be divided into three different steps.

During the initial step of identification the adjudicator will determine which identities are, in the context of the state, considered as historically, systematically and/or structurally discriminated. If there are any characteristics that are considered as “suspect categories” then they should also be taken into account.⁷⁵ The two other steps to assess identities will come by way of the context and the testimony of the victim which are going to be covered in their own separate sections below. In any case, the adjudicator must bear in mind that while the identification might isolate the identities for a brief period, it does not follow that a single-axis approach needs to be used.

However, one of the concerns identified in the early stages of this thesis when the operationalisation process of intersectionality proposed in this chapter was being planned is that adjudicators do not have control on how the facts are presented by the victim, it is possible to assume that on some occasions the identities could be brought up at different points of the submission, that they are presented in a single-axis framework or that their relevance to the case is not easily identified. The listing of identities thus allows a certain

⁷⁴ For further discussion on how intersectionality makes visible more aggravated forms of oppression see Chapters 2 and 3.

⁷⁵ A discussion on suspect categories can be found in Avendaño-González LEA, Pérez-Pedraza E, Rabell-García E. Categorías sospechosas y control difuso en la práctica del juzgador familiar. *Colomb Forense*, vol. 5, no. 1, pp. 43-56, abril 2018

level of isolated identification as it requires the adjudicator to list all those that they can identify from the documents submitted by the victim or its representatives.

The identification of intersectional identities is crucial to determining where the individual is positioned within the spectrum of marginalisation and privilege as it is important to understand how social divisions interact.⁷⁶ Focusing on individuals who are only marginalised will not be ideal to achieve the purpose of intersectionality in international human rights adjudication and a more comprehensive application of intersectional analysis should recognise that those that have a combination of privileged and marginalised identities are entitled to intersectional analysis.⁷⁷ Therefore, it was relevant to create a way in which the theory of positionality could be used in practice. This way, adjudicators will be able to understand which victims belong to more oppressed social groups, the marginalised within the marginalised, and those who have a combination of privileged and marginalised identities. This way the purposeful recognition of the positionality⁷⁸ of the victims will serve as safeguard to prevent individuals to have their harm essentialise or receive reparations without taking into account the different needs of those who have suffered the same violations.

⁷⁶ On the topic of positionality see Padilla, 'Intersectionality and Positionality: Situating Women on Color in the Affirmative Action Dialogue'; Carstensen-Egwuom, 'Connecting Intersectionality and Reflexivity: Methodological approaches to social positionalities'; Staunæs, 'Where have all the subjects gone? Bringing together the concepts of intersectionality and subjectification' and Sorrells and Sekimoto, *Globalising Intercultural Communication: A Reader*.

⁷⁷ Nash, 'Re-thinking intersectionality'; Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality'; Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' and Roseberry, 'Multiple discrimination'.

⁷⁸ See supra note 76 and chapter 2

For example, in *Case of Women Victims of Sexual Torture in Atenco v Mexico*⁷⁹ the victims included a university student that was in Atenco researching her undergrad dissertation and a woman selling produce in the market. Although both suffered sexual violence, the effect on each was different as their positionality resulted in different qualitative experiences of the same human rights violations.

Angélica Patricia Torres Linares claimed that she was unable to finish her university degree because she believed that her rape would have had never occurred if she had not been at university, and thus needing to research for her dissertation.⁸⁰ When the Court assessed how the sexual violence had affected her life project, they included the harm perpetrated against her professional development in the context of her education.⁸¹ Her privileged social position of being a woman who can access higher education intersected with her oppressed identities of being a woman and an indigenous person, creating harm unique to her social location.⁸² For Yolanda Muñoz Diosdada, the woman selling produce in the market, the rape she suffered when police illegally detained her allegedly because she was participating in some riots and her consequent incarceration due to same accusations, created a new layer of vulnerability that intersected with her sex and social class. She became unemployed as a result of her detention and was stigmatised for having been in prison which affected her ability to find another job.⁸³ For her, the systems of

⁷⁹ I/A Court H.R., *Case of Women Victims of Sexual Torture in Atenco v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 28, 2018. Series C No.371.

⁸⁰ *Ibid* Footnote 458.

⁸¹ *Ibid* para 351 and note 458.

⁸² Se conocerá la verdad en el caso de Atenco y se hará justicia, dice Patricia Torres al gobierno mexicano. Yunuhen Rangel. Desinformémonos. 7 octubre 2016 available at <https://desinformemonos.org/se-conocera-la-verdad-en-el-caso-de-atenco-y-se-hara-justicia-dice-patricia-torres-al-gobierno-mexicano/>.

⁸³ I/A Court H.R., *Case of Women Victims of Sexual Torture in Atenco v Mexico*. Preliminary Objection, Merits, Reparations and Costs. para 372.

oppression that placed her in a particular degree of vulnerability due to her sex and economic status intersected with new forms of marginalisation in the shape of unemployment and stigma due to her arrest and imprisonment. Although same rights were violated the importance of individualising how each violation took place is relevant to have a more nuanced understanding of the harm of the victims and consequently it would allow adjudicators redress the suffering of the victims in a more appropriate way, not to mention it would also ensure that the victim is more accurately seen by the human rights system that tries to protect them.

What this example illustrates is the importance of understanding how the victims of the same violation are different and why it is argued in this thesis that adjudicators need to address their cases in an individualised manner. It is important for the proper use of intersectional analysis that adjudicators do not assume that, because certain social categories intersect in a specific manner, this will be reproduced in every case that has similar identities.⁸⁴ As Grazna and Biana argue the intersectional configurations determined in one case cannot be assumed in others.⁸⁵ Although some determinations made by the judges will affect all victims, different forms of oppression are going to produce different types of suffering which translates into different measures the state must take to protect the victims and different reparations to minimise the different degrees of

⁸⁴ Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House'; Phillips, 'What's wrong with Essentialism?'; Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory' and Linde, 'Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of Social Justice Coalition v Minister of Police 2019 4 SA 82 (WCC)'.

⁸⁵ Grazna, Intersectionality: A foundations and frontiers reader and Biana, 'Extending Bell Hooks' Feminist Theory', 18.

oppression.⁸⁶ The same human rights will be breached, yet the reasons and the effects of the breach will not be the same. The purpose of this step is to focus on the meaningful distinctions and similarities that make sure everyone is accounted for and work towards establishing the necessary conditions to the full enjoyment of their human rights.⁸⁷

Chow, in an examination of the potential of intersectionality in UN Treaty Bodies argues that distinctions should be of particular importance in legal disciplines because the artificial boundaries created by the law, such as under what circumstances a human right is breached, do not account for the complexity of life experiences that cannot be neatly fitted into these boundaries.⁸⁸ The varying degrees of harm suffered by multiply-burdened individuals depend on their intersectional location. Through the incorporation of social positionality into their use of intersectional analysis, adjudicators will contribute to dismantling the ways law simplified and reified inequality into unidimensional and fixed concepts.⁸⁹

In this same sense, some scholars⁹⁰ are concerned that if the operationalisation of intersectionality is broadened to include every individual regardless of their social position, individuals who are ‘intersectionally disadvantaged’⁹¹ will be pushed to the margins. This is especially concerning because the application of the law tend to reproduce the same

⁸⁶ A more detailed explanation of this aspect can be found on section 4 of the present Chapter.

⁸⁷ Youmna Chlala in Association for Women's Rights in Development (AWID), 'Intersectionality: A Tool for Gender and Economic Justice'.

⁸⁸ Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence', 458.

⁸⁹ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis', 791.

⁹⁰ Jordan Zachery, Julia Sheron and Nikol G. Alexander-Floyd, *Black women in politics : demanding citizenship, challenging power, and seeking justice* (SUNY series in African American studies, SUNY Press 2018).

⁹¹ Al-Faham, Davis and Ernst, 'Intersectionality: From Theory to Practice', 251.

social hierarchies that are present in society.⁹² The power structures that allowed the most privileged voices to be the norm in single-axis frameworks of oppression are the same ones that allow privileged voices to flourish in legal spaces.⁹³ Hence, intersectionality could easily be co-opted so it is less about the marginalised within the marginalised and more about the privileged within the marginalised.

Nonetheless, patterns of harm can and will emerge when a victim shares two or more characteristics with other victims.⁹⁴ Any application of intersectionality should find a balance between the inseparability of social categories, understanding the individual as a whole with distinguishable properties and the acceptance of unifying categories⁹⁵. Thus, for example, the category of ‘women’ is not wholly rejected. This is particularly relevant when dealing with multiple victims. In such circumstances, the mapping of intersecting identities of each victim is still necessary but a step can be added to the proposed operationalisation of intersectionality, in order to identify the unifying categories amongst the multiplicity of victims by grouping them when they share identities. In line with the conclusions reached by the majority of intersectionality scholars, the best way is to treat victims in their individuality and their relationship with other victims.⁹⁶ This is a common argument throughout intersectional theory. Even when individuals have different

⁹² *Ibid.*

⁹³ *Ibid* 252.

⁹⁴ Mutatis mutandis Bordo, 'Feminism, Postmodernism, and Gender-Scepticism', 149.

⁹⁵ Rodó-Zárate and Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal', 10.

⁹⁶ Dancig-Rosenberg and Yosef, 'Crime Victimhood and Intersectionality' and Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis'.

qualitative experiences of harm and oppression, they can still work collectively to dismantle the systems that oppress them.⁹⁷

For example, in Chapter 5 the case of *Cuscul Pivaral* uses subgroups to determine how people living with HIV who are also poor, and illiterate all shared some violations of human rights due to their shared context. However, the differences between the members of the subgroups are also entitled to an individualised analysis of intersectionality.⁹⁸ ‘Intersectionality fills out the Venn diagrams at points of overlap where convergence has been neglected, training its sights where vectors of inequality intersect at crossroads that have previously been at best ped through’.⁹⁹ Having recognised those shared identities and not the full extent of the intersections will leave some intersecting vectors of inequality hidden and perpetuate them.

Now, when it comes to the specific grounds that could justify the use of intersectional analysis, the current practice of adjudicative bodies is rescued¹⁰⁰, this means that in the proposed operationalisation of intersectionality, adjudicators should not use a static list of identities that ‘legitimises’ its use. It is not possible to use an intersectional approach to analyse one identity without looking into the other identities that intersect.¹⁰¹ Adjudicative bodies should not limit the use of intersectionality to just a group of identities as it could leave other multiply-burdened individuals without recognition of their intersections.

⁹⁷ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis', 804.

⁹⁸ See *Cuscul Pivaral* in Chapter 5.

⁹⁹ MacKinnon, 'Intersectionality as Method: A Note', 1020.

¹⁰⁰ See the conclusion reached in chapter 3

¹⁰¹ Vigoya, 'La interseccionalidad: una aproximación situada a la dominación', 8.

Identities (particularly in human rights adjudication) are necessary to understand how oppression manifests within different societies in macro (social categories) and micro (individual) levels,¹⁰² but their content cannot be imposed by the adjudicator.

One suggestion is to make use of the intra-categorical complexity approach proposed by Leslie McCall and apply it to the adjudication of human rights. This approach could be included in intersectional analysis as, according to McCall, the intra-categorical complexity approach sits between the rejection of categories of identities and their content, and the study of categories as really existing. It analyses and challenges the boundaries of social categories and the processes that have defined them while recognising their importance as they represent stable components.¹⁰³ It is assumed that inter and intragroup relations are dissimilar¹⁰⁴ and need to be studied simultaneously. Using the intra-categorical approach in the assessment of harm would see adjudicators recognising the social category of disability, yet how disability is experienced and understood by the individual cannot be boxed in static terms.

Instead of separating social categories, the proposal is to acknowledge the distinguishable elements and names of each for theoretical and legal purposes only.¹⁰⁵ Distinguishing social categories will not isolate them as they are properties of an individual that can easily be named and individualised.¹⁰⁶ Especially because social identities are not mutually

¹⁰² Collins, 'Black feminist thought : knowledge, consciousness, and the politics of empowerment'.

¹⁰³ McCall, 'The complexity of Intersectionality'.

¹⁰⁴ Crooms, 'Indivisible Rights And Intersectional Identities Or, What Do Women's Human Rights Have To Do With The Race Convention' 624.

¹⁰⁵ Gunnarsson, 'Why we keep separating the 'inseparable': Dialectizing intersectionality'.

¹⁰⁶ Rodó-Zárate and Jorba, 'Metaphors of Intersectionality: Reframing the Debate with a new Proposal' (2020), 9.

exclusive as individuals can belong to different social categories.¹⁰⁷ In feminist theory, some schools reject ‘essentialist/totalising descriptors’ such as nationality or age¹⁰⁸ but this would not work in IHRL adjudication, using specific names for identities and social categories (most commonly referred to as grounds)¹⁰⁹ helps provides law with a degree of certainty that does not necessarily contradict the objective of intersectionality. Yet, this should not signify that essentialist views of those descriptors are acceptable and encouraged, for that reason a middle ground needs to be found. Therefore, McCall’s inter-categorical approach will be followed as it uses predefined and preselected social categories to be the subject of analysis and seeks to examine the relationships between categories to understand how they interact to create broader structures of harm.

4.2.4 Intersectional context analysis: assessing how social categories interact with the broader social, cultural and political context

Intersectionality is rooted in making interlocking systems of oppression visible; thus adjudicators should consider that when intersectional identities are present, structural violations are most likely also present.¹¹⁰ Therefore, the information that adjudicators could gather is how these systems are manifesting and being perpetuated in the state at the moment at which the violation took place. Human rights violations can and do exist in a single-axis manner, yet the present thesis will not apply to these scenarios, nor will it address the possible problems in the adjudication of such cases. In cases in which the

¹⁰⁷ George A. Akerlof and Rachel E. Kranton, 'Economics and Identity' (2000) 115 *Quarterly Journal of Economics* 715.

¹⁰⁸ Mcmurtry-Chubb, 'There Are No Outsiders Here: Rethinking Intersectionality As Hegemon-ic Discourse In The Age Of #Metoo', 17.

¹⁰⁹ Oddny Mjoll Arnardottir, 'The Differences That Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' *Human Rights Law Review*, Vol. 14, Issue 4 (2014), pp. 647-670

¹¹⁰ Collection, 'A Black Feminist Statement' and Moraga, Anzaldúa and Bambara, *This bridge called my back : writings by radical women of color*, 210–218.

subject is oppressed but for one identity, while there could still be a need for a context analysis to determine the structural violation, it would not require an intersectional one.¹¹¹

The theoretical foundations of intersectional context analysis, as proposed, relates to the inter-categorical complexity approach defined by McCall¹¹² under which the operationalisation of intersectionality focuses on pre-existing relationships of inequality between social categories.¹¹³ In the analysis of context, the pre-existing relationships are translated into the social, cultural or political scenario that allowed particular social groups to be oppressed and the relationship it has with the individual cases. It refers to the examination of systems, structures, norms and policies that create interlocking systems of oppression.

For the process of operationalising intersectionality, it was recognised that there is a need to analyse any data taking into account the relationship between the individual and the context in which their life is embedded and their relationship with other subjects.¹¹⁴ In feminist theory, the marginalisation endured by multiply-burdened individuals is often analysed considering the social, political and historical contexts.¹¹⁵ This approach is not always present in the application of intersectionality in IHRL adjudication and so is particularly relevant to the operationalisation process because it recognises that dynamics of power can take place between individuals, individual and group, and between groups.

¹¹¹ For a more detailed description on intersectional context of oppression see Chapter 4.

¹¹² McCall, 'The complexity of Intersectionality'.

¹¹³ *Ibid*

¹¹⁴ Butler, Gender trouble : feminism and the subversion of identity and Butler, Bodies that matter : on the discursive limits of 'sex'.

¹¹⁵ Cherríe Moraga, Gloria Anzaldúa and Toni Cade Bambara, This bridge called my back : writings by radical women of color and Collins, Black feminist thought : knowledge, consciousness, and the politics of empowerment.

This multi-layered analysis of how interlocking systems of oppression such as patriarchy or able-bodism work is fundamental to understanding harm. When there is a context of intersectional oppression, the adjudicative bodies will be able to include in their decision-making process how this manifest and to what extent the context allowed the violation to take place.

The context contributes to the understanding of the facts of the case¹¹⁶, therefore when the facts suggest to the adjudicator that the event is part of a broader context of oppression, an analysis of context is necessary to be incorporated into the intersectional analysis. This section seeks to figure out how social categories interact with the broader social, cultural and political context and whether the context of a particular state demonstrates the existence of systems, traditions, structures or institutions that allow interlocking systems of oppression to operate and survive. The broader structures of oppression in which the grievances of the individual are embedded are fundamental to understanding how the individual harm could take place and to what extent the interlocking systems of oppression further burden individuals. The importance of adding systems and structures of oppression as part of intersectionality is to understand how power relations come to play when the broader structures of oppression interact with the individuals that are multiply-burdened.¹¹⁷

This stage of the operationalisation process required the adjudicator to discern if there are any broader structures or contexts related to the intersecting identities of the victims. The

¹¹⁶ Andrés Vanegas Diaz, 'El valor del Contexto en los fallos dictados contra Colombia por la Corte Interamericana de Derechos Humanos', Universidad Santo Tomás

¹¹⁷ For example, May, Pursuing intersectionality, unsettling dominant imaginaries; Brah and Phoenix, 'Ain't I a woman? Revisiting Intersectionality', 82; Viveros Vigoya, 'La interseccionalidad: una aproximación situada a la dominación'

intersectional analysis of context is not going to dismantle identities and social categories to the smaller component because what is targeted are the structures that harm and marginalise certain individuals.¹¹⁸ The analysis of context as proposed will not address all structural inequality but rather will look at cases where multiple axes intersect.

The purpose of this macro analysis of a violation is to reveal patterns of inequality and map the dynamics of power between the state and the victims. What could be considered as an otherwise isolated human rights violation gains a unique feature with this analysis. Determining a context of intersectional oppression would permit the adjudicator to highlight how an individual can be victimised not only because of the act done to them but also because of the environment in which it took place.

The context of each case is what gives the specific value to the violation of each of the rights of the [American] Convention. To ignore the context is to ignore the essence of the case, the endogenous and exogenous factors that constitute its content.¹¹⁹

While all violations are grave, the existence of a structure of inequality and an environment of subjugation directed towards a particular group or an individual that is believed to belong to a social category, allows the harm to be considered as a unique experience.

As for the practice of adjudicative bodies that support the proposal of an intersectional analysis of the context, this is not a foreign concept for adjudicative bodies; for example both the Inter-American Court and the International Criminal Court¹²⁰ are well-known for

¹¹⁸ Cho, Crenshaw and McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis', 803 *Dean Spade, 'Intersectional Resistance and Law Reform'* (2013.) 38 *Signs* 1031.

¹¹⁹ Andrés Vanegas Diaz, 'El valor del Contexto en los fallos dictados contra Colombia por la Corte Interamericana de Derechos Humanos', Universidad Santo Tomás The original version of this text is only available in Spanish, the translation is work of the author of the thesis.

¹²⁰ This research has been using international human rights adjudicative bodies, however the International Criminal Court (ICC) was used as an example because this international criminal tribunal, alongside the

using analysis of context to determine the international responsibility of states and individuals.¹²¹ It is possible to judge a case without considering the context in which the events took place but this would entail that the root of the violations is not properly addressed.¹²²

Courts use the analysis of context when it is possible to determine *a priori* that the human rights violations correspond to a specific time, space and facts that manifest beyond isolated cases.¹²³ Judge Humberto Sierra Porto of the IACtHR has identified 3 elements that constantly appear in the judgements of the IACtHR as a methodology to analyse the context:

- a) The individual case fits into a bigger picture of collective, massive or systematic violations.
- b) The facts unveil a practice relevant to the time and space frame and has as a unifying element, the individuals.
- c) Those who exist at the receiving end of the practice share some characteristics.¹²⁴

IACtHR, has plenty literature that discusses the way the context can be incorporated into the work of a court. Notwithstanding the importance of the analysis of context under an international criminal perspective undertaken by the ICC and other international criminal tribunals, this research proposes to only follow the analysis of context from the Inter-American Court as it resembles, in both purpose and method, the macro analysis used by intersectional feminist scholars (see Chapter 2). The ICC deals with the prosecution of systemic crimes and not with violations suffered by victims, this means that their literature on analysis of context is not relevant to the operationalisation of intersectionality, even when some of their levels of analysis might overlap with the discussions on the IACtHR.

¹²¹ Karina Ansolabehere and others, *Violaciones, derechos humanos y contexto: herramientas, propuestas para documentar e investigar*. Manual de Análisis de Contexto para Casos de Violaciones a los Derechos Humanos (International Bar Association's Human Rights Institute and Facultad Latinoamericana de Ciencias Sociales, Sede México. 2017).

¹²² Ana Belem García Chavarría, *La prueba en la función jurisdiccional de la Corte Interamericana de Derechos Humanos*, vol Colección Sistema Interamericano de Derechos Humanos (Comisión Nacional de Derechos Humanos 2016).

¹²³ Humberto Sierra Porto, 'El Control de Convencionalidad una institución en proceso de construcción. Los debates en torno a la utilización del 'contexto' en el derecho nacional' in Francisco Rubio Llorente and others (eds), *La Constitución Política de España: estudios en homenaje a Manuel Aragón Reyes* (Centro de Estudios Políticos y Constitucionales 2016).

¹²⁴ *Ibid.*

To determine if there is a context of intersectional analysis, the second and third elements used by the IACtHR will serve as a basis to construct the proposed process of operationalisation. The adjudicators will be able to map the historical and systematic intersectional context analysis in the same manner as the context is being used in the judgements of the IACtHR.¹²⁵ The context of intersectional oppression will explain the broader structures that push certain social groups to the margins of society.¹²⁶ Unlike the current use, the analysis of context will see beyond the behaviour of a state with regards to a specific social category, i.e. how Guatemala has historically discriminated their indigenous people, but rather how the contexts of marginalisation intersect, such as how women who are journalists suffer from contexts of violence against women and violence against journalists.

Intersectional context analysis would acknowledge the historical, social and political context of inequality relevant to the facts of the case that render the violations unique. If the context determines that the individual belongs to historically marginalised communities, it will also be important for intersectional analysis to understand how these systems of oppression came to be and whether they have changed over time. The power relationships that intersectional context analysis will uncover will also help the adjudicator understand if they are in front of a form of horizontal inequality allowed and tolerated by the state, or a vertical one that emanates directly from the state.

¹²⁵ For reference on the use of intersectional analysis see Chapter 3.

¹²⁶ This in line with Patricia Hill Collin's concept of interlocking systems of oppression. See Collins, *Black feminist thought : knowledge, consciousness, and the politics of empowerment*.

With regards to the identification of more collective, massive or systematic violations, there is no need to differentiate between a case with several victims and a case with only one. The review of cases made in the previous chapter allowed to conclude that the job of the adjudicator is easier when dealing with several victims as an individual case can fit into a broader picture just by comparing it with the other victims. In individual cases, the analysis of the situation of the groups to which the victim belongs is done at a broader level; the victim can demonstrate the context by using the structures of oppression endured by their social groups in the specific country, region, or the world.

4.3 The active role of the adjudicators: using intersectionality to better judge

There have been some instances, such as the case of *R.B.P. v The Philippines* from CEDAW Committee or the third party interventions in *Cînța v Romania* from the EctHR in which the experts on intersectionality and victims that have participated in IHRL adjudicative processes have framed intersectionality more comprehensively and clearly than the adjudicative bodies.¹²⁷ This has prompted a concern within the present research where victims and their representatives could provide a more nuanced explanation of the theory and application of intersectional analysis in the documents they submit to the court than the case-law produced by the adjudicative bodies. This could become an issue if for example the adjudicative body does not know enough about intersectionality and a victim

¹²⁷ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs; European Court of Human Rights. *Cînța v Romania* (Application no. 3891/19). (ECHR, 18 February 2020) or UN Committee on the Elimination of Discrimination against Women. *R.B.P. v The Philippines*.

who is not multiply-burdened argues that their case should be analysed under an intersectional approach.

In order to address this it was important to create a space within the operationalisation process in which scholars, victims and the representatives that could be much more familiar with the theory of intersectionality than adjudicators can push for the application of intersectional analysis in a given case and help the advancement of this theory within IHRL. To address this possible scenario, the operationalisation of intersectionality requires a mechanism to create a bridge between the *cognoscenti* and the adjudicative bodies. Adjudicators can open this dialogue via an existing mechanism of requesting additional information to better judge, either from the victims or from third parties. Although adjudicative bodies might not have the same procedures, when it comes to the adjudicative bodies examined in this research, they all have as part of their rules of procedure the faculty to request additional information from the victim or their representatives.¹²⁸ Hence why this aspect of the operationalisation is not carried out during, for example, the hearings which might not be available to all adjudicative bodies.

The interaction between the adjudicator and the victim is a proposal to overcome one of the criticisms of operationalising intersectionality in IHRL; the fact that adjudicative bodies have ignored not only the identities that render an individual multiply-burdened but also the intersectional analysis that some victims or commissions present or request.¹²⁹ If

¹²⁸ For example, see UN Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council, 14 July 2011, A/HRC/RES/17/18. Rule 15 or European Court of Human Rights. Rules of Court. Rules of Procedure. 1 January 2020. Strasbourg Rule 47 5.2 and Rule 49.

¹²⁹ Two examples of this can be found in the cases of UN Committee on the Elimination of Discrimination against Women. R.B.P. v The Philippines and I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary -Objection, Merits, Reparations and Costs.

the adjudicator does not pay attention to the intersectional analysis provided by the parties previous to their own analysis, they will not be able to provide a comprehensive delivery of justice.

If the process of identifying intersectional identities was seen as the responsibility of the victims alone, the effect would be that on those occasions in which the victim or their representatives were unaware that they were dealing with intersectional identities, their cases would result in judgements lacking an intersectional analysis.¹³⁰ However, the adjudicator cannot hold all the power of determining who will be subjected to an intersectional analysis and who will not, because even if the victim requests an intersectional analysis and demonstrates the importance of it, if the adjudicator does not want it or is unfamiliar with how to operationalise intersectionality the analysis will not take place.¹³¹ These situations can occur still but when the process of operationalising intersectionality is envisioned as a collaborative effort between the adjudicator and the victim, many of the issues identified *supra* and in previous chapters can be prevented or at least minimised.

It is also proposed that, when deciding whether to use intersectional analysis, if the representatives of the victims or any of the parties to the process request an intersectional analysis, the adjudicators should ask them for a detailed justification. This does not imply

¹³⁰ For example, in the case study of *Lluy v Ecuador*, the representatives of the victims did not ask for an intersectional analysis until the amicus curiae brought it to their attention. See *Alegatos finales escritos de los representantes de las víctimas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador*. CIDH-6-2014/001. 20 de mayo de 2015 and I/A Court H.R., *Case of Gonzales Lluy et al. v Ecuador*. Preliminary Objections, Merits, Reparations and Costs.

¹³¹ For example, see UN Committee on the Elimination of Discrimination against Women. *R.B.P. v The Philippines* or I/A Court H.R., *Case of Women Victims of Sexual Torture in Atenco v Mexico*. Preliminary Objection, Merits, Reparations and Costs.

that an analysis will be undertaken only at the request of the victim or their representatives; the judges should undertake this analysis of their own accord. This step is an extra vehicle included so adjudicators can gather additional information to better judge. This dialogue would prevent two situations that have arisen in adjudicative bodies; the parties request the intersectional analysis, and the adjudicative body rejects it without giving any explanation, or the request is made in cases in which there is no apparent need for;¹³² such as, in cases of single-axis discrimination where the individual is marginalised but for one identity.

Intersectionality scholars have placed much interest in the narrative of multiply-burdened individuals as one of the main components of intersectional analysis is the possibility to understand how individuals interpret their experiences of harm through their own eyes.¹³³

When the victim is alive and is capable of understanding the procedures, the adjudicators should ask them about the identities seen as intersectional and relevant to the violation.

Therefore, any process of operationalisation of intersectionality, especially in international human rights adjudication where the victim has already been given an active role,¹³⁴ should focus on giving to that narrative a more prominent voice. When available, the testimony of the victim is the best way to understand how the harm affected the individual who

¹³² Examples of these issues can be found *ibid* and Committee on the Elimination of Discrimination against Women, *Inga Abramova v Belarus*.

¹³³ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics'; Ferguson, 'Resisting the Veil of Privilege: Building Bridge Identities as an Ethico-Politics of Global Feminisms'.

¹³⁴ For a more detailed discussion on the role of the individual see Luis Jimena Quesada and Fabián Salvioli, 'The individual, Human Rights and International Instruments: Focus on the Council of Europe' (1994) 2 LSA Law Review ; Angel Sánchez Legido, *La reforma del mecanismo de control del Convenio Europeo de Derechos Humanos* (Ed. Colex 1995) and Fabián Salvioli, 'Derechos, acceso y rol de las víctimas' in Instituto Interamericano de Derechos Humanos (ed), *El futuro del Sistema interamericano de protección de los derechos humanos* (El futuro del Sistema interamericano de protección de los derechos humanos, Instituto Interamericano de Derechos Humanos 1997).

experienced it. When the victim is not available, either because they are dead, disappeared or any other reason, the adjudicator can make use of the information submitted by their representative, the family of the victim and witnesses. As mentioned before, it was relevant to include in the operationalisation of intersectionality that is being proposed to have a space within the decision-making process where the victim can make their voices and opinions heard; the most suitable moment found for this is also when the judges ask the parties for additional information ‘to better judge’.

Within the specific actions that the adjudicative bodies would take can be found; a) the court should ask a victim if they believe all the identities expressed on their submissions were relevant to the violation and how they consider the identities were affected; b) if a victim does not want to be identified with a certain characteristic or does not identify themselves with it, this is also the procedural moment to express those concerns. In such a case, the adjudicators should not include it as part of the analysis; c) additionally, when they feel their identification is incorrect, the judges should allow them to correct it.¹³⁵

When the victim is not available, adjudicators should still contact their representatives or next-of-kin to ensure that the information they are extracting from the submissions conforms with the identities of the victim.

¹³⁵ This is in line with the argument that the individual should be the one giving content to their identities and should not be imposed by an external actor such as a Court. For more information on these debates see McCall, 'The complexity of Intersectionality'; Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'; Hanneet, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' and Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought'.

Freedman argues that human rights mechanisms must include the participation of the individuals they try to protect,¹³⁶ as access to justice and the inability to access justice are mediated by the corporeal intersections of identity and the structural and interlocking meanings placed on bodies.¹³⁷ Adjudicators ultimately decide how the case will be judged. However, closer interaction between the victims and the judges will take some of the power of the court and transfer it to the victim. The power relations will shift slightly to provide victims with a more active participation in constructing their own narrative of harm as their involvement is necessary to understand how their human rights have been violated.

Ideally, the considerations in this section would prevent the adjudicator from assuming about the behaviour and experiences of an individual. This would result in a rejection of social categories that homogenise individuals due to their differences and provide a means to understand how these differences shape power relations and position people in terms of exclusion and inclusion.¹³⁸ Asking the victims to provide further information, including the correction or rejection of their identification as intersectional subjects, will allow social categories that have suffered from inconsistent, obscured, oversimplified or poor conceptualisation to be acknowledged.¹³⁹ In practice this would translate into giving the

¹³⁶ Jane Freedman, 'Women, Islam and Rights in Europe: Beyond a Universalist/Culturalist Dichotomy' (2007) 33 *Review of International Studies* 29, 43.

¹³⁷ Jennifer A. Zenovich and Leda Cooks, '#Metoo, The ICTY, And Intersectionality In Postsocialist Global Capitalism' (2019) 44 *Journal Of Communication Inquiry* 1, 8.

¹³⁸ See discussions on the subject in Chapter 3. In particular this idea has been inspired by McCall, 'The complexity of Intersectionality' and Clark, Matthew and Burns, 'Power, privilege and justice: intersectionality as human rights?', 111-112.

¹³⁹ Philip A. Rozario and Letha A. Chadiha, 'Social work and minority aging' in Keith Whitfield and Tamara Baker (eds), *Handbook of Minority Aging* (Springer 2014); Sharon Koehm and others, 'Revealing the shape of knowledge using an intersectionality lens: report on a scoping review on the health and health care access and utilisation of ethnocultural minority older adults' (2013) 33 *Ageing & Society* 437; and Shari Brotman, Ilyan Ferrer and Sharon Koehn., 'Situating the life story narratives of aging immigrants within a structural context: the intersectional life course perspective as research praxis'. (2019) *Qualitative Research* 1.

victim a much more significant and active role; the narrative given by the victim on how they experienced the violation, the harm and their identities should not be incorporated to the case without any analysis from the judges. This is why the operationalisation process demands dynamic collaboration; the narrative of the victim cannot be included in the judgement just to obtain information on the facts of the violation, the adjudicators in charge of deciding the case need to give them due consideration in the specific context of intersectional analysis.

4.3.1 Safeguards for the participation of multiply-burdened individuals in the decision-making process

The proposed process of operationalisation includes certain safeguards. The different courts and tribunals that adjudicate IHRL have recognised the existence of risks to the victims, witnesses and representatives of the victims when accessing an international adjudicative process. These risks could include public shaming, threats to their lives, extrajudicial killings, further marginalisation and social stigmatisation.¹⁴⁰

Adjudicative bodies have dealt with the possibility of revictimization via the anonymisation of the victim and by including protection clauses in their procedural rules.¹⁴¹ Considering these risks could potentially present themselves in the

¹⁴⁰ For more in depth discussions on the topic see Charles P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 Michigan Journal of International Law 805; Carlos Fernández de Casadevante Romani, 'International Law of Victims' (2010) 14 Max Planck Yearbook of United Nations Law 219; Mónica Feria Tinta, 'La víctima ante la Corte Interamericana de Derechos Humanos a 25 años de su funcionamiento' (2006) 43 Revista Instituto Interamericano de Derechos Humanos 159 and Felipe Gómez Isa, 'El derecho de las víctimas a la reparación por violaciones graves y sistemáticas de los derechos humanos (ILSA- Instituto Latinoamericano para una Sociedad y un Derecho Alternativos 2007).

¹⁴¹ For example, see Rules of Procedure of the Inter-American Court of Human Rights. Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009. Article 53 and Rules of Procedure of the Inter-American Commission on Human Rights. Approved by the Commission at its 109^o special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions held from October 7 to 25, 2002. Article 28.b.

operationalisation of intersectionality, the existing safeguards are still expected to work for the protection of the victim. For example, if the victim does not want to be identified in a specific manner but does not reject their belonging to that identity or if a victim believes being identified as an intersectional subject further marginalises or stigmatises them, they are entitled to request the Court not to identify them as such in public proceedings and can request their name be anonymised. This safeguard already exists in most adjudicative bodies¹⁴² and would therefore not impose a burden on the courts and tribunals. To minimise those risks, the active role of the victim is once again central to the operationalisation of intersectionality.

4.4 Gathering information from third parties

Once the Court has a much better understanding of the violations, the intersectional harm suffered by the individual, the intersectional context of oppression and the identities that are relevant to the case, the last step is to understand the differentiated impact of the violation. The importance of including the different qualitative experience of harm suffered by the victim relates to intersectionality's epistemological and methodological debates, where the experience of the individual has been considered an important goal of intersectionality.¹⁴³

¹⁴² For example, see Rules of Procedure of the Committee on the Elimination of Discrimination Against Women. Report of the Committee on the Elimination of Discrimination against Women. Twenty-fourth session (15 January-2 February 2001). Twenty-fifth session (2-20 July 2001). General Assembly Official Records. Supplement No.38 (A/56/38) Article 74.4; European Court of Human Rights. Rules of Court. Article 47.4 and Rules of Procedure of the Inter-American Commission on Human Rights. Articles 28.b, 30.2 and 73.

¹⁴³ Collins, 'Intersectionality as critical social theory', 157.

The adjudicator is in a privileged position where they can ask experts for more information regarding the experience of multiply-burdened subjects and the differentiated experience a violation of a human right has had on those individuals. One cannot expect adjudicators to be experts on every issue presented, and so they need to rely on information from multiple sources including experts, civil society, NGOs, international organisations and other adjudicative bodies. Already common practice in the IASHR and to some extent in the European system, this strengthens the protection of human rights in both the universal and regional systems.¹⁴⁴

The use of expert witnesses, amicus briefs and third-party interveners is not a foreign practice to adjudicative bodies, and, with mixed results, they have all helped steer the discussion of adjudicative bodies towards new approaches. For example, the ECtHR has had several third-party interventions that have highlighted the presence of intersecting identities of the victims of several cases. In *S.A.S. v France*, regarding the ban on face coverings, the ECtHR included a third-party intervener who pointed out that the violation endured by the victim was intersectional discrimination on the grounds of religion and sex and the political rhetoric surrounding the ban appeared to be specifically targeting women wearing Islamic face veils.¹⁴⁵

¹⁴⁴ For example see Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971 and Thomas Buergenthal, 'The Advisory Practice of the Inter-American Court of Human Rights' (1985) 79 *American Journal of International Law* 1.

¹⁴⁵ European Court of Human Rights. *S.A.S. v France*. App no 43835/11. (ECHR, 1 July 2014) paras 97 and 98.

*Konstantin Markin v Russia*¹⁴⁶ is another example of the importance of including amicus briefs or third-party interventions in the operationalisation process. The case is significant because third-party interventions showed intersectional discrimination towards a male victim who was simultaneously being discriminated against on the grounds of his sex and also his status as a member of the military. The third party further argued that:

If discrimination on the basis of sex and discrimination on the basis of to military status were analysed separately, the stereotypes concerning military servicewomen would recede to the background. If one set of comparisons concerned men and women in general and the other set of comparisons concerned soldiers and civilians, then nowhere in that equation could the concerns of military servicemen and even less so of servicewomen, be recognised directly¹⁴⁷

The Court limited its analysis of intersectional discrimination to finding that the denial of parental leave to the applicant was due to the combination of their military status ‘plus’ sex. The word ‘plus’ in the judgement tends to indicate additive rather than intersectional discrimination.¹⁴⁸ This in line with the partly dissenting opinion of Judge Pinto de Albuquerque who explicitly stated that he was going to analyse separately the military status of the victim and his gender in order to determine if there was discrimination.¹⁴⁹ Hence, the communication between different actors and the adjudicative bodies in the operationalisation of intersectionality is not only feasible but is also a practice with which most courts and tribunals are familiar.

The use of experts and other sources of information to understand how harm changes depending on the simultaneous sources of oppression should contribute to a more

¹⁴⁶ European Court of Human Rights. *Konstantin Markin v Russia* (Application no. 30078/06). (ECHR, 22 March 2012).

¹⁴⁷ *Ibid* para 122.

¹⁴⁸ *Ibid* para 98.

¹⁴⁹ *Ibid* Dissenting opinion of Judge Pinto de Albuquerque.

comprehensive determination of the responsibility of the state. Ideally, the experts would work with multiply-burdened individuals, intersectionality, oppression or any other relevant subject that illustrates the different qualitative experience of harm of a multiply-burdened, yet they are not expected to be experts on the specific intersections of the identities of a specific victim.

The information requested by the adjudicative body needs to be as specific as possible to prevent generalisation and essentialisation,¹⁵⁰ so if the case relates to girls living on the streets who have become pregnant as a result of the violence they endure, the court should not ask general questions about how it is to live on the streets or what are the rights of a girl as this would be a single-axis approach.¹⁵¹ Rather, it should frame its questions in an intersectional manner; what are the risks that women living on the streets endure? Is there any difference in the risks if that woman is a child? This will follow the intersectional identities acknowledged in the victim. If the victim and their representatives have already provided an account of this differentiated effect, the work of the adjudicator is simplified as the amount of information it needs to gather reduces and they can focus on fact-checking rather than fact-gathering.

Every case will require different amounts of additional data, so instead of signalling a threshold at which the data is going to be deemed sufficient, thereby risking missing an important piece of information, it would be better to this operationalisation process to

¹⁵⁰ Examples of this discussion can be found, in Mohanty, 'Bajo los ojos de occidente. Academia Feminista y discurso colonial' and King, 'Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology'.

¹⁵¹ Busquier, '¿Interseccionalidad en América Latina y el Caribe? La experiencia de la Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora desde 1992 hasta la actualidad'.

establish a minimum amount of data expected to help construct the different qualitative experiences of harm. The judges should at least cover a) an understanding of the systemic violation of the intersectional identities and how the interlocking systems of oppression operate; and b) how, when a victim has at least two intersectional characteristics affected by a specific violation, the experience of harm differs from that of an individual who is experiencing harm in a single-axis, compounded or additive manner.

4.5 Intersectionality as part of the judgement

The implementation of intersectional analysis as part of the judgement requires the adjudicators to use the intersectional identities, the facts and the additional information to determine the merits. The usual structure of judgements can be applied to the operationalisation of intersectionality.

4.5.1 Establishing the facts of the case through an intersectional lens

Once identities and social categories have been determined by the adjudicator, the next step suggested for the successful recognition of the harm of the multiply-burdened victim, requires them to explain how the facts of the case demonstrate the intersectional oppression endured.

The current use of intersectionality in the adjudicative process lacks consistency, constancy and transparency as it is not possible for a person to understand the rationale behind the use of it.¹⁵² For this reason, adjudicators that use this theory in their decision-making should aim to explain, as clearly as possible, how the facts presented demonstrate

¹⁵² A more detailed explanation on the subject can be found on Chapter 3.

intersectional oppression. This means that every time the court decides to implement an intersectional analysis there should be an appropriate motivation that demonstrates why this analysis is needed.

Feminist theory is concerned with how to illustrate the connection between specific events, the intersecting identities that influenced the occurrence of those events and the harm suffered by the victim.¹⁵³ The same approach needs to be translated into the human rights adjudicative processes. The courts should avoid mentioning intersectionality or intersecting identities without properly explaining how the facts of the case relate to these identities, especially because sometimes there is a disconnect between the facts as established by the adjudicative body and the use of intersectional analysis.¹⁵⁴ Ensuring the facts expressly demonstrate how a human rights violation is linked to the multiply-burdened nature of the victim will provide clarity and transparency in the role intersectional analysis plays in the adjudication of rights but also how using intersectional analysis will demonstrate how a human rights violation is different for those who are multiply-burdened than for those who experience that same violation ‘but-for’ one identity, and establishes more adequate reparations for the victims.

4.5.2 Merits

When explaining the current use of intersectional analysis in IHRL, one of the concerns expressed was how some adjudicative bodies would use intersectionality only in cases

¹⁵³ This can be inferred from the elements described in Chapter 3 regarding the use of intersectionality in International human rights law.

¹⁵⁴ As it happened in the case of Committee on the Elimination of Discrimination against Women, Inga Abramova v. Belarus. Communication No.23/2009 (27 September 2011)

where there was a violation to the prohibition to discriminate and not as a tool to understand the impact other violations have on multiply-burdened individuals. However discrimination is a violation of human rights that can be considered as having legal standing of its own,¹⁵⁵ and it can also operate in combination with other violations. Thus, the conclusions reached by Bouchard and Meyer-Bisch is rescued in the present operationalisation of intersectionality, and it is agreed that the concept of intersectionality should apply to:

‘all complex situations of intertwined violations of many human rights, where the violations are so closely related that it cannot be distinguished which violation [...] causes which impact’.¹⁵⁶

Therefore, in the operationalisation process, the ‘battle-ground’ of intersectionality should be every human right and not just the autonomous right to live free of discrimination. Adjudicators must bear in mind that all the identities of the victim are indivisible and are affected simultaneously by the violation.¹⁵⁷ Ideally, the court would show how, in any type of human rights violations, the experience of that individual is unique. The purpose of highlighting what makes a multiply-burdened victim different is to ensure their harm is properly addressed and redressed instead of being subsumed into the harm of those most privileged within the marginalised.¹⁵⁸

¹⁵⁵ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 191.

¹⁵⁶ *Ibid* 193.

¹⁵⁷ In accordance to the theory of intersectionality explained throughout this thesis. Especially chapter 2.

¹⁵⁸ This was a constant critique made by feminist of race, gender and class such as King, 'Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology', Lorde, 'Age, Race, Class, and Sex: Women Redefining Difference ' Page 445–451, hooks, *Feminism is for everybody: passionate politics*, 37 See also Yuval-Davis, 'Intersectionality and feminist politics'.

Even though intersectionality will be used as a tool to understand the harm a multiply-burdened individual endured as a consequence of the violation of their human rights, the manifestation of that harm will necessarily be attached to a specific conventional right that was breached. Otherwise, the adjudicative body would be acting outside its competency.¹⁵⁹ One of the most important aspects of the proposed operationalisation process is to change how adjudicators assess whether or not a violation has taken place. To do so, it will be necessary to challenge how they determine whether a state has breached its obligation to protect, respect and fulfil the human rights of people under their jurisdiction. The process of operationalisation of intersectionality proposed tries to understand how the intersecting identities of the victim were impacted by the violation, how is it that the factual framework of the case tell us how the victim who is multiply-burdened did not have their rights guaranteed. At the same time, this chapter will provide possible tools to help adjudicators understand which legal framework works best to protect the human rights of multiply-burdened individuals.

Adjudicators should avoid systematising the information already collected due to some salient characteristics of the victims (children, women, indigenous peoples, etc.) as this would be incompatible with intersectional analysis not because the salient characteristic is not important but because embedding the violation into the characteristic could promote single-axis analyses. For example, determining if the terms of an international instrument

¹⁵⁹ Article 33 of the American Convention on Human Rights, Article 19 of the European Convention on Human Rights and Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

have been breached because the rights of women were not protected is an analysis on a single-axis framework that does not account for the complexity of the individual.¹⁶⁰

The harm subject to analysis in the adjudication process could be the consequence of a right not being protected or guaranteed,¹⁶¹ and so the process of operationalisation should establish how multiply-burdened individuals have been prevented from enjoying their human rights. Adjudicative bodies which agree to follow the proposed process need to think of these obligations not as how they are owed to the population at large but rather attending to the specific context of intersectional identities. Instead of assuming all rights need protection in the same manner, using intersectional analysis would ensure that the harm endured by the multiply-burdened individual is properly addressed.

The use of intersectionality in the merits stage will be operationalised in the following stages:

- i) Current good practices in determining the responsibility of the State.
- ii) How did the rights of multiply-burdened individuals were affected when determining a state's compliance with human rights obligation;
 - a) How the intersectional context of harm relates to the obligations with which the state did not comply; and

¹⁶⁰ Such as I/A Court H.R., Case of González et al. ('Cotton Field') v Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No.205 Section VII.

¹⁶¹ Jorge Calderón Gamboa, La reparación integral en la Jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano (Instituto de Investigaciones Jurídicas Suprema Corte de Justicia de la Nación Fundación Konrad Adenauer 2013) 158.

- b) How the harm of the individual, that resulted from the state not complying with their human rights obligations, had a different manifestation because the victim is multiply burdened.

To illustrate the different steps, the prohibition of slavery and modern forms of slavery will be used as an example.

4.5.3 Current good practices in determining the responsibility of the State.

One of the practices that can be seen in all the decisions of the adjudicative bodies considered in this thesis, is the description in general terms of the rights breached.¹⁶² One of the things noticed in the study of the different cases incorporated into chapter 3 is the fact that adjudicative bodies begin their analysis with a broader perspective of what the right under scrutiny encompasses, contextualising a possible breach in a general manner.

An overview of how IHRL understands a specific substantive right without any reference to a specific context or the specific circumstance of the case is a good practice that should remain as it provides a basis for intersectional analysis. However, this should not be the

¹⁶² This can be seen in I/A Court H.R., Case of Chinchilla Sandoval et al. v. Guatemala; Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs; Case of Duque v. Colombia. Preliminary Objections, Merits, Reparations and Costs; Case of González et al. ('Cotton Field') v. Mexico; Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs; Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs; Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs; Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs; Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs; Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs; Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits; Case of Suárez Peralta v Ecuador. Preliminary Objections, Merits, Reparations and Costs; Case of Women Victims of Sexual Torture in Atenco v Mexico. Preliminary Objection, Merits, Reparations and Costs or European Court of Human Rights. Cînta v Romania (Application no. 3891/19); Garib v The Netherlands. App. No(s). 43494/09; Konstantin Markin v Russia (Application no. 30078/06) and S.A.S. v France. App no 43835/11. (ECHR, 1 July 2014)

only reference to the obligations the state should have complied with; the court should not stop its analysis at this point and expect to apply single-axis interpretations of rights to multiply-burdened individuals as they are inadequate for cases dealing with intersectional subjects.¹⁶³ For example, if the court is trying to assess if a poor, migrant man has been subjected to modern forms of slavery, it does not contradict the use of intersectional analysis if adjudicators begin the analysis by reflecting on the prohibition of modern slavery without making reference to intersectionality, intersecting identities or multiply-burdened individuals¹⁶⁴.

4.5.4 How did the rights of multiply-burdened individuals were affected when determining a state's compliance with human rights obligations.

4.5.4.1 How the intersectional context of harm relates to the obligations with which the state did not comply

So far, the proposed method of operationalisation of intersectionality in the merits stage has tried to narrow the analysis of human rights obligations from a general and abstract conception to a specific and individualised one. Part of this includes situating the intersectional analysis in the national context. Using the intersectional context analysis, the courts can determine how the state breached the rights of multiply-burdened individuals. This will show if there has been any historic or systematic abuse of the rights

¹⁶³ Busquier, '¿Interseccionalidad en América Latina y el Caribe? La experiencia de la Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora desde 1992 hasta la actualidad'; Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos'; Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' and Lacey, 'Legislation against Sex Discrimination: Questions from a Feminist Perspective', 413-414.

¹⁶⁴ This is similar to what adjudicative bodies currently do in documents such as Human Rights Council. Current and emerging forms of slavery Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences. Forty-second session. 9–27 September 2019. Agenda item 3. A/HRC/42/44.

of multiply-burdened individuals that share characteristics with the victim of the case before it.

Intersectional context analysis should be used as a macro framework where the individual harm is embedded; consequently, the courts could move from general concepts into more specific violations interpreted in the context of the intersecting identities. If in the hypothetical case the victim of slave labour is a poor migrant woman with disabilities, the intersectional context analysis would deal with the particular structures that have marginalised women, people with disabilities and people who are migrants.¹⁶⁵ However, intersectional analysis requires adjudicators to think about these issues as simultaneously interacting with each other. For example, what are the broader structures of oppression that allow for the marginalisation of poor women with disabilities, women who are migrants, people with disabilities who have migrated to another state and live in poverty and the combined marginalisation of a poor disabled migrant woman. Adjudicators who decide to follow this operationalisation process have some freedom in how they frame the analysis, as long as it is done bearing in mind that they must include the simultaneous existence of the identities of the victim.

If we translate this into a practical example, the adjudicative body would be able to determine how Mexico has contributed to vulnerable groups being forced into slave labour.¹⁶⁶ Following the example of the prohibition of modern forms of slavery and slavery, what is expected in the analysis is for the court to determine if people who are

¹⁶⁵ For the purpose of clarity, the identities have been listed in isolation.

¹⁶⁶ Comisión Nacional de los Derechos Humanos. Diagnóstico sobre la Situación de la Trata de Personas en México. 2013. México available at https://www.senado.gob.mx/comisiones/trata_personas/docs/Diagnostico_Trata.pdf.

poor and have migrated are more likely to see their right to not be subjected to slavery breached. The court would also need to address how the state should have acted to prevent people from low economic backgrounds from migrating to other states and becoming victims of slavery, or the measures that the state needed to implement to prevent migrants from being used as forced labourers.¹⁶⁷ In this example, the court should take the opportunity to address how the state failed to make efforts to fight modern methods of slavery when dealing with already vulnerable groups that are multiply-burdened such as immigrants living in poverty.¹⁶⁸

Amongst the possible conclusions that adjudicators could reach at this level of analysis is how Mexico has systematically failed to protect migrants that are poor, while providing all the institutional support to those individuals who are rich or middle-class migrants. The conclusion in the intersectional context analysis is to simultaneously address the economic conditions that lead to the migration of poor people and the conditions that allowed for the enslavement of those poor migrants. If employers and labour authorities in Mexico constantly ignore their duty to protect migrant workers based on their economic status, then the adjudicative body could find that this is a situation of marginalisation of multiply-burdened individuals that goes beyond the individual case. This could eventually translate into measures that are more precise to tackle the structural issues that could guarantee that similar human rights violations will either not occur, or they will be properly addressed.

¹⁶⁷ Marcia Vasconcelos and Andréa Bolzon, 'Trabalho forçado, tráfico de pessoas e gênero: algumas reflexões' (2008) 31 *Cad Pagu*.

¹⁶⁸ Cristiana Costa da Rocha, 'Os retornados: reflexões sobre condições sociais e sobrevivência de trabalhadores rurais migrantes escravizados no tempo presente' (2012) 32 *Revista Brasileira de História* 149.

4.5.4.2 How the harm of the individual, that resulted from the state not complying with their human rights obligations, had a different manifestation because the victim is multiply burdened.

Although in some cases adjudicative bodies are already implementing certain rights with intersectional identities in mind,¹⁶⁹ the practice is not widespread. There is a change from describing how the state did not ensure the enjoyment of the right to all individuals to a narrower focus on the enjoyment of human rights as experienced by multiply-burdened individuals. What is suggested in cases that require an intersectional analysis, the adjudicative body should establish what obligations exist in IHRL that correspond to the harm suffered by individuals who are multiply-burdened. This aspect of the process of operationalisation differs slightly from the current practice where adjudicative bodies concentrate on certain groups such as indigenous people or children,¹⁷⁰ and the special measures that need to be taken in order to guarantee their rights. Instead, the focus of the analysis is the intersections of each social category and how these intersections create a need to implement positive obligation towards fulfilling their human rights. The intersections of social categories in their marginalisation and not the social categories themselves should be the main objective of intersectional analysis.

The analysis of differentiated effect needs to recognise that single-axis frameworks are not equipped to deal with situations where the effect a violation of human rights has

¹⁶⁹ See UN Committee on the Elimination of Discrimination against Women. *Alyne da Silva Pimentel Teixeira ('Alyne') v Brazil*.

¹⁷⁰ A discussion on how special measures are currently being used can be found in Anne F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1.

simultaneously touched different identities of the same individual, nor are they the appropriate tool to assess interlocking systems of oppression.¹⁷¹

If the victim of the hypothetical case is a poor migrant man from Central America who has been subjected to slave labour in Mexico, then the analysis of the court should respond to those identities.¹⁷² In Mexico, migrant workers who are trying to reach the US to escape poverty are the main group subjected to modern forms of slavery. The diversity of the individuals who are migrating creates different interlocking systems of oppression. It is not the same experience for an internal Mexican migrant than that of those who are not Mexican nationals, as the latter face aggravated forms of oppression such as discrimination and violence at the hands of the authorities and the citizens of Mexico.¹⁷³

Those differences that manifest in real life are fundamental to determining how the state violated the human rights of the victim. In the example, one could argue that it is possible that the existence of measures envisioned exclusively for the protection of Mexican nationals migrating to the US might enable the violation of the human rights of people coming from Central America. The same can be said about slave labour. It has been found that the experience of being the victim of slave labour in the country of which the individual is a national is different to that of immigrant victims, particularly if they are in an irregular situation.¹⁷⁴

¹⁷¹ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' and Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'

¹⁷² Comisión Nacional de los Derechos Humanos. Diagnóstico sobre la Situación de la Trata de Personas en México.

¹⁷³ *Ibid*

¹⁷⁴ *Ibid*

4.6 Different qualitative experience of harm

According to the refined conceptualisation of intersectionality proposed in chapter 3, intersectional analysis in IHRL it contributes to uncovering the ‘different qualitative experience of harm’.¹⁷⁵ This is when the intersectional identities of the victim (the micro-analysis) are embedded in the interlocking systems of oppression (the macro-analysis)¹⁷⁶ to obtain a comprehensive intersectional analysis, as Patricia Hill Collins suggested.¹⁷⁷ The institutional and social processes that allowed for the violation in a specific context should be understood so the adjudicative bodies can suggest the state ways to reverse the patterns of inequality that exist within a society.¹⁷⁸

One of the concerns that have been expressed in this study relates to the homogenisation of members of social categories and, in human rights law, the homogenisation of victims.¹⁷⁹ Everyone, multiply-burdened or not, experience violations differently victimhood and harm are subjective experiences. Thus, adjudicators need to perceive and ascertain harm and victimhood as personalised. The focus of intersectionality is to shine a light on the differences between members of oppressed and marginalised groups and the extra layers of complexity that exist in those who are multiply-burdened.¹⁸⁰

¹⁷⁵ As defined in page 43 of this thesis

¹⁷⁶ Comisión Nacional de los Derechos Humanos. Diagnóstico sobre la Situación de la Trata de Personas en México.

¹⁷⁷ Collins, Black feminist thought : knowledge, consciousness, and the politics of empowerment.

¹⁷⁸ Nazombe and Blagojevic, Women At The Intersection: Indivisible Rights, Identities, And Oppressions A Study Guide, 16.

¹⁷⁹ This is extensively explained in Chapter 2, particularly when addressing the genealogies of intersectionality and the concept of it in feminist theory.

¹⁸⁰ Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' and Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

The terms ‘differentiated impact’ or ‘different qualitative experience’ of an intersectional subject’ do not negate the possibility that victims of human rights violations, due to one identity, also experience harm differently. What these terms try to do is to make visible those experiences that have been obscured and made invisible as a result of the marginalisation and oppression to which the intersectional individual has been subjected.

The operationalisation of intersectionality seeks to transform the theory into a tool that can expose the harm to multiply-burdened individuals. However, because the uncovering of the harm is done in the context of adjudication, the harm translates into how the individual was prevented from enjoying their rights. Since harm manifests differently depending on the identities that intersect, it needs to be addressed in an individualised manner. This can sometimes refer to how the violation of human rights harmed the victim at the precise moment the violation took place, or the long-term effect the violation had on the victim, demonstrating the interconnectedness of identities.¹⁸¹

The adjudicative bodies should try to avoid language that assumes and imposes how a victim must or must not have felt when seeing their rights breached and should try and use the narrative of the victim, if available, to construct the harm endured. They could also assess how the harm the victim has expressed relates to the right that has been breached. While the suggestion made here could be applied to all cases, it is particularly important for cases where the victim is multiply-burdened because, as explained in the previous chapters, they are usually neglected by traditional legal systems.

¹⁸¹ Yuval-Davis, 'Intersectionality and feminist politics'; Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition' and Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful'.

To illustrate these steps, the case of *Azul Rojas Marin and another v Peru* will be used. The case deals with the detention and subsequent torture, including rape, of Azul Rojas Marin, a transgender woman who at the time of her detention identified as a gay man.¹⁸² When the Inter-American Court addressed the nature of the sexual violence endured by the victim, they did it in a generalised manner,¹⁸³ all the determinations about the effect that sexual violence has on a victim were extracted from cases in which the victims were cisgender women.¹⁸⁴ The only time the Court made an individualised analysis of the harm endured by the victim, it was done with reports submitted by expert witnesses.¹⁸⁵

Thus while the case rightly departs from the assumption that all cases of sexual violence are the same and tries to deconstruct the category of ‘rape victim’ by explaining how sexual violence manifests differently when perpetrated against gay men, other than from the brief use of the victim’s narrative to explain the acts of rape and the physical pain endured, there was an assumption that she felt shame and experienced sexual violence in the same way as the cisgender women that were the victims of the cases quoted in the judgement,¹⁸⁶ an assumption that was accompanied by language that essentialised all victims of rape.

The different qualitative experience of harm of the victim can also be constructed in opposition to the single-axis frameworks that constrain the understanding of the effect of human rights violations. Instead of trying to fit the harm experienced by a multiply-burdened individual with that of an individual being affected due to one identity,

¹⁸² I/A Court H. R., Case of Azul Rojas Marín et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 12, 2020. Serie C No. 402.

¹⁸³ *Ibid*

¹⁸⁴ *Ibid* Notes 190, 192, 193 and 207.

¹⁸⁵ *Ibid* paras 163-165.

¹⁸⁶ *Ibid* paras 163-165.

adjudicative bodies should try to demonstrate how they differ. The case of *Cuscul Pivaral et al.*, which is extensively described in the following Chapter, is a good example of the importance of the analysis of the different qualitative experiences of harm.¹⁸⁷

4.6.1 Chain reactions of violations

The operationalisation of intersectionality cannot be limited to the exact moment the violation takes place. Expanding the application of intersectional analysis to help make visible the further marginalisation the violation produced, will be part of something called the ‘chain reactions of violations’. According to Bouchard and Meyer-Bisch, the concept of intersectionality could be broadened beyond intersectional discrimination because human rights violations could overlap.¹⁸⁸ They argue that this occur because there could be a chain reaction of violations:

The interdependence of human rights violations could be intersectional, it also pointed towards interdependence in the form of chain reactions. This type of interdependence became particularly evident when we looked into what happens after the original nexus of violations occurred. What we saw was that the original violations had far-reaching impacts in terms of chain reactions of violations.¹⁸⁹

What must be rescued from this quote is that intersectional analysis should be applied to cases of discrimination and all types of human rights violations because the condition to apply it is not the presence of a discriminatory act but the presence of intersecting characteristics that are linked to the violation and make the victim multiply burdened. Using intersectional analysis to determine the violations allows for a more comprehensive

¹⁸⁷ I/A Court H.R., Case of *Cuscul Pivaral et al. v Guatemala*. Preliminary Objection, Merits, Reparations and Costs.

¹⁸⁸ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?'

¹⁸⁹ *Ibid*, 197.

and nuanced understanding of the issues under scrutiny.¹⁹⁰ In other words, by including the chain reactions of violations in intersectional analysis, adjudicators will be able to assess how the situation in which the initial violation put the multiply-burdened subject increased their state of vulnerability and exposed them to further human rights violations.¹⁹¹ Furthermore, the chain reactions of violations could even provide a better understanding of the impacts of discriminatory acts that occurred in a single-axis manner and the consequences of that single-axis act impacted other identities simultaneously, thus the impact and not the initial violation is what requires an intersectional analysis. The case studies in Chapter 5 illustrate this as in both cases the violation (denial of medical services) produced a chain reaction of further violations.¹⁹² In some instances, the inequality that members of certain groups endure is so constant that it is not possible to identify which human rights violation had an effect or which made them multiply-burdened.¹⁹³

Similarly, limiting the use of intersectionality to identities that were directly affected by the violation would not be enough because a violation might not limit its effect to the intersection of identities that are relevant at the precise moment the human rights of the victim were being breached. The harm experienced might as a consequence have a future effect on other intersecting identities that were not directly affected by the violation.¹⁹⁴ An example of this could be a situation where the right to health is breached. In this

¹⁹⁰ Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights', 908

¹⁹¹ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 196.

¹⁹² See Chapter 5. Particularly, the facts of the cases

¹⁹³ Bouchard and Meyer-Bisch, 'Intersectionality and Interdependence of Human Rights: Same or Different?', 196.

¹⁹⁴ Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color'.

hypothetical case parents acquire health insurance because their child is diagnosed with a life-threatening syndrome, the health insurance is supposed to cover all the medical expenses to keep their child at home receiving their medical treatment. However, one day the insurance company unexpectedly changes their internal rules and decided they were no longer going to provide the in-home treatment for the child, as a consequence, the parents need to pay for the treatment. Even when the parents try all judicial procedures to get their child's treatment reinstated, this takes place five years after the initial violation. Without the medical treatment, the child can die, so for the five years the insurance did not cover their in-home treatment, her parents need to cover all the expenses. The initial violation, a violation to the right to health, impacted other identities of the child, in this scenario could be that the family was a working class family and having to cover the medical expenses aggravated their situation and almost left them in a situation of poverty, also they live in a remote area where access to a hospital is not easy, without the insurance they cannot afford a 24/7 access to a medic nor can they afford an ambulance so if their child suffers any problem that requires hospitalization they will have to overcome more hurdles to ensure their child can have access to their right to health.

In conclusion, the initial violation was not the consequence of the intersection of one or more social categories that made them vulnerable, but the consequences of said violation did impacted their intersecting identities. Thus, the operationalisation of intersectionality proposes to include in the analysis not only how the intersecting identities shape the way in which the victim experienced the actual violation but also the consequences of it, showing how the violation caused harm to the victim.

4.7 Conclusion

The operationalisation of intersectionality is not an easy task for international human rights adjudicators but is an invaluable tool that will help harness intersectionality as an approach to international law, and one which is closer to the feminist methods, message and objectives of the theory. In IHRL, there is a gap between the theoretical use of intersectionality in soft law and the implementation in adjudicative processes. Unfortunately, no adjudicative body has tried to clarify the steps they follow in their operationalisation of intersectionality although it is widely used. A process of operationalisation that encompasses all the elements of intersectional theory is long overdue.

The recognition of the personal identities of the victims that have intersected to create a unique experience reinforces the idea that, at the centre of human rights adjudication, is the individual. Instead of constraining human rights into international standards envisioned for single-axis lives, the proposed process will tend to all the intersecting identities of the victim that surface during all stages of the procedure at the international tribunal. The process proposed tries to harmonise the theoretical discussions surrounding intersectionality with the practicalities of international human rights adjudication and so apply it without losing its essence and its purpose, which has so far not happened.

While all the ideas presented come from theoretical discussions of intersectionality, the operationalisation process itself is a completely new proposal. The novelty of its argument relies on the fact that the process shows why and how intersectionality should be used in adjudications of human rights. Operationalising this theory to serve as a tool in

adjudication demonstrates the flexibility of using intersectionality as an approach to IHRL and also demonstrates how far removed the current use of it in the judicial and quasi-judicial functions of international bodies is from the ideas that surround the theory in feminism.

The role of the adjudicative body will be both passive and active; adjudicators will be able to point out the intersectional identities and the differentiated impact of harm even when the victim is unable to see it. On other occasions, the adjudicator needs to take a step back and allow the victim to express either the content of their suffering and their own complex lives or their desire to not be subjected to intersectional analysis. This collaboration ensures that the process of adjudication does not fall within an uneven dynamic of power between a powerful institution (the human rights adjudicative body) and the individual, especially when the result of this unbalanced relationship could be that the assumptions and understandings of the powerful player overcome the needs and the voice of the individual.

If the purpose of operationalisation is to bring justice in the most comprehensive manner possible, then intersectionality must attend to both the merits of the case and the obligations of the state. Therefore, the process must establish which specific obligations were not met by the state and how this caused the harm suffered by the individual, including the broader context of oppression. This will be done by ensuring that the analysis of the merits of the case is specific to the intersectional context. The merits section tried to include traditional aspects of adjudication, such as describing general measures to protect rights, in combination with intersectional approaches that could help tailor the analysis to the harm of the victim and could bring to the centre those who have been existing at the margins of the protection of human rights.

Chapter 5. The operationalisation of intersectionality in cases adjudicated by the IACtHR.

The point of intersectionality analysis is not to find 'several identities' under one.... This would re-inscribe the fragmented, additive model of oppression and essentialise specific social identities.¹

5.1 The importance of implementing intersectionality in real-life cases.

The case studies in this chapter will illustrate how the complexity of intersectionality does not impede its operationalisation. Using case studies as part of the operationalisation process will present in a real-life context a proposal that could otherwise seem abstract and theoretical. The case studies will cement the novel aspects of Chapter 4, as they will demonstrate how when using intersectional analysis as the proposed operationalisation the adjudicative body will be able to better articulate the harm which would result in a more accurate portrayal of identities, this more nuanced way of acknowledging the victim is important in and of itself but it could also lead to differentiated awards for reparations, as it will be explained in the conclusion of the thesis. They also illustrate, beyond the theoretical, how refining the concept and implementation of intersectionality theory will benefit human rights adjudication. These case studies are the perfect example of how using intersectionality to analyse only autonomous violations of the prohibition to discriminate limits the usefulness of intersectionality and creates an inadequate standard for its application.

¹ Yuval-Davis, 'Intersectionality and feminist politics', 205.

Two cases from the IACtHR have been selected because intersectionality has already modified how the Inter-American System of Human Rights decides cases where the victims are multiply-burdened. For example, the application of intersectionality in cases of women, indigenous peoples and afro-descendant communities has already transformed the states' obligations to guarantee, protect, respect and fulfil the rights of these communities.²

The use of case studies is an exercise to confront the theory of intersectionality with the complexities of real victims and real human rights violations. A theory imagined for all victims in all scenarios might not be able to detect its shortcomings unless used in a case with an identifiable victim and identifiable violations.

*Cuscul Pivaral et al. v Guatemala*³ and *Gonzales Lluy and family v Ecuador*⁴ demonstrate how intersectionality is being implemented inconsistently and arbitrarily. The original judgements both include a request from the victims and third parties to use intersectional analysis, but the Court refused to apply it to most of the victims in the former case while in the latter intersectionality played a central role in the judgement. This is particularly striking as the cases have similar violations and the victims are clearly multiply-burdened individuals. While this discrepancy will be explored in the following sections, the main issue with both cases is that, for anyone bringing forward a complaint where the victim is

² Zota-Bernal, 'Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos', 76 and Claudio Grossman, 'El futuro del Sistema Interamericano de Derechos Humanos' (2005) 3 Saberes: Revista de estudios jurídicos, económicos y sociales 1.

³ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs.

⁴ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs.

multiply-burdened, the court has little guidance on how, when and why intersectionality will be used in the adjudication of a case.

The chapter will imagine how the judgements from the cases selected would have looked like if the operationalisation process proposed in the previous chapter had been applied by the judges. It begins with a brief description of the facts of the cases and the way intersectionality was applied by the Court, if at all, followed by the reimagined judgement. It seeks to show how human rights adjudication is in desperate need of a standard concept and implementation of intersectionality.

5.2 Selection of cases

To show that standardisation matters and the current lack of cohesion in the application of intersectionality can result in vastly different outcomes, two cases with virtually identical intersecting identities and closely related facts were chosen. Although the Inter-American Commission of Human Rights has a wide collection of reports and decisions which show a more comprehensive and updated understanding of intersectionality, the two chosen cases are judgements decided by the IACtHR. Instead of comparing decisions obtained via different procedures and with different mechanisms of implementation that could influence how intersectionality is operationalised, using cases only from the Inter-American Court reduces the number of variables that could have played a role in how intersectionality affected the judgement. Hence, it was decided that the implementation of the operationalisation process would benefit more of an analysis before a judicial body than from a non-binding decision by a quasi-judicial body.

One of the characteristics of the implementation process described earlier was the multiply-burdened nature of the victims that would benefit from the process. This created a first filter to select the cases; all those cases that had one or more multiply-burdened individuals as victims were considered for inclusion. They were later categorised between those which had one victim and those with several victims to corroborate that the implementation of intersectionality can be done regardless of the number of victims. *Cuscul Pivaral et al. v Guatemala* and *Gonzales Lluy and family v Ecuador* were selected. Each deals with the intersection of HIV positive status and poverty alongside other marginalised identities, and the facts of each relate to the inability of the victims to access health services and live a life free from discrimination. In the specific case of *González Lluy et al. v Ecuador*, this was the first case where the IACtHR used intersectionality as a tool to adjudicate human rights. Judge Ferrer Mac-Gregor in his concurring opinion points out that ‘for the first time, the Inter-American Court used the concept of ‘intersectionality’ to **analyse the discrimination**’.⁵

There are some concerns about the use of these two lesser-known cases instead of more iconic cases such as *Cotton Field v. Mexico*,⁶ especially considering that the English-speaking literature on the Inter-American System of Human Rights tends to analyse the

⁵ I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Concurring Opinion Judge Eduardo Ferrer Mac-Gregor Poisot. Paragraph 2. The emphasis is not present in the original opinion.

⁶ The Cotton field case relates to the inadequate response (lack of measures for protection of the victims, prevention of crimes in spite of a patten of femicides in the country, lack of due diligence in the investigation of the homicides, denial of justice and inadequate reparation) of the authorities of Mexico in the disappearances and subsequent deaths of Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez in Ciudad Juárez on November 6, 2001.

previously mentioned *Cotton Field* case quite often.⁷ *Cotton Field* was the first case decided by the Inter-American Court where the subject of femicide was extensively discussed by the adjudicative body. It is also a landmark decision on the protection of the rights of women and girls. With this in mind, it could be argued that it makes more sense to use the proposed method of operationalisation in a case like *Cotton Field* because it is more alive in the collective imaginary and is a key case from the IASHR, yet the selection of cases was also informed based on these reasons, since the intention was to contribute to the literature it made more sense to show how intersectionality can work in every case, whether they are iconic for women's rights or not. Both *Cuscul Pivaral* and *González Lluy* are significant for the jurisprudence in the right to health and children's rights but are not the cases that one would immediately think of when addressing women's rights.

The author of this thesis vehemently agrees with Patricia Hill Collins in her statement that intersectionality is not synonymous of feminism⁸ and, one could also add, is not synonymous with being a woman. This does not mean that intersectionality should not focus on women's rights, what the rejection of a landmark decision on women's rights means is that the literature should explore the possibility (and possible consequences) of expanding the scope of intersectional analysis to include subjects that are not traditionally the focus of feminism or women's right such as indigenous women or multiply-burdened

⁷ For example, see Ruth Rubio-Marín and Clara Sandoval. "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the 'Cotton Field' Judgment." (2011), *Human Rights Quarterly* 33, 4, 1062–91; Rebecca Cook. "Lessons from the Cotton Field Case About Gender Justice." Proceedings of the Annual Meeting (American Society of International Law) 104 (2010), 565–67; Rosa M. Celorio. "González ('Cotton Field') v. Mexico (Inter-Am. Ct. H.R.), Introductory Note by Rosa M. Celorio." (2010), *International Legal Materials* 49, 3 637–761; Caroline Bettinger-Lopez, "The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case." (2011), *CUNY Law Review* 15, 2, 315–34.

⁸ Collins, *Intersectionality as critical social theory*, 107.

men. In other words, it is time to question thoroughly what could happen if intersectionality is used to analyse the effect of a human rights violation of a victim that is privileged but for two or more identities that intersect?

The conclusions reached on chapter 3 demonstrate how in practice it is very easy to use intersectionality as a default whenever the victim is identified as a “woman”. While it makes sense that adjudicative bodies like CEDAW Committee do it, it is less clear the role intersectionality plays in IHRL cases when the multiply-burdened victim is not a woman or when the adjudicative body is dealing with a violation of, for example, right to property. Based on this, it was important to avoid reproducing this practice and *Cuscul Pivaral* was key to it as it presented a wider variety of victims, having heterosexual men, indigenous men and men who have sex with other men, to name a few, allowed a wider gender perspective in the use of intersectionality.

The structure to implement the operationalisation process was the same in both cases. First, there is a brief description of the case, followed by an explanation and critique of how the Inter-American Court decided them to demonstrate the inconsistencies in the use of intersectionality. Finally, intersectional analysis, as proposed in this thesis, is applied in order to see how the outcome would differ from the original judgement.

Two moments can be identified as part of this reimagination: the work of the judges before the judgement, and the merits. The work of the judges will cover all the pre-judgement tasks explained in the operationalisation of intersectionality: the identification of the intersectional identities of the victim, consulting experts and the victim (when available) to gather information, determining if there are any dynamics of power that played a role in the violation and establishing the intersectional context analysis. The merits sections of the

judgements include many different aspects that, if they were to be analysed and reimagined, would result in massive pieces of work that depart from the purpose and objective of a case study within a doctoral thesis. Hence, one violation and one victim and in *Cuscul Pivaral* one subgroup of victims will be selected from each case to show how the judges decided that specific issue and how intersectionality can and should be used in the adjudication of IHRL.

5.3 González Lluy et al. v Ecuador

5.3.1 Facts of the Case

Talía Gabriela Gonzáles Lluy was three years old and living in Ecuador when she contracted HIV as a result of a blood transfusion. This case establishes the different moments at which the state of Ecuador was responsible for the violation of her right to a dignified life and personal integrity. It also deals with the international responsibility incurred by the state for, amongst other things, not complying with the special duty of care they owed to Talía on account of her being a child.⁹

In 1998 Talía was living in Cuenca, Ecuador when she was diagnosed with thrombocytopenic purpura in a private clinic. Her condition required an emergency blood transfusion.¹⁰ Her mother, Teresa Lluy, resorted to the services of the Blood Bank of the Red Cross of Azuay (Ecuador), where she was advised that she needed to find blood donors. Teresa asked some acquaintances to donate blood for Talía, including Mr HSA who at the time was not aware of his status as HIV positive. Due to the urgent need, Talía

⁹ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs.

¹⁰ *Ibid* para 75.

was to receive the transfusion on the same day the donors had given the blood.¹¹ A day later, personnel of the Red Cross of Azuay tested Mr HAS's blood for the first time and a week later he was notified of his condition as HIV positive. It was almost 3 months later that Talía was tested for HIV, and it was confirmed she was also infected.¹² None of Talía's family members were living with HIV. After several tests, it was confirmed she had been infected as a result of her blood transfusion. According to one of the victims, the medic treating Talía told them that he was willing to keep helping her as long as her mother would not denounce the infection to the authorities. Furthermore the same medic told Talía's brother that without his help she would die by the time she was 5 years old.¹³ For approximately 10 years, Talía received medical treatment at the Military Hospital of Quito.¹⁴

The Lluy family endured further marginalisation on account of Talía's condition. For example, when Talía was 5 years old she has registered on the "*Zoila Aurora Palacios*" school where she studied for just two months before her condition as a person living with HIV was made known by to teacher and the head of school who then proceeded to remove her from the school.¹⁵ Talía was expelled from her primary school on the basis that her HIV positive status represented a threat to the health and well-being of other children. Despite multiple medical opinions that pointed out the almost non-existent risk of Talía passing her illness to another child, the state decided to deny her right to education. Talía's

¹¹ *Ibid* para 76.

¹² *Ibid* para 78.

¹³ *Ibid* para 84

¹⁴ *Ibid* para 148

¹⁵ *Ibid* para 133

mother tried to get her reinstated in school, yet the national tribunals ordered that Talía be educated at home and without any other child around.¹⁶

When Talía was able to study, she had to do so in an almost undercover manner as she was not registered as a student, was unable to partake in school's activities and the school's authorities would have to constantly deny her presence at school. Additionally the state launched a harassment campaign against her and everyone who would help her access education.¹⁷ Amongst other things, Talía was forced to attend school in secret, which meant that she was not officially enrolled and no one outside the school's staff could know she was studying at that school. To make matters worse, the state authorities would constantly visit the school where Talía was secretly studying to question whether the Head of the school had allowed Talía to enrol there. When the whereabouts of Talía would not be disclosed to the authorities, then the Head of school would be threatened with the termination of her contract on the basis of helping Talía access education.¹⁸

Teresa was fired from her job once the company she worked for found out her daughter was living with HIV.¹⁹ This forced Teresa to apply for a poverty *amparo*²⁰ that would grant her a waiver of court costs so she could file a civil action for damages suffered as a consequence of the HIV infection. It was recognised by the Court that, as a consequence of Talía's HIV positive status, the family was unable to rent a house or have a permanent

¹⁶ *Ibid* para 144

¹⁷ *Ibid* Section X.

¹⁸ *Ibid* para 279.

¹⁹ *Ibid* paras 214, 217 and 223.

²⁰ An *amparo* is a judicial remedy for the protection of constitutional and individual rights available in many jurisdictions in Latin America. In González Lluy, this judicial remedy sought to recognise the family's status as people living in poverty in order to protect Teresa's right to access to justice.

address. They were either denied a place to rent or had been asked to move out of the accommodation they had managed to find.²¹

5.3.2 Exploring the operationalisation of intersectionality in the decisions of the IACtHR

In its judgement, the Court used intersectional analysis in specific instances to determine the qualitatively differentiated harm that resulted from the barriers faced by Talía. The IACtHR recognised that the condition of multiply-burdened Talía had been due to her age, gender, disability, economic situation and health.²²

In section X-B.5 of the judgement, the Court uses intersectionality to establish the scope of the discrimination endured by Talía.²³ There is no use of intersectionality to determine any other right, although this could be attributed to the fact that some of the claims brought forward by the representatives of the victims were dismissed. The representatives of the victims claimed that Talía's right to health under article 26 (progressive development) of the ACHR was breached due to a lack of access to medical treatment and argued that she did not access the appropriate care that takes into consideration her intersecting characteristics. However, the Court dismissed this claim based on the fact that the representatives did not provide further details of how this deficient medical treatment took place. The lack of information and the inability of the Court to see a breach to the right to health appear to be one of the reasons as to why intersectional analysis was not used in certain sections of the judgement.²⁴ Nonetheless, section X-B.5 is a great contribution to

²¹ *Ibid* para 155.

²² *Ibid* paras 289 and 290.

²³ *Ibid*

²⁴ *Ibid* para 192-205

the case-law of the IACtHR. However, it suffers from a concerning issue – the use of intersectionality is confined to a violation to the right not to be discriminated against and it is not made part of the analysis of any of the other human rights allegedly breached.

Intersectional analysis is used as a starting point to describe how there is a general context of oppression endured by all individuals who have an HIV positive status in conjunction with another identity that renders them multiply-burdened.²⁵

First, a determination is done taking into account the general obligations states have to promote equality for girls.²⁶ The judgement includes a recognition of how the historic discrimination experienced by women throughout their lives increases the risk to suffer human rights violation, as such the way HIV/AIDS impacts the life of women should be examined taking into account gender roles and the marginalisation already endured by women.²⁷

Later on, the Court also recognises how there is a double victimisation endured by children living with HIV/AIDS, according to the Court discrimination itself is what causes children to be vulnerable to contracting HIV/AIDS. This means that discrimination is both the cause and the consequence of children like Talía being considered multiply-burdened. Furthermore, the IACtHR also recognised that children who live in remote or rural areas do not have access to medical services causing a greater harm.²⁸ The Court compared the

²⁵ *Ibid* para 298

²⁶ *Ibid* para 285-287.

²⁷ *Ibid* para 288

²⁸ *Ibid.* para 287.

needs of a multiply-burdened subject such as Talía to those of children not living with HIV without looking at the other factors that intersected.

Finally, the merits of the case focus on the situation of poverty experienced by Talía and her family, according to the IACtHR the manner in which the family faced the HIV was conditioned by their economic resources. Their economic situation was not overcome due to Talía's health, her mother was fired from her job because of the stigma associated to HIV and later she also experienced difficulties to maintain herself employed due to the same reasons.²⁹

The use of the words intersectionality, intersecting or intersected is also usually followed by the term discrimination, difference or differentiated treatment. For example:

The Court notes that, in Talía's case, numerous factors of vulnerability and **risk of discrimination intersected** that were associated with her condition as a minor, a female, a person living in poverty and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors but also arose from **a specific form of discrimination that resulted from the intersection** of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.³⁰

The intersection of age, health status and residency are all included in the decision, and they also correspond to the intersecting identities that Talía has. *González Lluy* is significant because the judges recognise that the nature of the discrimination endures changes depending on the factors that intersect. So for example, the IACtHR says that poverty played a role in the infection as their limited economic resources prevented Talía and her family from accessing medical treatment of the highest quality. Furthermore, this

²⁹ *Ibid* para 288

³⁰ I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 290. The emphasis is not present in the original judgement.

same situation of poverty impacted their right to housing and education. In the same paragraph, the Court also tries to connect how the lack of education on the basis of her seropositive status impacted her development as a girl, considering it is through education that women can overcome gender stereotypes. Finally, it was briefly considered how now, as a woman living with HIV, her life project has been halted as she has not received enough information to decide on matters that she deems fundamental to her future, such as motherhood and having a partner.³¹

Human rights adjudicative bodies and feminist theory all agree that identities are not static concepts³² and they change depending on time and space, so it is encouraging to see that *González Lluy* did not depart from that standard. The Court recognises how HIV is not something that impacts individuals in a homogenous manner. This means that the Court decided to understand Talía's identities as dynamic, demonstrate a positive use of intersectionality. There is still some room for improvement, but it shows that the courts are capable of incorporating intersectionality without losing its method and message.

5.3.2.1 The Court's assessment

The IACtHR found that Ecuador was responsible for the acts perpetrated by a private entity. The duty of supervision and oversight belongs to the state because it is them who is responsible for the protection of the respective public good. When a person is admitted to a private hospital they are under the care of the state and as such the precariousness and

³¹ *Ibid* para 290

³² E.g. Puar, 'I would rather be a cyborg than a goddess': Becoming-Intersectional in Assemblage Theory' or UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 26 on women migrant workers

irregularities in Azuay's blood bank from which the blood came for Talía is a reflection of the state's non-compliance of the obligations to supervise and supervise medical centres.³³

The transfusion that resulted in Talía's infection has caused permanent damage to her health. Moreover, due to the severity of the risks associated with HIV and the danger of death that Talía has and might face in the future all amounted to a violation of the right to life (article 4) and the right to personal integrity (article 5) in relation to Article 1.1 of the ACHR.³⁴

In the previous section, the manner in which the IACtHR used intersectional analysis was explained, hence this section will not repeat the same details. However, it is important to add that the Court noted that Talía and her family suffered multiples instances of discrimination derived from Talía's condition as a person with HIV. In this sense, the Court found that despite the situation of vulnerability experienced by Talía, Teresa and Iván Lluy, Ecuador did not take the necessary measures to guarantee her and her family access to their right to housing, work and education without discrimination. Consequently, the State is responsible for the violation of the right to personal integrity (article 5.1) in relation to Article 1.1 and article 24 all of the American Convention.³⁵

The Court also found a violation the right to education contained in Article 13 of the Protocol of San Salvador, in relation to Articles 19 and 1.1 of the American Convention to the detriment of Talía Gonzales Lluy. This violation was found when the state did nothing

³³ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Para 47-52

³⁴ *Ibid* Para 41-61

³⁵ *Ibid* Para 62-81

to prevent Talía from being withdrawn from the “Zoila Aurora Palacios” kindergarten due to her medical situation. Based on these considerations the Court concluded that Talía suffered discrimination derived from her condition as a person with HIV, a girl, a woman, and living in poverty.³⁶

Finally, the IACtHR declared Article 8.1 in relation to Articles 19 and 1.1 of the American Convention breached because the state did not provide to Talía and her family with the judicial guarantees of due diligence and reasonable time in relation to the criminal proceedings brought against the medical personnel who participated in Talía’s blood transfusion.³⁷

The reparations ordered can be summarised as follows: a) the State had to provide free, immediately, timely, adequate and effective, medical and psychological or psychiatric treatment to Talía; b) the State had to adopt the medical recommendations of a trusted doctor indicated by Talía; c) the State publish had to publish the judgment in its entirety and its official summary. Likewise, the state had to hold a public act of acknowledgment of international responsibility in relation to the facts of this case; d) the state had to grant Talía a scholarship to continue her university studies and a scholarship to carry out a postgraduate degree at any university in the world; d) The Court ordered that the State provide Talía Gonzales Lluy with a decent home; e) Ecuador has to carry out a program for the training of health officials on best practices and rights of patients with HIV, as well as on the application of the procedures established in the Comprehensive Care Guide for

³⁶ Ibid

³⁷ Ibid Para 82-91

Adults and Adolescents with HIV/AIDS and all positive measures needed to avoid or reverse the situations of discrimination suffered by people with HIV.³⁸

5.3.3 Re-imagining González Lluy et al. v Ecuador

5.3.3.1 Using intersectional analysis to establish the basis of the case

González Lluy et al. v Ecuador distinguishes three victims; Talía González Lluy as the primary victim, and her mother Teresa Lluy and her brother Iván Lluy Lluy as secondary ones.³⁹ The operationalisation of intersectionality starts with the analysis of the identities of the victims and their conditions as multiply-burdened. An important characteristic of this case is the availability of narratives; in both the judgement of the IACtHR and in the submissions of the victims, it is possible to hear from the victims themselves how a human rights violation has affected the lives of those considered multiply-burdened.⁴⁰ By relying on the narratives of the victim, the Court allowed Talía and her family to provide a clearer explanation of how they live their identities and explained from their own experiences how the harm was experienced, this in line with the proposed operationalisation process. Based on these narratives, it was possible to systematise the identities the victims (see Table 1) as having relevance to: (a) the violation and consequent harm endured; (b) the chain reaction produced by that initial violation and that has impacted the victims after the violation has occurred and, c) how the facts demonstrate a need for an intersectional analysis of the case.

³⁸ I/A Court H.R., Case of González Lluy et. al. v. Ecuador. Judgment of 1 of September of 2015 (preliminary objections, merits, reparations and costs). Oficial summary.

³⁹ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 43.

⁴⁰ Alegatos finales escritos de los representantes de las víctimas. Talía Gabriela González Lluy (TGGL) y familia contra Ecuador and *Ibid.*

Table 1. Summary of findings

Victim	Intersectional Identities - violation	Intersectional Identities - Impacted after the violation has occurred.	Facts
Talía Gabriela Gonzáles Lluy	Child, living with HIV, living in poverty or with limited economic resources, woman. ⁴¹	Teenager, adult woman in reproductive age, student.	<p>When she was three years old, she contracted HIV as a result of a blood transfusion.⁴²</p> <p>The state expelled Talía from basic school when the teacher and head of school of the education centre she was attending found out she was HIV positive.⁴³ Talía was forced to study in secret when state officials launched a campaign to prevent her from attending any education centre that accepted to enrol her.⁴⁴</p> <p>Talía had to live in very precarious houses because she and her family were constantly expelled of their accommodation once the owners found out Talía was a person living with HIV.</p> <p>Talía had to endure an invasive gynaecological procedure when she was 3 years old to dismiss the possibility of rape.⁴⁵</p> <p>She has not received any information regarding sexual and reproductive health while living with HIV from any of the medical services provided by the State.⁴⁶</p>
Teresa Lluy	Woman, head of household, living in poverty or with limited economic resources, mother, relative of a	Health issues, unemployed. ⁴⁸	<p>Teresa Lluy was fired from her job once her employers found out she had a daughter with HIV.⁴⁹</p> <p>Teresa was prevented from exercising her right to a judicial remedy against the individuals who provided the contaminated blood.⁵⁰</p> <p>Teresa was forced into poverty and later indigence. The state recognised her status of the person living in poverty but did not allow her to claim civil damages against the state or the individuals who provided the contaminated blood.⁵¹</p>

⁴¹ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Section X-B.5.

⁴² *Ibid* paras 75-85.

⁴³ *Ibid* paras 133-134.

⁴⁴ Escrito de argumentos, solicitudes y pruebas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador. CDH-6-2014/001. 10 de Junio de 2014, 17 and 42.

⁴⁵ *Ibid* 11, 13, 49 and 50.

⁴⁶ *Ibid* 39.

⁴⁸ Escrito de argumentos, solicitudes y pruebas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador. CDH-6-2014/001, 28 and 29.

⁴⁹ *Ibid* 19-26 and 43.

⁵⁰ *Ibid* 49-51.

⁵¹ *Ibid* 24.

	person living with HIV. ⁴⁷		Teresa has suffered discrimination as a result of her daughter being a person living with HIV. ⁵² As a consequence of her litigation against the state and the discrimination her and her family have suffered, Teresa Lluy suffers from multiple health problems. ⁵³ Teresa was constantly expelled from the places she was living once the landowners found out her daughter was a person living with HIV. ⁵⁴
Iván Mauricio Lluy Lluy	Teenager, living in poverty or with limited economic resources, relative of a person living with HIV. ⁵⁵	Breadwinner, did not finish his studies, homeless, mental health issues. ⁵⁶	Iván had to quit studying to support her mother and sister. ⁵⁷ Iván was accused of sexually assaulting his sister and infecting her with HIV ⁵⁸ He has had to live on the streets. ⁵⁹ He suffers from depression and suicidal thoughts as a consequence of the discrimination and pressure he has had to endure as a relative of someone living with HIV. ⁶⁰

Given the limited space in this thesis, Talía González Lluy, as the primary victim, will be the only one subjected to a more detailed example of how an intersectional analysis should be undertaken and what would be the result of it. What Table 1 shows is how Talía’s identification as a multiply-burdened individual is closely linked to the multiple facts that are under analysis before the Court. For example, Talía’s living conditions were not only originated by her status as a person living with HIV, but it created a chain reaction that had an effect on her development as a child, a woman and her economic power. Hence, Table 1 will provide a visual aid to understand which acts demonstrate the intersectional oppression experienced by Talía as a child, woman and HIV carrier.

⁴⁷ Alegatos finales escritos de los representantes de las víctimas. Talía Gabriela González Lluy (TGGL) y familia contra Ecuador. CDH-6-2014/001. 20 de Mayo de 2015, 83.

⁵² *Ibid* 19-26.

⁵³ *Ibid* 26-30.

⁵⁴ *Ibid* 22 and 23.

⁵⁵ *Ibid* 25 and 26.

⁵⁶ *Ibid* 22.

⁵⁷ *Ibid* 25-26.

⁵⁸ *Ibid* 13.

⁵⁹ *Ibid* 26.

⁶⁰ *Ibid* 42 and 47.

5.3.3.2 Intersectional context analysis

The example of the context analysis is still quite limited as Ecuador only produces information and statistics regarding certain populations. The existing references to the situation of children living with HIV in Ecuador are focused on vertical transmission or access to healthcare once infected, and they do not explore the causes of the infection beyond that. For this reason, this section will explain how the Court could have filled the gaps in information regarding the context.

When an adjudicator is presented with a case, the intersectional context analysis will not be established by comparing the situation of the victim to that of another person who cannot be considered multiply-burdened.⁶¹ Talía's intersectional oppression cannot be compared to that of adults with HIV as some of her harm took place when she was a child and some when she has a teenager. She also cannot be compared to children who do not have HIV as their lived experiences are completely different. Neither can she be compared to adults who do not have HIV, or to boys living with HIV. Moreover, her economic class created an additional burden in her quest to have her right to life protected. Therefore, the adjudicator needs to establish how the social categories to which the victim belongs, in this case, a child (and later an adult woman) living with HIV who also lives in poverty, produced interlocking systems that oppressed and further marginalised her. What is expected of the judges is to determine the context of disadvantage in which Talía and other

⁶¹ For example see Bullock and Masselot, 'Multiple discrimination and intersectional disadvantages: Challenges and opportunities in the European Union legal framework', 61; Hanne, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination'; Roseberry, 'Multiple discrimination', 19; Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory' and Conaghan and Chudleigh, 'Women in Confinement: Can Labour Law Deliver the Goods?'

individuals who share her identities are living. In this section it will be demonstrated what the Court should have done in order to demonstrate a context of intersectional oppression in Ecuador.

The adjudicators need to ascertain if in Ecuador, at the time of the facts of the case, individuals living with HIV were oppressed due to their health and if this oppression intersected with other marginalised identities (women, children, people living in poverty) creating a more aggravated form of oppression. *González Lluy* has the particularity of not including much information regarding the intersectional context analysis in Ecuador. The following section will describe how to gather this missing data, however, below is one of the sections that judges should incorporate to understand how the violations took place, why they took place and how these violations have endured throughout time.

In Ecuador, the first cases of HIV were detected in 1984. In 2017, it was established that 36,544 people were living with HIV. The most affected group was people between the ages of 15 and 49 with a higher incidence in men.⁶² According to the Government, the most affected provinces are Guayas with 31.68% of new cases, followed by Pichincha with 16.51%, Manabí with 5.99%, Santo Domingo with 5.86%, El Oro with 5.75%, Los Ríos with 5.34%, Azuay with 5.28%, where Talía resides, Esmeraldas with 3.77% and Tungurahua with 3.14%.⁶³

⁶² Ministerios de Salud Pública del Ecuador available at <https://www.salud.gob.ec/vih/>.

⁶³ Ministerios de Salud Pública del Ecuador. Subsecretaría Nacional de Vigilancia de la Salud Pública. Dirección Nacional de Estrategias de Prevención y Control. Boletín Anual de VIH/sida. Ecuador -2020. Estrategia Nacional de VIH/sida-ITS available at <https://www.salud.gob.ec/wp-content/uploads/2021/06/Boletin-anual-VIH-Ecuador-2020.pdf>, 7

The girl child, teenagers and women are considered to be at higher risk of HIV/AIDS. Women in poverty are also recognised as having a higher degree of vulnerability.⁶⁴ Although the HIV/AIDS epidemic is prevalent throughout Ecuador, the efforts of the state tend to be directed mostly to high-risk groups such as teenagers, transsexual people, sex workers or men who have sex with other men.⁶⁵ There is almost no information surrounding HIV/AIDS in children and even less information on the transmission of HIV via blood transfusion.

This data is relevant to this case because it shows how: (a) the donated blood that was not tested led to a violation of the right to health for Talía, as it came from a man with the characteristics of one of the most affected populations; and (b) amongst the recognised ‘vulnerable groups’ for HIV/AIDS in Ecuador it is possible to identify characteristics that were present in Talía – she was a girl, later a woman, and she lived in poverty. In Ecuador, the oppression experienced by individuals who are HIV/AIDS positive is aggravated by gender, social class and sexual orientation. These interlocking systems of oppression affect how people living with HIV, such as Talía, access treatment.⁶⁶

According to Muñoz, in Ecuador there are 3 factors – economic, social and cultural – that affect people with HIV/AIDS. All are present, one way or another, in *González Lluy*. Economic factors such as the costs of travel to reach hospitals and medical centres or the long distances between the home of the patient and the hospital aggravate the situation

⁶⁴ Ministerios de Salud Pública del Ecuador. VIH/SIDE e infecciones de Transmisión Sexual en Ecuador. Available at <http://www.coalicionecuatoriana.org/web/pdfs/VIH-sida-ITS-en-Ecuador-MSP.pdf>, 1.

⁶⁵ Rubén Muñoz Martínez, 'Estigma estructural, adherencia al tratamiento antirretroviral y cultura organizacional de cuidados en la atención hospitalaria en VIH y Sida en Guayaquil, Ecuador.' (2018) 15 *Andamios* [online] 311, 318

⁶⁶ *Ibid* 321

endured by people living with HIV/AIDS. Talía and her mother explained on more than one occasion that they had to travel to a medical centre far from home due to the stigma experienced by Talía. Secondly, people with HIV/AIDS and their families tend to be discriminated against in the workplace. It is very difficult to access work, and this imposes a financial burden on the individual or their families.⁶⁷ This is also seen in this case when Talía's mother found herself unemployed due to the stigma associated with having a family member who was living with HIV. Finally, there is also a stigma surrounding being seropositive because medical and other state authorities tend to make assumptions about how a person got infected with HIV.⁶⁸ In this case, the entire state apparatus rejected the most obvious explanation of her getting infected via a blood transfusion and pursued the hypothesis of rape, suggesting Talía's brother had raped her or that her parents were also seropositive, and she had been infected at birth.⁶⁹

5.3.3.3 The active role of the adjudicators: using intersectionality to better judge

Because this step allows the Court to request additional information from experts and the victims to better judge, some examples of how it would work in practice will be explored. In *Gonzales Lluy* there is a noticeable gap in information regarding HIV/AIDS in Ecuador. The little information contained in the parties' submissions about how Ecuador has dealt with the epidemic prevents anyone from understanding if Talía's case fits into a context of intersectional oppression of people living with HIV who are multiply-burdened. This

⁶⁷ Rubén Muñoz Martínez, Representaciones sociales de la atención médica, el tratamiento antirretroviral y los cuidados en las redes comunitarias de las personas viviendo con VIH-Sida en Guayaquil, desde un enfoque de género, vol Beca Prometeo-Senescyt (FLACSO 2015)

⁶⁸ Muñoz Martínez, 'Estigma estructural, adherencia al tratamiento antirretroviral y cultura organizacional de cuidados en la atención hospitalaria en VIH y Sida en Guayaquil, Ecuador.', 321-333

⁶⁹ Escrito de argumentos, solicitudes y pruebas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador and I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 92.

presents a challenge concerning the intersectional context analysis because neither the representative of the victims, the *amicus curiae* nor the Inter-American Commission on Human Rights provided evidence to illustrate how people who live with HIV in Ecuador undergo additional barriers in the enjoyment of their rights. The Court should have requested, as part of its active role, additional information about the possible inequalities in Ecuador that caused Talía to suffer discrimination and other violations of her human rights. Inserting the case into a national context could provide a more comprehensive understanding of how the harm suffered by Talía and her family fitted in a broader context of oppression.

How the judgement stands makes it impossible to establish intersectional context analysis. However, a proposal on what sort of information could have been sought can be made. Ideally, this section of the judgement would have been constructed with the specific interlocking systems of oppression that operate in Ecuador. Because of the lack of information of the differentiated effect offered by the parties, the judges should have had an active role and requested information regarding the conditions of women with HIV, children with HIV, people living in poverty with HIV and infections through blood transfusion. The Court could have consulted right-to-health experts on the specific intersection of childhood and medical care. Maybe the findings of state responsibility would have been the same, however, the analysis of the extent of the harm and possible reparations would have been tailored to the victim.

The active role of the adjudicators comprises an interaction with the victim. In *González Lluy*, the narratives of the victims are available, so the Court has a solid starting point from where to identify the victim as multiply-burdened. However, the Court should also ask

Talía her view on how she is identified. It recognises that Talía is a woman, that she is living with HIV, that she has a disability and that she is poor,⁷⁰ and consequently she is subjected to an intersectional analysis. For example, the Court identifies Talía as a person with disabilities on account of the barriers she faced. According to the IACtHR:

historically, persons with HIV have been discriminated against owing to different social and cultural beliefs that have stigmatized the illness. Thus, the fact that a person is living with HIV/AIDS, or even the mere assumption that he or she has HIV/AIDS, may create social and attitudinal barriers to that person having equal access to all his or her rights. The relationship between this type of barrier and a person's health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case⁷¹

However, hypothetically, Talía might believe she is not a person with disabilities because she has not reached the apparent threshold of 'may create social and attitudinal barriers to that person having equal access to all his or her rights'. Thus this is the best procedural moment to inform the Court about her rejection of this approach. Of course, in the actual case study, the approach is applicable to Talía's situation but since it has been a controversial argument wielded by the Court it made sense to use it as an example of this sort of communications. Ideally, the Court should then keep analysing the barriers that she faces just not in the context of disabilities but also of health.

Another peculiarity about *Gonzales Lluy* is that at one moment during the public hearing, Judge Sierra Porto asked Talía why she was willing to present her case, knowing that she could potentially face greater stigmatisation.⁷² Initially, the case was processed at the

⁷⁰ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 285.

⁷¹ *Ibid* para. 236

⁷² I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Public Hearing of 20 of April of 2015 available at <https://vimeo.com/125856559> Minute 00:46.

Commission without revealing her identity. However, she decided to waive the anonymisation of her case once it reached the Court. This is not something discussed or included in the judgement beyond a simple note regarding the change in the name of the case.⁷³ However, it illustrates that, when dealing with multiply-burdened individuals, it is important for the judges to protect the individual from further marginalisation and oppression by simply asking them if they are aware of the possibility of future harm and if they consent to the level of exposure an international case brings. It is also a demonstration of the importance of the interaction between the judges and the victim.

The Court does not allow anyone outside of the process to consult the evidence submitted, hence it is not possible to assess whether there was any information in it about the differentiated effect underwent by the victims. In the brief containing pleadings, motions and evidence⁷⁴ and the final written arguments,⁷⁵ the petitioners asked expressly for an intersectional analysis of Article 24 (non-discrimination) of the American Convention on Human Rights. The Commission also argued during the public hearing that the discrimination suffered by Talía was aggravated as a result of the intersection of the different vulnerability factors.⁷⁶ The IACtHR listened to the request of the petitioners and used the voices of scholars of intersectionality⁷⁷ to issue *Gonzales Lluy et al. v Ecuador* the first and most iconic case of intersectional analysis in the Inter-American System.

⁷³ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Footnote Cover Page.

⁷⁴ Escrito de argumentos, solicitudes y pruebas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador.

⁷⁵ Alegatos finales escritos de los representantes de las víctimas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador, 83.

⁷⁶ Case of I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Public Hearing of 21 of April of 2015 available at <https://vimeo.com/125856559>. Minute 2:18:11.

⁷⁷ Such as Kimberle Crenshaw and Carol Aylward.

Which goes to demonstrate that adjudicative bodies such as the IACtHR must give due weight to the petitioners' request to incorporate intersectionality, including a brief reasoning of why they decided to use intersectional analysis (or not) in the judgement will help create a more robust literature on the operationalisation of intersectionality.

5.3.4 Implementing intersectionality as part of the judgement

The victims⁷⁸ argued that the state of Ecuador had violated Articles 19 (rights of the child), 4 (right to life) 5 (personal integrity) and 8 and 25 (judicial guarantees) in relation to article 1.1 of the American Convention. Due to space constraints, the merits stage will not cover all the identities nor all the facts, the use of intersectionality will be illustrated with the analysis of Article 4 as it applies to Talía. This choice was made mainly because the Court briefly argued the initial blood transfusion that resulted in the violation of article 4 was possible due to the intersection of her health condition (thrombocytopenic) and her economic resources. Additionally, the right was directly breached by the state as guaranteeing the right to health is an obligation that rests on the State even when the provider is a private entity.⁷⁹ This is in contrast with, for example, the right to housing where the responsibility of the state was due to their failure to protect Talía and her family from the discriminatory act perpetrated by a private individual.

The operationalisation of intersectionality in the merits stage allows adjudicators to initially frame the violation of a conventional right and the consequent harm considering

⁷⁸ In the present analysis the family of the victim are excluded from the analysis despite the fact the Court recognised them as victim with regards to the violation of article 5 (personal integrity).

⁷⁹ I/A Court H.R., Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149. Para. 89 and 90

the substantive right generally. For example, the Court could begin its analysis explaining how the right to health is conceived in the international *corpus juris*, providing some definitions of what it entails and even explaining the obligations of the state in the protection of said right.

In this case, the Court might analyse if, in the regulatory scheme of the right to health, Ecuador complied with the adaptability, accessibility, acceptability and quality (AAAQ) framework⁸⁰ to avoid inflicting harm on Talía. In this scenario, the Court needs first to explain how accessibility refers to the right of individuals to have access to health facilities, goods and services. Particularly when the person exercising their right to health is a person that has limited economic resources like Talía's family. In that matter the Court takes on the assessment made by CESCR and argues that:

Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, **including socially disadvantaged groups**. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;⁸¹

This means the state needs to take extra steps to ensure individuals who are living in poverty or have limited economic resources and experiencing some health issues, such as Talía, can have access to medical services that are of good quality and do not face an

⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) para 12. The emphasis is not in the original text.

⁸¹ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Para.173. The emphasis is not in the original text.

aggravated experience of harm either by accessing lower-quality private services or inappropriate State care.

Once the overview of the right to health has been and, as the Court did in the judgement a more general framework on the inspection and control of private blood banks by the state has also been explained, the Court can proceed with a more nuanced analysis of the right to health of multiply-burdened individuals. In the context of *González Lluy*, the Court should cover Talía's age, sex, health status and socioeconomic class.

Talía's infection is the origin of the chain reaction of human rights violations and the social barriers her and her family faced. The Court could have determined that studies demonstrate that when it comes to Latin America and the Caribbean there is a link between the economic power and new HIV infections.⁸² While 16 countries are classified as middle-income and two as high-income, Latin American is the world's region with the greatest income inequality.⁸³ In the context of *González Lluy*, the inequality in the region is relevant as poverty and HIV/AIDS usually intersect to create unique dimensions of harm. The intersection of seropositive status, age and any other condition of vulnerability accentuates the risk of multiply-burdened individuals such as Talía and contributes to the gravity of the epidemic of HIV/AIDS.⁸⁴

⁸² UN Committee on the Rights of the Child (CRC), General comment No. 1 (2001), Article 29 (1), The aims of education para 9.

⁸³ Leonardo Gasparini, Nora Lustig. The rise and fall of income inequality in Latin America. Society for the Study of Economic Inequality Ecineq, Working Paper Series (2011). 2011–213 and World Bank. Country and Lending Groups | Data. 2013. Available at: <http://data.worldbank.org/about/country-classifications/country-and-lending-groups#LAC>.

⁸⁴ UN Committee on the Rights of the Child (CRC), General comment No. 3 (2003): HIV/AIDS and the Rights of the Child para 7.

Children living with HIV/AIDS may experience intersecting oppression due to their economic marginalisation and health status.⁸⁵ When the victim of a violation of the right to health is a girl, there is an added interlocking system of oppression, as a girl child is more vulnerable to HIV due to several factors that include physical, social, economic, and policy-related interlocking systems of oppression.⁸⁶ For instance, the girl child is more likely to having her education denied,⁸⁷ in order to meet the family's needs, impoverished families withdraw their children from school and send them to work.⁸⁸ In many cases, this translates into 'HIV-related risk created by poverty and gender inequality for women'.⁸⁹ Despite this, according to García et al. there is very little information and studies that focus on how women in Latin America are at risk of contracting HIV when they do not belong to the categories of pregnant women and sex workers.⁹⁰

When it comes to Ecuador, is particularly telling that as early as 1998 it was public knowledge that on average 89.50% of blood donors were screened for HIV,⁹¹ which meant that there was a massive pool of 10.5% of blood donated that was not screened from where

⁸⁵ *Ibid.*

⁸⁶ Steffanie A Strathdee, Wendee M Wechsberg, Deanna L Kerrigan, Thomas L Patterson. HIV prevention among women in low- and middle-income countries: intervening upon contexts of heightened HIV risk. (2013) *Annu Rev Public Health*. 34:301–16.

⁸⁷ 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 para 21 and Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para") article 9.

⁸⁸ Human Rights Watch. *Failing our children. Barriers to the Right to Education.*

⁸⁹ Steffanie A Strathdee, Wendee M Wechsberg, Deanna L Kerrigan, Thomas L Patterson. HIV prevention among women in low- and middle-income countries: intervening upon contexts of heightened HIV risk. Discussion.

⁹⁰ Patricia J. García, Angela Bayer and Cesar P Cárcamo. (2014). The changing face of HIV in Latin America and the Caribbean. *Current HIV/AIDS reports*, 11(2), 146–157.

⁹¹ Gabriel A. Schmunis, Fabio Zicker, Francisco Pinheiro and David Brandling-Bennett. Perspectives. Risk for Transfusion-Transmitted Infectious Diseases in Central and South America. *Pan American Health Organization, Washington, D.C., USA Vol. 4, No. 1, January–March 1998.*

there was a real risk of getting infected with HIV. In Talía's case, as the IACtHR argues, the Red Cross of Azuay did not have the economic resources nor did they establish appropriate protocols to screen for blood donated after 6pm, which resulted in Talía getting infected via blood transfusion.⁹² Furthermore, this 10.5% of blood not screened means in practice that during that same timeframe Ecuador was one of only three countries in Latin America that 'could have missed detecting an HIV-infected transfusion unit; the probability of getting an infection in these countries was estimated at 0.57, 0.22, and 0.95 per 10,000 transfusions, respectively.'⁹³ In the case of Talía's situation, it makes sense that while Ecuador argues that they have the policies and strategies to inspect private blood banks, the economic resources that are needed to screen blood donations and prevent transmission of infectious diseases are not available. What is more concerning is that in the same study the authors found that in Brazil, Argentina and Mexico 42% of HIV-infected youth (12-21 year olds) acquired the virus through horizontal transmission, of which 20% got it specifically through blood transfusions.⁹⁴ Once again it is noticeable how poverty plays a role during the violation of article 4 and the subsequent harm endured by Talía, however the Court really limit itself in this analysis and those not go in-depth in the correlation of how the transfusion with the infected blood was a result of the low quality of the medical services Talía's mom could afford.

In Talía's case, Table 1 demonstrates that the behaviour of state authorities who failed to properly regulate blood banks resulted in many other violations as Talía grew up that

⁹² I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Para.188

⁹³ Gabriel A. Schmunis, Fabio Zicker, Francisco Pinheiro and David Brandling-Bennett. Perspectives. Risk for Transfusion-Transmitted Infectious Diseases in Central and South America.

⁹⁴ *Ibid*

would not have been experienced by a child not living with HIV. She has said that the obstacles she faced after she received the infected blood severely affected her development as a girl and as a woman living with HIV. Moreover, with Talía's blood transfusion the economic situation of her family only deteriorated, and they were forced to live in poverty. While it is not possible to assess what would have happened to the Lluy family had Talía not been given the infected blood, the situation of poverty experienced by them was exacerbated by the expenses they faced to ensure Talía could have a good quality of life.⁹⁵ Poverty is associated with illness and in the case of Talía this took place in two different moments, when she experienced a deficient service and conditions in Ecuador's Red Cross blood bank and her access to health services and drugs.⁹⁶

Blood for transfusion should be considered akin to an essential drug. [...] The safety of the blood available for transfusion depends on the quality of the donors, in terms of their risk behaviours and factors for acquiring infections that may be transmitted through blood transfusions, and also on the capacity of the health systems to segregate high-risk donors and to perform laboratory analyses to determine if the collected blood could be the source of infections.⁹⁷

Talía's health situation was the result of the lack of appropriate services that existed in Ecuador, financial resources allocated to conducting adequate processing of collected blood -which in *González Lluy* was done a day after the blood was given to Talía's family- are fundamental to minimise the possibility of an infection being transmitted through

⁹⁵ Escrito de argumentos, solicitudes y pruebas. Talía Gabriela Gonzáles Lluy (TGGL) y familia contra Ecuador.

⁹⁶ Manuel Collazo Herrera, Justo Cárdenas Rodríguez, Roxana González López, Rolando Miyar Abreu, Ana María Gálvez González y Jorge Cosme Casulo. (2002) La economía de la salud: ¿debe ser de interés para el campo sanitario? *Rev Panam Salud Publica*, 12(5), 359–364.

⁹⁷ José Ramiro Cruz and María Dolores Pérez-Rosales. Availability, safety, and quality of blood for transfusion in the Americas. (2003) *Rev Panamericana Salud Publica/Pan Am J Public Health* 13(2/3).

transfusions.⁹⁸ This data supports the conclusion reached by the Court where it affirms that in the case of Talía, her situation of poverty “had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV”. Demonstrating this intersection between poverty and health beyond just a phrase would have been a very significant contribution from the Court. The existing literature covering transmission of HIV through blood donations is limited, especially when countries such as Ecuador do not have a system to report or even account for incidents of infected blood being used for blood transfusions consequently the potentially negative impact of blood transfusions are underreported.⁹⁹

5.3.5 Final thoughts on González Lluy

González Lluy is a complicated case to re-imagine. It is the first time the Inter-American Court used intersectionality to determine the merits of a case and the effort the Court put into assigning intersectional analysis a prominent role in its decision is to be commended. However, the judgement is also far from ideal. From the available documents, which include the submissions of the state and the petitioners, one can conclude that the suggestion of using intersectionality was not part of the initial submissions nor was it a distinct part of the process at the Commission. The incorporation of intersectionality came from external sources and not the parties to the dispute. It was the submissions of amicus curiae that triggered the use of intersectionality.

⁹⁸ *Ibid.*

⁹⁹ Gabriel A. Schmunis and Jose R. Cruz. Safety of the Blood Supply in Latin America. *Clinical Microbiology Reviews*. Jan. 2005, p. 12–29 Vol. 18, No. 1. Pan American Health Organization, Regional Office of the World Health Organization for the Americas, Washington, D.C.

The challenging part of re-imagining this judgement is the fact that the representative of the victims argued in favour of the using intersectional analysis during their closing arguments, which meant that the representatives of the victims had to frame their arguments last minute to try and present the facts in a way that took into account Talía's intersecting identities. This produced really interesting views from the Court, because some parts of the judgement seemed to overlook that the victim is multiply-burdened, most likely because of the lack of information from the victims. These inconsistencies can be detected, for example, in the use of the Talía's narrative. The case features the narrative of the victim much more prominently than other cases decided by the Court, and anyone who consults the case will encounter extracts of the testimony given by Talía and see how they include how she sees herself as a woman, a child and as a person living with HIV/AIDS. Unfortunately, the case relies heavily on Teresa's narrative, this is understandable in, for example, issues surrounding due process as it was her who brought the judicial complaints on behalf of her underage daughter. What is not appropriate is that Teresa's testimonies are used to explain the harm endured by Talía.

The Court does not explain properly the points of convergence and the effects these interactions have, it limits itself to describe the scope of the discrimination as compounded issues. The descriptions of how women, children and other groups suffer intersectional discrimination is not made the central analysis of this section. The Court seems to be just listing the different identities but not concluding anything about it.¹⁰⁰

¹⁰⁰ I/A Court H.R., Case of Gonzales Lluy et al. v Ecuador. Preliminary Objections, Merits, Reparations and Costs. para 290.

The analysis of power relations and pre-existing inequality relationships, referred to in this thesis as the intersectional context of oppression, was also framed as part of the prohibition of discrimination and more often than not as described in each context of oppression as single-axis issues.¹⁰¹ The analysis of the harm mostly focuses on her health and not so much on her age, sex or economic position.¹⁰²

The re-imagination of the judgement produced, amongst other results that will be explained in the upcoming paragraphs, a completely new argument of the responsibility the State had on violating the right to health in the context of the right to life of Talía. During the analysis of article 4 the IACtHR never addresses poverty, it rather focuses on the duty states have to supervise and coordinate private medical services such as the Red Cross' blood banks, this is indeed important and interesting but there is no intersectional analysis made in this section of the merits. However, later on the judgement the Court includes one line explaining how poverty was fundamental in the sort of medical services Talía accessed and how her poverty put her in a scenario that allowed for the blood that was infected with HIV to be used in her treatment. In sum, without an operationalisation process of intersectionality we see a judgement that randomly includes intersections in their anti-discrimination considerations but do not develop them either at all or outside this scope, with the operationalisation process proposed in this thesis what seem to be isolated phrases in the judgement are turned into more robust arguments for a violation. In the case of the violation chosen, it contributes to a more nuanced understanding of how the blood transfusion impacted Talía's right to health under the right to life.

¹⁰¹ *Ibid* para 265-266, 269-274.

¹⁰² *Ibid* para 267-274.

The original judgement maps the manner in which the HIV-infection impacted other areas of Talía's life, it does start by examining how Ecuador was responsible for the infection as they failed to regulate, monitor and supervise the services provided by private health care centres and then moves on to analyse how the initial violation to the right to life has resulted in other rights being breached. However, in the analysis of the chain reaction of violations, as included in the operationalisation process of intersectionality, it is possible to notice how the work of the IACtHR differs from the re-imagined judgement. Particularly, the Court finds that the difference in treatment suffered by Talía, and her family became graver over time,¹⁰³ yet there is no information as to what they meant by 'passing of time' nor any explanation of how time influences the harm experienced by an individual. On more than one occasion, the Court included Talía's testimony, sometimes as a footnote, to demonstrate the harm she endured. Although the testimony would have had important indicators of how the harm affected her intersecting identities, the judgement ignored it.

This is clear when Talía refers to the different types of barriers she endured as a child, a teenager and a woman and the Court does not analyse at all the harm she endured as a teenager. The Court makes a time jump from her being a child to her being an adult woman. The representative of the victims also did not argue how Talía the teenager experienced having HIV, but the fact it was hinted at should have been enough to trigger the active role of the judges. They should have gathered information regarding that specific time to better judge. In other moments, Talía refers on several occasions to the effect HIV had in her

¹⁰³ *Ibid* para 265.

development, briefly mentioning the harm endured when she was a teenager and later as an adult, but the Court does not go into much depth about this. It refers to the nature of the harm throughout life in a general manner referring to all individuals who are HIV/AIDS positive or mentions superficially that Talía had different experiences of due to her age. This demonstrates the sometimes-arbitrary use of intersectionality.

The fact that third parties managed to change how the case was litigated reaffirms the importance of having adjudicators engage with experts and third parties. The issue with *González Lluy* is that the submission of the parties, particularly of the representatives of the victim, included intersectionality only as an afterthought. They based their submissions almost entirely on the amicus brief which resulted in a lack of reflection about how the victim could benefit from intersectional analysis. This also compromised the available information as Talía's narrative was not as developed as one would have expected from a case using intersectional analysis. Even when Judge Ferrer Mac-Gregor talks about the importance of understanding how Talía suffered a different type of discrimination because of her intersectional identities, the construction of her suffering is always limited to a couple of testimonies because it is quite clear the representatives of the victims were not prepared to bring forward a case framed under intersectionality.

In conclusion, *González Lluy* could have benefited from better use of intersectionality as demonstrated by the re-imagining of the judgement, but it also includes some good practices from the part of the adjudicators that point to an acceptance of using intersectionality and provides hope that, in the future, the Inter-American Court can refine and rework its understanding of intersectionality.

5.4 Cuscul Pivaral et al. v Guatemala

5.4.1 Facts of the case

The facts of this case refer to the violation of various rights established in the American Convention to the detriment of 49 victims who were diagnosed with HIV in Guatemala between 1992 and 2003. Details of the victims are given in Appendix 1. The Commission established that until 2006 there was a total lack of state medical care for the victims, their status as people living with HIV, and in a situation of poverty was never considered and this omission had a serious impact on their health, life and personal integrity. According to the Inter-American Commission, from 2006 the state implemented some sort of treatment for people living with HIV, but the care was neither comprehensive nor adequate. Therefore, it considered that these deficiencies continued to violate the rights to health, life and personal integrity of the surviving victims.¹⁰⁴

Regarding the victims, all 49¹⁰⁵ were diagnosed with HIV/AIDS between 1992 and 2003.¹⁰⁶ Their situation can be summarised as follows:

¹⁰⁴ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. para 1.

¹⁰⁵ Luis Rolando Cuscul Pivaral, Francisco Sop Gueij, Corina Robledo, Petrona López González, Aracely Cinto, Olga Marina Castillo, Israel Pérez Charal, Karen Judith Samayoa, Juana Aguilar, Darinel López Montes de Oca, Luis Rubén Álvarez Flores, Audiencio Rodas, Luis Edwin Cruz Gramau, Martina Candelaria Álvarez Estrada, Maria Felipe Pérez, Sayra Elisa Barrios, Felipe Ordóñez, Santos Isacax Vásquez Barrio, Ismera Oliva García Castañon, Guadalupe Cayaxon, Sandra Lisbeth Zepeda Herrera, Cesar Noe Cancinos Gómez, Santos Vásquez Oliveros, Maria Vail, Julia Aguilar, Sebastián Emilia Dueñas, Zoila Pérez Ruiz, Santiago Valdez, Pascuala de Jesús Mérida, Iris Carolina Vicente Baullas, Reina López Mújica, Marta Alicia Maldonado Paz, José Cupertino Ramírez, José Rubén Delgado, Elsa Miriam Estrada, Ismar Ramírez Chajón, Félix Cabrera, Silvia Mirtala Álvarez, Facundo Gómez Reyes, Alberto Quiché Cuxeve, Rita Dubón Orozco, Ingrid Janeth Barillas Martínez, Luis Armando Linares, Mardo Luis Hernández, Jorge Armando Tavárez, Miguel Lucas Vail, Dora Marina Martínez, Melvin Geovanny Ajtún and Teresa Magdalena Ramírez Castro.

¹⁰⁶ Comisión Interamericana de Derechos Humanos. Luis Ronaldo Cuscul Pivaral y otras personas afectadas por el VIH/SIDA, Guatemala. Informe No. 32/05. Petición 642/2003, Admisibilidad. 7 de marzo de 2005. para 61.

- ❖ Many of the alleged victims are unemployed, with limited economic resources and do not live in Guatemala City
- ❖ Many of their relatives and loved ones also live with HIV/AIDS.
- ❖ Several of the victims are heads of households and have children
- ❖ Despite requesting medical assistance at public health centres, including requesting access to antiretrovirals, they did not receive any state assistance until 2006. Their health has thus been affected.

To this day, most of the victims have received medical attention at the hands of international organisations and not the state ¹⁰⁷ The State has even recognised the fact that, initially, when the victims of this case found out they were HIV positive, they did not receive free medical attention from Guatemala.¹⁰⁸ Some 13 victims in this case have died. Three did not receive any medical treatment before their deaths, five were never subjected to the necessary examinations, the viral loads of three were never examined nor were they subject to CD4 counts.¹⁰⁹

According to the facts of the case, of the remaining victims that are alive, they did not receive any treatment from the state before 2006 and all subsequent medical treatment has not been integral. The treatment is deficient considering they are not subjected to medical exams, there is no constant access to medicine and the hospitals and clinics are often short

¹⁰⁷ *Ibid* para 63.

¹⁰⁸ *Ibid* para 3

¹⁰⁹ The University of Texas Law School Human Rights Clinic. and The University of Texas at Austin. Dell Medical School. Escrito de amicus curiae presentado a la Corte interamericana de derechos humanos en el caso de Luis Rolando Cuscul Pivaral y otras personas con HIV/SIDA v Guatemala, 68. According to the World Health Organization, a viral test load measures the number of viral particles found in each millilitre of blood and it is used to assess whether the disease is progressing from HIV to AIDS. A CD4 count test measures the amount of white blood cells a person with HIV has in order to determine how the immune system is fighting the virus. See https://www.who.int/diagnostics_laboratory/faq/viral_load/en/

of antiretrovirals.¹¹⁰ The health of the victims has deteriorated because they do not have constant access to antiretrovirals, this is particularly concerning when some of the victims were pregnant and did not have access to medicine even to prevent passing the HIV to their children.¹¹¹

The consequences of not accessing the appropriate medicine results in opportunistic diseases, most of the victims have experienced these type of conditions and the state has failed to provide information on the sort of diseases that have affected the 49 victims and claimed the life of 8 of them.¹¹² Moreover, even when the deceased victims did access antiretrovirals, they were not provided with the periodicity required nor were they subjected to the medical tests that helps control the advancement of HIV and the presence of opportunistic diseases. The state did not do any effort to investigate the deaths of these individuals and have not provided any information to demonstrate that they provided the adequate medical treatment.¹¹³

The Ministry of health started to provide medicine only in 1999. In 2003 the state allocated some public funds to combat the HIV/AIDS epidemic, yet this money was not enough and only eighty people living with HIV/AIDS of the almost four thousand people that live with HIV/AIDS in Guatemala have been able to benefit from those measures.¹¹⁴ In 2007 and 2008 43% of individuals who are seropositive was receiving medical treatment.¹¹⁵ From

¹¹⁰ Comisión Interamericana de Derechos Humanos. Luis Ronaldo Cuscul Pivaral y otras personas afectadas por el VIH/SIDA, Guatemala. para 68.

¹¹¹ *Ibid.* para 18.

¹¹² *Ibid* para 20

¹¹³ *Ibid* para. 26

¹¹⁴ *Ibid* para 85

¹¹⁵ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. para 54

the 49 victims, when the IACtHR issued the judgement, 15 had already passed away and 34 were still trying to get proper medical care. The Court also accepted that most of them had suffered from opportunistic diseases, had very limited economic sources, were heads of household, had a low educational level, were forced to quit their jobs, were pregnant or lived in remote areas.¹¹⁶

5.4.2 Exploring the operationalisation of intersectionality in the decisions of the IACtHR

Cuscul Pivaral et al. v Guatemala is a complex case. The intersectional analysis applied by the Court was done successfully at times and they were mostly done outside of its express use of intersectionality but demonstrate the possibility of using some of the elements proposed in this thesis. One of the most interesting aspects of how intersectionality was applied was the disclaimer added by the IACtHR where it suggests that it will conduct such an analysis when appropriate, recognising that in some instances a single axis framework might be more appropriate to understand the harm of the individual.

the presumed victims that took into account the different factors of vulnerability that coalesced and resulted in a specific form of discrimination owing to their intersection. Consequently, the Court will analyse whether discrimination existed in this case. Also, bearing in mind that, in this case, it has been alleged that several individuals were victims of discrimination for similar reasons, the Court will analyse each reason for which they were discriminated against separately, as appropriate.¹¹⁷

¹¹⁶ *Ibid* para 63

¹¹⁷ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. para 128

This brief commentary about the manner in which they will tackle intersectionality is followed by a quick recapitulation of the duty to ensure the right to health is accessible to everyone without distinction, the Court also mentions how States have the duty not only to ensure people are not discriminated against but also to create the conditions so people who belong to historically excluded groups can access their rights.¹¹⁸

The most explored identity in the judgement was location. This structure of marginalisation contributed to further deny the victims the medical treatment they needed. The Court gave a good and succinct analysis of how their location oppressed the victims;¹¹⁹ however, it was done in isolation from the other identities that intersected. This translates to a generalised statement about how the most marginalised and vulnerable sectors of a society should have geographical and economic access to health services.¹²⁰

The Court also carried out an intersectional analysis concerning women who were pregnant; they established that pregnant women are affected differently by their condition as HIV can be transmitted to their children. They differentiated between those who had received medical treatment during their pregnancy and those who had not.¹²¹ Notwithstanding the use of intersectional analysis in anti-discrimination frameworks, the focus of its application was on 5 of the 25 victims who are women. According to the judgement, the interaction of sex and motherhood/pregnancy required an expressed intersectional analysis. However, the Court uses the narrative of the victims who were

¹¹⁸ *Ibid* para 129 and 130

¹¹⁹ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No.359 paras 124-126.

¹²⁰ *Ibid* para 125.

¹²¹ *Ibid.* paras 135-139.

pregnant at the time of their infection or gave birth while being infected with the virus to explain how the lack of access to medical services created a qualitatively different experience of harm which was not present in the narrative of those who were not pregnant women.¹²² This created a uniquely grave experience of harm which departed from what is usually experienced by individuals that do not have access to medical services because of the stigma of having HIV/AIDS.¹²³

The Court also included children as particularly vulnerable due to the intersection of age and health condition. This was done in the context of the special measures states need to comply with when avoiding vertical transmission of HIV.¹²⁴ However, considering none of the victims of the case is a child nor did they get infected with HIV/AIDS when they were children it is odd that the Court would include an intersectional analysis for children and not for all the 49 victims. There was also a brief mention of poverty as being one of the causes that put people living with HIV/AIDS at a higher risk either because the lack of economic resources tends to result in individuals getting inadequate or incomplete medical attention or because the unequal access to information and services allow for more infections to occur within communities that are economically marginalised.¹²⁵

The Court did not impose definitions of identities but rather used the same wording that the representatives of the victims were using to give content to an identity. For example, in sexual orientation, the victims were not labelled as lesbian, gay or heterosexual. Only in those cases in which the victim self-identified with a sexual orientation was it used the

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ *Ibid* para 132-133

¹²⁵ *Ibid* para 130

same way by the Court. For instance, people having a relationship with someone of the same sex were described as ‘a man in a relationship with another man’ or ‘a woman married to another woman’. This simple exercise removes the risk of treating all individuals as members of the social category labelled gay or lesbian, which presupposes a certain conceptualisation, understanding and, in some cases, prejudices from the adjudicators.¹²⁶

5.4.2.1 *The Court’s findings*

The Court found that 48 of the victims did not receive any medical treatment from the State before 2004 and, after 2004, the Court found that the state failed to comply with its duty to guarantee the right to health of 43 people. The Court found that victims had irregular, null and inadequate access to antiretrovirals, they did not have access to regular medical tests, some victims were unable to access health centres and some victims received was inadequate social support. The IACtHR established that Guatemala was responsible for the violation of the duty to guarantee the right to health, in accordance with Article 26 of the ACHR, in relation to Article 1.1 (general obligations) of the same instrument due to the omissions they incurred that were incompatible with the elements of availability, accessibility and quality of health care. The state’s inaction prior to 2004, were also the basis for a violation to the obligation of progressive realisation of the ESCR as enshrined in article 26 of the ACHR. According to the IACtHR, the total absence of state protection

¹²⁶ Examples of only one subgroup are being used to avoid repetition and redundancy due to being a case with 49 victims, space constrains were also a factor to consider in the selection of some subgroups only for analysis. This is not an indication that only certain subgroups or certain individuals are going to benefit from anti-essentialist measures, positionality analysis or self-identification.

for people living with HIV places them at risk of suffering harm to their life or personal integrity when they do not receive medical care.

The Court considered that the lack of medical care provided caused the death of 12 victims. If these omission had not occurred there would have been a lower chance of the victims developing what are known as opportunistic diseases, which ultimately cost them their lives. The Court also found that 46 of the victims suffered physically and mentally as a result of their condition as people living with HIV. Thus, the state was found to be responsible for the violation of the duty to guarantee the right to life (Article 4.1) and humane treatment (article 5.1), in relation to Articles 26 and 1.1 of the ACHR.

The state was also responsible for the violation of Articles 8.1 (due process) and 25 (juridical guarantees), in relation to Article 1.1 of the American Convention, to the detriment of 13 victims when the Constitutional Court delayed the resolutions of the legal processes brought forward by the victims without any justification.

As it was explained in the previous section, the Court found that Guatemala had discriminated against two of the victims of the case that were pregnant at the time of being diagnosed with HIV or that they were pregnant after their diagnosis. Intersectional analysis was used to conclude that the lack of medical treatment amounted to discrimination based on gender, since it had a different impact on the victims who are women and generated a risk of vertical transmission of HIV to their children.

Finally, in relation to the next of kin, the Court found that they suffered damages to their personal integrity due to the suffering and/or death of the 49 victims. Therefore, Guatemala

is responsible for the violation of Article 5.1 (personal integrity), in relation to Article 1.1 of the American Convention.

The Court determined the following reparation measures:

A. Rehabilitation: 1) provide free medical and psychological treatment to victims of violations of the right to health and personal integrity, and their families, and 2) adopt positive measures to guarantee accessibility to health centres.

B. Satisfaction: 1) publish the Judgment in its entirety, as well as its official summary, 2) hold a public act of acknowledgment of responsibility, and 3) grant study scholarships to the sons and daughters of the victims who thus request it.

C. Guarantees of non-repetition: 1) implement mechanisms for the control and supervision of health services, 2) design a mechanism to improve the accessibility, availability and quality of health services for people living with HIV, 3) implement a training program for health system officials, 4) guarantee adequate medical treatment for pregnant women living with HIV, and 5) carry out a national awareness and sensitization campaign on the rights of people living with HIV.

D. Compensatory damages: pay the monetary sums fixed.¹²⁷

5.4.3 Re-imagining *Cuscul Pivaral et al. v Guatemala*

5.4.3.1 Using intersectional analysis to establish the basis of the case

The judges of the IACtHR should have, firstly, determined who the victims were, and which intersectional identities played a role in the violation. Because *Cuscul Pivaral* has 49 victims it would have been important to determine not only the intersectional identities of each but also if any of those intersecting identities are shared by more than one victim and then to group them, if possible, to determine which of the violations and interlocking systems of oppression are apparent beyond isolated cases.

¹²⁷ I/A Court H.R., Case of *Cuscul Pivaral et al. v Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgement of 23 of August of 2018. Official Summary.

The identities of each are presented in Tables 2 (deceased victims) and 3 (live victims) in a systematised manner. The identities rely on the testimony of the victims, the documents submitted by the parties and the Annex included in the judgement. What the Tables illustrate is the importance of individualising each victim. Instead of dividing victims into macro groups such as gender, age, indigenouness or sexual orientation, they are individualised as much as possible to avoid essentialism. In this case, the data contributes to the decision-making not only with the identification of intersecting identities that will be subsequently used in the merits stage but also because through this systematisation the adjudicators can identify the social location of the victims, the structures and systems that contribute to their marginalisation and the possibility of having groups that simultaneously share disadvantage or oppression while having heterogeneous experiences of harm. This helps adjudicators understand that each victim (even those who shared almost all intersectional characteristics) are different from each other. For example, in Table 3 the subgroup ‘Heterosexual woman, incomplete basic education, unemployed, was pregnant while living with HIV, limited economic resources/poverty’ does not imply that all women are the same. The level of basic education is specified because not all women have access to the same level of education and this in turn made their understanding of HIV/AIDS different.¹²⁸ The more the adjudicators recognise what makes each victim unique, the more comprehensive the justice being delivered will be.

The identities in this case and following the definition established previously, all define a person as multiply-burdened. Some of the victims have one or more identities that can be

¹²⁸ *Ibid*

considered privileged: for example, those who are heterosexual men and currently employed. However, because all other identities are marginalised, the victims are still considered intersectional ones, the existence of privileged identities in addition to those that are marginalised is not an excluding factor. Making a distinction between privileged and marginalised identities is important in recognising the positionality of intersectional individuals.

The number of victims in a relationship with a person of the opposite sex was important in the context of the HIV/AIDS epidemic in Guatemala. Although people identified as members of the social category of cisgender heterosexuals are often seen as privileged with regards to their sexual orientation and sexual identity, they are marginalised due to their health condition, especially given that heterosexuals are one of the most affected groups by the HIV/AIDS epidemic in Guatemala.¹²⁹

Table 2. Deceased victims

Intersectional identities	Victims (Deceased)	Additional comments
Man, in a relationship with another man/has sex with other men, lives outside of Guatemala City	Ismar Ramírez Chajón	
Heterosexual man, father, living in poverty or with limited economic resources, living outside Guatemala City.	Melvin Yovani Ajtun Escobar	
Heterosexual man, illiterate, lives outside of Guatemala City, has children.	Facundo Gómez Reyes José Rubén Delgado López José Cupertino Ramírez	
Heterosexual man, lives outside of Guatemala City	Alberto Quiche Cuxeva	There is not much information available regarding this victim.

¹²⁹ The University of Texas Law School Human Rights Clinic. and The University of Texas at Austin. Dell Medical School. Escrito de amicus curiae presentado a la Corte interamericana de derechos humanos en el caso de Luis Rolando Cuscul Pivaral y otras personas con HIV/SIDA v Guatemala

Heterosexual woman, illiterate, lives outside of Guatemala City	Reina López Mújica	
	Petrona López Robledo	Mother (her daughters are both underage).
Woman, in a relationship with another woman, unemployed, mother, lives in Guatemala City	Silvia Mirtala Alzarex Villatoro	
Indigenous woman, lives in poverty, lives outside of Guatemala City	María Blanca Vaíl López	
Woman, living outside of Guatemala City	Rita Mariana Dubón Orozco	Heterosexual. There is not enough information available about her.
	Juana Aguilar	There is not enough information available about her.
Heterosexual woman, incomplete basic education, lives outside of Guatemala City, mother.	Guadalupe Herminia Cayaxon García	
	Elsa Miriam Estrada Ruíz	Unemployed.

Table 2. Live victims

Intersectional Identities	Victims (HIV/AIDS positive)	Additional comments
	Olga Marina Castillo	There is no information about her personal characteristics.
Indigenous woman, heterosexual, unemployed, incomplete basic education, lives outside of Guatemala City	María Felipe Pérez	Speaks Mam and Spanish.
Man, with diverse sexual orientation	Luis Armando Linares Ruano	Not enough information exists about additional personal identities.
	Luis Rolando Cuscul Pivaral	Lives in Guatemala City, mental health issues.
	Felix de Jesús Cabrera Morales	Did not finish school, has no steady income.
Heterosexual woman, employed.	Marta Alicia Maldonado Paz	Mother.
	Ingrid Janeth Barrillas Martínez	Lives outside of Guatemala City.
Heterosexual woman, employed.	Marta Alicia Maldonado Paz	Mother.
	Ingrid Janeth Barrillas Martínez	Lives outside of Guatemala City.
Man, lives outside of Guatemala City.	Israel Perez Charal	There is no more information available about him.
	Darinel López Montes de Oca	
	Luis Rubén Isabel Alvarez Flores	Unemployed.
Woman, heterosexual, was pregnant while living with	Corina Dianeth Robledo Alvarado	Has a child who is HIV positive.

HIV, limited economic resources, lives outside of Guatemala City.		
Indigenous heterosexual man, unemployed, lives outside of Guatemala City, speaks indigenous language and Spanish	Francisco Sop Quiej	
	Felipe Tebalan Ordoñez	Incomplete basic education. Father.
Heterosexual man, father, illiterate, lives outside of Guatemala City, limited economic resources.	Miguel Lucas Vaíl Sebastián Emilio Dueñas	
Heterosexual man, father, lives outside of Guatemala City, employed	Jorge Armando Tavares Barreno	
Heterosexual man, father, lives outside of Guatemala City, employed, incomplete basic education.	Mardo Luis Hernández y Hernández	
	Santos Isacar Vásquez Barrios	
Heterosexual man, father, lives outside of Guatemala City, unemployed, incomplete basic education.	Santiago Francisco Valdéz Aguilar	Children had to migrate to pay for the treatment.
	Santos Vásquez Oliveros	
	Audencio Rodas Rodríguez	
	César Noé Cancinos Gómez	
Heterosexual woman, lives outside of Guatemala City.	Iris Carolina Vicente Baullas	She is now a migrant in the US.
	Dora Marina Martínez Sofoifa	Cannot afford treatment, lives in a dangerous area.
	Ismerai Olibia García Castañon	Mother.
Heterosexual woman, lives outside of Guatemala City, unemployed.	Teresa Magdalena Ramírez Castro	Mother.
	Aracely Cinto	Incomplete basic education.
	Martina Candelaria Alvarez Estrada	Illiterate.
	Julia Aguilar	Illiterate.
Heterosexual woman, incomplete basic education, unemployed, was pregnant while living with HIV, limited economic resources/poverty.	Sandra Lisbeth Zepeda Herrera	Has a daughter who is also HIV positive.
	Karen Judith Samayoa Vásquez	Lives in Guatemala City.
	Zoila Marina Pérez Ruíz	Illiterate, two of her children had to migrate to the US to be able to afford the treatment.
	Pascuala de Jesús Mérida Rodríguez	
	Saira Elisa Barrios	

Cuscul Pivaral brings to the fore how the same violation (lack of adequate health care) can manifest differently according to the types of identities that intersect. For instance, victims who have access to employment could afford some medicines and even distributed them amongst the victims who depended entirely on the state.¹³⁰ Positionality helps adjudicators understand that, while the violation is the same, the existence of certain privileged identities will lessen the effect of those violations and reality will change how the violation manifests. Instead of arguing a complete lack of access to medicine for all 49 victims, the analysis of the violation will centre on access to medicine being limited to those victims that could not afford private health care.

The intersectional identities of the victims also include systems and structures that could render them more susceptible to being marginalised. In *Cuscul Pivaral* the location of the victim's home was relevant to how the violations affected each of them. Where they lived might be argued as not representing an identity, but it is a structure that marginalises individuals. For victims that did not live in Guatemala City or Coatepeque, there was an extra burden as they needed to travel to these two cities. Those who lived far from a medical centre and could also not afford the transport were prevented from accessing their medical treatment adequately. This is only one example as to why, in practice, systems and structures that oppress are also relevant to the intersectional analysis.

The case of *Cuscul Pivaral et al.* is unusual because the Court annexed a list of the victims that described not only their intersectional identities (used to create Tables 2 and 3) but it also specified which facts demonstrated the intersectional oppression experienced by each.

¹³⁰ I/A Court H.R., Case of *Cuscul Pivaral et al. v. Guatemala*. Public Hearing. 06 of March 2018 Part 2 available at <https://vimeo.com/258874292> Minutes 00:43:00-01:00:34

This was not done to implement an intersectional analysis but rather to map when and how the state failed to provide medical attention to each of the 49 victims. For these reasons, the relevant parts of that Annex are reproduced at Appendix 1 of this thesis as an example of what courts should do when they are gathering information to enable them to better judge.

What can be seen from Appendix 1 is how the facts that demonstrate a violation of the human rights of the victim are linked to their intersecting identities and what harm they produced. The systematisation of facts will be the basis for the intersectional context analysis as it is easier to map the shared oppression or marginalisation when the information has already been organised. Following the proposed process, this information and the level of description of the facts will also inform the analysis of the merits. A format similar to that adopted by the Appendix would be used as a starting point to understand how all the identities play a role in the violation of Article 26 (the right to health) in connection with Articles 4 (right to life) and 5 (personal integrity), and of Articles 8 and 25 (judicial guarantees) of the American Convention.

5.4.3.2 Intersectional context analysis

The next thing that needs to be recognised is the identities that create the intersectional context analysis. From the information provided in Tables 2 and 3 and the appendix, the most obvious identity that all victims share is their status as people living with HIV/AIDS. In itself, this identity is considered as marginalised because people living with HIV/AIDS are subjected to marginalisation, acts of discrimination and social exclusion. The violations that each victim endured created a harm that is embedded in a broader structure that rejects

people living with HIV/AIDS. Since the Court did not include an analysis of context, this section will illustrate how this step would look like in the judgement.

The second identity that can be identified is the lack of economic resources, an identity that most of the victims referred to as existing before their diagnosis.¹³¹ While some of them live in extreme poverty, almost all came from a socioeconomic class that prevented them from paying for their treatment or other expenses related to their medical condition. The information available does not explicitly mention how the economic status of the victims affected their access to medicine but this can be inferred in the analysis of the context. In Guatemala, the most affected individuals are those belonging to already marginalised groups such as sex workers, homosexual men, men who have sex with other men, transsexual people and people deprived of their liberty,¹³² all identities that have been traditionally marginalised, oppressed and discriminated against. Some of the victims are members of these marginalised social categories. That the epidemic of HIV/AIDS affects social categories already rejected by the majority of society speaks volumes about the horizontal inequalities that help perpetuate the oppression of these groups.

A third identity that can be identified as part of the intersectional context analysis is sexual orientation. Resulting from this assessment the Court has the opportunity to assess how social categories are differently affected depending on their sexual orientation. Based on these interlocking systems of oppression, it is possible to construct the following analysis

¹³¹ In some few occasion the victims declared that their economic status allowed them to fulfil their basic needs. However, this changed once they were diagnosed with HIV/AIDS considering the economic burden of the treatment was too big for their income.

¹³² The University of Texas Law School Human Rights Clinic. and The University of Texas at Austin. Dell Medical School. Escrito de amicus curiae presentado a la Corte interamericana de derechos humanos en el caso de Luis Rolando Cuscul Pivaral y otras personas con HIV/SIDA v Guatemala, 51.

of context that demonstrates that the harm endured by the victims of the case are not isolated but rather belong to a wider practice of oppression.

Guatemala is one of the two Latin American countries with the highest number of cases of HIV/AIDS.¹³³ The government was aware of the existence of cases of HIV/AIDS in 1984 and yet only started to report cases officially in 2003.¹³⁴ It declared HIV/AIDS as a national emergency ten years after the first case was identified and it was not until 1999 that a National Plan for the Prevention and Attention of STI/HIV/AIDS was approved.¹³⁵ Despite this plan, the health services provided are still substandard, there is a lack of resources and coordination and services are provided in a centralised and slow manner.¹³⁶ Guatemala has had a widespread practice of denying free health care to people with HIV, a practice that extends beyond the victims of the *Cuscul Pivaral* case.

In 2005, approximately 78,000 people were living with HIV/AIDS in Guatemala.¹³⁷ New cases of HIV have increased by 167% since 2010 and the death rates related to AIDS have increased by 23%.¹³⁸ By 2016, only 36% of the population had access to antiretroviral therapy to combat the disease.¹³⁹ As the facts of the case demonstrate, 19 years after the

¹³³ Banco Mundial - Programa Global del VIH/SIDA. América Latina y el Caribe. Reduciendo la Vulnerabilidad al VIH/SIDA en Centroamérica. Guatemala: Situación del VIH/SIDA y la respuesta a la epidemia. 2016. Available at: <http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1103037153392/CAHIVAIDSGuatemalaFINALSPA.pdf> and Fondo de la ONU para la infancia (UNICEF). Guatemala- VIH/SIDA. Available at: https://www.unicef.org/guatemala/spanish/hiv_aids_1523.htm.

¹³⁴ Banco Mundial - Programa Global del VIH/SIDA. América Latina y el Caribe. Reduciendo la Vulnerabilidad al VIH/SIDA en Centroamérica.

¹³⁵ *Ibid*

¹³⁶ Patricia J García, Angela Bayer and César P Cárcamo, 'The changing face of HIV in Latin America and the Caribbean' (2014) 11 Current HIV/AIDS Reports 146

¹³⁷ Fondo de la ONU para la infancia (UNICEF). Guatemala - VIH/SIDA. 2018. Available at: https://www.unicef.org/guatemala/spanish/hiv_aids_1175.htm.

¹³⁸ Joint United Nations Programme on HIV and AIDS (UNAIDS). Guatemala. Available at: <http://www.ONUSIDA.org/en/regionscountries/countries/guatemala>.

¹³⁹ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. para 40.

first case of HIV/AIDS was registered in Guatemala the state started being responsible for the medical treatment of their HIV/AIDS positive population.¹⁴⁰ In 2002 less than 1% of the population living with HIV/AIDS had access to state-provided antiretroviral medicines.¹⁴¹

Of all the hospitals and health centres that provide services to people living with HIV/AIDS, only Hospital Puerto Barrios in Coatepeque is not in Guatemala City.¹⁴² The substandard levels of health services provided to people with HIV/AIDS can be illustrated by the fact that only 19% of pregnant women with HIV/AIDS were given treatment in 2018.¹⁴³

The first antiretroviral treatment was available in Guatemala in 1999 provided not by the State but by a pharmaceutical company conducting HIV research. In 2000, Médecins Sans Frontières became responsible for providing free medical treatment to patients.¹⁴⁴ It was only in 2002 that the Ministry of Health began to give free antiretroviral medicines but to

¹⁴⁰ Joint United Nations Programme on HIV and AIDS (UNAIDS). Ending Aids: Progress Towards the 90-90-90 Targets. 2017. Available at: http://www.ONUSIDA.org/sites/default/files/media_asset/Global_AIDS_update_2017_en.pdf.

¹⁴¹ Comisión Interamericana de Derechos Humanos. Luis Ronaldo Cuscul Pivaral y otras personas afectadas por el VIH/SIDA, Guatemala Informe No. 32/05. para 64

¹⁴² Ministerio de Salud Pública y Asistencia Social de Guatemala - Programa Nacional de Prevención y control de ITS/VIH/SIDA. Plan Estratégico Nacional sobre ITS, VIH y SIDA. Marzo 2006; Ministerio de Salud Pública y Asistencia Social de Guatemala - Programa Nacional de Prevención y Control de ITS/VIH/SIDA. Informe Nacional sobre los Progresos realizados en la Lucha contra el VIH y SIDA. Marzo 2014; Banco Mundial - Programa Global del VIH/SIDA. América Latina y el Caribe. Reduciendo la Vulnerabilidad al VIH/SIDA en Centroamérica. Guatemala: Situación del VIH/SIDA y la respuesta a la epidemia.

¹⁴³ Joint United Nations Programme on HIV and AIDS (UNAIDS). Guatemala. 2018. Available at: <http://www.ONUSIDA.org/en/regionscountries/countries/guatemala>.

¹⁴⁴ Organización Panamericana de la Salud. Evaluación para el Fortalecimiento de la Respuesta del Sistema de Salud al VIH en Guatemala. 2009. Available at: http://www.paho.org/gut/index.php?option=com_docman&view=download&category_slug=difusion&alias=188-respuesta-al-sistema-de-salud-del-vih-en-guatemala&Itemid=518.

less than 1% of the population living with HIV/AIDS (27 people in the entire country), claiming a lack of economic resources. None of them are victims in this case.¹⁴⁵

Finally, in 2006 the Guatemalan state started taking care of the treatment of people living with HIV/AIDS.¹⁴⁶ It took the state 19 years from the beginning of the epidemic to start buying basic medicines to combat and treat the condition.¹⁴⁷ It is only relatively recently that free health care has been incorporated into the Constitution,¹⁴⁸ thus ensuring access to medicine for people who cannot afford health care.

The data demonstrates that the violations endured by the victims are a small sample of a large-scale problem that permeates Guatemalan society. The institutionalised disregard for the medical treatment of people living with HIV is an indication of a dynamic of power that oppresses them vertically. The power relations between the state and the victims are relevant to the intersectional analysis in situations in which, like this one, the victims were dependent on the acts of the state to ensure their survival. This is a very uneven position as the state holds all the means to ensure their right to life is protected. Understanding the intersectional context analysis will also improve understanding of how oppression can operate horizontally.

¹⁴⁵ Comisión Interamericana de Derechos Humanos. Luis Ronaldo Cuscul Pivaral y otras personas afectadas por el VIH/SIDA, Guatemala Informe No. 32/05. para 64 and footnote 12.

¹⁴⁶ Organización Panamericana de la Salud. Evaluación para el Fortalecimiento de la Respuesta del Sistema de Salud al VIH en Guatemala.

¹⁴⁷ Joint United Nations Programme on HIV and AIDS (UNAIDS). Ending Aids: Progress Towards the 90-90-90 Targets.

¹⁴⁸ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. para 115.

The documents available for consultation contained very little information regarding the existence of possible interlocking systems of oppression, hence any further analysis on this subject will be included in the following section.

5.4.3.3 The active role of the adjudicators: using intersectionality to better judge

The Inter-American Commission of Human Rights and the representatives of the victims requested an intersectional analysis for the judgement, and during the public hearing, the victims' lawyers listed the identities that rendered each more marginalised when it intersected with HIV/AIDS. Considering this, the Court should have requested additional information as to why the Commission and the victims believed that the intersectional analysis was necessary. Adjudicators could ask the representative of the victims to justify the need for an intersectional analysis, asking them to provide information as to why and how they believe the victims could benefit from an intersectional analysis.

Part of the active role of the adjudicators in the process of operationalisation is to collaborate with experts in better understanding the way identities interact and create different qualitative experiences of harm. The Court in *Cuscul Pivaral* had various amicus briefs submitted from, amongst others, UNAIDS, CESCR, and the Special Rapporteurship on Economic, Social and Cultural Rights of the Inter-American Commission of Human Rights. The following examples demonstrate all the scenarios where the Court decided not to use intersectional analysis, as it has been explained in other sections of this case study; the court had at its disposal the information that will be presented below, they knew these

characteristics intersected in one form or another in the lives of the 49 victims.¹⁴⁹ Yet, instead of using intersectional analysis to understand all the violations experienced by all the victims, the IACtHR only recognised the intersectionality of women who were mothers (either pregnant or with children) and had HIV/AIDS.

The expert introduced by the representatives of the victims pointed out that they all had identities that put them in a particular position of vulnerability even before they contracted HIV. Therefore, the Court should have requested information on how the epidemic affects populations that live in poverty, extreme poverty or have limited economic resources. This is important because, from the systematisation of facts and identities, it is possible to conclude that the economic situation of the victims played a significant role. The intersection of economic class and health is an intersection that has been researched by experts outside of the Inter-American System and even the Court itself, so the judges are in a privileged position to explore and further develop this intersection in the context of HIV/AIDS. The questions could focus on the mortality rate of people with HIV/AIDS that cannot access medical treatment, the number of cases amongst the most marginalised economic classes, how many people can access treatment from private medical practices in Guatemala, the average costs of treatment and any other questions related to these two intersectional characteristics. This could lead to a better understanding of how economic class affects the right to health. For example, if the victims had enough money to access a private practice, the issue of the lack of treatment offered by the state would have had

¹⁴⁹ During the public hearing, the representatives of the victim and the Commission mentioned these intersections several times.

different implications, maybe less severe than those endured by the victims in this case, as they could have obtained the medicine, tests and check-ups from private medical centres.

Similarly, if the victims had not been diagnosed with HIV/AIDS their economic status could have, probably, allowed them to fulfil their basic needs, they would have been employed, or for those living in poverty, their living conditions would not have harshened by a life-threatening disease.

Other social categories are also in need of more information to better judge: age, sexual orientation and location of the victim are some of them. For example, during the public hearing, one expert declared that age was a significant characteristic that changed how an individual will undergo treatment for HIV/AIDS. The 49 victims were diagnosed with AIDS at ages ranging from 18 to 40, and the Court could use this information to further explore how age created a different qualitative experience for individuals affected by the lack of medical treatment.

During the public hearing, one of the victims declared that she had not heard about HIV/AIDS before she was diagnosed and that she was illiterate.¹⁵⁰ The Court should explore the relationship between HIV/AIDS and education levels and whether there is a causal link between lower levels of education and new cases of HIV/AIDS. This is relevant with the victims as a considerable majority had very low education levels which impacted their access to work and, in some cases, their ability to understand their medical condition.

¹⁵⁰ I/A Court H.R., Case of Cuscul Pivaral et al. v. Guatemala. Public Hearing. 06 of March 2018 Part 2 available at <https://vimeo.com/258874292> Minutes 00:02:39-00:17:17

Sexual orientation was another unexplored topic in the judgement. The different experts they had at their disposal could have helped them understand what role sexual orientation plays in HIV in Guatemala. For example, as one *amicus curiae* reported, in Guatemala, the heterosexual population was at a higher risk of contracting HIV/AIDS¹⁵¹ than any other sexual orientation and the Court could have asked questions to determine how heterosexualism created a differentiated effect on the victim once they contracted HIV/AIDS. Similarly, with individuals who were in a relationship with people of the same sex, the Court needed to explore if the marginalisation increased once they were identified as living with HIV/AIDS. In line with the importance of including positionality in intersectional analysis, the Court should not assume that intersectionality will only take into account marginalised or disadvantaged positions and hence exclude heterosexual cisgender people as part of the analysis because these two social categories do not usually render someone multiply-burdened. For example, are heterosexual cisgender women in Guatemala at more risk of contracting HIV due to pre-existing inequalities between men and women that are further exacerbated by poverty and lack of education? Is the marginalisation experienced by cisgender heterosexual men in Guatemala due to their indigenusness that intersects with the marginalisation endured by those who do not speak Spanish or are illiterate a decisive factor in them contracting HIV/AIDS, thus creating a third interlocking system of oppression?

¹⁵¹ The University of Texas Law School. Human Rights Clinic. and The University of Texas at Austin. Dell Medical School. Escrito de *amicus curiae* presentado a la Corte interamericana de derechos humanos en el caso de Luis Rolando Cuscul Pivaral y otras personas con HIV/SIDA v. Guatemala.

This demonstrates the idea that every identity could intersect with others as long as the social, economic or historical context marginalises them, potentially turning them into a subject of intersectional analysis, bringing to the centre the most marginalised within the marginalised. Hence, it is as important to understand the harm of someone who only has identities that have been marginalised than it is to comprehend how the harm is lived by those that reap the benefits of privilege and endure the suffering of marginalisation simultaneously.

5.4.3.4 PENSAR EN TITULO!

One step that has been omitted in the implementation of the operationalisation process in *Cuscul Pivaral* is the duty of the Court to evaluate all the evidence that the parties have submitted to determine if there is any data that demonstrates the differentiated impact that the victims have endured. Because the Court does not allow anyone outside the process to consult the evidence submitted and, unlike *Lluy v Ecuador*, the case brief is not available to the public, this step cannot be accurately illustrated in this case. With the information available, an assumption can be made to show how this could have been undertaken by the Court. During the hearing, the representatives of the victims, the NGO Center for Justice and International Law (CEJIL), requested the application of intersectionality in the decision-making process. To exhibit the importance of said analysis, they described the identities that made the victims multiply-burdened.¹⁵² It is not outlandish to assume that CEJIL made that same request in the brief containing pleadings, motions and evidence. As they had systematised the identities that render the victims as multiply-burdened

¹⁵² I/A Court H.R., Case of Cuscul Pivaral et al. v. Guatemala. Public Hearing. 06 of March 2018. Part 3 available at <https://vimeo.com/258891243> Minutes 00:01:23-00:32:24

individuals so they could present it succinctly during the hearing, one can also assume they had more detailed information in their brief. Using these two presuppositions it is possible to envision how this step could have taken place. The Court should have extracted from the brief each reference to intersectionality, intersectional analysis or related keywords and all information regarding the simultaneous interaction of the identities of the victims. Due to how the *amicus curiae* were presented, the Court should also have singled out any reference to interlocking systems of oppression. Each time the amicus or petitioners mentioned how a social category has been systematically or historically oppressed and this oppression was enhanced by the HIV/AIDS epidemic, the Court should have stopped to analyse and use this data.

5.4.4 Implementing intersectionality as part of the judgement

The use of intersectionality in the merits stage can be implemented either by using the intersectional identities of an individual, the subgroups as sections of analysis or the rights themselves as transversal categories for analysis. In this case, the latter approach will be used.

The victims¹⁵³ argued that the state of Guatemala had violated Articles 26 (the right to health and progressive realisation), 4 (right to life) 5 (personal integrity) and 8 and 25 (judicial guarantees). However, the use of intersectionality will be illustrated with the analysis of one right only due to the limited space available. Article 26 was chosen mainly

¹⁵³ In the present analysis the family and friends of the victim are excluded from the analysis despite the fact the Court recognised them as victim with regards to the violation of article 5 (personal integrity).

because most facts that could potentially demonstrate a violation of the rights of the victims of the case related to the right to health.

The analysis of Article 26 included an assessment of Articles 4 (right to life) and 5 (personal integrity). The possible violation of Articles 8 and 25 (judicial guarantees) referred to specific facts and did not encompass the totality of the harm endured. Additionally, the recognition of the violation of Article 26 has been considered a significant development in the protection of economic, social and cultural rights in the Inter-American System.¹⁵⁴

Three victims were indigenous peoples who spoke both Spanish and an indigenous language. The representatives of the victims were not clear about the experience of indigenous communities in Guatemala that live with HIV/AIDS. Using experts to help understand, amongst other things, what the most common forms of transmission of HIV/AIDS are, the level of knowledge about the virus, whether or not they can access information in their own language, the mortality rate in their communities, how many new cases are registered within these population and the levels of access to treatment could help make visible the additional struggles indigenous communities endure. As it will be further detailed before, the fact the court did not have the information it needed on this topic at its disposal resulted in the Court not seeing a reason to use intersectional analysis to understand the intersection between health and indigenoussness. In the case of pregnancy

¹⁵⁴ Eduardo Ferrer Mac-Gregor, 'La exigibilidad directa del derecho a la salud y la obligación de progresividad y no regresividad (a propósito del caso Cuscul Pivaral y otros vs. Guatemala)' (2019) 52 *Boletín mexicano de derecho comparado* 425.

and HIV, the intersection was clearly detailed by the representatives of the victims and consequently by the IACtHR at the judgement.

The analysis of Article 26 should begin by discussing the right to health in a generalised and abstract manner. The Court should first explain the concept of the right to life and what this entails. Secondly, it should assess how the state failed to fulfil its obligations to all individuals under its jurisdiction, not only those affected by HIV. An introduction to how the acts of the state caused harm to the victims is compatible with an intersectional analysis as they set the threshold from which an individual or social category can be deemed a disadvantage.

In practice, this could translate as follows. The Court could address how the right to life is indispensable to the enjoyment of other rights.¹⁵⁵ As the harm endured by the victims is the result of the state not ensuring their rights are properly fulfilled, the Court could explain how the state must protect the right to health by making sure individuals have, amongst other things, access to essential medical services that are effective and of good quality, and appropriate conditions to improve the overall health of the population.¹⁵⁶

The Court can also find, at this stage, that the state is responsible for medical services, either private or public.¹⁵⁷ It would also be advisable for the adjudicators at the Court to describe the conditions in which medical care should be given for the state to comply with its obligations. Using the AAAQ framework, the Court could explain how the medical

¹⁵⁵ I/A Court H.R., Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para 144.

¹⁵⁶ I/A Court H.R., Case of Poblete Vilches et al. v Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No.349 para 118.

¹⁵⁷ I/A Court H.R., Case of Suárez Peralta v Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No.261 para 134.

services provided by Guatemala should have avoided inflicting harm on the victims of the case. These characteristics include ensuring that medical services are respectful of medical ethics and the culture of the people that access those services. They should be appropriate from a medical and scientific standpoint, available to everyone without distinction or discrimination and the state must have enough medical services and programmes to meet demand.¹⁵⁸ This overview of the right to health is not part of the proposed operationalisation process of intersectionality as it is something the IACtHR does in all its cases, however framing the content and the scope of the right that is being breached in general terms, helps understand in an easier way how these general obligations are transformed when the victim is multiply-burdened.

Thus, once such general overview has been completed by the Court, adjudicators should focus on how the right to health should be guaranteed to multiply-burdened individuals. The Court is no longer talking about the right to health generally but is analysing the responsibility of the state in the context of the intersecting identities of the victims that are multiply-burdened. For example, the Court could find that people with HIV/AIDS are, as a result of their health, a vulnerable group. This could include an assessment of how the availability and accessibility of health treatment are fundamental to the survival of individuals with HIV. Inability to access antiretroviral treatment leads to the death of a person living with HIV.¹⁵⁹ The Court should clearly explain how health care for individuals

¹⁵⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) para 12.

¹⁵⁹ I/A Court H.R., Case of Cuscul Pivaral et al. v. Guatemala. Public Hearing. 06 of March 2018 available at <https://vimeo.com/258860394>. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court. Minute 00:12:43.

living with HIV/AIDS requires individualised and integral measures¹⁶⁰ that range from education to prevent new cases of HIV and treatment of opportunistic diseases to constant and supervised antiretroviral treatment.¹⁶¹

People who live in poverty have unequal access to health services and information which also puts them at higher risk of getting infected with HIV or, if they are already living with the virus, they are more likely to receive inadequate or incomplete treatment.¹⁶² These identities, which are shared by almost all the victims, need to be explored simultaneously as understanding them in isolation reaffirms the single-axis approach. The Court should explore how the state failed to protect the health needs of the groups that are at highest risk and are more vulnerable. It must question whether the state takes differentiated measures to provide health services according to the identities that put them at a higher risk, and whether the state is combating the prejudices and inequalities that are at the root cause of those vulnerabilities or ensuring that health services are accessible to the most vulnerable and marginalised groups of society without discrimination.

The right to health also has a different dimension when the victims are women and women of reproductive age as women with HIV are at higher risk.¹⁶³ In the fight to eradicate and prevent HIV/AIDS, when dealing with women the state has to pay attention to their needs,

¹⁶⁰ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. Paragraph 109 and I/A Court H.R., Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs. para 176.

¹⁶¹ Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), International Guidelines on HIV/AIDS and Human Rights. Sixth guideline.

¹⁶² *Mutatis mutandi* Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs. Judgment of August 24, 2010. Series C No. 214. para 233.

¹⁶³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). para 45.

taking into account the subordinated position they have in certain societies as a factor that contributes to making them more vulnerable to getting infected with HIV.¹⁶⁴

As part of the assessment of the merits, it is important to know how the interlocking systems of oppression exist and are perpetuated in Guatemala. Thus, the Court must determine how, in the specific case of *Cuscul Pivara*, Guatemala violated the right to health of the victims and consequently made them experience an aggravated form of harm. The example of what this would look like in practice has been omitted from this section as it is already included in the “Intersectional context of oppression” section *supra*.

Drawing on Tables 2 and 3, the group of victims that will be used to reimagine the case are those victims that, besides their sex and status as people living with HIV/AIDS, were also indigenous people and spoke an indigenous language. The selection of this group relies mostly on the fact that they have at least one identity, their sexual orientation being heterosexual, that locates them within what could be considered a privileged social category. For example, María Felipe Pérez is an indigenous woman, heterosexual, unemployed, with incomplete basic education, lives outside of Guatemala City and speaks Mam and Spanish. The following paragraphs will illustrate how the Court can determine if the right to health was breached by the state and the extent of the harm of the victims using intersectional analysis.

In Latin America, indigenous groups often live below the poverty line. They tend to have the lowest literacy rates, limited access to economic opportunities and jobs and their access

¹⁶⁴ UN Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 15: Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS). para (b).

to medical services and information about sexual and reproductive health is also poor.¹⁶⁵

The victims in *Cuscul Pivaral* have all expressed these barriers as part of their harm endured.

In Guatemala, the number of newly registered cases of people living with HIV/AIDS has increased significantly in regions where there is a majority of indigenous peoples. The most affected groups are the Mayan people who live in the departments of Izabal, del Petén, San Marcos, Huehuetenango, Quetzaltenango, Escuintla, Retalhuleu, Suchitepéquez, Chimaltenango del Sur, Garifuna communities living in Izabal, Puerto Barrios and the borders with Honduras and Mexico.¹⁶⁶ The victims in this case all live in the regions listed above; in particular, there is a trend amongst the victims of residing in Retalhuleu and Quetzaltenango which shows their harm is linked to their place of residency in more than one instance, and living within those departments has exposed them to HIV/AIDS. Some 21.9% of people living with HIV in Guatemala belong to the Maya indigenous groups, amongst them the most vulnerable are those that belong to the K'iche, Queqchi and Mam y Kaqchiquel linguistic groups.¹⁶⁷ The victims are also amongst these groups, they are Mayans and speak K'iche or Mam. This demonstrates, once again, that the conflation of two social categories has created an aggravated experience of harm as these victims belong to already marginalised groups.

¹⁶⁵ Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina. Mayo 2016, 52.

¹⁶⁶ Organización Panamericana de la Salud, Asociación Mundial de Sexología. Promoción de la salud sexual y prevención del VIH/sida y de las ITS en los pueblos indígenas de las Américas: Abana-Yala Kunarinaki. Washington DC: OPS; 2003.

¹⁶⁷ Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina. Page 68.

When it comes to indigenous peoples, the accessibility and quality of health services should of course refer to the physical location of the place.¹⁶⁸ In *Cuscul Pivaral* the victims that were also indigenous people lived far from the nearest medical centre, but it also entails other aspects related to their intersecting identities. The limited access to medical centres and services near or in their communities contributes to the underestimation of the real effect that HIV/AIDS has had in those communities.¹⁶⁹ The barriers indigenous peoples endure to access health services of good quality is also linked to their economic power. Most health centres that detect and treat HIV/AIDS tend to be located either in urban areas or far from the rural zones where indigenous peoples often live and the cost of transportation is often too high for indigenous peoples.¹⁷⁰ Francisco Sop Quiej, one of the victims who is an indigenous man, stated that to travel from his home in Suchitepéquez to the nearest health centre in Coatepeque takes him approximately two hours and costs 60 quetzals per trip, an amount that is beyond his economic resources.

In certain instances, the cost of transportation is even higher because the person living with HIV might require someone else to accompany them either for translation or just for support.¹⁷¹ This is the situation with the victims of this case. The harm experienced by their condition as seropositive was exacerbated by their inability to travel to the medical centres because they did not have the means to pay the public transport.¹⁷² Thus, when it comes to

¹⁶⁸ UN Committee on Economic, Social and Cultural Rights. General Comment No. 14: The Right to the Highest Attainable Standard of Health. para 1.

¹⁶⁹ Ministerio de Salud Pública y Asistencia Social, MSPAS; Organización Panamericana de la Salud; Organización Mundial de la Salud en Guatemala, Perfil de salud de los pueblos indígenas de Guatemala. Guatemala, 2016.

¹⁷⁰ Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina, 116-117.

¹⁷¹ *Ibid* 117.

¹⁷² I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. Paragraph 125. Annex 2 para 86.

indigenous peoples, the intersection of poverty and their indigeness is fundamental to understanding their risk of contracting HIV and their ability to access subsequent treatment.¹⁷³ The Court could have concluded that the lack of health centres that are geographically accessible and economically affordable imposed a higher burden on those who belong to already marginalised groups due to their economic status and which created a different qualitative experience of harm.

Access to medical services and information also further marginalised the victims of the case due to their language and culture. According to Solval, Ikeda and Hirsch, between 70 and 90% of indigenous people have an understanding of how health issues can be prevented and treated that differs from that of Western medicine.¹⁷⁴ This means that even when the Government brings sexual awareness campaigns to the indigenous territories, these campaigns have a different linguistic and cultural codification as they have with a white or *mestizo* recipient.¹⁷⁵

Most medical centres that deal with indigenous populations do not have translators or even interpreters,¹⁷⁶ and so once they reach the medical centre some patients would not have access to a service in their own language. For those victims who spoke Spanish, this might

¹⁷³ Organización Panamericana de la Salud; Organización Mundial de la Salud, *Incorporación del Enfoque Intercultural de la Salud en la Formación y Desarrollo de Recursos Humanos*. Abril de 1998. Washington, D.C.

¹⁷⁴ Solval, A.R., Ikeda, J.M. & Hearst, N. (2007). *Culturally appropriate integrated care is essential for the Adherence of Indigenous Persons Infected with HIV in Guatemala* as cited in *Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina*.

¹⁷⁵ *Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina*, 110.

¹⁷⁶ Rubén Muñoz, 'Atención Médica, Adherencia Terapéutica al Tratamiento Antirretroviral y Discriminación. Algunas problemáticas en la atención a personas que viven con VIH-sida, desde una perspectiva antropológica' (2014) 9 *Revista Pueblos y fronteras digital* 95.

not be an issue but for the victims that only spoke Mam or K'iche it is a problem that prevents them from accessing medical help effectively.¹⁷⁷ This further marginalises them as they need to rely on third parties to obtain information regarding their status as HIV positive or their treatment. This break in confidentiality can have negative effects on the individual.¹⁷⁸ All these barriers that intersect create an even graver experience of marginalisation when the reason they are seeking medical help is for a chronic illness such as HIV/AIDS.

Indigenous women living with HIV not only suffer from the intersecting oppression described, their sex also creates a different qualitative experience to that of their male counterparts. The illiteracy and school drop-out rates are high amongst indigenous women, and this translates into a lack of knowledge on how to prevent HIV/AIDS and the risks associated with the virus.¹⁷⁹ They are also one of the segments of the population that often lack maternal care. Indigenous women are often subjected to gender roles that encourage unsafe sex and early initiation of sexual activity.¹⁸⁰ For example, indigenous men often have multiple partners who can be other women, men or transgender people, yet the use of condoms is not expected in any of their relationships. Condoms are usually only used when indigenous men have sex with sex workers.¹⁸¹ Indigenous women living with HIV/AIDS are also further marginalised because there is a belief that women are the carriers and

¹⁷⁷ I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2018. Series C No.359 Annex 2.

¹⁷⁸ Secretariado Internacional de Pueblos Indígenas frente al VIH, la sexualidad y los derechos humanos SIPIA; ONUSIDA – Latina. Estado del Arte sobre VIH y Pueblos Indígenas en América Latina. Mayo 2016, 125-126.

¹⁷⁹ *Ibid* 55-56.

¹⁸⁰ *Ibid* 98-99.

¹⁸¹ *Ibid* 101.

transmitters of HIV/AIDS.¹⁸² In *Cuscul Pivaral*, the amicus briefs highlighted this problem amongst the HIV/AIDS population in Guatemala. They informed the Court that individuals who self-identified as heterosexual comprised a significant portion of the population living with HIV/AIDS. In the narratives of the victims, it is also possible to assess how often heterosexual women would say that their husbands infected them with HIV/AIDS.

Furthermore, the Court should have also assessed what conditions create a different qualitative experience of harm for women when it comes to access to treatment. This results from the fact that, during the public hearing, Judge Odio Benito asked the expert if gender played a role in medical treatment.¹⁸³ The expert witness explained that, although the treatment is the same irrespective of the sex of the individual, the progression of HIV and the effect the disease has on the body is different for women and men.¹⁸⁴ The Court could have determined whether treatment without the appropriate adjustments according to the sex of the patient violated their right to health.

This shows why the Court should not have denied an intersectional analysis to each victim. Limiting the understanding of the right to life of indigenous peoples to a brief mention in the general analysis of the AAAQ framework hides the systems of oppression that makes indigenous people living with HIV/AIDS multiply-burdened.

¹⁸² *Ibid* 102.

¹⁸³ I/A Court H.R., Case of *Cuscul Pivaral et al. v. Guatemala*. Public Hearing. 06 of March 2018. Part 1 available at <https://vimeo.com/258860394> Minute 01:04:21.

¹⁸⁴ *Ibid* Minute 01:05:05

5.4.5 Final thoughts on *Cuscul Pivaral*

It is not enough that a court, in this case the Inter-American Court, gives general descriptions on how accessibility to and quality of health services should be done. What is required is a more detailed explanation of how this obligation will imply different things when dealing with, for example, indigenous communities or people living in extreme poverty. The importance of using the voice of the representatives of the victims or the victims themselves is greater in cases like *Cuscul Pivaral* where including the narrative of 49 people (13 of whom had died by the time of the judgement) is a monumental task for the Court and might even represent an impossible challenge. Providing content to identities is a collaboration between adjudicator and victim and should not be omitted because of the number of victims. However, these obligations are still conceived in single-axis frameworks and do not account for the barriers that individuals might encounter as the result of the interaction of two or more identities.

One of the biggest issues with *Cuscul Pivaral* is that most of the determinations of the Court are constructed using a generic victim that lives with HIV/AIDS and does not have access to medical treatment.¹⁸⁵ How a lack of medical services produces harm in victims of HIV/AIDS tends to be described in a generalised manner, assuming all individuals with HIV/AIDS who cannot access medical services experience harm in the same way.¹⁸⁶

With regards to more specific measures, the Court formulated obligations of a general nature such as the state having an obligation to provide adequate medicines of the highest

¹⁸⁵ I/A Court H.R., Case of *Cuscul Pivaral et al. v Guatemala*. Preliminary Objection, Merits, Reparations and Costs.

¹⁸⁶ *Ibid*

quality possible and run all necessary tests and psychological therapies but neglected the fact that, even in apparently identity-neutral obligations, identities matter. Access to medicine for people living with HIV/AIDS varies depending on age and sex and so the obligations of the state should be conceived in an intersectional manner that includes the differences in the formula health-sex-age. These measures are unfortunately worded in a single-axis manner. Better would be a mention on the lines of ‘this should be done taking into account the intersectional identities of the victim’ or ‘an intersectional perspective needs to be applied when implementing the measures’.

Without this intersectional analysis, the Court is missing the importance of examining why people in Retalhuleu are at a higher risk of contracting HIV/AIDS or the role of language in the increased infection rate amongst Mayans who speak K’iche or Mam. If this section is compared to the merits section of *Cuscul Pivaral*, it will become apparent how the overall lack of specificity of the intersectional oppression of the victim does little to address and redress the harm

Cuscul Pivaral is a particularly good example of how intersectionality can be used even in cases where the number of victims is large. Working with the violation of the rights of 49 individuals, 13 of whom had died, was not an easy task for either the Court, the representatives of the victims or the author of this thesis but it produced very significant approaches to adjudication.

Intersectionality as a feminist approach to adjudication is seen more often in cases of one victim or cases with a primary victim who has intersectional identities. Using *Cuscul Pivaral* in opposition to this demonstrates that intersectionality can be as effective in cases with one or a few victims as in those with a large number of victims. This also relates to

one of the concerns that exist in feminist theory, in which some authors are concerned that using intersectional analysis calls for an over-disaggregation of individuals and imposes a barrier to group-based solutions or public policies. *Cuscul Pivaral* was also chosen to demonstrate that it is possible to disaggregate the identities of an individual and still use social categories to offer special measures of protection to certain groups. The different figures that were incorporated in the re-imagining of the case show the different patterns that emerge when you have a context of oppression that affects the intersecting identities of several victims. Although all victims are different and all have unique intersections, they are united by their collective harm; a harm produced by the oppression of their economic status and their health conditions.

This also shows the importance of positionality as having such a diverse group of people as individuals located in different social positions opens the door for analysis of difference rather than comparison. The Court does not argue that heterosexual people suffer less than homosexual people, nor does it claim people who have been able to keep working despite their illness deserve less attention than those who live in extreme poverty. They were all considered to determine the responsibility of the state, but the harm was analysed from their own positionality.

The annexes included in the judgement and that were later adapted and included in the re-imagining are also a very significant contribution by this case. The narrative of the victims, while neither perfect nor comprehensive, are included in *Cuscul Pivaral* with much more detail than, for example, *González Lluy*. It is possible for everyone reading the case to understand the identities of the victims and the effect the violations had on their lives. There is more to be done in this area, but it was a most welcome improvement.

Of course, not everything that the Court did was good. If it had been then there would be no need to re-imagine the case. One of the most disappointing things is that the Court rejected the use of intersectional analysis to everyone that is not a woman who was pregnant at the time of the violation. It is with such limited use of intersectionality that the message and objective of intersectionality got lost. This is particularly discouraging because the Commission and the representatives of the victims did such good work in trying to frame the case as in need of intersectional analysis. During the public hearing, the Commission started their intervention by asking for the use of intersectionality. CEJIL, as part of their closing remarks, explained why there was a need for an intersectional approach throughout the whole judgement. However, the Court decided to use intersectionality selectively.

5.5 Conclusion

Cuscul Pivaral and *Gonzáles Lluy* represent one of the shortcomings of the current operationalisation of intersectionality. As a tool of adjudication, intersectionality is already being applied in many international courts. However, the variations in its conceptualisation and operationalisation have resulted in a lack of clarity as to when and how it will be used. Although *Cuscul Pivaral* and *Gonzáles Lluy* deal with very similar facts and similar intersecting identities, the IACtHR decided to apply intersectionality to the primary victim in *Gonzáles Lluy* but not to those of *Cuscul Pivaral*. The reasoning behind this divergence is not clear, which in turn makes it impossible to predict which form of interpretation of intersectionality will be applied to the judgement, or if it is going to be applied at all.

Both cases illustrate the need for a refined understanding of the concept of intersectionality. The lack of consistency and clarity regarding how intersectionality is being used resulted in two dramatically different evaluation of the need to use intersectionality. To make this inconsistency even more troubling, when comparing *Cuscul Pivaral* and *González Lluy* the thought process of the Judges of the Inter-American Court is even less clear. In *González Lluy* despite the submissions of the Parties were far from demonstrating a need for intersectional analysis, the Court took a positive stance of including intersectionality. The same cannot be said about *Cuscul Pivaral* where the approach was to justify their refusal of using intersectional analysis with all the victims and just reducing it to a very small number of individuals.

A significant element of the *Gonzales Lluy* case rests on the fact that it is the first case where the Inter-American Court used and applied the term intersectionality, despite having used related keywords before such as multiple discrimination. It also illustrates how a harm which originated in a human rights violation can shift depending on whether the intersecting identities have remained static over time or are ever-changing. Even though the Court did not do an in-depth analysis on the subject, it briefly recognised how the intersection of HIV positive status and the age of the victim caused different types of harm as she transitioned from childhood to adulthood. This case also shows how a court can apply intersectional analysis even when the parties to the case are not specific in their request. During the public hearing, there was no mention of intersectionality, and it was only in the closing written arguments that the representative of the victims asked the Court to consider their intersectional identities. While *González Lluy* had many shortcomings in

the way it was litigated, the Court felt the need to be active in the inclusion of intersectionality.

In contrast, in *Cuscul Pivaral* the Court did not use an intersectional analysis except in women who were pregnant or breastfeeding, even though the Commission and the representatives of the victims expressly requested its application to all 49. This illustrates the arbitrary application of intersectionality. The parties in *Cuscul Pivaral*, framed the entire case within intersectionality theory but the Court failed to be proactive in the use of intersectional analysis for 44 of the 49 victims. *Cuscul Pivaral* clearly illustrates how an adjudicator can use the proposed process in a case with many victims. Although the process of operationalisation is conceived for a single victim, all regional human rights courts have cases with more than one victim and the process of operationalisation should also be able to adapt to such cases. It is clear, for example from the lack of an intersectional context analysis that explains the disadvantage certain groups have in the national context, that expecting judges to have a passive role in the decision-making process is not beneficial to the victims. Knowing that the judge will take an active role in obtaining information ensures that intersectionality will be used more widely.

These cases show that intersectionality can be operationalised despite being a theory heavily charged with subjective elements. Regardless of how positionality and the dynamics of power are fluid and abstract concepts, once applied to a real-life case they become clearer. There will be still many instances in which intersectional analysis will produce widely differing results in apparently similar cases, and that is part of the anti-essentialist and heterogeneous aspects of intersectional theory. However, these results will not be due to a lack of standardisation and clarity of the implementation of intersectional

theory. Rather, they will be the result of the different qualitative experiences of each victim. They will no longer be cases that are similar, yet with judgements who value the use of intersectional analysis vastly differently. The proposed operationalisation process of intersectionality can contribute to closing the gap between cases litigated with a clear knowledge of intersectionality, like *Cuscul Pivaral*, and those that use the concept of intersectionality less adeptly, like *González Lluy*.

Chapter 6. Conclusion

This thesis has shown how, through its operationalisation as a tool for the adjudication of human rights, intersectionality can contribute to the delivery of justice for victims who endure oppression and marginalisation due to their intersecting identities. In so doing, it has questioned what intersectionality is and what does it do when part of IHRL, the results of that exploration pointed towards a need to refine its place in the protection of human rights to ensure that the methods and messages of intersectionality theory are properly adopted and adapted. This thesis has provided an account of intersectionality theory, a more detailed and clearer operationalisation process to be implemented in IHRL and provided an understanding of the parts of intersectional theory that can be applied to the law, and which cannot.

Feminist approaches to international law have gained traction and legitimacy and are now often used to challenge the *status quo* of international law. One of these approaches has been intersectionality. The ideas put forward by Crenshaw in her two influential articles *Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Colour* and *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* provided new tools with which to understand discrimination, identity, power, domination and marginalisation. As one of the most significant contributions from feminist studies, intersectionality has influenced not only feminism but also IHRL.

Crenshaw's critique of anti-discrimination law and the single-axis framework have made such an impact on the way oppression and marginalisation are understood, that IHRL

needed to incorporate it one way or another. Whether it did it successfully or not has been examined in this thesis. An overview of the available literature on intersectionality and human rights shows a need to debate not whether intersectionality should belong in the human rights arena but rather what justifies the use of intersectional analysis in IHRL adjudicative process, and how can it be successfully adopted and adapted to the needs of IHRL without sacrificing its message and methods. Noting this gap, this thesis has explored the leading edge of intersectionality used in feminist theory and how these theories can be applied to IHRL.

The literature and cases demonstrate that the use of intersectionality as a tool to adjudicate alleged human rights violations in the international arena has some ideas that are more progressive than those currently existing in feminist debates, while others do very little to properly incorporate intersectionality. The mainstreaming of intersectionality into human rights law has been inconsistent, as the data in Chapter 3 demonstrated. International human rights adjudicative bodies have selected only certain aspects of intersectionality at the expense of the integrity of the theory. The message of intersectionality in feminist theory and IHRL tend to operate in parallel instead of in harmony with one another. The examination of judgements and communications decided by international human rights adjudicative bodies in the last half-decade has shown that the use of intersectionality is a slow yet constant practice in human rights adjudication. The thesis has addressed the gap that exists between the use of intersectionality in feminist theory and IHRL. This is of particular importance as intersectionality is not currently so widespread that a change in its use would be a significant challenge for adjudicative bodies.

Through the operationalisation of intersectionality, this thesis creates a dialogue between the core constructs of feminist theory and the tenets of IHRL. It has also demonstrated that intersectionality has only been partially incorporated into human rights law as the lack of operationalisation of intersectionality in that area is ineffective in achieving the aims of intersectionality. However, the refined concept of intersectionality and the novel operationalisation process proposed in this study are tools that can ensure that intersectionality as a feminist approach to international law is not modified and co-opted to the point of losing all relevance to the feminist theories that are its roots. Instead, by proposing a new way to operationalise intersectionality as a tool to adjudicate human rights, intersectionality has been adapted to the complex dynamics of law whilst abiding by the nuances of the theory, bringing justice to the objectives, messages and methods it tries to convey.

This was done by first establishing the discussions surrounding intersectionality in feminist theory. From the literature review, it was possible to extract certain theoretical discussions common to all intersectionality theory; for example, all authors one way or another included social positionings and discussions on oppression as part of an intersectional analysis. In other instances, intersectionality scholars could not agree on key issues. When this occurred, this thesis revisited the genealogy of intersectionality and the work of Kimberlé Crenshaw to take a stance. The most significant representation of this exercise is the limitation imposed on the operationalisation process proposed in this thesis. It was decided that only multiply-burdened individuals would be conceived as subjects who benefit from intersectional analysis.

How intersectionality was understood in international human rights, how it was applied and for whom the intersectional analysis was intended were also discussed. Amongst the concerns expressed, it was possible to identify two major issues in the use of intersectionality in IHRL. The concept of intersectionality is being used with different connotations and serving different purposes which makes it almost impossible for a party to determine how and when intersectionality will be applied. Therefore, a refined concept of intersectionality that could more accurately encompass all its guiding premises and core constructs was suggested, with the objective of facilitating IHRL adjudicative bodies to incorporate intersectionality to their functions. The analysis and conclusions drawn from Chapter 2 resulted in clearly demarcated elements and objectives that provide a solid base for the incorporation of intersectionality into human rights law without sacrificing the integrity of the theory.

Adjudicators already have an increased interest in using intersectionality as a tool to understand the different qualitative experiences that multiply-burdened victims have when their rights are being violated. The best way to do this, according to judges such as Ferrer Mac-Gregor, Vehabović and Pinto de Albuquerque, is to use intersectionality. Yet, as was clear from the data presented in Chapter 3, adjudicative bodies either do not have consensus on what intersectionality is, what it does, to whom it applies or how to implement it.

Intersectionality delivers more comprehensive justice as it focusses on the victim not as an entity that experiences human rights violations in an abstract and homogenous manner but as a complex individual. Intersectionality needs to be incorporated into human rights adjudication to help adjudicators fully grasp the effect human rights violations have on

multiply-burdened individuals. To ensure that human rights tribunals and courts use intersectionality in line with current debates, this study included as novel elements a common conceptualisation of intersectionality to be used in adjudication and a proposal on how to operationalise it.

The different interpretations examined stress how important it is to have clarity as to when, if and why judges incorporate intersectionality. This thesis has contributed to the literature on intersectionality by proposing a base concept where it should be understood in IHRL adjudication as a theory that uncovers the different qualitative experiences of harm that result from the interactions of two or more identities and their relationship with the broader structures of oppression. It also revised the use of intersectionality in human rights law and assessed the extent to which it was coherent with its objective and purpose.

Some the issues that emerged was for example, that in some attempts to provide intersectionality with a method to be operationalised, scholars applied intersectionality using tools to combat single-axis acts of discrimination. To reclaim the purpose of intersectionality and make visible those who are multiply-burdened, it has been removed from the realm of single-axis discrimination and placed in its own space of application and using tools tailored for the purpose and objective of intersectionality. To maintain it within single-axis anti-discrimination frameworks and its tools is not in line with the message, aims and objectives of intersectionality and clearly demonstrates that feminist ideas are being incompletely adapted into intersectional law. Intersectionality as a feminist approach is being deprived of some of its core tools to respond to the status quo of international law.

Human rights adjudicative bodies have used intersectionality as a tool to understand acts of discrimination that violate the autonomous right to non-discrimination but have

neglected its application in other types of violations, based on the right to equality that complements other rights protected by different IHRL treaties. To successfully operationalise intersectionality, there was an imperative need explore the possibility of removing the attachment of intersectionality to the autonomous right to non-discrimination in order to implement intersectionality in a broader range of cases, all of it based on the right to equality.

Regarding whom can benefit from intersectional analysis, examination of the judicial functions of international human rights adjudicative bodies pointed towards a broader approach than that in feminist theory. Instead of having specific discussions of which grounds justified the use of intersectional analysis, IHRL adjudicative bodies tried to use said analysis in as many grounds as possible. This thesis argued against the limited approach and proposed that all identities can benefit from intersectional analysis as long as they interact with one identity that is marginalised. Individuals with only privileged identities are not the subjects of such analysis but individuals with both marginalised and privileged identities can be.

In Chapter 4, the thesis focussed on proposing how adjudicators and human rights practitioners will better understand the harm and its manifestations. The intersecting characteristics of the victims were placed at the centre of the intersectional analysis. It concluded that intersectionality and IHRL have as a unifying element the need to determine the qualitatively different experience of harm suffered by the victim and propose a means to alleviate the harm and combat the structures that allowed for the violation to occur on the first place. To address and redress the violations perpetrated on the individual, intersectionality was operationalised to determine how the intersectional identities of the

victim create a unique experience of harm while simultaneously revealing the structures of oppression that existed before the violation and which allowed the violation to occur.

Intersectionality relies on abstract theoretical components such as positionality or anti-essentialism that would be hard to imagine as part of the work of adjudicative bodies without seeing how it would operate in real-life scenarios. Although Chapter 4 detailed mostly practical steps to operationalise intersectionality, it was important to demonstrate how would this work in a real case and this was achieved by using case studies. Both *González Lluy* and *Cuscul Pivaral* provided challenging and rich scenarios to test the feasibility and practicability of the reworked concept and the operationalisation process.

Despite the limited information available on the cases, Chapter 5 illustrated how intersectionality can be used as a tool to adjudicate human rights without imposing an undue burden on adjudicative bodies.

The outcomes of the research ensure that intersectionality can be successfully applied to guarantee that the harm suffered by a victim is adequately addressed and therefore redressed. This thesis contributes to safeguarding intersectionality from being used, in IHRL, as a buzzword or trend and used to its full potential within adjudication. The results provide an avenue where intersectionality may allow for a more comprehensive understanding of the complexities of lived experiences.

While there is much literature that covers the use of intersectionality in IHRL, it tends to be limited in content. The discussions are either very narrow in scope or there is a lack of proposals to overcome the issues identified. This thesis filled some of the gaps within the existing scholarship by widening the scope of the research and by ensuring there was a

suggestion on the way forward. It expanded beyond the scope of existing literature and, instead of focusing only on the UN treaty bodies, the regional systems were also subjected to a closer inspection, in particular the Inter-American System of Human Rights which provided many of the examples in the thesis. The discussions that were presented were not limited to a theoretical exercise but were taken beyond that and a practical component was added through operationalisation to fill the gaps detected.

One of the novel elements of this thesis is the direct comparison between the use of intersectionality in feminist theory and IHRL. This resulted in a mapping of where the two fields of study overlapped and where they deviated from each other. This exercise was central to the research because IHRL is still struggling to move away from the constraints of single-axis frameworks. Helping IHRL to broaden its understanding and application of intersectionality prevents the theory from resorting to the structures and tools of human rights law it seeks to challenge as they are not capable of dealing with the experiences of multiply-burdened individuals. Thus, the proposals in this thesis help create a positive effect in cases where a victim has suffered a different qualitative experience of harm due to their condition as multiply-burdened. This thesis is not only contributing to the ongoing debates by pushing the boundaries of what intersectionality can do in IHRL but also is filling some of the existent gaps in the literature, all to make sure that there is a better use of intersectional human rights analysis.

Finally, there is no better moment to challenge intersectionality as an approach to IHRL than now. While the use of intersectionality is becoming more widespread, there is still a long way to go before it becomes a staple of human rights law. Hence, this is an ideal moment to advocate for a refined, clearer, more concise and consistent use of the theory.

Especially in a moment like now, when it is already possible to see a trend amongst adjudicative bodies of using intersectionality, and their not very nuanced explanations and understanding of the theory are being reproduced into several of their decisions.

Using intersectionality in legal systems does not imply sacrificing its original message. Adapting intersectionality to legal systems must be done carefully. Before calling for law and human rights to fully embrace the potential of intersectionality, this thesis stressed the importance of including the theory of intersectionality in a nuanced manner in human rights adjudication.

To better understand the implications of these results, future research is needed to address how the operationalisation process can be used in determining reparations. Chapter 4 limits the operationalisation process to the merits stage of a case being litigated before an adjudicative body but the operationalisation process can also be used to assess the reparations given to a victim. There is literature that already uses intersectionality to redress the harm of multiply-burdened individuals so it would be a significant contribution to test the proposals included in this study in the reparations stage of an adjudicative process. While this thesis only focuses on the addressing part, there is motivation to move forward and work on the redress aspects.

Some adjudicative bodies include functions beyond the litigious process, and it would be interesting to understand whether or not the operationalisation process would work on other areas such as precautionary measures. Most likely, such research would require an adaptation of the proposals included in this thesis but there is the potential to expand its application to other functions of the adjudicative bodies.

People interested in this research should also consider challenging some of the limitations self-imposed by the author. For example, it would be interesting to see how this same research would look like if applied to the African or European human rights systems. The focus on the Inter-American System was an effort to decolonise, to the extent possible, this research. However, this should not obscure that one of the objectives of the thesis was to create a proposal that could cater to all regional systems and all treaty bodies.

Finally, it is hoped that the debates and proposals presented in this thesis will also be adopted and adapted to include individuals whose identities intersect in privilege and not in marginalisation. This is an expectation that does not emerge from the need to make invisible multiply-burdened individuals, rather it is a way to test the boundaries of intersectionality and to challenge the ideas laid out here.

Appendices

Appendix 1 – Summary of the circumstances of the petitioners in *Cuscul Pivaral et al. v Guatemala*¹

Victim	Facts
Facundo Gómez Reyes	He was diagnosed with HIV in April 2002, in ‘Project Life’ of the Non-Governmental Organisation ‘Médecins Sans Frontières’ (hereinafter ‘MSF’). He did not have access to timely antiretroviral treatment, nor to viral load tests, CD4, genotype and phenotype. As a result of his condition, he suffered multidrug-resistant lymph node tuberculosis. His last consultation was on February 18, 2003. He died on February 27, 2003, due to tuberculosis.
Reina López Mujica	She was diagnosed on April 15, 2002, at the National Hospital of Coatepeque. She began receiving antiretroviral treatment in June 2003 through MSF’s Life Project. She had no genotype and phenotype exams, nor was she monitored to determine her health status. She suffered from tuberculosis and acute anaemia and died as a consequence of it on November 6, 2003.
Ismar Ramírez Chajón	He was diagnosed at 22 years of age in a private sanatorium to which he was admitted because he was in poor health. After his diagnosis, he was treated at the Guatemalan Social Security Institute. He was transferred to Roosevelt Hospital, where his medications were changed, later developing resistance to them. He was not tested for phenotype and genotype. He suffered from tuberculosis, herpes and human papilloma. He lost his vision and had sores. He was admitted to the San José hospice for 22 days where he died on December 5, 2003 due to cardiorespiratory arrest, disseminated mycosis and AIDS
Petrona López Robledo	She was diagnosed on February 26, 2001, at the Mazatenango Hospital. Her health was continually monitored at the San Bernardino Public Health Centre, Department of Suchitepéquez. However, she did not receive treatment to combat HIV, nor did she have access to CD4 and viral load tests to start antiretroviral treatment. She started antiretroviral treatment in mid-2003. She died in January 2004 due to pneumonia.
Rita Mariana Dubón Orozco	She began receiving medical care in 2002, at the National Hospital of Coatepeque. She received antiretroviral treatment from MSF since mid-2003. She did not have CD4, viral load, genotype nor phenotype tests that would allow her to treat her illnesses in time. She suffered generalised sepsis, diabetes mellitus, arterial hypertension, chronic renal failure and pneumonia. She passed away on June 27, 2006
María Blanca Vaíl López	She was treated at the Coatepeque Hospital. She was diagnosed with HIV on November 20, 2001, in MSF’s Life Project program. She started treatment with this organisation in 2003, where she received prophylactic treatment and nutritional support. As of 2004, she was treated by MSF, and later at the National Hospital of Coatepeque, where she received antiretroviral treatment. She had irregular access to CD4 (4 times) and viral load (1 time) exams. She suffered from genital herpes, vaginal candidiasis, dermatitis, otitis and histoplasmosis. She had no financial resources. She died on March 27, 2011, due to respiratory cardiac arrest and dehydration.
Guadalupe Herminia	She was diagnosed with HIV in 2002 at the Retalhuleu Hospital. Her treatment began in May 2002 at the National Hospital of Coatepeque with the attention of MSF. She began her antiretroviral treatment in November of that year. She did not have regular access to CD4 and viral load tests, nor was she given medications periodically. The lack of medication would have caused resistance to antiretroviral treatment, which allowed

¹ This appendix reproduces the relevant parts of Annex 3 included in I/A Court H.R., Case of Cuscul Pivaral et al. v Guatemala. Preliminary Objection, Merits, Reparations and Costs.

Cayaxon García	her to suffer from various opportunistic diseases. She suffered from hepatomegaly, herpes, severe sciatica, bronchial hyperactivity and pharyngitis. She died on October 9, 2012 from chronic renal failure
José Rubén Delgado López	He was diagnosed in 2002 in a private clinic. In the same year he was treated by MSF and then at the National Hospital of Coatepeque and in 2003 began his antiretroviral treatment. He was tested irregularly for CD4 (6 times) and viral load (3 times), without being informed of his results. In 2008, the state reported that he had respiratory tract infections and oral candidiasis. He suffered cryptococcus on the skin, scabies, eye trauma, pruritic papal rash, herpes, grade II malnutrition, lipotomy, diarrhoea, dizziness, otitis and headache. He was tested for antiretroviral resistance with results of therapeutic failure due to resistance to lamivudine, efavirenz and nevirapine. Due to his illness, he could no longer work. He died on May 14, 2010. During the fifteen days before his death, he had been seriously ill, unable to eat or urinate and vomiting
Elsa Miriam Estrada Ruíz	She was diagnosed with HIV in 2001. She was treated by MSF in 2001 but began her antiretroviral treatment until 2006. She was not tested for CD4 and viral load. She suffered from oral candidiasis, herpes zoster and neuropathy. She died on July 26, 2016 at the National Hospital of Coatepeque, due to a common illness
Alberto Quiché Cuxeve	He was under medical monitoring at the Roosevelt Hospital. He did not have access to CD4 or viral load tests to determine whether the treatment scheme he received was adequate. He died of pneumonia on January 4, 2001.
Silvia Mirtala Alvarez Villatoro	She was diagnosed with HIV in 1989 at the psychiatric wing of the Guatemalan Social Security Institute (IGGS), that year she began irregular antiretroviral treatment. She was tested for CD4 and viral load, although irregularly. She suffered from fungi. She did not receive psychological or nutritional support, only through NGOs she received advise for good adherence to treatment and condom use. Before being diagnosed, she worked in a printing press and was fired due to her health situation. It takes one hour and fifteen minutes to move from her home to the hospital. She died on March 13, 2016 due to bacterial meningitis and drug resistance.
Juana Aguilar	She was diagnosed with HIV on January 18, 2000, at the Red Cross of the Guadalupe Health Post. In March 2002, she began receiving MSF care. She began her antiretroviral treatment in November 2005. She suffered from herpes zoster, recurrent respiratory tract infections, viral tonsillitis, severe infections and scabies. Her last appointment was on April 30, 2014. Mrs Aguilar has already passed away.
Melvin Yovani Ajtun Escobar	He was diagnosed in 2001 at Retalhieu Hospital. He began his treatment in 2004, through MSF. He was not regularly tested for CD4 and viral load. He suffered dermatomycosis, constant fevers that would last for more than a month, myco skin manifestations, atypical pneumonia, oral candidiasis, pharyngitis, oral papillomatosis and villous oral leucoplakia. He did not have the financial resources to acquire the medicines. In 2006 he attended Clinic 12 of the National Hospital of Coatepeque, where he also received antiretrovirals. He received advise about condom use and prevention of reinfection. He died on June 17, 2016, for causes not related to HIV.
José Cupertino Ramírez	He was diagnosed in 2003, at the Mazatenango Hospital. He was assigned to the National Hospital of Coatepeque. Through MSF's Life Project program he began receiving antiretroviral treatment on June 9, 2004. He suffered anorexia, pharyngitis, mycosis, syphilis and genital herpes. The CD4 exams were not regular and the viral load tests were not performed. Due to his illness, his partner left him, his four children also left and, in the streets, they called him ' <i>sidoso</i> '. ² He died on January 8, 2013, from suffocation asphyxiation

² Pejorative term used to describe an individual who has HIV/AIDS.

Sebastián Emilio Dueñas	He was diagnosed with HIV in 2002 by a private laboratory. Before his diagnosis, he was a farmer and is now a merchant. He began his antiretroviral treatment in MSF's Life Project program on December 12, 2002. He was subsequently transferred to Clinic 12 of the Coatepeque Hospital. He has not had regular access to CD4 tests, viral load, or treatment for opportunistic diseases, which resulted in mouth fungus infection. He has suffered from recurrent oral candidiasis, upper respiratory infection and diarrhoea. He said he has been pointed out by people attending Clinic 12, who have referred to people living with HIV as 'there are those with the AIDS'. He receives psychological support every three months, he is also receiving support from a self-help group on issues of adherence to treatment and talks to avoid reinfections, using condoms
Julia Aguilar	She was diagnosed with HIV in 2002, in a private laboratory. She began her antiretroviral treatment with MSF's Life Project program and then with the Global Fund. She was transferred to Clinic 12 of the National Hospital of Coatepeque, in 2006, where she began her antiretroviral treatment on April 26, 2007. After MSF stopped giving free treatment, she continued to receive medical treatment at the hospital. She has been irregularly tested for CD4 and viral load and has not been able to access all the medications she was prescribed due to its high cost. Nor have genotype and phenotype tests been performed. She has suffered from acute tonsillitis, parasites, pharyngitis, sarcoidosis, neuropathy, moderate cervicitis, urinary tract infection, sinusitis, diarrhoea, spur of the coleoneum, peptic disease, post empathy neuropathy and obesity. She does not receive psychological or nutritional support, only medications. Nor does she receive family or community care. It takes one hour from her residence to the clinic and the ticket costs between 8 and 15 quetzals each way, which is too expensive for her. Mrs Aguilar has stated that she is subject to accusations for her status as a person with HIV, particularly by her neighbours who have identified her and her husband as 'the <i>sidosos</i> ' and comments made at the National Hospital of Coatepeque which, she said, makes her feel hurt.
Felipe Tebalan Ordoñez	Before the contagion he used to work planting and harvesting corn, however, he had to sell his plot because he could not continue working due to his illness. Once in treatment, he sold chicken and later he stopped working. He was diagnosed with HIV in 2002, in MSF's Life Project program. From June 2003 he began his antiretroviral treatment with MSF and approximately in 2004 he was transferred to Clinic 12 of the National Hospital of Coatepeque, where he had liver tests and, irregularly, CD4 and viral load exams. He has not had genotype and phenotype exams and he has been given some of the medications prescribed. He has suffered from liver problems, mild deafness, grade II malnutrition, acute diarrhoea, allergies and pimples in his mouth. He does not receive nutritional, social, nor family, community and home care support. He attends the psychologist once a year and has been given condoms
Martina Candelaria Alvarez Estrada	She was diagnosed with HIV in 2001 in MSF's Life Project program. she began her antiretroviral treatment in that organisation. Later she was transferred to Clinic 12 of the National Hospital of Coatepeque. She has had CD4 and viral load tests. She has suffered from neuropathy, arthralgia, diarrhoea, high temperatures in her tongue and tiredness. She has had difficulties going to the hospital because like her husband, Mr Felipe Tebalan Ordoñez, it is far from their home and they do not have the financial resources to do so.
Luis Rubén Isabel Alvarez Flores	He was diagnosed with HIV on October 18, 2002, at the Pedro de Bethancourt National Hospital, as a result of an opportunistic disease called fungus pneumonia. He was later transferred to the San José Hospice. After that, he was transferred to MSF where he began his antiretroviral treatment in February 2003. He was later assisted by the Marco Antonio Foundation, where he received psychological and nutritional care and was assisted by a social worker. Since 2008 he received medical attention in a public hospital in the City of Antigua. His medical attention was interrupted from 2011 to 2013 because he was in Honduras. He is currently receiving treatment at the Antigua hospital, where he receives antiretrovirals and has been tested for CD4, viral load and genotype, although there are some studies he has had to pay for. His treatment scheme has not changed and he has not received nutritional, family or community care but he does receive psychological care every three months. Mr Alvarez Flores said he had to quit his job when he was diagnosed and then he has faced obstacles to enter the labour market because of his status as a person with HIV. He also claimed to have had to make expenses of around 2000 quetzals a year to go to the clinic. He is not working but has the support of his brothers, his parents do not know about his condition.

Ingrid Janeth Barillas Martínez	The Court did not establish any facts regarding this victim.
Saira Elisa Barrios	She was diagnosed with HIV in 2002 when she was seven months pregnant. She began her antiretroviral treatment in that same year, in MSF's Life Project program. Subsequently, she was transferred to the National Hospital of Coatepeque and, at her request, was transferred to the Retalhuleu Hospital, where she received irregular treatment with regard to CD4 and viral load tests. She has suffered from various opportunistic diseases, such as intestinal parasites, mucous cutaneous manifestations, respiratory infections and severe bacterial infection. She has not received nutritional or social support, nor family, community and home care. However, every three months she receives psychological support and gets condoms. She receives medications for HIV but not for related or opportunistic diseases. She used to work in house cleaning, cooking, washing and ironing, activities that she had to suspend due to the physical conditions she suffered as a result of the deterioration of her health. She also said that it takes an hour and thirty minutes to arrive from her home to the Retalhuleu Hospital
Felix de Jesús Cabrera Morales	He was diagnosed in October 2001 in the laboratory <i>Casa Central</i> . He began his antiretroviral treatment in December 2001 at the IGSS, where there was no supply of medicines. They have performed irregularly CD4 and viral load tests, have not performed genotype and phenotype tests nor comprehensive care. Despite having his treatment changed several times he has not had regular access to medications due to a shortage. In relationship to the shortage of medicines, Mr Cabrera Morales has expressed his anguish caused specifically by the fear of contracting opportunistic diseases and generating resistance to medicines. Mr Cabrera Morales suffered consequences when he became aware of his status as a person living with HIV, as he was identified as a person with HIV by his colleagues and fired from his workplace. On the occasion of his dismissal, he filed a lawsuit with his employer, in which labour discrimination was proven. He works as an actor and does not receive a fixed salary. He tried to commit suicide with pills and went to the IGSS emergency service. He does not receive medical care for diseases that are not derived from HIV, nor does he receive care for opportunistic diseases because he has not presented them.
César Noé Cancinos Gómez	He was diagnosed with HIV on June 18, 2002, and on June 12, 2003 he began antiretroviral treatment in MSF's Life Project program. He was subsequently transferred to Clinic 12 of the National Hospital of Coatepeque, where he had some CD4 and viral load tests. Currently, he has been regularly tested for CD4 and viral load, although on recent occasions he was asked for an economic 'collaboration' of 10 or 5 quetzals for the tests. He has not suffered from opportunistic diseases, nor has he had genotype and phenotype tests. He does not receive nutritional support. It takes an hour to go from his home to Coatepeque. Sometimes there is not enough medicine for three months and he is given only for one month. He worked in a factory in the Capital but stopped doing so due to the physical deterioration he suffered from the disease and later returned to Coatepeque to work in agriculture.
Aracely Cinto	She was diagnosed with HIV in 1994 at the Tecún Umán Health Center, Department of San Marcos but her condition as a person with HIV in Coatepeque was confirmed. From 1994 to 2005 she was treated at the Red Cross. Later, she received medical attention from MSF's Life Project program and was finally transferred to Clinic 12 of the National Hospital of Coatepeque, where she began receiving antiretroviral treatment in 2009. At that time there was a supply of medicines. She has been irregularly tested for CD4 and viral load test of which she has not received any results. She has not suffered any opportunistic illness. She works washing clothes and selling ice cream, attends self-support groups. Mrs Cinto said that because the clinic she goes to is very small, the people who attend points them out and refer to them as 'the <i>sidosos</i> ' which creates feelings of distrust.
Luis Rolando Cuscul Pivaral	He was diagnosed on October 31, 1993 at the IGSS, where he said he had been subjected to accusations and ridiculed by the medical staff where he was treated and a sign was made indicating that he was a 'patient with AIDS'. He began his antiretroviral treatment at MSF's Life Project program, at Roosevelt Hospital, in September 2000. He has been tested for CD4, viral load, triglycerides, kidneys and liver function. He has

	suffered from lipodystrophy by virtue of having undergone experimental treatment before starting antiretroviral treatment. He has not suffered opportunistic or related diseases. He has not had genotype exams. When he learned of his diagnosis, he had feelings of depression and lost interest in everything and tried to commit suicide several times. He has not received social, family, community and home care.
Olga Marina Castillo	The Court did not establish any facts regarding this victim.
María Felipe Pérez	She was diagnosed in 1999, in MSF's Life Project program. She began her treatment in 2001. She was transferred to the National Hospital of Coatepeque but due to the remoteness and her economic situation, she moved to the Retalhuleu Hospital. She has had CD4 and viral load tests irregularly. They have not performed genotype or phenotype studies. She said she has not received treatment for HIV-related diseases. She does not work. Her children support her financially because she has no resources. She has not received nutritional, social, family, community or home care support. She has received psychological support and condoms. She said that her children received comments from people on the street and from friends, who told them that 'you have AIDS because your mother has AIDS'. She had to sell some land to help herself financially.
Ismerai Olibia García Castañon	She was diagnosed in 2003 by MSF's Life Project program and began receiving medical care by MSF that same year. She was transferred to Clinic 12 of the National Hospital of Coatepeque and began her antiretroviral treatment in 2007. She has not been regularly tested for CD4 and viral load. She has suffered from opportunistic diseases such as vulvovaginal candidiasis and chronic diarrhoea. She receives advice at the hospital and information on condoms and reinfection.
Santos Isacar Vásquez Barrios	Works collecting and selling coconuts. He was diagnosed with HIV in 2003 in MSF's Life Project program, where he was given a Trimetropin treatment for an approximate period of nine months and then he was given duovon and efaviren. He was then transferred to Clinic 12 of the National Hospital of Coatepeque, which is approximately 40 minutes from his home and spends approximately 45 quetzals to be able to come and go on consultation days. He began his antiretroviral treatment in 2004. He has been tested for CD4 and viral load. He has suffered from syphilis, neurosyphilis, herpes zoster, recurrent skin mycosis, parasites, fever, bloody diarrhoea, vomiting with white phlegm, mild aphonia and pharyngitis. He has received advice on adherence to treatment and nutritional and psychological support in MSF's Life Project. In Clinic 12, he has received psychological attention.
Mardo Luis Hernández y Hernández	He worked as a landowner, an activity he had to give up due to the weakness caused by the disease. He currently works in a baler. He was diagnosed with HIV in 2001, in MSF's Life Project program. He was subsequently transferred to Clinic 12, of the National Hospital of Coatepeque but was finally treated in Malacatan. He has had CD4 and viral load tests but he has not had genotype and phenotype tests. He has suffered from pneumonia, tuberculosis and cryptococci. He does not receive nutritional or social support. His son was identified as a person living with HIV by a nurse even though he does not have it, which generated feelings of guilt in Mr Hernández.
Luis Armando Linares Ruano	He was diagnosed in 1984, in the Asociación Guatemalteca de Atención Sexual. He spent approximately 14 years without receiving medical treatment, which he obtained for the first time at the San Juan de Dios Hospital, later at the Roosevelt Hospital and finally at the IGSS. With his treatment he received antiretrovirals. He has had CD4 and viral load tests. On one occasion, at the Roosevelt Hospital, he had a genotype test. He has suffered pneumonia and other conditions such as weakness, diarrhoea, very severe headaches, dizziness and lymphomas in various parts of the body (arms, legs and waist). He has not received nutritional, social, psychological, family, community or home care support. He receives condoms on demand. He has not been able to get jobs because of his sexual orientation and because he has to undergo medical exams.
Marta Alicia Maldonado Paz	She was diagnosed on December 4, 2001, by MSF's Life Project program. She started antiretroviral treatment in 2003, in that organisation. Subsequently, she was transferred to Clinic 12 of the National Hospital of Coatepeque. She has had some CD4 and viral load tests. He has suffered from vulvar and anal papillomatosis, oral and vaginal candidiasis, oral papillomatosis, tinea pedis, grade II malnutrition and histoplasmosis. She worked in a warehouse before being diagnosed and later was a receptionist at MSF's Life Project program.

Dora Marina Martínez Sofoifa	She works as a housemaid. She was diagnosed in 1998 at the National Hospital of Coatepeque, where she went because she had a fever and malnutrition. She did not receive medical treatment for HIV during the first year after her diagnosis because she was told at the hospital that there were no medications needed for her treatment. In 2004, she was treated by MSF, where she was screened for CD4 and indicated antiretroviral treatment. In 2010 she was transferred again to the National Hospital of Coatepeque. CD4 and viral load tests are performed irregularly. In 2014 they stayed several months without antiretrovirals. She has suffered from high cholesterol and lipodystrophy. She said that the hospital staff treat her differently after knowing her diagnosis. She also pointed out that the clinic where she is treated is 4 kilometres from her home and that due to the distance, the cost of the transfer and the dangers of the area where she lives, she has to go to her appointment at dawn and wait next to the emergency room to be treated.
Pascuala de Jesús Mérida Rodríguez	When she was diagnosed with HIV, she was unemployed. She was diagnosed in 2001 in MSF's Life Project program when she was 5 months pregnant. At MSF she was provided with trimetropin and received TARV for 4 months until her son was born. She has had CD4 and viral load tests irregularly. She was transferred to the National Hospital of Coatepeque and subsequently to the Retalhuleu hospital. She has not had genotype exams. She has suffered from diarrhoea and headache. She said that there was a shortage of antiretrovirals and sometimes they gave her medicines for children. When she was treated by MSF, she received nutritional support and attends a self-support group, where she is given condoms. She does not receive social, psychological, family, community or home care support. She said her mother-in-law expelled her from the house where she lived with her children and her husband (before he died). His daughters suffered bullying in elementary school because they were told that 'they also had AIDS'.
Darinel López Montes de Oca	Before his diagnosis, he was selling bananas and now he is selling shoes, clothes, perfumery, snacks and food. He was diagnosed in 2002 by MSF's Life Project program and began antiretroviral treatment in 2004. He was then transferred to the National Hospital of Coatepeque and referred to MSF, where he received treatment. He said that there were not enough medications in the Coatepeque hospital and the CD4, viral load and genotype tests were performed irregularly, which caused opportunistic diseases. He suffered from skin allergies, chronic malnutrition, anaemia due to the use of antiretrovirals and cryptococcal meningitis. He has received psychological attention. He only received nutritional support at MSF. They have not provided social support or family, community or home care. They do give him condoms. He affirms that he has felt singled out by his family, his friends and by society and that he has to go out to other towns to sell food because if people know that he is a person living with HIV they would not buy it.
Israel Perez Charal	He was diagnosed in 2002, at the San Juan de Dios Hospital, because he was going to donate blood and was told that he was HIV positive. Then they referred him to MSF. In 2003, his antiretroviral treatment began. In 2004 and 2005 he attended the Integral Health Association, Luis Ángel García Family Clinic where he was tested and received medication. Then, for work-related reasons, he requested his transfer to the IGSS. He suffered herpes but was not treated. In the years 2010 to 2016, he went again to the Luis Ángel García Clinic, where he currently receives medical attention. He has been tested for CD4 and viral load, although irregularly. He has suffered from obesity and herpes. He said there were not enough medications for all people.
Corina Dianeth Robledo Alvarado	She was infected by her husband via sexual transmission and, in turn, her son L.A.L. was infected via vertical transmission, being diagnosed with HIV at 3 years. She was diagnosed in 2001 at the Malacatan Hospital. She received attention for the first time from MSF's Life Project program. Later she was transferred to Clinic 12 of the National Hospital of Coatepeque. She has had access to antiretroviral treatment stably and permanently and has been tested for CD4 and viral load. She did not receive nutritional or psychological care. Mrs Robledo and her son L.A.L. indicated they were singled out by people who travel outside of Clinic 12 because they consider that this health centre is for 'sidosos'. It takes five hours from her home to the Roosevelt Clinic, which generated expenses that forced her to borrow money.

Audencio Rodas Rodríguez	He was diagnosed with HIV in 1998. Because of the diarrhoea, fevers and fungi caused by the infection he left his job. In 2001 he began his treatment at MSF's Life Project program, where he was given antiretroviral treatment, fungal medications and CD4 tests but not viral load. Then he was transferred to Clinic 12 of the National Hospital of Coatepeque and finally to the Hospital of Malacatan. He has had CD4 and viral load tests irregularly. He has not had genotype or phenotype exams. He has suffered hairy oral leucoplakia, severe bacterial pneumonia, herpes zoster and diarrhoea. They have not given him nutritional or psychological support nor family, community and home care. They supply condoms and lubricants. As a result of the deterioration of the health of Mr Rodas Rodríguez, his wife and daughters were forced to work to support the family, which caused him, in the words of Mr Rodas Rodríguez: 'a lot of sadness and worry, because we had to change our way of life, my little daughters could no longer study, they and my wife had to work to keep the house'.
Zoila Marina Pérez Ruíz	Before being diagnosed she worked selling fruits. She was diagnosed with HIV in 2002 but received medical treatment until 2004, although she did not have access to CD4 tests or viral load. Initially, she received medical attention by MSF, later she was transferred to the National Hospital of Coatepeque. By 2009 she had had access to CD4 exams 4 times and 2 times to the viral load tests. By 2015 she had 5 more viral counts and 5 more CD4 counts. Likewise, she has suffered the following opportunistic diseases: cervical adenopathy, vaginal candidiasis, scabies, disseminated tuberculosis, tonsillitis, pain, herpes, pneumonia, peripheral neuropathy, neck pain and mycosis in both feet. She has received advise on HIV/AIDS from MSF's Life Project program that have helped her. She was singled out at Roosevelt Hospital because the nurses avoided approaching her when they left her food because they said that 'it was a contagious disease and that they did not want to get contaminated'. Her economic situation is precarious, so two of her children dropped out of school to get a job and thus be able to help her with her treatments and with the studies of their younger siblings. She said that the trip from her residence to the hospital cost her approximately 500 quetzals per trip because she had to take her son with her, which is why she did not follow up on the plastic surgery that she needed to correct the lipodystrophy in her neck.
Santiago Francisco Valdéz Aguilar	He was diagnosed with HIV in 2001 at the National Hospital of Coatepeque. He started antiretroviral treatment in December 2002 with MSF. He had CD4 and viral load tests irregularly. Initially, he received medical attention by MSF, then he was transferred to the National Hospital of Coatepeque in 2002. As opportunistic diseases, he has suffered from oral candidiasis, dermatomycosis and minor mycocutaneous manifestations. On some occasions, he has had to buy the treatments for opportunistic infections himself. He has not received nutritional, psychological or social support but he has received support through self-support groups. Before the diagnosis he used to work in agriculture, however, due to the deterioration in his health, he had to stop working because he could not be exposed to the sun. As a result, two of his children went to the US to financially support him and his wife
Teresa Magdalena Ramírez Castro	She was diagnosed with HIV in 2002 by MSF's Life Project program. She began antiretroviral treatment on February 17, 2004. Initially, she received medical attention by MSF and was subsequently transferred to the National Hospital of Coatepeque. He had CD4 and viral load tests irregularly. As opportunistic diseases, she has presented cryptococcus, toxoplasmosis, fibromatosis and hyperglycaemia.
Karen Judith Samayoa Vásquez	She was diagnosed with HIV in 2002 at the San Juan de Dios Hospital and was immediately referred to MSF. She did not receive medical treatment at that time because there was a shortage of treatment and it was only provided to people who were in the final stages of the disease. She began her antiretroviral treatment in 2005 because due to her pregnancy it was important to administer the necessary medications to avoid vertical transmission to her daughter. Medical care and antiretroviral treatment were provided by the Luis Ángel García Clinic, where she currently attends. This clinic is approximately 5 kilometres away from her place of residence. Mrs Samayoa Vásquez said that when she was asked if she wanted to be transferred to the IGSS she refused because 'the attention is bad'. As health problems derived from HIV, she has

	presented problems in the nodes and depression. Since the diagnosis, her employment situation has varied. Until 2016 she worked as a hostess in a restaurant. She also receives financial support from her ex-partner to cover her daughter's education expenses.
Francisco Sop Quiej	He was diagnosed with HIV in August 2000 at the Military Medical Center. Initially, he received medical attention at the Military Hospital and MSF and was later transferred to the National Hospital of Coatepeque in 2005. He has had some tests done. On some occasions, he had to bear the cost of those tests. He did not receive nutritional or social support or family care but they did give him condoms as a method of prevention of HIV/AIDS. As an opportunistic disease, he had moniliasis. Before the diagnosis, he worked in the National Army of Guatemala. However, due to the stigmatisation he suffered from some of his co-workers and officers, he retired from the army and dedicated himself to agriculture. He stated that from his residence to Coatepeque it takes him approximately two hours and costs 60 quetzals per trip. These expenses cannot always be paid, so he must resort to loans from family and friends
Jorge Armando Tavares Barreno	He was diagnosed with HIV in 2001 at clinic 12 of the National Hospital of Coatepeque. Before being diagnosed, he worked in a carpentry shop and subsequently worked on his own. He began antiretroviral treatment in 2002 through MSF and was subsequently transferred to the Coatepeque National Hospital. He has had one CD4 test and one viral load test. He has suffered opportunistic diseases such as cryptococcal meningitis, pulmonary tuberculosis, blurred vision, oral candidiasis, acute wear syndrome, villous oral leucoplakia, genital ulcer, pneumocystis pneumonia, herpes, DCA, malaria, peripheral neuropathy and sexual impotence. He has received advise on the use of condoms to prevent reinfections and to have good treatment adhesion.
Miguel Lucas Vaíl	He was diagnosed with HIV in 2001 at a private clinic in Guatemala City. For a year he went to San Juan de Dios General Hospital since he worked in the capital. He did not receive antiretroviral treatment. In 2004 he began antiretroviral treatment through MSF and was subsequently transferred to Clinic 12 of the National Hospital of Coatepeque. Initially, he also did not receive antiretroviral treatment because of shortages. The CD4 and viral load tests have been performed irregularly. He has suffered from oral candidiasis, infections in the upper respiratory tract and diarrhoea. He has received advise on how to use condoms and on adherence at Clinic 12 of the National Hospital of Coatepeque. Before and after his diagnosis he worked as a gardener. Sometimes he has had to pay the cost of some exams or transport to the hospital. This transfer has a cost of 150 quetzals and takes him 5 hours to arrive but usually receives help from his employers to meet these expenses.
Santos Vásquez Oliveros	He was diagnosed with HIV in 2002 in a private clinic. He began antiretroviral treatment in 2003 with MSF and is currently treated by Clinic 12 of the National Hospital of Coatepeque. He had irregular CD4 and viral load tests. He has presented as opportunistic diseases oral candidiasis, grade I malnutrition, low back pain and tonsillitis. He has received, by MSF's Life Project programme and psychologists of the Clinic 12, advise on adherence and the use of condoms to prevent reinfection. Before receiving the diagnosis, he was unemployed, after this, he worked as a day labourer. To travel to the Clinic, he spends 25 quetzals and takes an hour to arrive
Iris Carolina Vicente Baullas	She was diagnosed with HIV in 2003. Initially, she received medical attention at MSF and was subsequently transferred to the National Hospital of Coatepeque. She began antiretroviral treatment in November 2006. In 2007 she went to live in the US. She has suffered from various opportunistic diseases such as pharyngitis, skin rash, scabies, bacterial pneumonia, low back pain, vaginal candidiasis, conjunctivitis, vaginal discharge, osteopenia, colitis, insomnia, peripheral neuropathy, moderate cervicitis and peptic disease
Sandra Lisbeth Zepeda Herrera	She was diagnosed on January 6, 2000, at the San Juan de Dios General Hospital when she was seven months pregnant. There was vertical transmission of HIV to her daughter. In 2002, she was referred to MSF, where she received medical follow-up but there was a shortage of antiretrovirals and no CD4 tests were performed. On May 13, 2004, through the Yaloc clinic of MSF, she resumed antiretroviral treatment and was periodically tested for CD4 and viral load. In 2007 she was referred to the Marco Antonio Foundation, where she continued to receive antiretroviral treatment. In 2009 she was transferred to the Luis Ángel García Clinic, where both she and her daughter continued to receive antiretroviral treatment and have been tested for CD4 and viral load, although sometimes they have not been able to perform these exams nor

<p>have they been provided medicines for other diseases. As an opportunistic disease, she has suffered lipodystrophy. She said that the treatment received by the health staff at the San Juan de Dios Hospital was not very cordial and that sometimes there were no medications, so she has had to buy them. She said that at the Luis Ángel García Clinic the medical staff showed interest in her health and provided her with adequate treatment. Before being diagnosed, she worked as an employee in a <i>maquila</i> but was fired when she informed them of her diagnosis. Currently, it is difficult for her to get a job since she is required to undergo exams and have a health card and she also needs to ask for permission to go to her medical check-ups and that is difficult because companies 'question a lot, even harass her'. For this reason, she works selling various products in the markets of Guatemala City. She also suffered rejection from her family, so she has lacked financial support, so she could not provide studies to her daughter who has had to work with her to pay for food.</p>

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