

**Harnessing the Full potential of Intersectionality Theory in  
International Human Rights Law:  
Lessons from Disabled Children’s Right to Education**

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**Introduction**

Despite recent efforts to capitalise on intersectionality, the field of international human rights law has not been able to harness the full potential of intersectionality theory. Intersectionality has often been interpreted in the field, *qua* norms of equality and antidiscrimination, as a theory of identities. It is thus divorced from the structural analysis of identity-categories that is at the heart of intersectionality theory’s theoretical and methodological framework. This misreading of intersectionality plays into the way in which it is invoked in international human rights law as simply focusing on identity-categories instead of the structures of disadvantage associated with one or several of them simultaneously. This chapter aims to refocus on a systems-based understanding of intersectionality, with the aim of illuminating the lived reality and experience of human rights between different groups of people. This systems-based understanding of intersectionality involves balancing the attention to identities with an inquiry into the relationships of power that underpin those identities. The chapter thereby excavates what may be the actual significance of intersectionality theory for the purposes of human rights, especially beyond equality and antidiscrimination law, which is often limited to focusing on identity-categories.

With this, the chapter offers a way to unlock intersectionality theory’s full potential, which is subsequently illustrated with the right of disabled children to education. It analyses disability in its various expressions, and also considers its intersection with other characteristics, to explicate the wide range of issues that result in disabled children’s exclusion from education. Drawing upon the various provisions of human rights treaties and the recommendations of the UN treaty bodies, the chapter shows how greater alignment with intersectionality theory could be conducive to strengthening human rights protection. The chapter argues that the UN treaty bodies would thus be in a position to address those human rights violations that are often left concealed and hence unaddressed.

## I. Retracing Intersectionality in International Human Rights Law

This section retraces how the consideration of intersectionality theory has evolved in the field of international human rights law. It first explores how the field has engaged with intersectionality and then critiques its present engagement as too focussed on identity-categories. It then suggests that a reading of intersectionality – which has more to do with relationships of power rather than simply identity-categories – may not only be preferable in international human rights law but may also be a more accurate rendering of intersectionality at all. It thus pleads for a systems-based understanding of intersectionality which could help realise the actual significance of intersectionality theory for the purposes of human rights.

### A. International Human Rights Law

The concept of intersectionality stems from the recognition that discrimination on the basis of multiple grounds can lead to a unique and specific kind of discrimination, termed intersectional discrimination, which is different from discrimination based on a single ground. The term ‘intersectionality’ was coined by Kimberlé Crenshaw to explain the discrimination suffered by Black women, which was neither based on race nor sex, but on both of them at the same time.<sup>1</sup> Intersectionality has since been commonly considered in the context of equality and antidiscrimination norms enshrined in domestic legislation. In international human rights law, these norms take the form of general antidiscrimination clauses, such as in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These general antidiscrimination clauses guarantee the exercise of human rights free from discrimination on the basis of a non-exhaustive list of grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>2</sup>

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<sup>1</sup> K. Crenshaw, ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 4 *University of Chicago Legal Forum. Feminism in the Law: Theory, Practice and Criticism* 139; K. Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241.

<sup>2</sup> International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, art. 2(1); International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3, art. 2(2). The ICCPR also has a provision prohibiting discrimination beyond the enjoyment of the rights protected by the Covenant (art. 26, ICCPR).

The bulk of research on intersectionality has therefore been concentrated in the field of antidiscrimination law.<sup>3</sup> This research has identified both the theoretical and the practical problems of combining several grounds of discrimination into one intersectional claim. On the one hand, there are theoretical issues like the question of finding an appropriate comparator (i.e. a group which does not possess the relevant characteristics as those invoked by the plaintiff).<sup>4</sup> Black women, for instance, differ not only from white men, but also Black men and white women. Who then should be the relevant comparator on a principled basis in an intersectional claim brought by Black women? On the other hand, there are also practical questions like a closed list of grounds available to a victim. Victims will pick a ground that is available and has the greatest chances of success.<sup>5</sup> Scholars have offered possibilities to resolve these problems, which include the use of hypothetical comparators and the use of positive duties in redressing intersectional claims.<sup>6</sup>

Intersectionality has also been considered in international human rights law beyond the prohibition of discrimination that has defined intersectional debates in the domestic context. Here, instead of focussing on particular grounds, the focus is on specific groups that have a particular human rights treaty devoted to their rights, such as women, children and disabled people. The so-called group-specific human rights treaties not only prohibit discrimination against such groups, but also guarantee both general and specific human rights to those groups. These human rights treaties include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC)

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<sup>3</sup> D. Schiek and A. Lawson (eds), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, 2011); D. Schiek and V. Chege (eds), *European Union Non-discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish, 2009).

<sup>4</sup> E. Ellis and P. Watson, *EU Anti-discrimination law* (Oxford University Press, 2012) 156.

<sup>5</sup> J. Milner, 'EU Equality Law. From Protecting 'Groups' to Protection of All' in J. E. Wetzel (ed), *The EU as A Global Player in the Field of Human Rights Law* (Routledge, 2014) 213, 222; R. Kahn Best and others, 'Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation' (2011) 45 *Law & Society Review* 991, 1019; European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (EU 2007) 21.

<sup>6</sup> D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe* (Hart Publishing, 2007) 218-222; M. Jonker and S. Halrynjo, 'Multidimensional Discrimination in Judicial Practice. A Legal Comparison between Denmark, Norway, Sweden and the Netherlands' (2014) 34 *Netherlands Quarterly of Human Rights* 408, 422-428; V. Chege, 'The European Union Anti-discrimination Directives and European Union Equality Law: the Case of Multi-dimensional Discrimination' (2012) 13 *ERA Forum* 275, 288; K. Koldinska, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma women in central and Eastern Europe' in Schiek and Lawson (n. 3) 241, 253-254.

and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>7</sup> There are thus separate human rights regimes put in place for women, children and disabled people. This has however contributed to fragmentation of norms across the range of human rights treaties; no norms across these treaties seems to indicate forthrightly the obligations states have towards those who fall within the remit of several of these treaties. The question spurred by intersectionality then is: how does international human rights law work for those who belong to two or more of these (and other) groups?

Research on this question in the field of international human rights law initially concentrated on the intersection of gender and race.<sup>8</sup> More recently, it has expanded to the consideration of difficulties faced by the UN treaty bodies in handling intra-group differences and inter-group similarities.<sup>9</sup> Individual treaty bodies though have had to work primarily with the specific group protected under the concerned human rights treaty. This approach is still too limiting in realising intersectionality theory,<sup>10</sup> and, in practice, not expanding beyond the considerations of gender and race.<sup>11</sup> In order to pay attention to intra-group differences and inter-group similarities, it is nonetheless possible to apply human rights treaties in combination for protecting those belonging to several groups at once.<sup>12</sup> This is particularly possible with a systems-based understanding of intersectionality, as it was originally conceived in intersectionality theory and will be highlighted throughout the present chapter. But before we consider this possibility, it is important to first justify the need for such a move, i.e. in what way does this reading of intersectionality go beyond or improve the current group-based practice of the UN treaty bodies?

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<sup>7</sup> Convention on the Rights of the Child, 1989, 1577 UNTS 3; Convention on the Rights of Persons with Disabilities, 2006, 46 ILM 443.

<sup>8</sup> C. Ida Ravnbøl, 'The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics' (2010) 17 *International Journal on Minority and Group Rights* 1; A. Vakulenko, 'Gender and International Human Rights Law: the Intersectionality Agenda' in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar Publishing, 2010) 97; N. Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193; J. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71; M. Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights & Development Law Journal* 1.

<sup>9</sup> P. 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* 453.

<sup>10</sup> I. Truscan and J. Bourke Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 *The Equal Rights Review* 103, 107-108.

<sup>11</sup> B. Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *The Equal Rights Review* 73, 73-74.

<sup>12</sup> G. de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 4 *Human Rights Law Review* 633, 644-645.

## B. From Identity-categories to Systems

Intersectionality rejects the unidimensional analysis of identity-categories constructed along single identities.<sup>13</sup> Instead, it draws attention to power relationships that emerge from the social context in which those identities operate together.<sup>14</sup> To be sure, intersectionality does not reject the importance of identity politics in understanding how identities intersect. However, it goes further by highlighting how such intersecting identities may bring about disadvantages that transcend those identities.

UN treaty bodies have tried to overcome the unidimensional logic of separate human rights regimes embodied in the CEDAW, the CRC and the CRPD. They have done so from within the ambit of their corresponding human rights treaty albeit also broadening this ambit in order to deal with categories otherwise protected by other human rights treaties.<sup>15</sup> The way in which the UN treaty bodies have approached intersectionality has therefore been to bring together those identities that straddle the main category along which they operate.

For instance, the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) ruled that the absence of emergency health care for a pregnant woman of African descent was a violation of CEDAW in the case of *Alyne Da Silva Pimentel vs Brazil*.<sup>16</sup> As argued by Meghan Campbell, while the Committee noted that the pregnant women had been discriminated ‘not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background’,<sup>17</sup> it did not assess how the various identities through their interaction eventually led to her death.<sup>18</sup> In the case of *R.P.B. vs the Philippines*, concerning the rape of a deaf (minor) girl, the CEDAW Committee considered that the failure to provide for sign language in court proceedings amounted to discrimination within the meaning of CEDAW.<sup>19</sup> However, the isolated consideration of disability, alongside the CEDAW Committee’s complete neglect of the age

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<sup>13</sup> See in particular the critique of single-axis discrimination initially set out by Crenshaw: Crenshaw, ‘Demarginalising’ (n. 1) and Crenshaw ‘Mapping the Margins’ (n. 1).

<sup>14</sup> V. May, *Pursuing Intersectionality, Unsettling Dominant Imaginaries* (Routledge, 2015) 112-18; P. Collins and S. Bilge, *Intersectionality* (Polity Press, 2016) 95-97.

<sup>15</sup> de Beco (n. 12) 657.

<sup>16</sup> CEDAW Committee, *Alyne da Silva Pimentel vs Brazil*, 2011, CEDAW/C/49/D/17/2008, [7.5].

<sup>17</sup> *ibid.*, [7.7].

<sup>18</sup> M. Campbell, ‘CEDAW and Women’s Intersecting Identities: A Pioneering Approach to Intersectional Discrimination’ (2015) *Revista Direito GV* 479, 488.

<sup>19</sup> CEDAW Committee, *R.P.B. vs the Philippines*, 2014, CEDAW/C/57/D/34/2011, [8.7].

dimension, prevented it from looking into the mutually enforcing oppressions at play in that case. What has been missing though has been an integration of the theoretical framework of intersectionality theory into international human rights law going further than the current equality and antidiscrimination model where all the attention goes to identity-categories themselves.

This does not mean that that the UN treaty bodies have entirely overlooked cases of intersectional discrimination. To their credit, they have both acknowledged that individuals may be discriminated on the basis of various grounds and dealt with intersectional claims in light of these various grounds. The focus has nonetheless been on identity-categories which, when added up, may exacerbate prejudice against certain groups. The CEDAW Committee declared that discrimination on the basis of sex ‘is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity’ in the *Kell vs Canada* case,<sup>20</sup> and again that gender stereotypes had been magnified through ‘disregard for the individual circumstances of the case, such as the author’s disability and age’ in the *R.P.B. vs the Philippines* case.<sup>21</sup> While considering multiple identities, it has neglected to investigate how these identities are situated in interlocking relationships of power that result in infringements of human rights in a way different than just a matter of discrimination on the basis of the different grounds.

In addressing intersectionality, international human rights law has therefore essentially proceeded by identifying subgroups in need of protection through the aggregation of identities. Although critics have claimed that intersectionality theory encourages such aggregation, this theory does not simply seek to add up identity-categories or the disadvantages faced (or not faced) by the different groups to which these identity-categories relate to.<sup>22</sup> By adopting a purely identitarian understanding of intersectionality, international human rights law has overlooked an important aspect of intersectionality theory (thereby replicating the misreading of intersectionality by its critics). It has failed to determine how the identities are connected to specific forms of oppression when these identities interact and intersect in multiple permutations and combinations.

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<sup>20</sup> CEDAW Committee, *Kell vs Canada*, 2012, CEDAW/C/ 51 /D/19/2008, [10.2].

<sup>21</sup> CEDAW Committee (n. 19), [8.9].

<sup>22</sup> S. Atrey, *Intersectional Discrimination* (Oxford University Press, 2019) 58-57; A. Carastathis, *Intersectionality. Origins, Contestations, Horizons* (University of Nebraska Press, 2016) 140-142.

Intersectionality theory points to the pitfalls of simply adding up identity-categories alongside the individual structures of disadvantage associated with race, gender, age, disability and so on. Such a reading of intersectionality misconstrues the structures of disadvantage as existing independently and thus capable of being brought together to reveal intersectional disadvantage. In fact, forms of oppression co-exist and intersect with one another, thereby forming a ‘matrix of domination’ which varies in time and space.<sup>23</sup> Intersectionality theory is a reaction against any approach that provides no more than a comparison between a number of categories and separates the different structures of disadvantage or simply assembles them together.<sup>24</sup> What is needed, with a view to replacing this approach with a proper reading of intersectionality, is an approach that accounts better for the lived reality and experience of human rights between different groups of people. Such an approach, so it is argued here, should draw upon a wider systems-based understanding of intersectionality that exceeds the identitarian understanding of intersectionality that has so far prevailed in the field of international human rights law.

Such a systems-based understanding of intersectionality should allow getting to grips with the forms of oppression that harm some groups disproportionately. Those forms of oppression again can be due to disadvantages associated with a distinct identity-category or group, but they may also relate to aspects that appertain to multiple identities or that are unrelated to identities at all, such as poverty. Intersectionality takes all these forms of oppression on board. The human rights discourse, *qua* this understanding of intersectionality, would no longer revolve only around identities strictly covered by particular group-specific human rights treaties but look for forms of oppression associated with identities that intersect with those already recognised in and across treaties. Intersectionality theory shows that the intersectional disadvantage suffered at the intersection of multiple forms of oppression is both similar but also different from individual forms of oppression.<sup>25</sup> Its theoretical framework thus requires an inquiry into the ‘ideological structures in which subjects, problems, and solutions [are] framed’.<sup>26</sup> Instead of dwelling more deeply into categories themselves, it is social

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<sup>23</sup> P. Collins, *Black Feminist Thought. Knowledge, Consciousness, and the Politics of Empowerment* (Routledge, 2000) 228.

<sup>24</sup> L. McCall, ‘The Complexity of Intersectionality’ (2005) 30 *Signs* 1771, 1787.

<sup>25</sup> Atrey (n. 22) 38-41.

<sup>26</sup> S. Cho, K. Crenshaw and L. McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications and Praxis’ (2013) 38 *Signs* 785, 791.

institutions that become the central point of attention. These social institutions spread across a range of domains, from family, healthcare, employment and education to political participation and community life, wherefrom individuals can be excluded as they possess certain characteristics in a given social context. In order to seek to capitalise on intersectionality, the field of international human rights law must move away from a preoccupation with the characteristics that are enlisted in human rights instruments and move towards efforts to see these characteristics as fundamentally infused with structures of disadvantage that shape the experience of human rights. The focus on identity-categories has thus impeded the consideration of human rights issues that affect those belonging to several groups at once. It misses the fact that the various structures of disadvantage are themselves a product of how identities are enmeshed and integrate to begin with.<sup>27</sup>

While the UN treaty bodies have been aware of the need to interpret human rights more consistently across the range of human rights treaties, there is yet a ‘the lack of cross-referencing among [them]’, which hinders the actual pursuit of intersectionality theory.<sup>28</sup> This method of ‘cross-referring’, however, will not be enough for intersectionality to be duly accounted for. If the UN treaty bodies are to consider intersectionality in its true sense, there must be an interrogation of what this cross-referencing entails and is aimed at. This cross-referencing can be meaningful if it helps raise issues which span across treaties and concern categories belonging to more than just one group falling within the remit of a particular treaty. Only such cross-referencing may allow for intersectionality to be accounted for in terms of understanding and addressing multiple and crosscutting structures of disadvantage.

### C. Operation

Some of the UN treaty bodies have spelled out generally how their corresponding human rights treaties relate to intersectionality. The Committee on Economic, Social and Cultural Rights (CESCR Committee) has declared that individuals ‘face discrimination on more than one of the prohibited grounds ... Such cumulative discrimination has a unique and specific impact on individuals’.<sup>29</sup> By contrast, the Human Rights Committee has not gone further than recognising

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<sup>27</sup> Yuval-Davis (n. 8) 193.

<sup>28</sup> Truscan and Bourke-Martignoni (n. 10) 107.

<sup>29</sup> CESCR Committee, *General comment No 20. Non-discrimination in Economic, Social and Cultural Rights*, 2009, E/C.12/GC/20, [17].

that different grounds can be intertwined,<sup>30</sup> while its approach, especially under its individual communications procedure, remains embedded in the unidimensional analysis of identity-categories.<sup>31</sup> The CEDAW Committee has issued several general recommendations on specific groups of women, recognising that women face intersectional discrimination.<sup>32</sup> It has also examined how gender issues intersect with other systemic issues of migration and family relations amongst others.<sup>33</sup> In relation to disabled women, the Committee on the Rights of Persons with Disabilities (CRPD Committee) went a step further by recognising that individuals ‘do not experience discrimination as members of a homogenous group but rather, as individuals with multidimensional layers of identities, statuses and life circumstances’.<sup>34</sup> It further defined intersectional discrimination, adding that it ‘can appear as direct or indirect discrimination, denial of reasonable accommodation or harassment’.<sup>35</sup>

The UN treaty bodies have also drawn attention to a number of intra-group differences and inter-group similarities. This attention has however varied according to their willingness to consider categories who belong to more than one group at once. These treaty bodies thus assume that the intersectional characteristics by themselves lead to further disadvantages, which they undertake to address through some irregular exercise of addition or multiplication.<sup>36</sup> While stating that discrimination is potentially more severe for people who possess such intersectional characteristics, they have stopped short of setting forth what that severity means or does to human rights. Instead, they have relied on identities to embark on a repeated exercise of re-categorisation. Although this approach attests to their commitment to take into account intra-group differences and inter-group similarities, it does not encapsulate that intersectional characteristics can generate co-constituted structures of disadvantage that are associated with two or more categories at the same time.

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<sup>30</sup> Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, 2000, HRI/GEN/1/Rev.9, [30].

<sup>31</sup> S. Atrey, ‘Fifty Years On: The Curious Case of Intersectional Discrimination in the ICCPR’ (2017) 35 *Nordic Journal of Human Rights* 220, 221-222.

<sup>32</sup> CEDAW Committee, *General Recommendation No. 26 on Women Migrant Workers*, 2008, CEDAW/C/2009/WP.1/R; CEDAW Committee, *General Recommendation No. 27 on Older Women and Protection of Their Human Rights*, 2010, CEDAW/C/GC/27; CEDAW Committee, *General Recommendation No. 18: Disabled Women*, 1991, A/46/38; CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States parties under article 2*, 2010, CEDAW /C/GC/28, para. 18; CEDAW Committee, *General recommendation No. 25 on article 4, paragraph 1, on Temporary Special Measures*, 2004, A/59/38 at 78, [12].

<sup>33</sup> Campbell (n. 18) 489-90.

<sup>34</sup> CRPD Committee, *General comment No 3. Article 6: Women and Girls with Disabilities*, 2016, CRPD/C/GC/3, [16].

<sup>35</sup> CRPD Committee, *General comment No 6 on Equality and Non-discrimination*, 2018, CRPD/C/GC/6, [19].

<sup>36</sup> Chow (n. 9) 473.

What is needed is a more comprehensive approach that avoids groups of people being left out, rather than one that makes partial use of intersectionality theory's theoretical framework leaning on identity politics. The CRPD has taken a step in this direction by declaring that different grounds can 'interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination'.<sup>37</sup> It thereby brought home the fact that any disadvantages regarding human rights may be intersectional and constituted by one another. In order to offer specific groups of people more adequate human rights protection, the UN treaty bodies should inquire into how intersectional disadvantage produces forms of oppression that an exclusive focus on identity-categories does not allow them to detect. The question is not only about the possible consequences of belonging to one or more groups, as these treaty bodies have envisaged so far, but also about shortcomings in social institutions that have the effect of ignoring the complexity of human diversity and difference.

The way to unlock intersectionality theory's potential in the field of international human rights law is therefore to relate human rights to whatever forms of oppression that can harm a particular group of people. The approach may translate differently depending on how social arrangements are designed to cope with these forms of oppression. Rather than revolving around a number of identities, the UN treaty bodies could lay out the obligations imposed on States to make society more sensitive to intersectional characteristics. The CEDAW Committee indicated that 'the convergence or association of the set of elements described may have contributed to the failure to provide necessary and emergency care' causing the plaintiff's to pass away in the *Alyne Da Silva Pimentel vs Brazil* case.<sup>38</sup> While it considered that she has been discriminated against on the basis of different grounds, it however did not explain that this was the *result* of the interaction of identities and, additionally, it did not mention 'intersectional discrimination'.<sup>39</sup> While the Committee recommended that judicial proceedings be 'conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and disability' in the *R.P.B. vs the Philippines* case,<sup>40</sup> it similarly limited itself to addressing separately the individual structures of disadvantage and

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<sup>37</sup> CRPD Committee (n. 35), [19].

<sup>38</sup> CEDAW Committee (n. 16), [4.11].

<sup>39</sup> Campbell (n. 18), 498.

<sup>40</sup> CEDAW Committee (n. 19), [8.9].

ended up overemphasising some of them at the expense of others.<sup>41</sup>

A proper reading of intersectionality does not call for the simple acceptance of intra-group differences and inter-group similarities. It requires highlighting the steps to be taken in order to mitigate the disadvantages that intersecting identities may intensify. It is, thus, about reflecting upon a range of identities that correlate to co-constituted structures of disadvantage associated with race, gender, age, disability and so on at the same time. States must be urged to both break down the relationships of power and respond to those who are subject to specific forms of oppression due to the sharing of these intersecting identities. How this could be done is shown next through an examination of disabled children's right to education.

## **II. Disabled Children in Education**

This section examines the intersectional issues raised in the context of the education of disabled children. After considering the intersectional position of disabled children, it discusses how this bears on their right to education in terms, specifically, of the different kinds of impairments as well as the intersection of disability and other characteristics, like age and gender, which can exacerbate the exclusion from education. It suggests that international human rights law could redress such exclusion through better alignment with intersectionality theory. The examination foremost calls upon the two group-specific human rights treaties, which mark the boundaries of human rights protection in this context: the CRC and the CRPD. The section thereby aims to explore how far is it possible to look beyond the unidimensional logic of separate legal regimes established in international human rights law and from there, to reach conclusions as to the real added value of intersectionality theory in the field.

### **A. Disabled Children**

Disabled children are especially disadvantaged in society. While vulnerability due to young age is aggravated by another layer of prejudice for being disabled, age leads to an exacerbation of the image of disabled people as dependent and inferior. As a result, disabled children are

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<sup>41</sup> Truscan and Bourke-Martignoni (n. 10), 119.

surrounded by particularly negative stereotypes and are amongst the most vulnerable groups.<sup>42</sup> Their families also face challenges, as these children are particularly dependent on them.<sup>43</sup> As disabled children are defined by both their age and their disability, they are an apt example of intersectionality that has an impact on their experience of human rights in a fundamental way.

Disability has its own specificity. It refers to a diverse reality and experience informed by the interaction of various kinds of impairments with barriers in society. There is even considerable variation within the different types of disabilities.<sup>44</sup> Disabled people, therefore, represent a largely heterogeneous group.<sup>45</sup> Whatever is done in order to distinguish them, it is impossible to capture the phenomenon as a whole. This heterogeneity must then be put into further perspective, as disabled people (as any group of people) might simultaneously belong to other groups, such as racial minorities, women and children. Any additional characteristic will alter the way in which someone's disability intersects with their race, gender, age or other identity.

Disabled children fall within the remit of two group-specific human right treaties: the CRC and the CRPD. Adopted in 1989, the CRC provides for a whole series of rights attached to children. Adopted in 2006, the CRPD's purpose likewise is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities'.<sup>46</sup> As the CRPD largely borrowed from, and expanded upon, the CRC (which chronologically precedes it), both conventions have some resemblances. Noteworthy is also the fact that the former has been ratified at an extremely rapid pace with 181 parties at the time of writing,<sup>47</sup> while the latter has achieved almost universal ratification, that is, all countries except one.<sup>48</sup>

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<sup>42</sup> UNICEF, *The State of the World's Children. Children with Disabilities* (UNICEF 2013) 2, [https://www.unicef.org/sowc2013/files/SWCR2013\\_ENG\\_Lo\\_res\\_24\\_Apr\\_2013.pdf](https://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf) accessed 11 February 2020.

<sup>43</sup> A. Rimmerman, *Family Policy and Disability* (Cambridge University Press, 2015) 38.

<sup>44</sup> R. Garland Thomson, 'Disability, Identity, and Representation' in T. Titchkosky and R. Michalko (eds), *Rethinking Normalcy* (Canadian Scholar's Press, 2009) 63, 69.

<sup>45</sup> T. Siebers, *Disability Theory* (University of Michigan Press, 2008) 71.

<sup>46</sup> CRPD, art. 1.

<sup>47</sup> See: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) accessed 11 February 2020.

<sup>48</sup> See: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en) accessed 11 February 2020.

The two conventions approach disabled children from two different perspectives though. The CRPD and the CRC each regard such children mainly from *their own* viewpoint of a single identity, which dominates the way that they provide human rights protection to them, either as disabled persons first or as children first.

So, on the one hand is the CRPD, a human rights treaty concerned with disability. Recalling that disabled people are rights-holders, it focuses on inclusion into society and the promotion of independence. Its sweeping scope can be seen in its affirmation that disabled people ‘include those who have long-term physical, mental, intellectual or sensory impairments’,<sup>49</sup> while its Preamble recognises that disability is ‘an evolving concept’.<sup>50</sup> Underscoring that such impairments ‘in interaction with various barriers may hinder their full and effective participation in society’,<sup>51</sup> the CRPD is viewed as inspired by the social model of disability.<sup>52</sup> While this view has been criticised,<sup>53</sup> as more extensively the social model itself,<sup>54</sup> the social model remains a powerful tool to call for the removal of obstacles created by society.

The CRPD’s particular attention to disabled children is evident from its provisions. While it contains a separate article on disabled children,<sup>55</sup> it also has a number of provisions highlighting issues related to age.<sup>56</sup> It further prohibits ‘discrimination on all grounds’.<sup>57</sup> Yet, the CRPD does not recalibrate each provision with respect to disabled children. So, for example, although it protects disabled children against separation from their parents,<sup>58</sup> it does not consider the situation of families for their own sake.<sup>59</sup> Similarly, while autonomy is one of

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<sup>49</sup> CRPD, art. 1.

<sup>50</sup> CRPD, Preamble.

<sup>51</sup> CRPD, art. 1.

<sup>52</sup> R. Kayess and P. French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1, 21; P. Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75 *Modern Law Review* 752, 758-761; P. Harpur, ‘Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability & Society* 1, 3-4.

<sup>53</sup> T. Degener, ‘A Human Rights Model of Disability’ in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2016) 31, 34-48.

<sup>54</sup> T. Shakespeare, *Disability Rights and Wrongs Revisited* (Routledge, 2014) 21-3 and 77; L. Terzi, ‘The Social Model of Disability: A Philosophical Critique’ (2004) 21 *Journal of Applied Philosophy* 141, 152; J. Morris, ‘Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights’ (2001) 16 *Hypatia* 1, 14; L. Barclay, ‘Natural Deficiency or Social Oppression? The Capabilities Approach to Justice for People with Disabilities’ (2012) 9 *Journal of Moral Philosophy* 500, 520.

<sup>55</sup> CRPD, art. 7.

<sup>56</sup> CRPD, arts. 8, 13, 16 and 23.

<sup>57</sup> CRPD, art. 5(2).

<sup>58</sup> CRPD, art. 23(4).

<sup>59</sup> Rimmerman (n. 43) 85.

the general principles of the CRPD,<sup>60</sup> it may be somewhat at odds with childhood and does not entirely square with the relevance of age for disabled children.

On the other hand, the CRC is a human rights treaty that is concerned with childhood. It promotes children's wellbeing while stressing on the role of families and communities in upholding their rights. It covers both civil and political, as well as economic, social and cultural rights, thereby bridging the two sets of rights for the first time in a human rights instrument,<sup>61</sup> a move repeated also in the CRPD.<sup>62</sup> The CRC is the first human rights treaty to mention disability explicitly in its general antidiscrimination clause – which has a non-exhaustive list of discrimination grounds as those of the ICCPR and ICESCR<sup>63</sup> – and it devotes an entire article to disabled children,<sup>64</sup> much like the CRPD.

However, the CRC has a number of drawbacks in respect of disability. It aims more at *protecting* disabled children against discrimination than guaranteeing their *inclusion*, which is often evaded on account of their human difference.<sup>65</sup> This then allows for a kind of separate-but-equal type of human rights protection for disabled children. And even though it is more detailed than its equivalent in the CRPD, the CRC's separate article on disabled children refers to 'special care' and 'assistance ... provided free of charge, whenever possible', which implies that disability is only a matter of welfare and not of rights.<sup>66</sup> At the same time, some of its provisions follow a rights-based approach that may compensate for such weakness although they do not mention disability,<sup>67</sup> including the requirement to 'provide material assistance and support programmes' in order to protect children's right to an adequate standard of living.<sup>68</sup>

Both the CRPD and the CRC together can help resolve some of the inconsistencies in considering the intersectional position of disabled children. The CRPD upholds the view that

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<sup>60</sup> CRC, art. 3(a).

<sup>61</sup> R. Brett, 'Rights of the Child' in C. Krause and M. Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University, 2009) 227, 229.

<sup>62</sup> G. de Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 *International & Comparative Law Quarterly* 141, 149-152.

<sup>63</sup> CRC, art. 2(1).

<sup>64</sup> CRC, art. 23.

<sup>65</sup> M. Sabatello, 'Children with Disabilities: A Critical Appraisal' (2013) 21 *International Journal of Children's Rights* 464, 469-470.

<sup>66</sup> CRC, art. 23(2) and (3).

<sup>67</sup> G. Quinn and T. Degener, *The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (UN, 2002) 196-197.

<sup>68</sup> CRC, art. 27(3).

disabled children are rights-holders, guaranteeing the enforcement of their rights via access to justice ‘through the provision of procedural and *age-appropriate accommodations*’.<sup>69</sup> The CRC, in turn, pays attention to parental involvement in the realisation of children’s rights. This includes ‘appropriate assistance to parents ... and services for the care of children’,<sup>70</sup> which speaks to the reality that families of disabled children often experience poverty.<sup>71</sup> Nonetheless, the CRC again does not recognise inclusion for its own sake, whereas inclusion is one of the CRPD’s general principles.<sup>72</sup> The CRC’s definition of the child as being ‘every human being below the age of eighteen’ also contrasts with the more dynamic approach to defining disability in the CRPD.<sup>73</sup> In view of this, it has been suggested that the social model of disability could enrich the CRC’s understanding of childhood and contribute to discerning disability’s intersection with age in more than just medicalised or biological terms.<sup>74</sup> In any case, neither the CRPD nor the CRC seem to provide complete protection for disabled children whose interests seem well served by both, but only in parts. A joint, intersectional reading of the CRPD and CRC may cover this gap in protection and in fact provide for more protection than currently afforded under each independently. The right to education helps explore how this could be done.

## B. Exclusion from Education

The right to education is recognised by several human rights treaties besides the UDHR.<sup>75</sup> While it is generally protected by both the CRC and the ICESCR,<sup>76</sup> the CRPD specifically focuses on disabled people’s right to education. Article 24 of that Convention stipulates that ‘[w]ith a view to realizing this right without discrimination ... States Parties shall ensure an inclusive education system at all levels and life long learning’.<sup>77</sup> Despite initial disagreement on the matter, the CRPD’s drafters endorsed the goal of inclusive education for all disabled

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<sup>69</sup> CRPD, art. 13(2) (emphasis added).

<sup>70</sup> CRC, art. 18(2).

<sup>71</sup> UNICEF (n. 42) 13-14; World Health Organisation (WHO), *World Report on Disability* (WHO, 2011) 39.

<sup>72</sup> CRPD, art. 3(c).

<sup>73</sup> CRC, art. 1.

<sup>74</sup> R. Sandland, ‘A Clash of Conventions? Participation, Power and the Rights of Disabled Children’ (2017) 5 *Social Inclusion* 93, 97.

<sup>75</sup> UN GA, *Universal Declaration of Human Rights*, 1948, 217 A (III), art. 26.

<sup>76</sup> ICESCR, art. 13 and 14; CRC, arts. 28 and 29.

<sup>77</sup> CRPD, art. 24(1).

people.<sup>78</sup> Even though the CRC does not explicitly consider disability in relation to education, the Committee on the Rights of the Child (CRC Committee) has also recognised that ‘[i]nclusive education should be the goal of educating [disabled children]’.<sup>79</sup> It nevertheless allowed for exceptions to be made to the goal.<sup>80</sup> In order to achieve inclusive education, the CRPD further provides that States Parties must ensure that disabled children can ‘access an inclusive, quality and free primary education and secondary education ... [and] ... receive the support required, within the general education system, to facilitate their effective education’.<sup>81</sup> Besides provisions that specifically consider age related issues, art. 24 of the CRPD is probably the most relevant provision for disabled children in the entire Convention.<sup>82</sup> As a result, an assessment of the right to education of disabled children may shed light on what a correct reading of intersectionality could offer in terms of enhanced human rights protection.

Disabled children’s right to education provides an example of how a particular domain – that is, in this case, education – perpetuates marginalisation and disempowerment. It highlights the inadequacy of education systems in meeting the varied needs of disabled children, which results in their exclusion from education. This inadequacy is usually attributed to these children’s lack of capacity as well as the difficulty of offering them the support they require in regular school or simply the costs involved in having more convenient settings and facilities for them.<sup>83</sup> For this reason, many children are referred to special schools where their needs can be met,<sup>84</sup> if they are educated at all. Thus, rather than removing obstacles to inclusive education, states often opt for the segregation of disabled children. The question is why regular schools are unable to cope with such needs in the first place.

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<sup>78</sup> G. de Beco, ‘Comprehensive Legal Analysis of Article 24 of the Convention on the Rights of Persons with Disabilities’ in G. de Beco, J. Lord and S. Quinlivan (eds), *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press, 2019) 58, 64-66.

<sup>79</sup> CRC Committee, *General Comment No 9: The Rights of Children with Disabilities*, 2007, CRC/C/GC/9, [66] (footnote omitted).

<sup>80</sup> *ibid.*

<sup>81</sup> CRPD, art. 24(2)(b) and (d).

<sup>82</sup> R. McCallum and H. Martin, ‘Comment: The CRPD and Children with Disabilities’ (2013) 20 *Australian International Law Journal* 17, 21.

<sup>83</sup> D. Anastasiou and J. Kauffman, ‘Disability as Cultural Difference: Implications for Special Education’ (2012) 33 *Remedial and Special Education* 139, 143-144; D. Anastasiou and J. Kauffman, ‘A Social Constructionist Approach to Disability: Implications for Special Education’ (2011) 77 *Exceptional Children* 367, 380.

<sup>84</sup> Inclusion Europe, *Children’s Rights for all! Implementation of the United Nations Convention on the Rights of the Child for Children with Intellectual Disabilities* (Inclusion Europe, 2011) 18-19, <http://www.eenet.org.uk/resources/docs/6130.pdf> accessed 11 February 2020; S. Ebersold, *Inclusive Education for Young Disabled People in Europe: Trends, Issues and Challenges - A Synthesis of Evidence from ANED Country Reports and Additional Sources*, April 2011, 7, [http://www.disability-europe.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20\(2\)\\_0.pdf](http://www.disability-europe.net/content/aned/media/ANED%202010%20Task%205%20Education%20final%20report%20-%20FINAL%20(2)_0.pdf) accessed 11 February 2020.

An inquiry into the way in which regular schools are letting disabled children down does not lie in dealing with the issue in the same way for all disabled children. It requires understanding how disability frames the life experience of disabled children and how their intersectional position creates structures of disadvantage, which are unique to them. This involves examining both particular kinds of impairments and disability's intersection with other characteristics as well as other cross-cutting issues, including other rights. Such examination means appreciating disability both from inside and from outside. On the one hand, disability should be seen in its full diversity given its multifarious manifestations, so as to acknowledge the varied experience of human rights of disabled people. On the other hand, its understanding should factor in a range of other issues associated with age, ethnicity, gender and socio-economic background, which concern children generally but will affect those who are disabled in very specific ways in how they actually experience human rights. Although this examination takes a particular characteristic as the point of departure, it moves outwards from it to enlarge the perspective taken in the application of human rights treaties and sheds light on the structures of disadvantage associated with that characteristic and in relation to all others it intersects with. In the words of Joanna Bond, it explores 'all of the relevant human rights that are violated in a given situation along multiple axes of oppression'.<sup>85</sup>

Take for example, autism and deafness, two kinds of impairments that pose very specific practical challenges to education systems. First, autism calls for strategies to avoid disturbing routines and drawing special attention to things that may be unsettling.<sup>86</sup> Making an education system autism-friendly entails fostering a feeling of safety as well as offering children spaces to recharge. It also means adopting different approaches to education in order to facilitate communication.<sup>87</sup> Although certain forms of traditional communication will remain difficult for some of those who are autistic, complete ignorance of different communication skills may actually diminish any chance of inclusion. Second, deafness necessitates not only a mix of sign language as well as speech, fingerspelling, gestures and lip-reading training and provision for deaf children, but also the facilitation of all of these mixed

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<sup>85</sup> Bond (n. 8) 155.

<sup>86</sup> N. Humphrey and S. Lewis, 'What does 'Inclusion' mean for Pupils on the Autistic Spectrum in Mainstream Secondary Schools?' (2008) 8 *Journal of Research in Special Educational Needs* 132, 137-138; S. Lindsay and others, 'Exploring Teachers' Strategies for Including Children with Autism Spectrum Disorder in Mainstream Classrooms' (2014) 18 *International Journal of Inclusive Education* 101, 110.

<sup>87</sup> J. Ravet, 'Inclusive/Exclusive? Contradictory Perspectives on Autism and Inclusion: The Case for an Integrative Position' (2011) 15 *International Journal of Inclusive Education* 667, 674-676.

methods with the purpose of enabling social interaction between deaf and non-deaf children. This entails supporting both deaf and non-deaf children in creating an atmosphere conducive to social interaction.<sup>88</sup> Since those who are deaf often self-identify as members of a linguistic community, they might yet view sign language as more than a tool of communication.<sup>89</sup> It is therefore imperative not to impose assimilation on them but to favour communication in their preferred language more widely. As all these measures involve a balancing exercise that takes into account the entire school population, they pertain to questions that point to careful adjustments to be made in the whole of the education system.

Ethnic background, culture and linguistic particularities too may increase the level of prejudice against disabled children.<sup>90</sup> Consideration of these particularities requires a focus on relationships with families, who may themselves experience their children's disability differently.<sup>91</sup> Another relevant aspect is the mistaken attribution of disability to racial minorities, as testified in the overrepresentation of racial minorities in special schools. Alternatively, the under-identification of disability can deprive racial minorities of access to services.<sup>92</sup> The misconception of the cultural and linguistic particularities culminates in further exclusion from education. Gender comes into play as well, as boys suffer more often from such misconceptions than girls, especially regarding emotional and behavioural difficulties.<sup>93</sup> This lack of understanding shows how insufficient attention to the various structures of disadvantage associated with race, gender, age, disability and so on exacerbate the position of those defined by more than one of them simultaneously. Education systems should respond to such differences acutely and comprehensively, rather than by targeting some groups of people based on common tropes surrounding particular types of disabilities alone.

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<sup>88</sup> Y-H. Xie, M. Potměšil and B. Peters, 'Children Who Are Deaf or Hard of Hearing in Inclusive Educational Settings: A Literature Review on Interactions with Peers' (2014) 19 *Journal of Deaf Studies and Deaf Education* 423, 434-435.

<sup>89</sup> S. Batterbury, 'Language justice for Sign Language Peoples: the UN Convention on the Rights of Persons with Disabilities' (2012) 11 *Language Policy* 253, 256-258.

<sup>90</sup> A. Liasidou, 'Inclusive Education and Critical Pedagogy at the Intersections of Disability, Race, Gender and Class' (2012) 10 *Journal for Critical Education Policy Studies* 168, 173-174.

<sup>91</sup> R. Caldin, 'Inclusive Social Networks and Inclusive Schools for Disabled Children of Migrant Families' (2014) 8 *European Journal of Disability Research* 105, 107-108.

<sup>92</sup> J. Travers and M. Krezmien, 'Racial Disparities in Autism Identification in the United States during 2014' (2018) 84 *Exceptional Children* 403, 416.

<sup>93</sup> S. Tomlinson, 'Special Education and Minority Ethnic Young People in England. Continuing Issues' (2015) 37 *Discourse: Studies in the Culture and Politics of Education* 1, 2 and 9; S. Strand and G. Lindsay, 'Ethnic Disproportionality in Special Education: Evidence from an English Population Study' (2009) 43 *Journal of Special Education* 174, 175.

States must realise disabled children’s right to education by reconciling the applicable human rights treaties that protect that right for them. The CRPD provides that education systems should aim at ‘[t]he development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities’.<sup>94</sup> In order to do so, States Parties ‘must support the creation of opportunities to build on the unique strengths and talents of each [of them]’.<sup>95</sup> They should also ensure that ‘everyone feels safe, supported, stimulated and able to express themselves’.<sup>96</sup> In the UK, the Upper Tribunal has ruled that inappropriate behaviour may not be invoked as a motive for expulsion due to autism, notwithstanding an exemption from the protection of the Equality Act 2010 in the case of ‘tendency to physical abuse’ (an exemption that was considered contrary to the European Convention on Human Rights as regards autistic children).<sup>97</sup> The CRC Committee has also recommended that ‘teaching methods should be tailored to the different needs of different children’,<sup>98</sup> which is crucial so that these methods can work for all those who are disabled. The CRC stresses the responsibilities of parents to whom ‘States Parties shall render appropriate assistance ... in the performance of their child-rearing responsibilities’.<sup>99</sup> This confirms the importance of enabling these parents to ensure the education of their children, regardless of disability.

The CRPD moreover provides that States Parties must facilitate ‘the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication’.<sup>100</sup> While such ‘modes, means and formats of communication’ are especially important for those who are blind, the obligation may be equally relevant, *mutatis mutandis*, for other disabled children. Education systems must recognise that children have diverse ways of communicating. According to the CRPD, States Parties must therefore ensure that education ‘is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development’.<sup>101</sup> As indicated by the CRPD Committee, ‘for such inclusive environments to occur, the States Parties should provide the required support, including by way of resources, assisted technology, and provision of orientation and mobility skills’.<sup>102</sup> In order to include those with different

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<sup>94</sup> CRPD, art. 24(1)(b).

<sup>95</sup> CRPD Committee, *General Comment No 4. Article 24: Right to inclusive education*, 2016, CRPD/C/GC/4, [16].

<sup>96</sup> *ibid.*, [12(f)].

<sup>97</sup> *C & C v Governing Body* [2018] UKUT 269 (AAC).

<sup>98</sup> CRC Committee, *General Comment No. 1: The Aims of Education (Art. 29(1))*, 2001, CRC/GC/2001/1, [9].

<sup>99</sup> CRC, art. 18(2).

<sup>100</sup> CRPD, art. 24(3)(a).

<sup>101</sup> CRPD, art. 24(3)(c).

<sup>102</sup> CRPD Committee (n. 95), [34(c)].

communication skills, this obligation means more than just translation into particular forms of language, such as sign language. Education systems must be re-thought, not by viewing disabled children as a unified category to be protected but by accepting, once more, that inclusion entails different approaches to education itself. By appreciating disability both discretely on its own varied terms and as a whole with respect to other characteristics, States might be in a better position to tackle intersectional disadvantage suffered by disabled children in enjoying their right to education.

Further, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>103</sup> forbids racial discrimination in the enjoyment of the right to education,<sup>104</sup> and the CRC too explicitly refers to ‘race’ – as well as ‘disability’ – in its general antidiscrimination clause.<sup>105</sup> Although these conventions do not consider cultural and linguistic particularities, they point to the necessity to do so with regard to education. Lack of consideration for such particularities has led to a number of cases, especially before the European Court of Human Rights, where States have been condemned for the segregation of Roma children, allegedly for reasons concerning disability but in fact because of race.<sup>106</sup> This is also the view expressed by the Special Rapporteur on the Right to Education, who reckons that inclusive education concerns any type of pupil, including ‘students with different cultural and linguistic backgrounds or, in general, any student who requires additional support to succeed in the education system’.<sup>107</sup> The CRPD itself calls for the ‘recognition ... of ... specific cultural and linguistic identity, including sign languages and deaf culture’,<sup>108</sup> which could pertain to any racial minority. In the same vein, the CRPD Committee considers that all children must be ‘welcomed equally, with respect for diversity according to, inter alia, disability, race, colour, sex, language, linguistic culture ... or other status’ with a view to inclusive education.<sup>109</sup> All of this makes clear that it is the education systems that need transforming and that transformation is only possible when those systems grapple with the full wherewithal of intersectionality.

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<sup>103</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195.

<sup>104</sup> ICERD, art. 5(c).

<sup>105</sup> CRPD, art. 2(1).

<sup>106</sup> European Court of Human Rights, *DH and Others v Czech Republic* (13 November 2007); *Sampanis and Others v Greece* (5 June 2008); *Oršuš and Others v Croatia* (17 July 2008); *Horváth and Kiss v Hungary* (29 January 2013).

<sup>107</sup> K. Boly Barry, *Report of the Special Rapporteur on the Right to Education*, 2017, A/72/469, [26].

<sup>108</sup> CRPD, art. 30(d).

<sup>109</sup> CRPD Committee (n. 95), [12(e)].

In sum, if the field of international human rights law is to harness the full potential of intersectionality theory, its unidimensional analysis of human difference must give way to a structural analysis of identity-categories that transcends identities and instead focuses on the various structures of disadvantage that feed those identities. UN treaty bodies should investigate whether and how social institutions themselves and not simply group membership are restricting the reach of human rights protection. The question does not relate to any distinct identity-category or group. Rather, it concerns all those whose disadvantages are particularly exacerbated by multiple forms of oppression that make the realisation of their human rights a distant reality. While intersectionality may raise issues related to a specific group of people, those issues are in fact a manifestation of concerns that are interconnected to those related to other groups. Addressing such interconnected concerns involves directing attention towards those factors that spill over all disadvantaged groups. For international human rights law, this means working both within and across separate human rights regimes for racial minorities, women, children and disabled people – as per the ICERD, CEDAW, the CRC and, finally, the CRPD. The way of putting intersectionality to work would be seeing how the disadvantages attached to each of the categories (race, gender, age, disability and so on) intersect to produce co-constituted structures of disadvantage associated with two or more of them at the same time. International human rights law, in such a way, would not only commit itself to the pursuit of intersectionality but also advance intersectionality theory itself as it gives effect to its structural analysis of identity-categories that forms its very essence.

### **Conclusion**

International human rights law has adopted an interpretation of intersectionality that, in many ways, replicates a theory of identities. In order to embrace the theoretical and methodological framework of intersectionality theory, this chapter proposes to replace this identitarian understanding of intersectionality with a wider systems-based understanding of intersectionality. Instead of a narrow focus on identity-categories, the attention goes to the co-constituted structures of disadvantage that are associated with two or more categories at the same time. UN treaty bodies would in such a way be able to determine why those defined by intersecting identities are systematically excluded from various domains. Rather than treating intersectionality as an aggregation of identities, international human rights law would set out to inquire into the intersectional disadvantage that results from the interaction of these identities.

The chapter has illustrated the proposed way to harness the full potential of intersectionality theory through the example of disabled children's right to education. This example shows how it is possible to bridge the specific human rights for women, children and disabled people and to interpret human rights across the whole range of human rights treaties in relation to education. An approach is developed through which the UN treaty bodies could look into a certain characteristic as a stepping stone toward drawing attention to the various structures of disadvantage associated with that characteristic and in relation to other characteristics and to the impact that they have on the lived reality and experience of human rights between different groups of people.

Finally, intersectionality theory has so far been used to improve human rights protection by distinguishing specific groups amongst well-established categories. It could also be used to cast a critical eye on the different ways in which social arrangements increase disadvantages as they fail to acknowledge the real complexity of human diversity as it bears on human rights. The field of international human rights law could mobilise intersectionality theory in actually delivering its own promises by remedying those human rights violations that are beyond sight with a single-minded focus on a distinct identity-category or group. Such an invocation of intersectionality would avoid intersectionality being interpreted as simply cutting between (as per its original meaning in Latin, i.e. 'intersecare') groups and into ever smaller subgroups, an interpretation it precisely opposes. Intersectionality would thus furnish a renewed basis of solidarity within and between groups in international human rights law.