The McGill Journal of International Law & Legal Pluralism

Recruitment Material for the

Editorial Team

*Applications due by midnight on **30 May 2018** via email to intergentes@mcgill.ca*

Job Descriptions

Senior Editor

Expected time commitment: 5-10 hours per week

- Oversee given steps of editorial process (either Internal Review, Substantive Edit, or Language / Grammar Review) and coordinate with Associate Editors on tasks and deadlines.
- For all other submissions, Senior Editor will work directly with Associate Editors to reach a decision.
- Report to Executive Editor on progress of individual submission.
- Desirable skills include:
    - Experience on a law journal will be considered an asset;
    - Bilingual in two of the three official languages of the Journal (French, English and Spanish).

Associate Editor

Expected time commitment: 5-7 hours per week

- Participate in editorial process of all submissions by either: completing an Internal Review, Substantive Edit, or Language Review.
- Report regularly to Senior Editor.
- Desirable skills include:
    - Bilingual in two of the three official languages of the Journal (French, English and Spanish).

Application Procedure

1. Please submit a short cover letter that answers the following questions: (1) Why are you interested in this position? (2) What can you offer to the Editorial Team and to *Inter Gentes*? (3) How have your past academic and professional experiences prepared you for this type of role?
2. Please submit your curriculum vitae.
3. Please see the English academic article below and answer all the following questions.

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

By Gauthier de Beco

***This article has been extracted for *Inter Gentes'* recruitment purposes only.**

Please answer the questions below and limit your answers to 2,000 words maximum for all five questions:

1) Summarize the extract. What is the thesis the author is attempting to advance? Is the argument logical and plausible?

2) Which area of international law does this article fall under? To the best of your knowledge, is this article an original, interesting or relevant addition to the field?

3) Does the author write clearly and concisely? Is the paper well organized?

4) Does the article appear to reference sources adequately? Do you anticipate any issues of plagiarism?

5) What changes would you recommend to the author? Would you recommend this article for publishing? Please justify your answer.

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

1. INTRODUCTION

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

In order to do so, the article critically assesses whether and how an intersectional approach to international human rights law can enhance human rights protection for

people who share a number of characteristics associated with distinct marginalised groups of people. By PUTTING FORTH THE UNIVERSAL DIMENSION of human rights and by arguing for greater consideration for people's varied experiences, it examines how to transform intersectionality into a practical device. The article advances research on intersectionality through using an intersectional perspective in order to reshape the way in which international human rights law is applied to particu- lar marginalised groups of people. In doing so, it provides a novel analysis of intersectionality.

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

The article proceeds with a discussion of the meaning of intersectional discrimination and human rights protection in the face of intersecting grounds of discrimination and analyses the conceptualisation of intersectionality and the adoption of an intersectional approach to international human rights law. Using the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), it then undertakes a case study of disabled people.[1] In order to illustrate how an intersectional perspective can be made to work, it investigates how the combined application of different human rights trea- ties can enhance human rights protection for three groups of disabled people: first, disabled women; second, disabled people from racial or ethnic minorities; and third, disabled children. The article concludes with an examination of how human rights protection can be improved for those who fall under the remit of several group- specific human rights treaties through 'intersectional mainstreaming' in international human rights law.

The approach taken in this article is principally doctrinal. The conceptual analysis builds on the vast academic literature on intersectionality, while relating its observations to the field of human rights. Based on evidence from relevant academic and policy sources, the case study is conducted through an examination of examples of intersectionality analysed within the parameters of international human rights law. The legal analysis undertaken takes due account of the provisions on treaty interpretation of the Vienna Convention on the Law of Treaties (VCLT).[2]

***

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

2

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

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

The UN TREATY BODIES HAVE ASSERTED THAT INTERSECTIONALITY LEADS TO FURTHER DISADVANTAGES but have offered no explanation for these disadvantages.[141] The next step, therefore, is to investigate the cases in which such disadvantages occur as well as the underlying causes and the way forward. An intersectional approach, however, re- quires enhanced collaboration between the UN treaty bodies. This is the *sine qua non* condition for looking to intra-group differences, even though such collaboration admittedly would not be enough to reach that goal. In order to adopt a truly inter- sectional perspective, they would also have to distinguish between those situations where grounds of discrimination intersect with each other from situations where these grounds are just aggregated.

132 See supra nn 17–19.

133 See supra n 22.

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

135 Truscan and Bourke-Martignoni, supra n 30 at 122–3.

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

137 Chow, supra n 28 at 472–4.

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

The same result, and even more, could be achieved through other means, especially since nothing guarantees that a single UN treaty body would result in more attention being paid to intersectionality. Collaboration between the UN treaty bodies could be enhanced to a much greater degree than is presently the case. The reporting procedure has been revised to prevent duplication.[147] The UN treaty bodies also meet through.[148] Collegial work should be further facilitated with a view to fostering greater dialogue between these bodies. In view of this, intersectionality could be more adequately considered through the adjustment of their working methods. The UN treaty bodies could refer more often to each other's concluding observations or even adopt—partly—common concluding observations to offer better human rights protection to those who fall under the remit of several group-specific human rights treaties (provided the State Party under review ratified the treaties in question). They could also draft 'joint general comments',[149] as already done by the CEDEW Committee and the CRC Committee,[150] which is perhaps the easiest way to start with and which may eventually

142 OHCHR, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, 22 March 2006, HRI/MC/2006/2, at paras 30, 44 and 51.

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

144 Scheinin, 'International Mechanisms and Procedures for Monitoring' in Krause and Scheinin (eds), *International Protection of Human Rights: A Textbook* (2009) 601 at 607.

145 OHCHR, Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights (2012); UN GA Res 68/268, 21 April 2014, A/RES/68/268.

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

147 Scheinin, supra n 144 at 606.

148 See www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/MeetingChairpersons.aspx [last accessed 7 August 2017].

149 OHCHR, supra n 142 at para 20.

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

have the broadest impact. They could moreover consider cases of alleged intersectional discrimination not just on their own, as done by the CEDAW Committee, but together with other such bodies, leading to 'joint decisions', as well as to 'joint common inquiries'. In this regard, a proposal to establish a joint UN treaty body working group on communications is still on the table.[151] In addition, UN treaty bodies could increase their collaboration by holding their sessions simultaneously, where possible, and also by having their secretariats cooperate more closely. Secondments could also be organised between these bodies as well as to common working groups.

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

In view of this, SOLUTIONS MUST BE FOUND TO ENHANCE COLLABORATION between the UN treaty bodies without amending the human rights treaties. Informal means of collaboration, through secondments and secretariat cooperation, as well as the for- mation of common views, through 'joint general comments' and 'joint discussions', could meet the threshold and play an important role in achieving this objective. It would be particularly important to also involve the Human Rights Committee and the CESCR Committee, which are well placed to create a new dynamism around intersectionality considering their universal remit.[154] There is room for some flexibil- ity in trying to achieve the best possible arrangement, and UN treaty bodies have al- ready exploited this in the past. The CRPD Committee is currently testing such arrangements by organising side-events as well as 'joint meetings' on areas of com- mon concern with other UN treaty bodies.[155] The CRC Committee, too, has made the step of appointing 'focal points' in each of the UN treaty bodies.[156] This could pave the way for adopting further 'joint general comments' in addition to organising 'joint discussions' in the future. Instead of advising on the various rights in relation

151 OHCHR, supra n 145 at 68.

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

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

154 Truscan and Bourke-Martignoni, supra n 30 at 129.

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

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

to one particular marginalised group of people, they could examine those rights across categories and zero in on intra-group differences. In order to do so, they could find inspiration in the work of the Special Rapporteurs, several of whom have been examining these rights in precisely such a way.[157]

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

> There are already signs that UN treaty bodies are showing greater concern for intersectionality. At a general day of discussion on the right to education for disabled people, the CRPD Committee invited members of the CEDAW Committee and the CRC Committee to start the day by making presentations on disabled women and children.[158] Engagement could be furthered by collaboration with other UN treaty bodies and, as suggested earlier, by having them co-sign future general comments. However, there are limits as to what dialogue can achieve beyond, perhaps, a superfi- cial nod to intersectionality. This is shown by the fact that the CERD Committee was absent from the general day of discussion on the right to education for disabled people. A comparable level of collaboration is necessary to make such dialogue a consistent and enduring means that proffers substantive progress on intersectionality. Depending on the mutual understanding and willingness of the UN treaty bodies, the collaboration may not work as well for all of these bodies and consideration for intra-group differences could remain fragmented. To be sure, there are disagree- ments between the UN treaty bodies that may prevent them from further collaborat- ing despite mutual consultations.[159] While states can only benefit from such

157 See supra n 85 and 124.

158 See www.ohchr.org/EN/HRBodies/CRPD/Pages/DGDontherighttoeducationforpersonswithdisabilities.aspx [last accessed 7 August 2017].

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

disagreements, the issue is how to reconcile these disagreements and, if impossible, how to choose between the diverging opinions. An intersectional perspective requires that UN treaty bodies look beyond their corresponding human rights treaties but if their views are opposed such perspective does not help to work out a solution to the problem. This problem is arguably inherent to the mandates of these treaty bodies.

Another example of concern for intra-group differences is the efforts by UN agencies to mainstream gender throughout the UN agenda. These agencies are also often compartmentalised in unitary categories. Over the years they have nonetheless been paying regular attention to gender in all their activities, which helps to explain why women have been given a prominent place in recent human rights treaties like the CPRD. gender mainstreaming, However, remains the exseption, alongside race and ethnic origin, albeit to a lesser extent.[160] It is also recommended that other grounds of discrimination, such as disability, likewise be mainstreamed throughout the UN agenda.[161] Ideally and as far as possible, 'intersectional mainstreaming' should offset the existing emphasis on monolithic identities. Contrary to what has been done to date, the different marginalised groups of people would no longer be considered in an isolated manner. Instead, such an approach would see intersectionality addressed more comprehensively by the UN agencies.

Rather than transforming UN treaty bodies by adopting a new common protocol, which is unlikely to happen, it is thus possible to achieve 'intersectional mainstreaming' through human rights practice. Such an approach could facilitate the application of human rights treaties in a way that better resembles the Vienna Declaration's vision of human rights as 'universal, indivisible and interdependent and interrelated'.[162] Achieving this vision in practical terms would surely strengthen human rights protection for many groups who experience disadvantage on account of multiple characteristics. In contrast with an approach that refers to the rights provided for in a single human rights treaty, the UN treaty bodies would apply the different human rights treaties in combination and activate those rights that allow them to enlarge the set of remedies for resolving instances of intersectionality. Interpreting these treaties in such a way, however, would require that these bodies adopt a consistent intersectional approach. If collaboration between treaty bodies could occur on an ongoing and consistent basis, they could move away from a compartmentalised approach to international human rights law. This would help to improve their sensitivity to situations where different grounds of discrimination intersect in a way other than superficial recognition of cases of intersectional discrimination. The issue concerns other actors as well, since civil society organisations also need to shift the focus away from unitary categories for this approach to work. The human rights community should

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

161 Vienna Declaration and Programme of Action, 25 June 1993, A/Conf.157/23, Part II at para 5.

likewise be encouraged to recognise multiple identities and no longer consider the different marginalised groups of people as homogeneous groups.[163]

This 'intersectional way of thinking' could help towards building bridges further exploring permeability between different identities.[164] Through the further use of in- formal means of collaboration and formation of common views, UN treaty bodies could focus on cross-categories with a view to handling intersectionality. While human rights treaties make room for the proposed 'intersectional mainstreaming', it will then be up to these bodies to identify what kind of experiences shape the occur- rence of intersectionality and find what are the appropriate responses.

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

163 Crooms, supra n 42 at 634–5.

164 Cho, Crenshaw and McCall, supra n 53 at 795.