

**Challenging the Single Axis from the Nexus:  
Operationalizing Intersectionality in  
International Human Rights Law to Adequately  
Address the Corrective Rape of Black Lesbians  
in South Africa**

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*Intersectionality refers to the synergistic interaction between various facets of an individual's identities that may result in compounded oppression. While intersectionality discourse has been around since the '80s, the international human rights law framework has yet to do away with its single-axis model of discrimination law, posing a challenge to adequately addressing human rights violations like corrective rape. The corrective rape of Black lesbians in South Africa falls squarely into the category of intersectional discrimination, as in this specific context, it is heavily predicated on the compounded effect of individuals' race, gender and sexual orientation. This Article explores opportunities for mainstreaming intersectionality in order to increase protections for persons with intersecting marginalized identities under the IHRL framework. In doing so, it makes the case that under the specific rubrics of intersectional mainstreaming and joint interpretive instruments, international human rights law can contribute meaningfully to the struggle for equal rights and justice for Black lesbians in South Africa.*

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## I. INTRODUCTION

Fifteen years ago, in the early evening of February 4, 2006, Zoliswa Nkonyana, a proudly out nineteen-year-old lesbian in Cape Town, was bullied out of a tavern she frequented.<sup>1</sup> A row had erupted between Nkonyana and a group of nine men who challenged her and her friends' use of the ladies' bathroom "while pretending to be tomboys" and they were asked to leave.<sup>2</sup> The group of young men followed her, and launched an assault.<sup>3</sup> They stoned her and then took turns stabbing her with the same knife to "finish her off."<sup>4</sup> The bodies of Sikazele Sigassa and Salome Massoa were discovered less than a year later, having been gang raped and shot execution style, in a field close to the Johannesburg suburb in which they resided.<sup>5</sup> However, it was only in 2008, when Eudy Simelane—a famed lesbian player for South Africa's national soccer team—was found,

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1. Mandy De Waal, *We'll Make You a "Real" Woman—Even If It Kills You*, DAILY MAVERICK (Dec. 9, 2011), <https://www.dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Andrew Martin et al., *Hate Crimes: The Rise of Corrective' Rape in South Africa* (ActionAid, London), Mar. 2009, at 9.

brutally murdered, naked and face down in a ditch in a Gauteng township,<sup>6</sup> that the term “corrective rape” was coined.<sup>7</sup>

In its original conception, corrective rape was used to refer to rape or sexual violence against women “who are, or are perceived to be, lesbians in order to ‘fix’ them by making them heterosexual.”<sup>8</sup> While lesbians - especially “butch” lesbians who are hyper visible<sup>9</sup>—were and continue to be especially vulnerable to corrective rape, as reports emerged, it became apparent that this hate crime was not limited to them; the corrective rape of transgender men,<sup>10</sup> bisexual women,<sup>11</sup> transgender women,<sup>12</sup> gay men<sup>13</sup> and asexual women<sup>14</sup> have all been documented. At its core, corrective rape is an avenue via which anyone who steps out of their assigned roles in the system of cisheteropatriarchy, either via gender presentation/expression, sexual or romantic attraction, or gender identity, is violently reminded of, and brought back to, their “proper place.” Cisheteropatriarchy is a system of oppression based on dominance over, and oppression of, women and LGBTQIA+ individuals by men who are cisgender and heterosexual.<sup>15</sup> Cisheteropatriarchy thus positions straight cis men as superior as well as the default, and establishes acceptable attraction, behavior, gender expression, roles and norms relative to them

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6. Alexa Mieses, *Gender Inequality and Corrective Rape of Women Who Have Sex with Women*, GMHC TREATMENT ISSUES (GMHC, Inc., New York, N.Y.), Dec. 2009, at 1.

7. Sarah Doan-Minh, *Corrective Rape: An Extreme Manifestation of Discrimination and the State’s Complicity in Sexual Violence*, 30 HASTINGS WOMEN’S L.J. 167, 167 (2019).

8. Centre for the Study of Violence and Reconciliation, et al., South African Shadow Rep. on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, at 64, Submission to the CEDAW Committee’s 48th Session (2011).

9. See Martha Bayne, *In South Africa, LGBTQ Bigotry Raises Concern of “Corrective” Rape*, SOCIAL JUSTICE NEWS NEXUS (May 15, 2019), <https://sjnnchicago.medill.northwestern.edu/blog/2019/05/15/in-south-africa-lgbtq-bigotry-raises-concern-of-corrective-rape/>.

10. “We’ll Show You You’re a Woman” Violence and Discrimination Against Black Lesbians and Transgender Men in South Africa, HUMAN RIGHTS WATCH (New York, N.Y.) Dec. 2011, at 2, 3, 10.

11. *Id.*

12. Karinda Jagmohan, *WATCH: Trans Women Bemoan Violence, Corrective Rape at #TotalShutdown*, SUNDAY TRIBUNE, (Aug. 1, 2018), <https://www.iol.co.za/sunday-tribune/news/watch-trans-women-bemoan-violence-corrective-rape-at-totalshutdown-16350493>.

13. Sarah Johnson, “Epidemic of Violence”: Brazil Shocked by “Barbaric” Gang-Rape of Gay Man, GUARDIAN, (June 9, 2021), <http://www.theguardian.com/global-development/2021/jun/09/epidemic-of-violence-brazil-shocked-by-barbaric-gang-rape-of-gay-man>.

14. Dominique Mosbergen, *Battling Asexual Discrimination, Sexual Violence and “Corrective” Rape*, HUFFPOST, (June 6, 2013), [https://www.huffpost.com/entry/asexual-discrimination\\_n\\_3380551](https://www.huffpost.com/entry/asexual-discrimination_n_3380551).

15. Shay-Akil Mclean, *Patriarchy & Gender*, DECOLONIZE ALL THE THINGS (Dec. 30, 2014), <https://decolonizeallthethings.com/learning-tools/patriarchy-gender-lesson-plan/>.

through the lens of the gender binary.<sup>16</sup> Accordingly, over the course of two decades, the definition of corrective rape has evolved to broadly encompass “the rape of any member of a group that does not conform to gender or sexual orientation norms where the motive of the perpetrator is to ‘correct’ the individual.”<sup>17</sup> It may also be referred to as “homophobic rape,” “punitive rape,” or “curative rape.”<sup>18</sup>

Because corrective rape is fueled by prejudice against an individual for their specific identity, it constitutes a hate crime that is the product of gender-based violence and homophobic violence.<sup>19</sup> Additionally, in the South African context, this violence intersects with systemic racism, producing a disproportionate impact on Black women.<sup>20</sup> As recently as 2020, a Black lesbian woman in Cape Town was on her way to a shop when she was attacked by three men who gang raped her, claiming to be doing so in order to “correct her sexuality.”<sup>21</sup> This was ironically shortly before the city’s denizens celebrated the Cape Town Pride festival. While there is no definitive data on the prevalence of corrective rape globally or in South Africa, some sources on the latter, including a qualitative study and an NGO report, have suggested that at least 10 women are correctively raped each week on average,<sup>22</sup> or at least 500 annually.<sup>23</sup> However, this number is likely a gross underestimate, both because of severe underreporting,<sup>24</sup> as well as flawed documentation that is characteristic of

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16. H. Samy Alim et al., *Language, Race, and the (Trans)Formation of Cisheteropatriarchy*, in THE OXFORD HANDBOOK OF LANGUAGE AND RACE 290, 294 (2020).

17. Doan-Minh, *supra* note 7, at 167.

18. Navi Pillay, *The Shocking Reality of Homophobic Rape*, OHCHR NEWS ARCHIVE 1994-2013 (June 20, 2011), <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11229&LangID=E>.

19. Luis Abolafia Anguita, *Tackling Corrective Rape in South Africa: The Engagement Between the LGBT CSOs and the NHRIs (CGE and SAHRC) and Its Role*, 16 THE INT’L J. OF HUM. RIGHTS 489, 490 (2012).

20. See Helen Wells & Louise Polders, *Anti-Gay Hate Crimes in South Africa: Prevalence, Reporting Practices, and Experiences of the Police*, 67 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 20, 23 (2006).

21. Monique Duval, *Boys Bust for Raping Lesbian*, DAILY VOICE, (Mar. 3, 2020), <https://www.dailyvoice.co.za/news/boys-bust-for-rape-lesbian-43994634>.

22. Kammila Naidoo, *Sexual Violence and “Corrective Rape” in South Africa*, GLOBAL DIALOGUE (Int’l Socio. Ass’n, Madrid, Spain), Mar. 22, 2018.

23. *Scourge of “Corrective Rape,”* AL JAZEERA (Feb. 19, 2011), <https://www.aljazeera.com/news/africa/2011/02/201121916353550215.html>.

24. “We’ll Show You You’re a Woman” Violence and Discrimination Against Black Lesbians and Transgender Men in South Africa’ HUMAN RIGHTS WATCH (New York, N.Y.) Dec. 2011, at 2.

the criminal justice system.<sup>25</sup> The seemingly unchanged lived realities of Black queer womxn<sup>26</sup> in South Africa, particularly visibly out lesbians, prompts an assessment of the role of international human rights law in addressing this egregious violation of rights.

In fleshing out this role, this Article delves into the theoretical underpinnings of intersectionality, before framing it within the international human rights law framework. Critically, this Article grapples with the incongruence of the traditional single-axis model around which discrimination in international human rights law (IHRL) is built and the overall protective function and intent of IHRL. The following Part examines which fundamental rights are implicated specifically under the core IHRL treaties before proceeding to explore what opportunities exist for increasing protections for individuals facing compounded oppression and intersectional discrimination. The exploration builds on the seminal works of legal scholars such as De Beco and Truscan, who imagine an international human rights law framework that is adaptive to the nuanced, multi-faceted experiences of individuals. Ultimately, these strategies are teased out further and applied to corrective rape in a bid to establish the feasibility of expanding frameworks in IHRL to adequately address the corrective rape of Black lesbians in South Africa.

## II. INTERSECTIONALITY IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

### A. *Theoretical Underpinnings of Intersectionality*

The complexity, diversity and multi-layered nature of individuals and human societies mean that each person bears more than one identity.<sup>27</sup> However, “too often, our equality laws seek to categorize people with a single label” that is just one facet of their identity.<sup>28</sup> In response to this

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25. *Africa Check, FACTSHEET: South Africa's Crime Statistics for 2018/19*, CITIZEN (Sept. 12, 2019), <https://citizen.co.za/news/south-africa/crime/2178462/factsheet-south-africas-crime-statistics-for-2018-19/>.

26. In this Article, womxn will be used interchangeably with women, as a nod to intersectional feminism and in recognition of the inclusion of trans women and woman-aligned non-binary individuals in this research study. To be clear, the use of womxn is not aimed at invalidating the womanhood of trans women, or erasing the distinct identity of non-binary individuals, but is rather intended as an expansive and inclusive term that does not center cis-men. See Cf; Khadija Khan, ‘Intersectionality in Student Movements: Black Queer Womxn and Nonbinary Activists in South Africa’s 2015–2016 Protests’ (2017) 31 *Agenda* 110.

27. *Roma Rights 2, 2009: Multiple Discrimination* EUR. ROMA RTS. CENTRE (Apr. 27, 2010), <http://www.errc.org/roma-rights-journal/roma-rights-2-2009-multiple-discrimination>.

28. Gay Moon, *Multiple Discrimination: Justice for the Whole Person*, 2 *ROMA RIGHTS J. EUR. ROMA RTS. CENTRE* 3, 5 (2009).

lacuna, in the late '80s, several Black female academics coined the term “intersectionality.”<sup>29</sup> This was specifically in reference to the “multi-dimensionality of Black women’s experience[s]”,<sup>30</sup> which were markedly different from the experiences of Black men or white women.<sup>31</sup> Its use has since been applied to other groups of marginalized persons. Crenshaw aptly defines it as a “lens through which you can see where power comes and collides, where it interlocks and intersects.”<sup>32</sup> To run with this optical metaphor, there are two focal points of intersectionality: the structural, and the dynamic consequences arising out of the interaction between two or more forms of discrimination or systems of subordination, such as racism and the patriarchy.<sup>33</sup> Structural consequences refer to discrimination that occurs “where policies intersect with underlying structures of inequality to create a compounded burden”<sup>34</sup> for particularly vulnerable individuals. Dynamic consequences are harder to map and are the result of the natural interaction of various forms of oppression, manifesting in social hierarchies and affecting the way that individuals who possess multiple subordinated traits interact and are treated in society. The net effect of the interplay between these discriminatory systems is the creation of layers of inequality that structure and dictate the relative positions of groups in society.<sup>35</sup> With the focus shifting away from the single axis framework, wherein discrimination grounds are viewed as single-issue and mutually exclusive,<sup>36</sup> intersectionality creates space to illuminate and interrogate the disadvantage that “flow[s] along these intersecting axes contributing actively to create a dynamic of disempowerment.”<sup>37</sup>

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29. See AKASHA HULL ET AL., *BUT SOME OF US ARE BRAVE: ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN: BLACK WOMEN’S STUDIES*, (1982).

30. Kimberle Crenshaw, *Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Anti-Racist Politics* 1989 UNIV. CHI. L. F. 139, 139 (2011).

31. See *DeGraffenreid v. General Motors Assembly Div.* 413 F. Supp. 142, 142 413 F. Supp. 142 (E.D. Mo. 1976).

32. Interview by Columbia Law School with Kimberlé Crenshaw, Professor, Columbia Law School (June 8, 2017).

33. U.N. Div. Advancement of Women, Off. High Comm’r for Hum. Rts., U.N. Dev. Fund for Women, Gender and Racial Discrimination, Rep. of the Expert Group Meeting, (Nov. 21-24, 2000), <http://www.un.org/womenwatch/daw/csw/genrac/report.htm>.

34. *Id.*

35. *Id.*

36. Ivona Truscan & Joanna Bourke-Martignoni, *International Human Rights Law and Intersectional Discrimination*, 16 EQUAL RTS. REV. 103, 106 (2016).

37. United Nations Division for the Advancement of Women (DAW), Gender and Racial Discrimination, Rep. of the Expert Group Meeting 1, 7 (2000).

To obtain a deeper understanding of the nuance of intersectionality, it is important to situate it within the larger field of discrimination. Fredman identified three ways in which such discrimination manifests: the first is where a “person suffers discrimination on different grounds and separate occasions.”<sup>38</sup> For example, a disabled immigrant may suffer discrimination on one occasion on account of their disability, and the other on account of their migrant status/country of origin. This is called “multiple discrimination.”<sup>39</sup> It is the easiest to tackle, with each incident examined and remedied separately.<sup>40</sup> The second manifestation occurs where several grounds of discrimination lead to the deleterious treatment of an individual in one particular instance.<sup>41</sup> Makkonen demonstrates this as such: where the job market is particularly hostile to immigrants, and a female immigrant applicant applies for a job in a male dominated industry,<sup>42</sup> the applicant’s chances of finding a job are considerably lowered by these two parts of her identity working concurrently.<sup>43</sup> This manifestation has an “additive” element—one ground adds disadvantage onto the other and this creates an “added burden.”<sup>44</sup> Accordingly, this manifestation is referred to as “multiple additive discrimination,”<sup>45</sup> or “compound discrimination.”<sup>46</sup> The third manifestation is the most complex, and as opposed to compound oppression, is not the simple result of adding two sources of discrimination.<sup>47</sup> Since the cumulative effect is not additive, it is impossible to neatly dissect the different components of a person’s experiences at the intersection of these identities.<sup>48</sup> Instead, a “synergy” exists.<sup>49</sup> This synergistic interaction is “intersectional discrimination.”<sup>50</sup> As Clare poetically puts it:

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38. Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, EUR. NETWORK L. EXPERTS GENDER EQUAL. NON-DISCRIMINATION (European Commission Brussels, Lux.) 2016, at 27.

39. Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experience of the Most Marginalized to the Fore* (April 2002) (LLM Thesis, Institute for Human Rights Åbo Akademi University) at 10.

40. Fredman, *supra* note 38, at 27.

41. Makkonen, *supra* note 39, at 11.

42. *Id.*

43. *Id.*

44. *Id.*

45. Fredman, *supra* note 38, at 27.

46. Makkonen, *supra* note 39, at 11.

47. See Sandra Fredman, *Double Trouble: Multiple Discrimination and EU Law*, 2 EUR. ANTI-DISCRIMINATION L. REV. 13, 13 (2005).

48. See Makkonen, *supra* note 39, at 11.

49. Fredman, *supra* note 38, at 27-28.

50. *Id.* at 28.

Gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; sexual orientation folds on top of race (. . .) everything finally piling into a single human body.<sup>51</sup>

By eschewing the simplistic idea of additive subordination, intersectionality grounds itself in the notion that when these synergistic interactions occur, they create “new and distinctive forms of oppression.”<sup>52</sup> Speaking to the situation of Black women in America, the flaw of anti-discrimination law, Crenshaw argues, is that:

The paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks [who are primarily men]. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.<sup>53</sup>

Critically, intersectionality challenges the assumed homogeneity of groups of individuals with a similar defining trait such as gender, providing a jumping off point for discourse on the differences that exist among, and not just between groups.<sup>54</sup>

Finally, an important element of intersectionality discourse is an emphasis on context, i.e., comprehending and prioritizing an awareness of the shifting meaning of, and weight given to, social identity categories and power systems, both geographically and temporally.<sup>55</sup> Therefore, social categories and identities, as Chow points out, need to be situated within broader discourse around history, politics, ideologies, economics and so forth, in order to be meaningfully understood.<sup>56</sup>

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51. ELI CLARE, ET AL., *EXILE AND PRIDE: DISABILITY, QUEERNESS, AND LIBERATION* xviii (South End Press ed., Duke University Press Books 2015 (1999)).

52. Pok Yin S. Chow, *Has Intersectionality Reached Its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence*, 16 *HUM. RTS. L. REV.* 453, 458 (2016).

53. Crenshaw, *supra* note 30, at 151.

54. Wendy G. Smooth, *Intersectionality from Theoretical Framework to Policy Intervention*, in *SITUATING INTERSECTIONALITY: POLITICS, POLICY, AND POWER* 11 (Angelia R. Wilson ed., Palgrave Macmillan 2013).

55. *Id.* at 21.

56. Chow, *supra* note 52, at 458.



*B. Intersectional Discrimination Under IHRL*

Although there is apparent consensus in academic discourse on the significance of intersectionality,<sup>57</sup> and it is “fast becoming common parlance among policy-making circles,”<sup>58</sup> the law in most cases, as Smith asserts, “still clings resolutely to ‘single-axis’ models of discrimination law,”<sup>59</sup> thereby failing to address the complex lived realities of those who experience intersectional discrimination. Hannett corroborates this by stating that “the current statutory regime, both conceptually and practically, hinders multiple discrimination claims.”<sup>60</sup> This is evident in IHRL instruments wherein antidiscrimination clauses largely prohibit distinctions based on discrete, mutually exclusive grounds of discrimination.<sup>61</sup> Consequently, the remedies provided by the international human rights mechanisms, as well as their policy recommendations, have tended to reinforce this notion, leading to an entrenchment of this singular conception of discrimination at the normative, as well as institutional level.<sup>62</sup>

In recent years however, some positive developments have taken place. Notably, the most recent treaty in the core international human rights instruments—the Convention on the Rights of Persons with Disabilities (CRPD)—is the “first international legally binding instrument which refers to multiple discrimination as a separate form of discrimination.”<sup>63</sup> In addition to a general non-discrimination provision,<sup>64</sup> women with disabilities are recognized as being subject to “multiple discrimination” (often used interchangeably with intersectional discrimination in IHRL).<sup>65</sup> This latter provision tasks states with

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57. Barbara Giovanna Bello, *Multiple Discrimination Between the EU Agenda and Civic Engagement: The Long Road of Intersectional Perspective*, 2 ROMA RTS. J. EUR. ROMA RTS. CENTRE 11, 11 (2009).

58. Kanchana N. Ruwanpura, *Multiple Identities, Multiple-Discrimination: A Critical Review*, 14 FEMINIST ECON. 77, 77 (2008).

59. Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, 16 EQUAL RTS. REV. 73, 74 (2016).

60. Sarah Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 OXFORD J. L. STUD. 65, 65 (2003).

61. Truscan & Bourke-Martignoni, *supra* note 36, at 103.

62. See VIVIAN M. MAY, PURSUING INTERSECTIONALITY, UNSETTLING DOMINANT IMAGINARIES 82 (2015).

63. Aart Hendriks, *The U.N. Disability Convention and (Multiple) Discrimination: Should EU Non-Discrimination Law Be Modelled Accordingly?*, 2010 2 EUR. Y.B. DISABILITY L. 7, 8.

64. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 5 (Dec. 13, 2006).

65. *Id.* at art 6.

hypervigilance when it comes to the treatment that women and girls with disabilities are subjected to.<sup>66</sup>

Furthermore, a number of treaty monitoring bodies have begun to incorporate these concepts within their work.<sup>67</sup> For example, the International Convention on the Elimination of Racial Discrimination (ICERD) Committee adopted a general recommendation addressing the disparate experiences of racial discrimination amongst men and women, pledging to enhance its efforts to integrate gender perspectives in examining forms and manifestations of racial discrimination, as well as the circumstances and consequences thereof.<sup>68</sup> General Recommendation No. 32 concretized this position, wherein the ICERD Committee acknowledges that because of intersectionality, the “grounds” of discrimination are extended in practice.<sup>69</sup> Situations of double or multiple discrimination may thereby warrant the Committee’s consideration of grounds not listed in the convention (such as religion) where discrimination “appears to exist in combination with . . . grounds listed in Article 1 of the Convention.”<sup>70</sup> Similarly the Convention on the Rights of the Child (CRC) Committee, in a general comment on indigenous children, recommended that state parties should consider the needs of “children who may face multiple facets of discrimination.”<sup>71</sup> The Committee highlighted the different situation of indigenous children in urban versus rural areas, and also noted the gendered dimension, along with urging that special measures be put in place to address disabled indigenous children.<sup>72</sup> The Convention on the Elimination of Discrimination Against Women (CEDAW) Committee, noted in its general recommendation on the core obligations of state parties that the discrimination women experience because of their sex and gender is “inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual

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66. Hendriks, *supra* note 63, at 8.

67. Truscan & Bourke-Martignoni, *supra* note 36, at 110.

68. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 25, Gender Related Dimensions of Racial Discrimination, at 214-15 ¶¶ 1, 4, 5, U.N. Doc. HRI/GEN/1/Rev.6 (2000).

69. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, ¶ 7, U.N. Doc. CERD/C/GC/32 (2009).

70. *Id.*

71. Comm. on the Rts. of the Child, General Comment No. 11: Indigenous Children and Their Rights under the Convention, ¶ 29, U.N. Doc. CRC/C/GC/11 (2009).

72. *Id.*

orientation and gender identity,”<sup>73</sup> and that such discrimination may consequently “affect women belonging to such groups to a different degree or in different ways to men.”<sup>74</sup> Likewise, the Human Rights Committee (HRC) observed that “discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>75</sup> Finally, the International Covenant on Economic, Social and Cultural Rights (ICESCR) Committee acknowledged that “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds,”<sup>76</sup> and that “such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”<sup>77</sup> The Committee reiterated this in a more recent general comment on the right to sexual and reproductive health.<sup>78</sup>

This shift in substantive interpretation expressed via soft law is also evident in some emerging individual case law. For example, the CEDAW Committee centered its decision regarding the property rights of an aboriginal woman on intersectional discrimination in the seminal case of *Cecilia Kell v. Canada*.<sup>79</sup> The applicant had suffered domestic abuse for years at the hands of her partner. After the subsequent break-up of their relationship, the state agency administering the property (at the prompting of her partner) took her name off the assignment of lease and she lost her housing.<sup>80</sup> She had originally obtained the lease under a scheme by the local housing authority to make lodging available to the indigenous population.<sup>81</sup> The CEDAW Committee concluded that her property rights

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73. Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 18, U.N. Doc. CEDAW/C/ GC/28 (2010).

74. *Id.*

75. Human Rts. Comm., CCPR Gen. Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 30, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

76. Comm. on Economic, Social, and Cultural Rts., Gen. Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights ¶ 17, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

77. *Id.*

78. CESCR, ‘General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the ICSECR)’ (2016) UN Doc. E/C.12/GC/22 para 2.

79. *Cecilia Kell v. Canada* [2012] Committee on the Elimination of All Forms of Discrimination against Women Communication No.19/2008, UN Doc. CEDAW/C/51/D/19/2008.

80. “*Cecilia Kell v. Canada*” (*Optional Protocol to CEDAW*), <https://opcedaw.wordpress.com/category/communications/cecilia-kell-v-canada/> (accessed June 9, 2020).

81. *Cecilia Kell v. Canada* (n 81) para 2.2.

had been prejudiced and that Kell had been a victim of intersectional discrimination based on her status as an aboriginal woman who was also a survivor of intimate partner violence.<sup>82</sup>

### III. SITUATING CORRECTIVE RAPE IN INTERNATIONAL HUMAN RIGHTS LAW

#### A. *Fundamental Rights Implicated Under the Core IHRL Treaties*

##### 1. The Right to Equality and Non-Discrimination

The principle of equality is one of the core principles of human rights<sup>83</sup> and it echoes throughout the Universal Declaration of Human Rights (UDHR), with some articles explicitly concerned with equality, while others implicitly refer to it, particularly through the framing of rights as being all-inclusive.<sup>84</sup> Article 1 states that, “All humans are born free and equal in dignity and rights.”<sup>85</sup> Article 2 then sets forth that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>86</sup> Article 7 provides for the equality of all before the law and the entitlement, sans discrimination, to equal protection before the law.<sup>87</sup>

In a similar vein, the International Covenant on Civil and Political Rights (ICCPR) provides that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>88</sup>

Article 26, the Convention’s principal clause on non-discrimination, expressly prohibits discrimination on the following non-exhaustive

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82. ‘Cecilia Kell v. Canada’ (n 82); the Committee thus found a violation of article 16 (right to property) in conjunction with article 1 (definition of discrimination), and article 2 (obligations of State Parties).

83. United Nations, “The Foundation of International Human Rights Law” (Oct. 7, 2015), <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited June 6, 2020).

84. Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law* (The Norwegian Centre for Human Rights 2004) Research Notes 03/2004 6.

85. G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948).

86. *Id.* at art 2.

87. *Id.* at art 7.

88. G.A. Res. 2200 A (XXI), International Covenant on Civil and Political Rights, art. 2(1) (Dec. 16, 1966).

grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>89</sup> While sexual orientation is not specifically enumerated as a protected ground against which discrimination is prohibited, the HRC, the body of independent experts in charge of oversight of the ICCPR,<sup>90</sup> held in *Toonen v. Australia*<sup>91</sup> that “the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”<sup>92</sup> Further, the HRC in its General Comment on Discrimination, expounded on the notion of discrimination, stating that the term applied to “any distinction, exclusion, restriction or preference based on any ground . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>93</sup> Because the exact definition of discrimination is absent from the ICCPR,<sup>94</sup> this framing directly borrows from the non-discrimination clauses of CEDAW<sup>95</sup> and ICERD,<sup>96</sup> wherein the term discrimination is elucidated in reference to sex and racial discrimination respectively.

A critical development in IHRL is the blurring of the line delineating the traditional public-private dichotomy, long criticized by feminists as failing to recognize the political nature of private life and the power distributions therein.<sup>97</sup> Previously, states were responsible for acts or omissions by their own actors and very limited acts of non-state actors.<sup>98</sup> The early conception of human rights law failed to recognize a state’s duty of protection of private individuals from other private parties, in addition

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89. *Id.* at art. 26.

90. OHCHR, Human Rights Committee, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (last visited June 7, 2020).

91. Nicholas Toonen v. Australia [1992] Human Rights Committee Case no. 488/1992, ¶8.7, UN Doc. CCPR/c/50/D/48811992. (Dec. 25, 1991).

92. *Id.* at 8.7

93. Human Rights Committee, CCPR General Comment No. 18: Non-Discrimination (1989), ¶¶ 6-7, UN Doc. HRI/GEN/I/Rev. 1 (July 29, 1994). HRI/GEN/I/Rev. 1 para 7.

94. *Id.* at 6.

95. Convention on the Elimination of All Forms of Discrimination Against Women 1979, art. 1, 10, 5(a), (1249 UNTS 13) (Sept. 3, 1981).

96. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (Jan. 4, 1969).

97. Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 94 (Rebecca J. Cook ed., 1994).

98. Alice M. Miller & Meghan Faux, *Reconceiving Responses to Private Violence and State Accountability: Using an International Human Rights Framework in the United States*, 1 GEO. J. GENDER & L. 67, 71 (1999).

to state actors.<sup>99</sup> Consequently, the muddling of the strict private-public dichotomy led to the evolution of the doctrine of due diligence.<sup>100</sup> The due diligence principle assigns state responsibility for substantive breaches that originate from the conduct of private persons.<sup>101</sup> For example, per Cook, “a state is not internationally responsible for a private act of sexual discrimination per se, but is bound to exercise due diligence to eliminate, reduce, and mitigate the incidence of private discrimination.”<sup>102</sup> The due diligence principle is evidenced in several newer treaty provisions. For example, CEDAW specifically tasks governments with taking “all appropriate measures to eliminate discrimination against women in order to ensure equal rights to men.”<sup>103</sup> In particular, states are obligated to work to modify social and cultural inequality between men and women, based on notions of “superiority of either sexes or on stereotyped roles for men and women.”<sup>104</sup> Put differently, this is a duty to “modify the behavior and conduct of private citizens to ensure equality for women.”<sup>105</sup> Lesbian women in South Africa who fall victim to, or live in constant fear of, corrective rape are in fact victims of these social and cultural gender-based inequalities.<sup>106</sup> To this point, Di Silvio argues that the inferiority of women and these stereotyped gender roles “encompass the animus toward gay women that motivates many men to commit corrective rape.”<sup>107</sup> Accordingly, a failure by the state to tackle these inequalities is a direct violation of CEDAW.<sup>108</sup> Correspondingly, ICERD enumerates the measures to be taken by the state to eliminate racial discrimination; making no distinction between public or private actors, Article 2 requires each state party to prohibit and bring to an end racial discrimination by any persons, group or organization.<sup>109</sup> Article 3 crucially condemns “racial

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99. Lorenzo Di Silvio, *Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations to Prevent Violence against Women*, 99 GEO. L.J. 1469, 1506, 1508 (2011).

100. *Id.* at 1508.

101. Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 151 (1994).

102. *Id.*

103. Convention on the Elimination of All Forms of Discrimination Against Women 1979, art. 10, (1249 UNTS 13) (Sept. 3, 1981).

104. *Id.* at art 5(a).

105. Silvio, *supra* note 99, at 1506.

106. Roderick Brown, *Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*, 18 ANN. SURV. INT'L COMP. L. 45, 57-59 (2012).

107. Silvio, *supra* note 99, at 1506.

108. Brown, *supra* note 106, at 59.

109. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(d) (Jan. 4, 1969).

segregation and apartheid” and assigns states the responsibility to “undertake to prevent, prohibit and eradicate all practices of this nature.”<sup>110</sup> Further, the convention charges states with the obligation of ensuring that everyone within their jurisdiction has “effective protection and remedies . . . against any acts of racial discrimination.”<sup>111</sup> As discussed, due diligence and the positive obligations of the state are, critically, widely applicable themes that will be threaded through the subsequent fundamental rights implicated.

## 2. Protection from Violence: The Right to Life, Liberty and Security of the Person

Article 3 of the UDHR succinctly states that “everyone has the right to life, liberty and security of person.”<sup>112</sup> The ICCPR splits this into two substantive rights: the inherent right to life protected by law, in which no person shall be “arbitrarily deprived of his life,”<sup>113</sup> and the right to liberty and security of the person, in which no one shall be deprived of liberty except on lawful grounds and in accordance with lawful procedure.<sup>114</sup> Further, Article 20 tasks states with prohibiting by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>115</sup> This provision is particularly relevant to the discussion on hate crime legislation, and homophobic violence incited by state actors. While CEDAW does not directly reference the right to life or the right to liberty and security of the person, the CEDAW Committee, the Convention’s monitoring body, firmly asserted that “gender-based violence is a form of discrimination,”<sup>116</sup> and that such violence “may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”<sup>117</sup> In line with the due diligence principle discussed earlier, the Committee further elaborated on the state’s positive obligations in tackling violence against women, recommending that states not only engage in legal measures, but also preventive and protective measures to effectively combat and overcome

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110. *Id.* at art. 3.

111. *Id.* at art. 6.

112. G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948).

113. *Id.* at art. 6(1).

114. *Id.* at art. 9(1).

115. *Id.* at art. 20(2).

116. Committee on the Elimination of Discrimination Against Women, ‘CEDAW General Recommendation No. 19: Violence against Women’ (1992), ¶¶ 1, U.N. Doc. A/47/38 (May 8, 2006).

117. *Id.* at 6.

violence against women.<sup>118</sup> Moreover, that “states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>119</sup> The Committee subsequently applied the principle in the landmark cases of *Yildirim v. Austria*<sup>120</sup> and *A.T. v. Hungary*,<sup>121</sup> finding culpability of the respective states for private acts where they failed to act with due diligence to prevent, investigate and punish acts of violence.<sup>122</sup> Lastly, Article 5 of ICERD provides a non-exhaustive list of rights that states have the obligation to guarantee to everyone regardless of race, color, national or ethnic origin.<sup>123</sup> This includes, *inter alia*, “the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”<sup>124</sup>

### 3. Prevention of Torture and Cruel, Inhuman, and Degrading Treatment

The right to be free from torture or “cruel, inhuman or degrading treatment” is set out in the UDHR,<sup>125</sup> the ICCPR<sup>126</sup> and the Convention against Torture (CAT).<sup>127</sup> As Randall and Venkatesh assert, this right includes the right to be free from domestic violence and rape.<sup>128</sup> Indeed, rape can fulfill all the elements necessary for an act to constitute torture,<sup>129</sup>

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118. *Id.* at 24.

119. *Id.* at 9.

120. *Yildirim v. Austria* [2007] Committee on the Elimination of All Forms of Discrimination against Women Communication No. 6/2005, ¶12.1, UN Doc CEDAW/C/39/D/6/2005 (Oct. 1, 2007).

121. *AT v. Hungary* [2005] Committee on the Elimination of All Forms of Discrimination against Women Communication No. 2/2003, ¶9.2, UN Doc CEDAW/C/32/D/2/2003 (Jan. 26, 2005).

122. *Id.* at 9.2; *See Yildirim v. Austria* [2007] Committee on the Elimination of All Forms of Discrimination against Women Communication No. 6/2005, ¶12.1, UN Doc CEDAW/C/39/D/6/2005 (Oct. 1, 2007); *See para 12.1 in Yildirim v. Austria.*

123. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (Jan. 4, 1969).

124. *Id.*

125. G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

126. G.A. Res. 2200 A (XXI), International Covenant on Civil and Political Rights, art. 7 (Dec. 16, 1966).

127. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 art. 1, 2, Dec. 10, 1984, OHCHR.

128. Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women’s Human Rights, and International Law*, 41 BROOK. J. INT’L L. 154, 179 (2015).

129. Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT’L L. REV. 895, 925-928 (2000).



namely: severe physical or mental pain or suffering, intentional affliction for purposes enumerated and unenumerated, and “is acquiesced to or condoned by a state actor.”<sup>130</sup> In the case of corrective rape, the former is indisputable and the latter is, as evidenced by the lackluster response of the South African criminal justice system, by and large, accurate. Crucially, the CAT Committee explicitly referenced the due diligence principle,<sup>131</sup> emphasizing the state’s culpability under the Convention where gender-violence or rape is carried out by non-state actors.<sup>132</sup> It thus follows that the South African state’s inaction to effectively prevent and punish the corrective rape of lesbians is a violation of this right.<sup>133</sup>

#### 4. The Right to Education

ICESCR provides for the right of everyone to education,<sup>134</sup> whose purpose shall include promoting “tolerance and friendship” among various groups of individuals.<sup>135</sup> By not providing education on sexual orientation, gender identity and expression, and sex characteristics, the state is shunning its obligations under the treaty; further, this lack of education is what breeds misconceptions about the LGBTQIA+ community, which in turn creates antipathy.<sup>136</sup> The CRC augments this right by articulating, as one of the goals of education, the “preparation of the child for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”<sup>137</sup> Therefore, the state is in direct violation of this right if educational institutions do not fulfill this role, or worse still, “become hubs for the dissemination of prejudice and practice of hatred towards lesbians and other sexual minorities”<sup>138</sup>

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130. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 1.

131. Committee Against Torture, ‘General Comment No. 2: Implementation of Article 2 by States Parties’ (2008) ¶¶ 18, 22 CAT/C/GC/2 (Jan. 24, 2008).

132. Randall & Venkatesh, *supra* note 128, at 179.

133. Brown, *supra* note 106, at 58.

134. International Covenant on Economic, Social and Cultural Rights 1966 art. 13(1), Dec. 16, 1966. United Nations General Assembly Resolution 200A (XXI).

135. *Id.* at art 13(1).

136. Brown, *supra* note 106, at 58.

137. Convention on the Rights of the Child 1989 art. 29(d), Nov. 20, 1989, 1577 U.N.T.S.

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138. Brown, *supra* note 106, at 58.

## 5. Peripheral Protections

Doan-Minh explains that because of “deeply entrenched, pervasive prejudice and discrimination against non-heterosexual and gender non-conforming individuals,”<sup>139</sup> corrective rape also infringes on myriad peripheral protections linked to a sense of autonomy and well-being, which are critical to making the core rights effective.<sup>140</sup> These include “the rights to sexual self-determination, human dignity, humane treatment, privacy, effective judicial recourse, safety, physical and mental integrity, integrity of the person, sexual and reproductive choice, and health.”<sup>141</sup>

### *B. The Current IHRL Response to Corrective Rape*

Corrective rape has garnered some attention in the international human rights law sphere and has been addressed by Special Procedures of the HRC and UN treaty bodies to varying degrees.<sup>142</sup>

With regard to the HRC’s Special Procedures, comprised of special rapporteurs, working groups and independent experts,<sup>143</sup> corrective rape has been highlighted as an inhumane violation against LGBTQIA+ persons. In 2016, in a country visit to South Africa, the Special Rapporteur on violence against women, its causes and consequences directly addressed corrective rape, pointing out that despite explicit protection from discrimination based on sexual orientation under the South African constitution, lesbians and other sexual minorities were extremely vulnerable to “corrective rape,” which was often accompanied by a “particularly heinous murder.”<sup>144</sup> She further noted that “this type of extreme violence was reported to be on the rise despite the difficulty of detecting it, since victims were unlikely to spontaneously report their sexual orientation and the police did not record such information.”<sup>145</sup> In the same year, the HRC’s Working Group on the issue of discrimination

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139. Doan-Minh, *supra* note 7, at 180.

140. *Id.*

141. Randall & Venkatesh, *supra* note 128, at 177-178.

142. ILGA World, Rape and Other Forms of Sexual Violence Against Lesbian and Bisexual Women and Non-Binary, Trans and Intersex Persons, Submission to the Special Rapporteur on violence against women for the thematic report on rape as a grave and systematic human rights violation and gender-based violence against women, 22 (2020).

143. OHCHR, Special Procedures (Human Rights Experts), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/SpecialProcedures.aspx> (Sept. 13, 2021), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/SpecialProcedures.aspx>.

144. UNHRC, Visit to South Africa: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, ¶ 33, A/HRC/32/42/Add.2 (Nov. 18, 2016).

145. *Id.*

against women in law and in practice described corrective rape as a “coercive, inhumane and degrading practice”<sup>146</sup> citing lesbians as a particularly vulnerable group even in countries where same-sex sexual orientation was not criminalized.<sup>147</sup> Similarly, the UN Special Rapporteur on the Right to Health noted that “lesbian, bisexual and transgender youth were at risk of ‘punitive’ rape on the basis of their sexual orientation or gender identity,”<sup>148</sup> insisting upon their right to protection from all forms of violence.<sup>149</sup> He also discussed the experiences of lesbian athletes who in certain jurisdictions had been “harassed and subjected to violence, including ‘corrective rape’ on the basis of their sexual orientation.”<sup>150</sup> Further still, the Special Rapporteur on Torture underscored that “sexual violence, including the practice of ‘corrective rape’, uniquely affects lesbian, gay, bisexual, transgender and intersex individuals.”<sup>151</sup>

More recently in 2019, the Special Rapporteur on violence against women, in a country visit to Nepal, expressed concern over reports of corrective rape being perpetrated by police officers against members of the LGBTQIA+ community.<sup>152</sup> Similarly, in his country visit to Mozambique, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (Independent Expert on SOGI), highlighted testimonies of various types of conversion therapies, including “‘corrective rapes’ imposed as a punitive measure for a disease that needed to be cured.”<sup>153</sup> The Independent Expert on SOGI cemented this notion of corrective rape as conversion therapy in his 2020 report on practices of so-called “conversion therapy.”<sup>154</sup>

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146. UNHRC, Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice, ¶ 58, A/HRC/32/44 (Apr. 8, 2016).

147. *Id.*

148. UNHRC, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 41, A/HRC/32/32 (April 4, 2016).

149. *Id.*

150. *Id.* at ¶ 51, A/HRC/32/33.

151. UNHRC, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 57, A/HRC/31/57 (Jan. 5, 2016).

152. UNHRC, Visit to Nepal: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, ¶ 69, A/HRC/41/42/Add.2 (June 19, 2019).

153. UNHRC, Visit to Mozambique: Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, ¶ 52, A/HRC/41/45/Add.2 (May 17, 2019).

154. See UNHRC, Practices of So-Called “Conversion Therapy”: Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, ¶¶ 18 & 39, A/HRC/44/53 (May 1, 2020).

With regard to the treaty bodies, in 2016, the HRC in its Concluding Observations on Namibia highlighted the insufficiency of the measures the country had taken to combat discrimination, noting with particular concern “discrimination, harassment and violence against lesbian, gay, bisexual and transgender persons, including cases of so-called ‘corrective rape’ against lesbians.”<sup>155</sup> In 2017, the CAT Committee addressed violence on the grounds of sexual orientation or gender identity in Cameroon, citing reports of “‘corrective rape’ and murder against lesbian, gay, bisexual and transgender (LGBT) persons,”<sup>156</sup> which were not being thoroughly investigated by Cameroonian authorities, and directed that the same be investigated “promptly, thoroughly and impartially.”<sup>157</sup> In 2018, the CEDAW Committee, in its assessment of Ethiopia’s observance of CEDAW, included corrective rape under discriminatory gender stereotypes and harmful practices “to which lesbian and bisexual women reportedly fall victim.”<sup>158</sup> Likewise, in its Concluding Observations on Tajikistan, the CEDAW Committee included LGBTQIA+ persons in its list of disadvantaged groups of women due to the police abuse they face, including “corrective rape.”<sup>159</sup>

#### IV. OPPORTUNITIES FOR INCREASING PROTECTIONS FOR PERSONS WITH INTERSECTING MARGINALIZED IDENTITIES UNDER IHRL

##### A. *Intersectional Mainstreaming: Transforming the Approach & Working Methods of Treaty Bodies*

As emphasized repeatedly in the text, the traditional single-axis framework in anti-discrimination law is a misrepresentation of the real world. Beco describes it as “a form of reductionism that underestimates the fluidity and permeability of identities.”<sup>160</sup> Using a case study of disabled people, he argues that the CRPD provides a deft entry point for intersectionality, given that it already expressly refers to multiple

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155. UNHRC, Concluding Observations of the Human Rights Committee: Namibia, ¶ 9(b), CCPR/C/NAM/CO/2 (Apr. 22, 2016).

156. UNCAT, Committee against Torture, Concluding Observations of the Committee against Torture: Cameroon, ¶ 43, 44(c), CAT/C/CMR/CO/5 (Dec. 18, 2017).

157. *Id.* at 44(c).

158. CEDAW, List of Issues and Questions in Relation to the Eighth Periodic Report of Ethiopia, ¶8, CEDAW/C/ETH/Q/8 (Aug. 3, 2018).

159. CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tajikistan, ¶ 43, CEDAW/C/TJK/CO/6 (Nov. 14, 2018). CEDAW/C/TJK/CO/6 para 43.

160. Gauthier de Beco, *Protecting the Invisible: An Intersectional Approach to International Human Rights Law*, 17 HUM. RTS. L. REV. 633, 643 (2017).

discrimination,<sup>161</sup> and contains standalone provisions on disabled women<sup>162</sup> and disabled children.<sup>163</sup> Most importantly, this intersectional perspective results in considerable gains for individuals with intersecting marginalized identities.<sup>164</sup> With specific regard to disabled women, for example, there is a “dual approach” to gender-related issues in the CRPD.<sup>165</sup> This means that the protected ground of disability is considered as a standalone entity but, in specific instances, is also examined in concert with other protected grounds—in this case gender—in order to assess if multiple discrimination is present in a complaint claiming a violation of the convention. Another example is disabled persons who belong to ethnic or racial minority groups, and who suffer from multiple discrimination in the workforce. Here, Beco asserts that although ICERD and CRPD offer limited solutions, an intersectional perspective “could help to articulate a greater number of remedies for the low degree of access to employment of disabled people belonging to racial or ethnic minorities.”<sup>166</sup> This is doable through the adoption of an intersectional approach by both Committees, and thus by extension, the relevant committees in any given situation involving a complaint of multiple discrimination.

In this particular instance, an intersectional approach would allow for an investigation of how disability and race intersect, and advice on measures for such people.<sup>167</sup> Beco thus suggests “intersectional mainstreaming” by UN treaty bodies, through transforming treaty bodies’ practice and allowing them to apply the different treaties in combination.<sup>168</sup> This would in turn grant each body access to a broader set of remedies for resolving instances of intersectional discrimination.<sup>169</sup> Beco’s suggested framework heeds Bond’s demand for a “radical restructuring of human rights treaty bodies”<sup>170</sup> in order to move beyond theory to effectively realize a human rights practice that is intersectional.<sup>171</sup> With regard to addressing corrective rape against Black lesbians

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161. *Id.* at 64.

162. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 6 (Dec. 13, 2006).

163. *Id.* at art 7.

164. Gauthier de Beco, *supra* note 160, at 646.

165. *Id.* at 649.

166. *Id.* at 652.

167. *Id.*

168. *Id.* at 661.

169. *Id.*

170. Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71, 185 (2003).

171. *Id.*

specifically, this intersectional mainstreaming approach holds significant potential: a complaint before either the CERD, CEDAW, CAT or HRC would trigger an examination under not just one, but all four treaties. Beyond the significant symbolic weight of such an action, a joint decision would apply substantial pressure on the state, requiring implementation of the resultant recommendations to the satisfaction of multiple treaty bodies. The input of all these bodies into the decision would also create an opportunity to tailor recommendations targeting a broad range of laws, policies and practice. For example, the HRC might focus on the positive obligation of the state under the right to life, liberty, and security of the person, and recommend extensive judicial and police reforms. Parallel to this, the CAT Committee might highlight the need for both structural reforms and social interventions around sexual and gender-based violence, while the CERD and CEDAW Committees might jointly highlight the need for hate crime legislation, requiring enhanced penalties for the prejudice/bias motivating the crime.

Through the consistent adoption of the intersectional approach by all human rights treaty bodies, and the resultant transformation of their working methods, a gradual progression away from the rigid, compartmentalized approach to IHRL would occur.<sup>172</sup> More importantly, this would enhance protections for individuals and groups existing at the nexus of multiple marginalized identities.

*B. Institutional Development of Intersectionality: Joint Interpretive Instruments*

The year 2014 marked a groundbreaking moment in the history of the UN treaty body system when two monitoring bodies, the CEDAW and CRC Committees, issued a joint interpretive instrument.<sup>173</sup> This decision emanated from observations by both treaty bodies that “harmful practices fell within [their] purview,” and each had “repeatedly expressed shared concern” regarding the subject matter in question.<sup>174</sup> In the joint General Recommendation/General Comment, the Committees make direct reference to intersectionality, asserting that harmful practices are “grounded on discrimination on the basis of sex, gender, age and other grounds as well as multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm

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172. Gauthier de Beco, *supra* note 160, at 661.

173. CEDAW and CRC, Joint General Recommendation No. 31/ General Comment No. 18 on Harmful Practices, ¶1, CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 4, 2014).

174. Truscan & Bourke-Martignoni, *supra* note 36, at 126.

or suffering.”<sup>175</sup> In recommending the adoption or amendment of legislation by states with a view to effectively eradicate harmful practices, the Committees noted that such legislation, including temporary special measures, should address the root causes of these practices, *inter-alia*, “discrimination based on sex, gender, age and other intersecting factors.”<sup>176</sup> One particularity of the joint instrument is that its normative content, “instead of being firmly anchored in the text of the Conventions themselves, is derived from the interpretive work of the . . . bodies.”<sup>177</sup> Both Committees contributed knowledge derived from their work on other related issues,<sup>178</sup> for example in defining harmful practices, and in identifying harmful practices as a form of discrimination against women and children.<sup>179</sup> In doing so, the joint instrument represented an organic fusion of the Committees’ evolving work, values, and priorities.

Joint interpretive instruments are however not a panacea. As Truscan and Bourke-Martignoni observe, institutional cooperation—in this case between the CEDAW and CRC Committees—is “not necessarily enough to achieve substantive integration and convergence.”<sup>180</sup> For example, in the joint General Recommendation/Comment, the principle of due diligence is reflected in a fragmented manner and states are expected to apply different standards of interpretation of the concept depending on whether the harmful practice is being examined in light of CEDAW or the CRC.<sup>181</sup> In the former case, due diligence arises in the instance of violence against women and girls, including gender based violence, while the latter encompasses “any form of violence against children” generally.<sup>182</sup> The instrument thus did not quite stick the landing in terms of achieving “substantive integration and convergence.”<sup>183</sup>

Indicative of the joint interpretive instrument picking up steam, in 2017, the CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)

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175. CEDAW and CRC, Joint General Recommendation No. 31/ General Comment No. 18 on Harmful Practices, ¶14, CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 4, 2014).

176. *Id.* at 54(e).

177. Truscan & Bourke-Martignoni, *supra* note 36, at 126.

178. *Id.*

179. Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 19: Violence against Women (1992), ¶¶ 1, 6, U.N. Doc. A/47/38 (May 8, 2006).

180. Truscan & Bourke-Martignoni, *supra* note 36, at 128.

181. CEDAW and CRC, Joint General Recommendation No. 31/ General Comment No. 18 on Harmful Practices, ¶ 10, CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 4, 2014).

182. *Id.*

183. Truscan & Bourke-Martignoni, *supra* note 36, at 128.

issued a General Comment on the human rights of children in the context of international migration.<sup>184</sup> Simultaneously, the Committees also jointly issued a general comment on the general principles regarding the human rights of children in the context of international migration.<sup>185</sup> The two complement each other and provide guidance to state parties on a broad range of issues affecting children in the context of international migration, including children left behind by their parents, unaccompanied minors, children born to migrant workers, and children who return to their country of origin whether accompanied by their parents or not.<sup>186</sup> While the CMW's individual complaint mechanism has not yet come into force,<sup>187</sup> the CRC Committee referenced the joint instrument in a 2018 case involving an unaccompanied child asylum seeker from the Ivory Coast, who was arrested while trying to enter Spain illegally.<sup>188</sup>

Evidenced by the nuanced elucidation of standards and principles, and the subsequent application of the instruments in the Committees' monitoring work, at its best, the joint instrument shows the powerful potential that exists for the expansion of the way treaty bodies analyze human rights violations. At the very least, it paves the way for future cooperation between treaty bodies and provides an opportunity to better address the intricate "synergy" that has dogged intersectionality discourse since its inception. In an ideal scenario, such a joint interpretive instrument would fit seamlessly into treaty bodies' intersectional working methods. In the particular case of corrective rape, calculated collaboration between the HRC, CEDAW, and CERD Committees would better address the complexity and nuance of this phenomenon. The production of

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184. CMW and CRC, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, ¶ 1, CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

185. CMW, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration (2017) CMW/C/GC/3-CRC/C/GC/22 (Nov. 17, 2017).

186. OHCHR, CMW-CRC Joint General Comment on the Human Rights of Children in the Context of International Migration, <https://www.ohchr.org/en/hrbodies/crc/pages/cmwrcccontextofinternationalmigration.aspx>, (last visited Feb. 11, 2021).

187. OHCHR, Complaints Procedures, <https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrbpetitions.aspx>, (last visited Feb. 11, 2021).

188. UNCR, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 11/2017, ¶ 12.4, CRC/C79/D/11/2017 (Feb. 18, 2019).



authoritative soft law on the subject, such as a joint General Comment/Recommendation, would elucidate shared interpretive standards, and create space for the Committees to apply integrated perspectives to emerging case law on corrective rape and other forms of sexual violence against not just Black lesbians in South Africa, but also other queer womxn around the globe.

## V. CONCLUSION

This Article interrogated intersectionality under IHRL in a bid to argue for its indispensability in the protection of Black lesbians in South Africa from corrective rape. The discussion made apparent the myriad overlapping and distinct rights in the international human rights law corpus that corrective rape violates. As signatory to these treaties, South Africa therefore bears responsibility, *inter alia*, under the principle of due diligence. With that linkage firmly established, intersectionality's theoretical underpinnings, as well as its contemplation in the IHRL sphere thus far, were explored. The analysis illustrated that while IHRL has earned the criticism of being too "single-axis" and has often failed to capture the nuance and synergistic nature of compounded oppression, it has also gradually evolved towards recognizing the multi-faceted experiences of marginalized individuals. As a result, intersectionality in IHRL has garnered substantive value beyond rights discourse that is theoretical. Building on ideas initiated by several scholars, this Article explored the ways in which this substantive value could grow, and in particular, how this transformation could be wielded in service to Black lesbians in South Africa who were especially vulnerable because of their multiple intersecting identities in this specific context. While by no means an exhaustive list, intersectional mainstreaming and joint interpretive instruments offer compelling arguments for the feasibility of an *intersectional* international human rights law system at both the procedural and substantive level. If implemented carefully, consistently and collaboratively, present a powerful justice avenue for Black lesbians in South Africa.