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SCHOLARLY ARTICLE

## Gender and Intersectionality in Business and Human Rights Scholarship

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### Abstract

In this article, we explore what intersectionality, as an analytic tool, can contribute to business and human rights (BHR) scholarship. To date, few BHR scholars have explicitly engaged in intersectional analysis. While gender analysis of BHR issues remains crucial to expose inequality in business activity, we argue that engagement with intersectionality can enrich and support this and other BHR scholarship. Intersectional approaches allow us to move beyond single-axis analysis, contest simplistic representations about gender issues and expose the complexity of human relations. It draws our attention to structures that sustain disadvantage such as racism, colonialism, social and economic marginalization and systematic discrimination. Moreover, intersectionality emphasizes the need to centre the contributions of those who have been marginalized. It can be used to challenge the legitimacy of the state and support subaltern, decolonized or postcolonial, including indigenous, perspectives. Adopting an intersectional approach can help problematize the neoliberal capitalist system and its constructs, in which the BHR normative framework is embedded, calling into question the reification of economic growth and its impact on individuals, communities and the planet. We must, however, remain cautious of attempts to co-opt intersectionality in the service of neoliberalism and remain conscious of our own privilege and discursive practices.

**Keywords:** business and human rights; gender dimensions of the UNGPs; intersectionality; UN Working Group on Business and Human Rights; women and persons of diverse genders

### 1. Introduction

In 2013, UN Women stated that gender inequality continues to be one of ‘the greatest challenges of our times’.<sup>1</sup> This is still true in 2022. Over 40 years since the adoption of the Convention on the Elimination of All forms of Discrimination Against Women

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<sup>1</sup> UN Women, *Annual Report 2012–2013* (New York: UN Entity for Gender Equality and the Empowerment of Women, 2013) 4.

(CEDAW)<sup>2</sup> and over 25 years since the endorsement by the international community of the Beijing Platform for Action,<sup>3</sup> gender inequality and oppression remains a harmful and pervasive reality. There have been important advancements in both international and domestic laws with respect to women's human rights.<sup>4</sup> Yet, progress on the ground has been limited. '[M]any women and girls worldwide continue to live in poverty, and be impacted by violent conflict, gender-based violence, and varying levels of other types of structural violence that impede their ability to conduct their lives in full potential of their abilities and desires'.<sup>5</sup> Not only has there been a lack of progress on women's inequality, but women's rights organizations have noted a significant opposition to gender equality initiatives including 'on issues of safety, sexual health and reproductive rights, and the gutting of social protection systems ... many governments are increasingly hostile to the human rights and dignity of women in all our diversity, including our racial, ethnic, religious, social, cultural, economic and sexual, and familial status'.<sup>6</sup>

Similarly, progress on the human rights of persons of diverse genders<sup>7</sup> has been slow, with 'only 27 percent of UN Member States [having] enacted broad protections against discrimination' for persons of diverse genders and other LGBTQI+ persons and 'only 38 percent [having] legislation in the field of employment'.<sup>8</sup> Persons of diverse genders suffer significant discrimination, marginalization, harassment and violence, including within the workplace.<sup>9</sup> Difficulty in accessing and retaining employment due to ongoing discrimination, harassment and violence often forces persons of diverse genders into the informal sector, including sex work, where they are subject to precarious working conditions.<sup>10</sup> The COVID-19 pandemic has significantly exacerbated the situation for women and persons of diverse genders. For example, research by UN Women confirms that women have been differentially impacted by the pandemic in multiple ways including impaired physical and emotional well-being and increased unpaid domestic and care responsibilities, especially for women with children.<sup>11</sup>

Gender inequality and oppression are a central business and human rights (BHR) issue. While globalization may have increased the formal participation of women in the global economy, it has done nothing to change 'the underlying patriarchal structures that perpetuate women's inequality' and render them susceptible to violence.<sup>12</sup> Nor has it

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 16 December 1979, entered into force 3 September 1981), 1249 UNTS 13.

<sup>3</sup> UN Women, Beijing Declaration and Platform for Action (New York: United Nations, 1995).

<sup>4</sup> Christine Chinkin and Keina Yoshida, '40 Years of the Convention on the Elimination of All Forms of Discrimination Against Women' (2020), The London School of Economics and Political Science Centre for Women Peace and Security, [http://eprints.lse.ac.uk/110306/1/Chinkin\\_40\\_years\\_of\\_the\\_convention\\_published.pdf](http://eprints.lse.ac.uk/110306/1/Chinkin_40_years_of_the_convention_published.pdf) (accessed 23 February 2022).

<sup>5</sup> Women's International League for Peace and Freedom, '25 Years, Limited Progress on Women's Rights', *Peace Women* (18 March 2020), [www.peacewomen.org/e-news/25-years-limited-progress-womens-rights](http://www.peacewomen.org/e-news/25-years-limited-progress-womens-rights) (accessed 23 February 2022).

<sup>6</sup> *Ibid.*

<sup>7</sup> In this article, we use the term 'persons of diverse genders' to refer to those whose gender expression, identity, orientation and sexualities do not conform to cis-heteronormativity.

<sup>8</sup> Victor Madrigal-Borloz, 'The Price that is Paid: Violence and Discrimination Based on Sexual Orientation and Gender Identity and Poverty' in Martha F Davis, Morten Kjaerum and Amanda Lyons (eds.), *Research Handbook on Human Rights and Poverty* (Cheltenham: Edward Elgar Publishing, 2021) 171, 174.

<sup>9</sup> IACHR, 'Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural and Environmental rights', OAS/ OEA/Ser.L/V/II (7 August 2020) 101, 107.

<sup>10</sup> *Ibid.*, 102.

<sup>11</sup> Lauren Billi et al, *Women and Girls Left Behind: Glaring Gaps in Pandemic Responses* (New York: UN Women, 2021). Participation in the workforce, availability of social protection and relief, and access to goods and services were also considered.

<sup>12</sup> Jacqui True, *The Political Economy of Violence against Women* (Oxford: Oxford University Press, 2012) 33.

challenged the dominant binary constructions of gender including cisnormativity that continue to oppress and marginalize persons of diverse genders.<sup>13</sup> Indeed the neoliberal<sup>14</sup> global capitalist system is itself a fundamental structural barrier that ‘has exacerbated inequalities within and between countries and among genders’.<sup>15</sup>

Linarelli, Salomon and Sornarajah have described the global capitalist system as a ‘grossly disempowering system that has both failed to benefit most people and created a huge alienated transnational class in the process’, the latter being considered a ‘dispensable necessity’.<sup>16</sup> Women make up a large portion of this alienated class. Whether in the formal or informal economy, women’s contributions are often precarious, undervalued and under-remunerated and with fewer avenues for advancement.<sup>17</sup> Women perform the vast majority of social reproductive work which remains invisible<sup>18</sup> despite being crucial to the functioning of the capitalist system.<sup>19</sup> Furthermore, social norms and discriminatory laws combine to undermine women’s access to land ownership and natural resources, exacerbating poverty and exclusion.<sup>20</sup> Meanwhile marginalization, discrimination and violence in society as well as in employment situations means that, along with other LGBTQI+ persons, persons of diverse genders are over-represented among the global poor.<sup>21</sup> Indeed, ‘the odds that a trans person lives in poverty are nearly double their cisgender, straight counterparts’.<sup>22</sup>

The international legal system is fully enmeshed with the global neoliberal capitalist order.<sup>23</sup> It has enabled and protected business activity by strategic regulation and deregulation,<sup>24</sup> resulting in the establishment of a market-friendly international legal system that fails to address adequately the human rights and environmental governance of corporate actors.<sup>25</sup> It is a system that ‘enriches the few at the expense of everyone else, ... wrongs women with particular efficiency, and ... is environmentally destructive and unsustainable’.<sup>26</sup>

The application of a gender perspective in BHR and related scholarship has become more prevalent leading up to, and following the release in 2019 of report of the UN Working

<sup>13</sup> Amy Lind, *Development, Sexual Rights and Global Governance* (London: Routledge, 2010) 1–3.

<sup>14</sup> See, e.g., David Harvey, ‘Neoliberalism as Creative Destruction’ (2007) 610 *The Annals of the American Academy of Political and Social Science* 22, who defines neoliberalism as ‘a theory of political economic practices proposing that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade’.

<sup>15</sup> Women’s Rights Caucus, ‘Feminist Declaration on the Occasion of the Twenty-Fifth Anniversary of the Fourth World Conference on Women’ (9 March 2020), [https://www.ywca.org.au/wp-content/uploads/2020/11/2020\\_Beijing-25-Feminist-declaration.pdf](https://www.ywca.org.au/wp-content/uploads/2020/11/2020_Beijing-25-Feminist-declaration.pdf) (accessed 23 February 2022).

<sup>16</sup> John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford: Oxford University Press, 2018) 17.

<sup>17</sup> UNDESA, ‘The World’s Women 2020: Trends and Statistics’ (2020), <https://www.un.org/en/desa/world's-women-2020> (accessed 22 February 2022).

<sup>18</sup> International Labour Organization, *Care Work and Care Jobs for the Future of Decent Work* (Geneva: ILO, 2018) xxix.

<sup>19</sup> *Ibid.*, 47–52.

<sup>20</sup> Working Group on the issue of discrimination against women in law and in practice, ‘Insecure land rights for women threaten progress on gender equality and sustainable development’ (July 2017), <https://www.ohchr.org/Documents/Issues/Women/WG/Womenslandright.pdf> (accessed 13 February 2022).

<sup>21</sup> Amanda Lyons and Cooper Christiancy, ‘Reclaiming the Human Rights Foundations of the UN Standards of Conduct for Business on Tackling Discrimination against LGBTI People’ (2022) 7:1 *Business and Human Rights Journal* 134, 138.

<sup>22</sup> Madrigal-Borloz, note 8, 172.

<sup>23</sup> Linarelli et al, note 16, 1.

<sup>24</sup> Anthony Angie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 211–236. See also Penelope Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ (2012) 3:1 *Journal of Human Rights and the Environment* 5.

<sup>25</sup> Penelope Simons, ‘Unsustainable International Law: Transnational Resource Extraction and Violence Against Women’ (2017) 26:2 *Transnational Law & Contemporary Problems* 415, 429; Simons, 24.

<sup>26</sup> Linarelli et al, note 16.

Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR) on the 'Gender Dimensions of the Guiding Principles on Business and Human Rights' (Gender Dimensions Report).<sup>27</sup> A growing number of scholarly works consider the disproportionate and differential impacts of business activity on women and bring a gender and women's rights analysis to the question of how such impacts might be addressed. At the same time, scholars from a wide range of disciplines have been embracing intersectional approaches to examining inequality and oppression, arguing that a single category/axis analysis is incapable of illuminating the full complexity of the multiple forms of discrimination and oppression that individuals and groups may experience based on gender, race, able-bodiedness, sexual orientation, class, poverty, geographical location, the impacts of climate change, biodiversity loss and pollution. Scholars examining gender and BHR often reference the intersectional nature of discrimination and oppression and/or mention the need to take intersectionality into account.<sup>28</sup> However, to date, only few BHR scholars, including each of us, have explicitly engaged with intersectionality as an analytic tool.

This article aims to address this gap, although not by providing an intersectional analysis of a BHR issue. Rather, we draw on the rich intersectionality literature to consider what intersectionality, as an analytic tool, can contribute to BHR scholarship, which has yet to grapple deeply with the patriarchal, cisnormative, racist, ableist, capitalist, colonial and other structures that sustain disadvantage. We argue that an intersectional approach to BHR issues can help to illuminate these structures of oppression, by challenging simplistic representations about gender, race and other issues, and to expose the complexity of the human condition. It can aid scholars in centring the experiences and agency of those who have been marginalized, in problematizing the centrality of the state and the neoliberal capitalist system along with the veneration of economic growth and its impact on individuals, communities and the planet.

We begin in section II with a discussion of the origins of the concept of intersectionality and we explain its precepts. In section III, we consider the extent to which the BHR regulatory framework has addressed intersectionality in the context of business activity. We focus on the United Nations Guiding Principles on Business and Human Rights (UNGPs),<sup>29</sup> and their elaboration by the WGBHR. In section IV we provide an overview of the extent to which scholars bringing a gender analysis to BHR issues have taken intersectionality into account. In section V, drawing on intersectional scholarship primarily from other fields, we critically assess the potential of an intersectional approach to non-intersectional BHR scholarship to advance gender justice and social change in the field. We provide some examples of how an intersectional approach can be applied to BHR analysis and we illuminate some areas of caution. Section VI offers some concluding thoughts.

## II. Intersectionality

The concept of intersectionality has its roots in the 19th century Black and Third World feminist activists who were challenging liberal understandings of women's experiences as

<sup>27</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Gender Dimensions of the Guiding Principles on Business and Human Rights', A/HRC/41/43 (23 May 2019).

<sup>28</sup> See section IV of this article.

<sup>29</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights (UNGPs)', A/HRC/17/31 (21 March 2011).

those of Western white, middle-class women.<sup>30</sup> The term ‘intersectionality’ was coined by Kimberlé Crenshaw, one of a number of Black feminist and other scholars who were engaged in exposing the distinctive oppressions of racialized women.<sup>31</sup> Crenshaw used the concept of intersectionality to illuminate how Black women’s experiences and identities were occluded by the tendency of courts, in considering anti-discrimination law, ‘to treat race and gender as mutually exclusive categories of experience and analysis’.<sup>32</sup> She also pointed to the absence of analysis of race in feminist theory and of sexism in anti-racist politics.<sup>33</sup> The concept of intersectionality requires an examination of ‘the dynamics of difference and sameness’ in order to facilitate ‘consideration of gender, race and other axes of power’,<sup>34</sup> including class, geopolitical position, language, ethnicity, caste, socio-economic status, religion, able-bodiedness, among other factors, that intersect to create unique experiences of discrimination. Crenshaw has referred to it as ‘a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other’.<sup>35</sup>

Since its origins, including its application to law in the work of Crenshaw and others, the concept of intersectionality has been widely embraced by a diverse set of scholars in a wide range of disciplines.<sup>36</sup> There is, therefore, a significant rich diverse intersectionality literature.<sup>37</sup>

Ajele and McGill point out that ‘there is no singular account that perfectly captures the many nuances and various applications of the concept’.<sup>38</sup> It has been understood as a metaphor,<sup>39</sup> a ‘heuristic device’ and ‘a range of positions’,<sup>40</sup> a social theory,<sup>41</sup> a concept, a (methodological or epistemological) approach, a paradigm, a statistical tool for empirical

<sup>30</sup> Sara Salem, ‘Intersectionality and its Discontents: Intersectionality as Traveling Theory’ (2018) 25:4 *European Journal of Women’s Studies* 403, 407. These activists included Anna Julia Cooper, Sojourner Truth and Savitribai Phule, among others. See Anna Carastathis, *Intersectionality: Origins, Contestations, Horizons* (Lincoln: University of Nebraska Press, 2016) 15–16. See also Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Oxford: Polity Press, 2016) 12.

<sup>31</sup> Grace Ajele and Jena McGill, *Intersectionality in Law and Legal Contexts* (Toronto: Women’s Legal Education and Action Fund, 2020) 16. See also Kathy Davis, ‘Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful’ (2008) 9:1 *Feminist Theory* 67.

<sup>32</sup> Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *University of Chicago Law Forum* 139. See also Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241.

<sup>33</sup> Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, note 32, 152.

<sup>34</sup> Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis’ (2013) 38:4 *Signs: Journal of Women in Culture and Society* 785, 787.

<sup>35</sup> Katy Steinmetz, ‘She Coined the Term “Intersectionality” Over 30 Years Ago. Here’s What It Means to Her Today’, *Time* (20 February 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality/> (accessed 6 May 2022).

<sup>36</sup> Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, note 32, 71.

<sup>37</sup> These include, for example, scholarship from law, sociology, women’s studies, criminology and health studies. See, e.g., Crenshaw, note 32; Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30 *Signs: Journal of Women in Culture and Society* 1771; Salem, note 30; Kathryn Henne and Emily Troshynski, ‘Mapping the Margins of Intersectionality: Criminological Possibilities in a Transnational World’ (2013) 17:4 *Theoretical Criminology: An International Journal* 455; Olena Hankivsky et al, ‘Exploring the Promises of Intersectionality for Advancing Women’s Health Research’ (2010) 9:1 *International Journal for Equity in Health* 1.

<sup>38</sup> Ajele and McGill, note 31, 19.

<sup>39</sup> Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, note 32, 149.

<sup>40</sup> Floya Anthias, ‘Intersectional What? Social Divisions, Intersectionality and Levels of Analysis’ (2012) 13 *Ethnicities* 3, 4.

<sup>41</sup> Davis, note 31.

research and data collection, a framing strategy, a human rights policy'.<sup>42</sup> However, there are a number of themes that transect much of the scholarship on intersectionality.

First, intersectionality is anti-essentialist and 'emphasizes dissimilarities within categories of social identity'.<sup>43</sup> As Grillo explains, intersectionality as an anti-essentialist approach means to:

... define complex experiences as closely to their full complexity as possible and that we do not ignore voices at the margin. The fact is, the choice with which we seem to be presented is either to accept a white, middle-class woman's view of the world or to talk explicitly about different types of women. ... Spelman describes a group of pebbles on the beach; they are all pebbles, but they are all shaped and colored in different ways. Essentialist feminist theory has picked one pebble and asked it to represent all.<sup>44</sup>

There is, therefore, no classless, raceless, atomistic, abstract 'essential' woman or person of other gender identities.<sup>45</sup> In the words of Atrey:

It is not that humans are human first in an abstract sense and then, secondly, men-women, straight-gay, rich-poor, Black-white etc, and then intersectional in the third sense when two or more of the second-order identities collide as straight middle-class white men, poor Black gay women etc. Instead, people are only (but fully) seen in all their complexity in terms of their location and relationships with others.<sup>46</sup>

Other identity categories such as class, race, geopolitical location or the legacies of colonialism cannot, therefore, simply be subtracted from gender; they are 'inextricable from gender'.<sup>47</sup>

Second, social identity categories are relational and linked to the power structures that define them and they 'cannot be meaningfully understood without reference to the wider historical contexts that shape [them]'.<sup>48</sup> As May argues, 'intersectionality researchers have repeatedly asserted that context is relevant to knowing (including contexts of structural inequality, affective economies, ideological forces, history, social location, material structures, philosophical norms, and more): these same contexts are, in turn, relevant to assessing how intersectionality is (and is not) being read or debated'.<sup>49</sup>

<sup>42</sup> Pok Yin S Chow, 'Has Intersectionality Reached Its Limits: Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 *Human Rights Law Review* 453, 456 citing Lutz et al, 'Framing Intersectionality: An Introduction' in Helma Lutz et al (eds.), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Farnham: Ashgate: 2011) 1; Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm' (2007) 5 *Perspectives on Politics* 63, 64; Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 194, 203–204; Lise Rolandsen Agustin, *Gender Equality, Intersectionality, and Diversity in Europe* (New York: Palgrave Macmillan, 2013) 64; Michelle Tracy Berger and Kathleen Guidroz, 'Introduction' in MT Berger and K Guidroz (eds.), *The Intersectional Approach: Transforming the Academy Through Race, Class and Gender* (North Carolina: The University of North Carolina Press, 2009) 1.

<sup>43</sup> Chow, *ibid.*, 457–458.

<sup>44</sup> Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 *Berkeley Women's Law Journal* 16, 22.

<sup>45</sup> *Ibid.*, 20.

<sup>46</sup> Shreya Atrey, 'Beyond Universality: An Intersectional Justification of Human Rights' in S Atrey and P Dunne (eds.), *Intersectionality and Human Rights Law* (Oxford: Hart Publishing, 2020) 17, 34.

<sup>47</sup> Grillo, *note 44*, 19.

<sup>48</sup> Chow, *note 42*, 458.

<sup>49</sup> Vivian M May, *Pursuing Intersectionality, Unsettling Dominant Imaginaries* (London: Routledge, 2015) 99–100.

Third, intersectionality is not additive. Systems of oppression and of privilege do not work together as the mere sum of their individual effects. Rather, they intersect and thus create a distinct, unique and discrete form of oppression.<sup>50</sup> An intersectional approach, therefore, ‘requires consideration of the unique and indivisible kind of oppression that results from the interplay’ of such oppressions.<sup>51</sup>

Fourth, the concept of intersectionality is ‘politically and socially interested’ rather than neutral,<sup>52</sup> aimed at ‘the transformation of systems of intersectional disadvantage’.<sup>53</sup> Some legal intersectionality scholars have sought to shift the focus away from ‘abstract identity categories for their own sake and toward analyses that focus on the underlying systems of power that create and maintain those categories, and distribute privilege and dis-privilege along identity-based lines’.<sup>54</sup>

The contribution of the concept of intersectionality to feminist and other scholarship cannot be overstated. As American sociologist Leslie McCall states, it ‘is the most important theoretical contribution that women’s studies, in conjunction with related fields, has made so far’,<sup>55</sup> and, in the words of Chow, it ‘has become the standard multi-disciplinary approach “for analyzing subjects’ experiences of both identity and oppression”’.<sup>56</sup>

Thus, adopting the concept or lens of intersectionality in BHR compels us to acknowledge that the experiences of women and other marginalized people are not uni-dimensional and uniform, but rather distinctive and multifaceted, and thus we are able to point out the difficulties, but not the impossibilities, of their agency, empowerment and resilience within the stories of marginalization and subordination.<sup>57</sup> It also sheds light on the complex systems of privilege and oppression at play in the neoliberal global capitalist system that the BHR normative framework seeks to regulate.

### III. Intersectionality in BHR Norms

The inequality of women and persons of diverse genders is considered to be a result of multiple forms of discrimination. The prohibition against discrimination is a central tenet of international human rights law. CEDAW defines discrimination against women broadly as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.<sup>58</sup> It calls on states to eliminate such discrimination ‘by all appropriate means’ including ‘legislative and other measures’ that prohibit such discrimination and protect the rights of women.<sup>59</sup> Among other things, it requires states to ‘take all appropriate measures to eliminate discrimination against women’ by private actors, including corporations and ‘to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’.<sup>60</sup>

<sup>50</sup> Chow, note 42, 458.

<sup>51</sup> Ajele and McGill, note 31, 22.

<sup>52</sup> May, note 49, 28.

<sup>53</sup> Ajele and McGill, note 31, 24.

<sup>54</sup> Ibid, 25. Ajele and McGill reference Cho, Crenshaw and McCall, note 34.

<sup>55</sup> McCall, note 37.

<sup>56</sup> Chow, note 42, 454, citing Jennifer Nash, ‘Rethinking Intersectionality’ (2008) 89 *Feminist Review* 1, 2.

<sup>57</sup> Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’, note 32.

<sup>58</sup> CEDAW, note 2, art 1.

<sup>59</sup> Ibid, art 2(b).

<sup>60</sup> Ibid, art 2(e)–(f).



There is no specific treaty on the human rights of persons of diverse genders. However, as the UN Human Rights Council has reaffirmed in a series of resolutions on human rights, sexual orientation and gender identity, all human beings are ‘entitled to all the rights and freedoms set forth in the [Universal Declaration of Human Rights], 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>61</sup> Indeed, persons of diverse genders are protected under all international human rights treaties that states have ratified, including CEDAW.<sup>62</sup>

The differentiated impacts of business activity on women and girls are increasingly being recognized by states, some businesses and by BHR scholars. Such recognition, however, has not yet resulted in systematic incorporation of these interests into BHR norms. The UNGPs,<sup>63</sup> the OECD Guidelines for Multinational Enterprises<sup>64</sup> or the draft business and human rights treaty,<sup>65</sup> have all been criticized for their failures to address gender adequately in the context of business activity.<sup>66</sup> A review of all BHR norms is beyond the scope of this article. We focus here on the UNGPs, a central BHR governance framework, which has been criticized for inadequately protecting women’s human rights in the context of business activity and for reproducing ‘the androcentric bias of traditional international human rights law’.<sup>67</sup> While women and women’s human rights are mentioned here and there within the UNGPs, Simons and Handl argue that the UNGPs fail ‘to integrate a gender perspective throughout the text as required by the UNHRC, to acknowledge the structural nature of women’s inequality, and to provide appropriate guidance for states and business actors on how to ensure that women’s human rights are not violated by business activity’.<sup>68</sup> The UNGPs and other BHR instruments are silent on the rights and interests of people who

<sup>61</sup> Human Rights Council, ‘Human Rights, Sexual Orientation and Gender Identity’, A/HRC/RES/17/19 (14 July 2011); Human Rights Council, ‘Human Rights, Sexual Orientation and Gender Identity’, A/HRC/RES/27/32 (2 October 2014); Human Rights Council, ‘Human Rights, Sexual Orientation and Gender Identity’, A/HRC/RES/32/2 (15 July 2016).

<sup>62</sup> CEDAW has been criticized for failing to recognize ‘gender identities that do not conform to the duality of male/female’ or intersectional discrimination. Dianne Otto, ‘Women’s Rights’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2018) 318, 320. The Committee on the Elimination of All Forms of Discrimination Against Women has, however, begun to interpret the Convention in its General Recommendations as protecting transgender women and intersex persons, among others. See, e.g., CEDAW, ‘General Recommendation No. 35 on Gender-Based Violence against Women, updating General Recommendation No. 19’, CEDAW/C/GC/35 (26 July 2017); ‘General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change’, CEDAW/C/GC/37 (13 March 2018).

<sup>63</sup> UNGPs, note 29.

<sup>64</sup> OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011).

<sup>65</sup> OHCHR, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises’, Third Revised Draft (17 July 2021).

<sup>66</sup> Like the UNGPs, the OECD Guidelines do not deal adequately with gender, although the subsequent guidance developed by the OECD for businesses on integrating gender considerations into supply chain due diligence as well as sector specific and other guidance, is an important step forward. OECD, ‘Responsible Business Conduct and Gender’, <http://mneguidelines.oecd.org/mneguidelines/Responsible-Business-Conduct-and-Gender.pdf>. On the draft treaty, see Feminists for a Binding Treaty, ‘Key Recommendations on the Third Revised Draft Dated 17 August 2021 of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (5 October 2021), <https://www.wilpf.org/wp-content/uploads/2021/10/Formatted-ENG-F4BT-Key-Recommendations-2021-3rd-Treaty-Draft-21.10.21.docx.pdf> (accessed 23 February 2022).

<sup>67</sup> Penelope Simons and Melisa Handl, ‘Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence Against Women in the Context of Resource Extraction’ (2019) 31:1 *Canadian Journal of Women and the Law* 113, 134.

<sup>68</sup> *Ibid.*, 149.

do not conform to cis-heteropatriarchal norms and do not challenge the structures that continue to oppress and marginalize them.

Neither the concept nor the word 'intersectionality' explicitly appears in the UNGPs, although they do acknowledge the 'different risks that may be faced by men and women'<sup>69</sup> and that 'individuals from groups or populations ... may be at heightened risk of becoming vulnerable or marginalized, and with due regard to ... the different risks that may be faced by women and men'.<sup>70</sup> The UNGPs also state that guidance provided by states to business enterprises should 'consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families'.<sup>71</sup>

The WGBHR, which has a mandate to promote the dissemination and implementation of the UNGPs and, among other things, is required to integrate a gender perspective throughout its work,<sup>72</sup> has developed interpretive guidance to address some of these gaps. It launched the project, a 'Gender Lens to the UNGPs' in 2017 with the aim of, among other things, raising 'sensitivity amongst all stakeholders about the need to adopt a gender lens to implement the UNGPs', mainstreaming women's human rights in BHR and developing practical guidance for States and business enterprises.<sup>73</sup> The concept of intersectionality was foregrounded in the consultations. Several of the consultations held dedicated sessions on the issue of intersectional discrimination and the large majority of consultation reports discussed intersectionality or intersectional discrimination.<sup>74</sup>

The WGBHR's 2019 Gender Dimensions Report<sup>75</sup> develops a gender framework for interpreting the obligations of states and the responsibilities of business set out in the UNGPs that is inclusive of persons of diverse genders. It provides specific guidance for each Guiding Principle along with examples of actions that could be taken by states and businesses to meet their obligations and responsibilities, respectively. Intersectionality features throughout the WGBHR's final report. The introductory paragraphs of the report acknowledge that 'human rights holders are not a homogenous group' and that:

because of intersecting and multiple forms of discrimination, different women may be affected differently by business activities in view of their age, colour, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, residence in a rural location, and migration, indigenous or minority status.<sup>76</sup>

The concept of intersectionality is also included in the gender framework for the UNGPs as an integral part of a gender responsive assessment of human rights impacts. Curiously, the WGBHR does not explicitly mention intersectional discrimination in either the text or illustrative actions of Guiding Principles 1 to 10 which clarify the state duty to protect.<sup>77</sup>

<sup>69</sup> UNGPs, note 29, Commentary to Principle 18.

<sup>70</sup> Ibid, General Principles.

<sup>71</sup> Ibid, Commentary to Principle 3.

<sup>72</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 (6 July 2011), para 6(f).

<sup>73</sup> OHCHR, 'Gender Lens to the UNGPs', <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx> (accessed 13 February 2022).

<sup>74</sup> See the agendas and summaries for the consultations in Asia, Africa, Australia and Latin America. Ibid.

<sup>75</sup> 'Gender Dimensions of the UNGPs', note 27.

<sup>76</sup> Ibid, para 2.

<sup>77</sup> Ibid, Annex, paras 1-20.

Rather, it makes only indirect reference in Guiding Principle 3, which calls on states to ‘take account of the gender framework and guidance ... in providing guidance to business enterprises on how to respect human rights throughout their operations’.<sup>78</sup>

On the other hand, with respect to Guiding Principle 12, the WGBHR recommends that, in relation to their responsibility to respect human rights, businesses must be ‘aware of the intertwined layers of discrimination faced by women because of intersectionality’ and goes on to explain that ‘different women may be affected differently by business activities’ and lists the different bases.<sup>79</sup> Regarding Guiding Principle 16, which requires business enterprises to embed their commitment to meet their responsibility to respect human rights in a statement of policy,<sup>80</sup> the WGBHR suggests that this includes the development of a gender equality policy, which should, among other things, take into account ‘the intersectional nature of discrimination’.<sup>81</sup> Guiding Principle 18 requires business enterprises to determine their human rights risks to individuals and communities by identifying and assessing actual or potential human rights impacts. The gender guidance of the WGBHR provides a list of illustrative actions, including that ‘business enterprises should use sex-disaggregated data and outcome indicators to assess the true impact of their activities on women and consider that different women may be affected differently because of the intersectional nature of discrimination’.<sup>82</sup> Moreover, when commenting on Guiding Principle 22, which obliges business enterprises to ‘provide for, or cooperate in’, the remediation of human rights violations, the WGBHR suggests that when providing for such remediation, ‘business enterprises should keep in mind differentiated intersectional impacts on women and their human rights’.<sup>83</sup> Finally, with respect to Guiding Principle 31, which sets out the effectiveness criteria for non-judicial grievance mechanisms, the WGBHR suggests that ‘[a]ll effectiveness criteria for non-judicial grievance mechanisms should be interpreted in a gender-responsive manner, considering especially the intersectional nature of discrimination faced by women in accessing such mechanisms’.<sup>84</sup>

In bringing the issue of intersectionality to the fore, the WGBHR is signalling to businesses the need to take into account the diversity of women, girls and persons of diverse genders and the different oppressions to which they may be subject in meeting their responsibilities articulated in the UNGPs. The WGBHR’s failure to more explicitly and comprehensively highlight the importance of intersectionality for states is unfortunate, especially in light of initiatives by states, such as Canada, to integrate gender-based analysis plus (GBA+) in all justice-related activities, including law and policy.<sup>85</sup>

<sup>78</sup> Ibid, Annex, para 5.

<sup>79</sup> Ibid, para 24(d).

<sup>80</sup> UNGPs, note 29, Principle 16.

<sup>81</sup> Ibid, note 27, para 32(b)(ii).

<sup>82</sup> Ibid, para 36(c).

<sup>83</sup> Ibid, para 44(a).

<sup>84</sup> Ibid, para 61.

<sup>85</sup> GBA+, for which training is now mandatory for Canadian Department of Justice officials, is described as ‘an analytical tool used to assess the potential impacts of policies, programs, services, and other initiatives on diverse groups of women, men and people with other gender identities. The “plus” highlights that this type of analysis goes beyond gender, and includes the examination of a range of other intersecting identify factors (such as age, sexual orientation, disability, education, language, geography, culture and income)’. Government of Canada, ‘Policy on Gender-Based Analysis Plus’, <https://www.justice.gc.ca/eng/abt-apd/pgbap-pacsp.html> (accessed 23 February 2022). For critical reflections on the practice of GBA+ in relation to Canada’s new federal impact assessment legislation, see Deborah Stienstra, Susan Manning and Leah Levac, ‘More Promise than Practice: GBA+, Intersectionality and Impact Assessment’ (31 March 2020), [https://liveworkwell.ca/sites/default/files/pageuploads/Report\\_Mar31\\_AODA.pdf](https://liveworkwell.ca/sites/default/files/pageuploads/Report_Mar31_AODA.pdf) (accessed 23 February 2022). For a reflection on the relationship between GBA+, intersectionality and human rights, see Sherry Pictou, ‘Decolonizing Decolonization: An Indigenous Feminist Perspective on the Recognition and Rights Framework’ (2020) 119:2 *South Atlantic Quarterly* 371.

#### IV. Gender, Intersectionality and BHR Scholarship

BHR is a relatively new field of interdisciplinary and multidisciplinary scholarship<sup>86</sup> that, at least in its most recent iteration, developed in response to the rise in power and the impunity of multinational corporations and detrimental impacts of the neoliberal global capitalist system.<sup>87</sup> It began to be more widely recognized as a distinct field of research following the 2011 endorsement by the UN Human Rights Council of the UNGPs.<sup>88</sup> However, the parameters of this scholarship are still far from settled and there are a number of other literatures that preceded the development of BHR, intersect with it and/or have influenced it. These include scholarship on corporate social responsibility, business sustainability, globalization, women's economic empowerment, business ethics and gender equality, corporate boardroom diversity, to name a few.<sup>89</sup>

It is beyond the scope of this article to undertake a systematic review of all such literature given its potential breadth. The BHR gender scholarship we have reviewed falls into a number of overlapping categories, including: (1) pointing to the need to bring a gender analysis to BHR issues;<sup>90</sup> (2) engaging in a critique of domestic and/or international BHR norms, such as the UNGPs or the Sustainable Development Goals (SDGs),<sup>91</sup> and considering how the gender gaps can be filled,<sup>92</sup> including by providing detailed guidance to states and business

<sup>86</sup> For example, the first six volumes of the *Business and Human Rights Journal* include contributions from scholars in business ethics, engineering, gender studies, international affairs, law, management, philosophy, political science, sociology, among others.

<sup>87</sup> See, e.g., Florian Wettstein, 'The History of "Business and Human Rights" and its Relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds.), *Research Handbook on Human Rights and Business* (Northampton: Edward Elgar Publishing, 2020) 23, 29–30, who argues that BHR has its roots in the work of legal scholars in the late 1990s and early 2000s who 'began to look into and conceptualize the relation between companies and international human rights law'. But see Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (New York: Routledge, 2016) chapters 1–3, who traces the origins of BHR to the 19th century anti-slavery and labour movements and the prosecution of the German industrialists at the Nuremberg trials.

<sup>88</sup> Human Rights Council, note 72.

<sup>89</sup> There are also a range of other fields that could be brought within the purview of BHR. See Surya Deva et al, 'Editorial – Business and Human Rights Scholarship: Past Trends and Future Directions' (2019) 4:2 *Business and Human Rights Journal* 201, 203, who suggest that applying a BHR lens to areas such as '[p]olitical democracy, tax avoidance, climate change, artificial intelligence, the Belt and Road Initiative, privatization of public services, trade and investment, migration, the role of religion, and human rights responsibilities of civil society organizations' among others could 'bring a fresh perspective to important global challenges'.

<sup>90</sup> Bonita Meyersfeld, 'Business, Human Rights and Gender: A Legal Approach to External and Internal Considerations' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 193, 200–201. See also Kathryn Dovey, 'Why Gender Matters for the Business and Human Rights Agenda in Southeast Asia' in Mahdev Mohan and Cynthia Morel (eds.), *Business and Human Rights in Southeast Asia* (London: Routledge, 2014) 57, 61–62; and Mona Paré, 'Réglementation des Activités Extractives et Protection des Droits de l'Enfant à travers une Approche Féministe' (2019) 31:1 *Canadian Journal of Women and the Law* 91.

<sup>91</sup> UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development', A/RES/70/1 (21 October 2015).

<sup>92</sup> See Meyersfeld, note 90. See also Ramona Vijayarasa and Mark Liu, 'Fast Fashion for 2030: Using the Pattern of the Sustainable Development Goals (SDGs) to Cut a More Gender-Just Fashion Sector' (2022) 7:1 *Business and Human Rights Journal* 45. Ramona Vijayarasa, 'Women, Work and Global Supply Chains: The Gender-Blind Nature of Australia's Modern Slavery Regulatory Regime' (2020) 1 *Australian Journal of Human Rights* 1; Sara L Seck and Penelope Simons, 'Sustainable Mining, Environmental Justice, and the Human Rights of Women and Girls: Canada as Home and Host State' in Sumudu Atapattu, Carmen Gonzalez and Sara L Seck (eds.), *The Cambridge Handbook on Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021) 314.

actors on how to bring gender considerations into law, policies and practices;<sup>93</sup> (3) pointing to gender oppression and inequality and considering how BHR norms could be used to address some of these crucial issues.<sup>94</sup> Other literature has considered the failure of BHR norms to address the structural nature of discrimination and oppression of women<sup>95</sup> or has theorized about how to move beyond current liberal legal structures and concepts in order to imagine new ways of preventing and addressing gendered and ecological impacts of business activity.<sup>96</sup>

To date, much of the BHR literature engaging in gender analysis, including some of our own past contributions, focuses on women, or women and girls. Many of these scholarly contributions point to the fact that women are not a homogenous group and/or mention the need for an intersectional approach.<sup>97</sup> Few, however, explicitly engage in intersectional analysis.<sup>98</sup> In fact, there has been limited engagement in BHR scholarship with other grounds of discrimination and oppression such as race,<sup>99</sup> sexual orientation and gender identity or expression,<sup>100</sup> or able-bodiedness,<sup>101</sup> let alone engagement of intersectional oppressions of gender and race,<sup>102</sup> gender and sexual orientation, or gender and disability.

The scholarship bringing a gender lens to BHR issues is indispensable. States, businesses and other actors are only just beginning to take gender oppression and inequality in the context of business activity more seriously and there remains much work to be done in this regard. It is therefore necessary to continue to problematize the inequality of women, girls and persons of diverse genders and to provide clear guidance so as to encourage states and businesses to engage with and address gender inequality and oppression. At the same time, we argue that there is a need for BHR scholars to bring an intersectional lens to their work.

<sup>93</sup> See, e.g., Linnea Kristiansson and Nora Götzmann, 'National Implementation Processes for the United Nations Guiding Principles on Business and Human Rights: Towards Gender-Responsive Approaches' (2020) 26:1 *Australian Journal of Human Rights* 93; and Joanna Bourke Martignoni and Elizabeth Umlas, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches* (Geneva: The Geneva Academy of International Humanitarian Law and Human Rights, 2018).

<sup>94</sup> See, e.g., Beth Goldblatt and Shirin M Rai, 'Remedying Depletion Through Social Reproduction: A Critical Engagement with the United Nations' Business and Human Rights Framework' (2020) 3:2 *European Journal of Politics and Gender* 1; Vijayarasa and Liu, note 92.

<sup>95</sup> See, e.g., Simons and Handl, note 67.

<sup>96</sup> See, e.g., Sara L Seck, 'Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker' (2018) 33:2 *Canadian Journal of Law & Society* 137; Sara L Seck, 'Relational Law and the Reimagining of Tools for Environmental and Climate Justice' (2019) 31:1 *Canadian Journal of Women and the Law* 151; Sara L Seck, 'A Relational Analysis of Enterprise Obligations and Carbon Majors for Climate Justice' (2021) 11:1 *Oñati Socio-Legal Series* 254.

<sup>97</sup> See, e.g., Dovey, note 90, 60-61 and 64; Vijayarasa, note 92, 64-65.

<sup>98</sup> But see, e.g., Leah S Horowitz, "'It Shocks Me, the Place of Women': Intersectionality and Mining Companies' Retrogradation of Indigenous Women in New Caledonia' (2018) 24:10 *Gender, Place & Culture* 1419; and Sari Graben, Angela Cameron and Sarah Morales, 'Gender Impact Analysis of Impact Benefit Agreements: Representation Clauses and UNDRIP' in Ibrionke T Odumosu-Ayanu and Dwight Newman (eds.), *Indigenous-Industry Agreements, Natural Resources and the Law* (New York: Routledge, 2020) 79.

<sup>99</sup> See Erika George, Jena Martin and Tara Van Ho, 'Reckoning: A Dialogue about Racism, AntiRacists, and Business & Human Rights' (2021) 30 *Washington International Law Journal* 171, 173, who note that, despite the growing engagement by BHR scholars with gender, there is a 'routine silence on racism within the field, and the challenges of combatting racism through BHR'.

<sup>100</sup> Lyons and Christianity, note 21, 142.

<sup>101</sup> Michael Stein and Ilias Bantekas, 'Including Disability in Business and Human Rights Discourse and Corporate Practice' (2021) 6:3 *Business and Human Rights Journal* 490, 493.

<sup>102</sup> But see, e.g., Charmika Samaradiwakera-Wijesundara, 'Reframing Corporate Subjectivity: Systemic Inequality and the Company at the Intersection of Race, Gender and Poverty' (2022) 7:1 *Business and Human Rights Journal* 100.

The next section will consider some of the benefits for BHR scholarship of engaging intersectionality as an analytical tool.

## V. The Implications of an Intersectional Approach for BHR Scholarship

What can intersectionality contribute to critical BHR scholarship? While of course not a panacea,<sup>103</sup> an intersectional approach can encourage ‘critical reflection that allows researchers ... to move beyond the singular categories that are typically favoured in equity-driven analyses ... This enables an examination of the simultaneous impact of and resistance to systems and structures of oppression and domination, such as racism, classism, sexism, ableism and heterosexism’.<sup>104</sup> It can, therefore, help to expose the complexity of human experience in the context of business activity and illuminate the unique and multifaceted aspects of oppression and privilege inherent in the global capitalist, ableist, white, cis, heteropatriarchal, economic system and the neo-colonial international legal structures that support it, including the BHR normative framework. Such scholarship can produce counter-hegemonic practices and critical resistance in the field of BHR, including when it relates to the impact of business activities on marginalized peoples. Indeed, intersectionality can be an exceptionally valuable concept ‘if it addresses relationships of power’.<sup>105</sup> For example, problematizing the intersectional nature of oppression and discrimination in the BHR context will allow us to move beyond remedies responding to one dimensional discrimination and towards more targeted responsive and transformative remedies.<sup>106</sup> Such remedies would be capable of addressing and redressing the differentiated impacts of resource extraction, not simply on women and persons of diverse genders, *but among* them, taking into account their differentiated experiences of violence and violations of environmental and other human rights, and tackling the root causes of the intersecting forms of oppression that facilitate such harm.

This section considers each of the four aspects of intersectionality identified above. We provide some ideas about how an intersectional approach can aid BHR analysis.

### Anti-Essentialism in BHR

An intersectional approach can shed light on anti-essentialist concepts of identity to resist dehumanizing others and succumbing to simplistic accounts of the experience of those who suffer the harms from business activity. Commentators have argued that the BHR normative framework, and in particular, the UNGPs, are ‘based on a particular androcentric neo-liberal ideology that upholds and endorses masculinized ways of knowing ... which help to construct an institutional reality of the appropriate way to address the human rights impacts of business activity’ in which women’s interests and experiences are marginalized and treated as special or belonging to a minority.<sup>107</sup> Intersectional scholarship can build on the work of

<sup>103</sup> Himani Bannerji, ‘Building from Marx: Reflections on Class and Race’ (2005) 32:4 *Social Justice* 147. David McNally, ‘Intersections and Dialectics: Critical Reconstructions in Social Reproduction Theory’ in Tihti Bhattacharya (ed.), *Social Reproduction Theory: Remapping Class, Recentering Oppression* (London: Pluto Press, 2017) 94.

<sup>104</sup> Olena Hankivsky et al, ‘An Intersectionality-Based Policy Analysis Framework: Critical Reflections on a Methodology for Advancing Equity’ in Olena Hankivsky and Julia S Jordan-Zachery (eds.), *The Palgrave Handbook of Intersectionality in Public Policy* (Cham: Palgrave Macmillan, 2019) 133, 135.

<sup>105</sup> Salem, note 30, 415 (emphasis added).

<sup>106</sup> Olena Hankivsky and Renee Cormier, ‘Intersectionality and Public Policy: Some Lessons from Existing Models’ in Hankivsky and Jordan-Zachery, note 104, 69, 90.

<sup>107</sup> Simons and Handl, note 67, 138. Furthermore, the UNGPs establish a hierarchy of human rights in which women’s human rights are referred to as additional standards that ‘may’ be relevant to corporate activity in certain

feminist BHR scholars and the WGBHR's interpretation of the gender dimensions of UNGPs to continue to expose and address state and business conduct concerning the intersectional exploitation and subjugation of women, girls and persons of diverse genders, as well as others, in the context of business activity and to understand their diverse experiences.

### *Moving Beyond Essentialisms*

Intersectionality research can contribute to problematizing and contesting simplistic representations about gender issues and practices. It is an anti-essentialist approach that aims to 'define complex experiences as closely [sic] to their full complexity as possible and ... not ignore voices at the margin'.<sup>108</sup> Indeed, one of feminism's challenges – and the main pitfall of white liberal feminism – has been to overcome the tendency to talk about 'women' as a homogenous group with standardized interests and vulnerabilities. Intersectionality is a tool that can help us problematize essentialisms and myths.

Otherring is a way of essentializing and stereotyping, dehumanizing the 'others'.<sup>109</sup> An intersectional approach can help to expose these practices. Horowitz, for example, applied an intersectional lens in her ethnographic study of Kanak women's engagement in negotiations and resistance with respect to two different mining projects in New Caledonia which were jointly owned by the Kanak nation and by transnational mining companies, Glencore and Vale.<sup>110</sup> Her research revealed that both Glencore and Vale justified the exclusion of women from negotiations about the respective mines by reference to 'custom'. Horowitz exposed actions taken by the two companies that perpetuated 'an anachronistic narrative' of the social position of Kanak women that disregarded developments in women's rights, bolstering 'pre-existing forms of oppression, and place[ing] the blame squarely with the other culture'.<sup>111</sup> In other words, these companies engaged in otherring to support their inaction. They used local custom as an excuse for failing to consult adequately with women and identify and address the latter's distinct concerns about the impact of the mines.<sup>112</sup>

The WGBHR's Gender Dimensions report calls on states (albeit indirectly) in mandating human rights due diligence (HRDD) and companies in undertaking HRDD to 'consider intersectionality'. The guidance recommends that businesses 'should adopt a gender-responsive approach, draw on gender experts, and conduct meaningful consultations with potentially affected women, women's organizations (including grass-roots organizations) and women human rights defenders'.<sup>113</sup> 'Considering intersectionality' would therefore require businesses to identify all women who could be affected, along with their respective organizations and take into account the differentiated impacts the business activities could have or are having on and among women, girls and people of diverse genders facing intersecting forms oppression and discrimination, including the implications of colonialism and its legacies. BHR scholarship will need to grapple with what this might mean for states and businesses and could provide crucial insights on what intersectional HRDD requires in theory and in practice. This is particularly pressing given that states in Europe are enacting HRDD laws and the European Commission's draft Directive on Corporate Sustainability Due

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circumstances and thus 'replicate and support the androcentric bias of traditional international human rights law'. *Ibid.*, 131–134.

<sup>108</sup> Grillo, *note 44*, 22.

<sup>109</sup> Sune Qvortrup Jensen, 'Otherring, Identity Formation and Agency' (2011) 2:2 *Qualitative Studies* 63, 65.

<sup>110</sup> Horowitz, *note 98*.

<sup>111</sup> *Ibid.*, 1423.

<sup>112</sup> *Ibid.*, 1433.

<sup>113</sup> 'Gender Dimensions of the UNGPs', *note 27*, para 35.

Diligence<sup>114</sup> does not include considerations of gender, despite significant lobbying on the part of civil society organizations.<sup>115</sup>

### *A Complex Understanding of Privilege and Disadvantage*

Scholars will have to be vigilant to ensure that they do not oversimplify the oppression of marginalized groups by simply categorizing them as vulnerable and thereby erasing their agency and resistance instead of capturing their complex and multiple – often contradictory – positions and roles. Intersectionality scholarship has been critiqued for ostensibly being unable to make privilege visible<sup>116</sup> and only accounting for the intersectional experiences of marginalization, suggesting that ‘identities are viscerally experienced as intersectional only by those who are hyper-oppressed’.<sup>117</sup> Yet, others suggest that an intersectional approach is capable of taking account of how individuals in power positions can benefit from others’ oppression. Moreover, individuals can both benefit from and be oppressed by the system, allowing for a complex, multilayered, nuanced and more just understanding of the experiences and relations. As Dhamoon points out, ‘marginalized peoples [can be] structurally implicated in hegemonies of power [and this] often gets obscured by feminist theorizing of intersectionality’.<sup>118</sup>

Intersectionality is not inherently a theory of privilege conceived to study white men or white women. However, it can illuminate how disadvantage intersects with privilege and thus enable us to account for the experiences of those who are both privileged and oppressed, such as a woman employer or manager in a garment factory in the Global South who exploits female employees of lower socio-economic status, and/or who are racialized, disabled, single mothers. Intersectionality also provides space to explore masculinities, such as white male cisgendered workers who are immigrants, gay or poor.

An intersectional lens also facilitates the problematization of the false dichotomies of ‘oppressed or privileged’ and ‘structure versus agency’. Underscoring and addressing the existence of the settler-colonial ableist white capitalist cis heteropatriarchy that undergirds our system does not mean that those who are oppressed have no agency, that their subjectivities are rendered unidimensional, only limited to that of defenceless victims who deploy no resistance, have no survival strategies or who cannot struggle to seek justice. Women human rights and environmental defenders, and particularly indigenous women, are a case in point. They are often highly vulnerable to violence, criminalization, discrimination and marginalization. At the same time, they exert significant agency as knowledge keepers, caretakers, decisionmakers, organizers, protesters, among other things.<sup>119</sup> Indeed, indigenous

<sup>114</sup> European Commission, ‘Proposal for a Directive on Corporate Sustainability Due Diligence and Annex’ (23 February 2022), [https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex\\_en](https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en) (accessed 22 March 2022).

<sup>115</sup> European Coalition for Corporate Justice, ‘International Women Human Rights Defenders Day: Over 60 NGOs Urge EU to Ensure Gender-Responsive Due Diligence Law’ (29 November 2021), <https://corporatejustice.org/news/eu-due-diligence-law-must-be-gender-responsive/> (accessed 22 March 2022).

<sup>116</sup> Anna Carastathis, ‘The Invisibility of Privilege: A Critique of Intersectional Models of Identity’ (2008) 3:2 *Les Ateliers de l'éthique* 23, 28.

<sup>117</sup> *Ibid.*

<sup>118</sup> Rita Dhamoon, ‘A Feminist Approach to Decolonizing Anti-Racism: Rethinking Transnationalism, Intersectionality, and Settler Colonialism’ (2015) 4 *Feral Feminisms – Complicities, Connections & Struggles: Critical Transnational Feminist Analysis of Settler Colonialism* 20, 31.

<sup>119</sup> Dalena Le Tran et al, ‘Gendered Geographies of Violence: A Multiple Case Study Analysis of Murdered Women Environmental Defenders’ (2020) 27:1 *Journal of Political Ecology* 1189; Sarah Morales, ‘Digging for Rights: How Can International Human Rights Law Better Protect Indigenous Women from Extractive Industries?’ (2019) 31 *Canadian Journal of Women and the Law* 58.



feminist scholar Sherry Pictou argues that the only way to move beyond the ‘victimhood induced by settler colonialism’ is by centring the resistance of indigenous women and persons of diverse genders to patriarchal colonialism.<sup>120</sup>

### *Relationality and Structures of Power*

An intersectional approach is relational and aims to identify structures of power and the larger historical context.<sup>121</sup> It explicitly acknowledges the systems and structures that make discrimination possible. As Mason notes, one of the main problems with how intersectionality tends to be applied is that it focuses on ‘interpersonal or individual experiences of discrimination’, failing to emphasize ‘structures of power in place’.<sup>122</sup> The focus must be on *how* and *why* systems of domination intersect and their inextricable complexity, rather than simply adding identity categories as intersecting. This means that human lives cannot be simply reduced to single identity categories. Nor can assumptions be made that only a particular identity category is relevant. Rather, unique diverse experiences will emerge.<sup>123</sup> An intersectional approach to BHR must therefore take into consideration histories of imperialism, colonialism, social and economic marginalization and systematic discrimination that have produced and sustained structures of disadvantage whose consequences extend across generations. Indeed, feminist and intersectionality theorists have long argued against ontologies and epistemologies that treat context as unimportant or unbiased.<sup>124</sup> Thus, for example, BHR scholars developing theoretical insights or practical guidance for states on the regulation of major technology companies with respect to the right to privacy or other human rights, will need to take into account the nature of the impact of such companies on women, girls and persons of diverse genders within particular historical, social and political contexts.<sup>125</sup>

An important insight for BHR scholarship is the need to pay attention to the relationship between collective and individual rights and related structures of power. For example, the individualist values of human rights law, including the rights of women, have been viewed by (male) indigenous leaders as threatening to the collective nature of indigenous sovereignty and rights to self-determination.<sup>126</sup> Indigenous feminist scholars have drawn attention to the need to reframe understandings of sovereignty and self-determination so that it is clear that ‘without Indigenous gender justice, there is no Indigenous self-determination’ and that ‘collective self-determination cannot be achieved without individual self-determination or without sovereignty over our own bodies’.<sup>127</sup>

<sup>120</sup> Pictou, note 85, 384–85.

<sup>121</sup> Chow, note 42, 458.

<sup>122</sup> Corinne L Mason, ‘Buzzwords and Fuzzwords: Flattening Intersectionality in Canadian Aid’ (2019) 25:2 *Canadian Foreign Policy Journal* 203, 206.

<sup>123</sup> McCall, note 37. McCall, in examining the literature on intersectionality, identified three distinct conceptual approaches: anti-categorical, intracategorical, and intercategorical. The anti-categorical approach is sceptical of categorization which is seen as perpetuating stereotypes and wrongly implies stability. The intracategorical approach aims to depict the complexity and flexibility of categories, for example, through ‘in-depth’ studies. It ‘avoid[s] the fully deconstructive rejection of all categorization, [but remains] deeply skeptical of the homogenizing generalizations ...’ Ibid, 1783. McCall adopts an intercategorical approach, which uses categories strategically.

<sup>124</sup> May, note 49, 99.

<sup>125</sup> Jane Bailey, ‘A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls’ Lives’ in Jane Bailey and Valerie Steeves (eds.), *eGirls, eCitizens: Putting Technology, Theory and Policy into Dialogue with Girls’ and Young Women’s Voices* (Ottawa: University of Ottawa Press, 2015) 21, 23.

<sup>126</sup> Pictou, note 85, 386.

<sup>127</sup> Ibid.

### Neoliberal Hegemonic BHR

Critical international law scholars – including Third World Approaches to International Law scholars – have pointed to the biased neocolonial neoliberal structure of the international legal system that protects and facilitates business activity and continues to allow for the exploitation of the Global South by powerful states and corporations in the Global North.<sup>128</sup> BHR norms, such as the UNGPs, are situated within this biased system and arguably fully enmeshed with global capitalism.

The WGBHR's Gender Dimensions Report identifies patriarchal power structures as one of the causes of women's inequality. The guidance in the report calls on states to address the 'root causes of discriminatory power structures' that undermine substantive equality<sup>129</sup> through various measures including remedial action.<sup>130</sup> However, the report neither identifies the role of the neoliberal global capitalist system in the oppression of women or persons of diverse genders, nor does it explore the ways in which the UNGPs either contribute to, or disrupt, these power structures.<sup>131</sup>

A key point is that an intersectional approach to BHR issues requires that we problematize neoliberal capitalism and its constructs. The capitalist system exploits women, among others, in various ways and entrenches neocolonial structures of oppression. Women's social reproductive labour, crucial to the functioning of the global economic system, remains invisible<sup>132</sup> and women's economic labour is undervalued and underpaid. Women from the Global South work in precarious underpaid positions in global supply chains and/or provide social reproductive labour for other workers.<sup>133</sup> At the same time, poor racialized women from the Global South migrate to countries in the Global North, and other wealthy countries, to provide social reproductive labour in the domestic sphere,<sup>134</sup> to support the economic participation of privileged professional women.<sup>135</sup> Thus, systems of oppression converge to keep these women in violent and/or precarious situations. Intersectionality sheds light on how social relations are enmeshed with broader power structures and cannot be addressed without understanding the historical context that produces structures of disadvantage<sup>136</sup> upon which neoliberal capitalism is built and that remain at play in the BHR context.

Neoliberal capitalism also idolizes economic growth as a pre-requisite for human progress.<sup>137</sup> Economic growth continues to be endorsed in key normative BHR frameworks

<sup>128</sup> See, e.g., James Thuo Gathii, 'The Promise of International Law: A Third World View', Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law (25 June 2020), <https://ssrn.com/abstract=3635509> (accessed 23 February 2022); BS Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al (eds.), *The Third World and International Order: Law Politics and Globalization* (Boston: Martinus Nijhoff Publishers, 2003); and BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

<sup>129</sup> OHCHR, note 27, para 2(a).

<sup>130</sup> *Ibid.*, paras 44–52.

<sup>131</sup> On the UNGPs' contribution to existing power structures, see, e.g., Simons and Handl, note 67, 144–148. Regarding Pillar II as disrupting power structures, see, e.g., Seck, note 96, 268–269.

<sup>132</sup> ILO, note 18. See also Nancy Fraser, 'Crisis of Care? On the Social-Reproductive Contradiction of Contemporary Capitalism' in Bhattacharya, note 103, 21, 24, who has referred to this as capitalism's contradictory dependence on life-reproducing practices.

<sup>133</sup> Sylvia Federici, *Revolution at Point Zero: Housework, Reproduction and Feminist Struggle* (Oakland: PM Press, 2012) 66.

<sup>134</sup> Miriam Bak McKenna, 'Feminist Materialism and the Laws of Social Reproduction' in Paul O'Connell and Umüt Özsu(eds.), *Research Handbook on Law and Marxism* (Cheltenham: Edward Elgar Publishing, 2021) 295–296.

<sup>135</sup> Roseanne Russell, 'Women and the "Business" of Human Rights: The Problem with Women's Empowerment Projects and the Need for Corporate Reform' (2022) 7:1 *Business and Human Rights Journal* 84, 95.

<sup>136</sup> May, note 49, 99.

<sup>137</sup> Linarelli et al, note 16, 258–259.

like the SDGs, notably Goal 8 on decent work and economic growth.<sup>138</sup> Yet, other Goals within the SDGs endorse a different vision, such as Goal 12 which calls for responsible production and consumption, while Goals 13, 14 and 15 draw attention to the need to protect and restore crucial planetary ecosystems whether climate, ocean or terrestrial.<sup>139</sup> If BHR does not wholeheartedly embrace environmental human rights issues, then it dangerously risks contributing to violations of the very planetary boundaries which support life on earth.<sup>140</sup> On the other hand, if BHR is understood as equally, if not more, relevant to problems raising environmental human rights concerns, then arguably there is a chance that this fundamental structural challenge could be overcome. For example, as Seck has argued, the responses to the horrific Bangladesh factory collapse at Rana Plaza focused on the need for building safety and for the rights of workers to be respected. Yet, the slow violence of environmental harms associated with toxic substances emanating from the same factories, which have a differentiated impact on women and girls and violate the rights of the children of factory workers to clean air and clean water, remain invisible under the narrow labour-focused approaches to BHR. By contrast, understanding the worker as also a parent and a member of a local community, that depends upon healthy and resilient local and global ecosystems, transforms our understanding of the problem and of the necessary solutions.<sup>141</sup> An intersectional approach can illuminate these other structures of oppression and marginalization that pose an existential threat to the global community.

### *Problematizing Liberal Empowerment*

One of the most well-known definitions of empowerment, developed by Kabeer, is the ability to make strategic life choices by those who were previously denied such an ability.<sup>142</sup> Today, two concepts of empowerment can be distinguished in the literature: ‘liberal empowerment’ which focuses on the individual woman and her achievement of self-interested goals, and ‘liberating empowerment’ which is a collective process of women working to challenge patriarchal structures.<sup>143</sup> Sardenberg notes that development discourse is marked by liberal feminist thinking, and approaches issues of gender in ways that essentialize women and focus exclusively on economic participation.<sup>144</sup> In this context, ‘women’s unpaid work [is treated] as a barrier to their “economic empowerment” and their further integration into the paid labour force’.<sup>145</sup>

While both versions of empowerment feature to some degree in the Women’s Empowerment Principles (WEP),<sup>146</sup> the latter take a predominantly androcentric market-based approach to empowerment in providing guidance to business actors on promoting ‘gender equality and

<sup>138</sup> SDGs, note 92, Goal 8.

<sup>139</sup> Ibid, Goals 13, 14 and 15.

<sup>140</sup> On the need to ensure sustainable development is understood not as balancing economy, society and environment, but rather with environment as a floor or ceiling, see Sumudu Atapattu, Carmen G Gonzalez and Sara L Seck, ‘Intersections of Environmental Justice and Sustainable Development’ in S Atapattu, CG Gonzalez and SL Seck, note 92, 1. For a key framework on environmental human rights, see Human Rights Council, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, A/HRC/37/59 (24 January 2018).

<sup>141</sup> Seck, ‘Transnational Labour and the Environment’, note 96.

<sup>142</sup> Naila Kabeer, ‘Resources, Agency, Achievements: Reflections on the Measurement of Women’s Empowerment’ (1999) 30:3 *Development and Change* 435.

<sup>143</sup> Cecília MB Sardenberg, ‘Liberal vs. Liberating Empowerment: A Latin American Feminist Perspective on Conceptualizing Women’s Empowerment’ (2008) 39:6 *IDS Bulletin Institute of Development Studies* 18, 20.

<sup>144</sup> Ibid.

<sup>145</sup> McKenna, note 134, 297.

<sup>146</sup> UN Women and UN Global Compact, ‘Women’s Empowerment Principles’, [www.empowerwomen.org/en/weps/about](http://www.empowerwomen.org/en/weps/about) (accessed 23 February 2022).

women's empowerment in the workplace, marketplace and community'.<sup>147</sup> Women's economic empowerment and the WEPs are ripe for engagement by more feminist and other BHR scholars. Bringing an intersectional lens can illuminate their problematic single axis approach to empowerment and failure to take into consideration the broader structures and systems that intersect to oppress and marginalize women and girls.

Meinhard and de Faria's empirical research, for example, examines the impact of the WEPs in the context of a large metallurgical company.<sup>148</sup> The authors show how unequal gender relations are perpetuated when the focus is restricted to the economic axis alone.<sup>149</sup> They demonstrate that adopting the WEPs meant the insertion of women in the labour market as a productive workforce, reinforcing classist gender relations within companies, and as a consequence, depoliticizing the role of women.<sup>150</sup>

Russell's study of corporate-led empowerment initiatives illuminates how these initiatives instrumentalize women. She notes that these initiatives:

simultaneously ignore *and* exploit the domestic sphere. Women in the Global South, who are already significant contributors to the economy through under-recognized work (care) and under-valued work (feminized occupations), are labelled as unproductive or an untapped resource that the market can put to gainful use. At the same time, the friendships and connections of these women are recognized as ready-made distribution networks that multinationals can use to expand their consumer pool.<sup>151</sup>

Intersectionality and its focus on structures intersecting in a particular relational and historical context can allow BHR researchers to examine how a limited, liberal understanding and androcentric version of empowerment has contributed to deepening the sexual division of labour, limiting the liberating potential of the inclusion of objectives of gender equality.

### *Problematizing the State*

Dominant interpretations of the international legal system are state-centric. Although many of the BHR norms address both state and business conduct, the international human rights obligations behind the UNGPs and other BHR norms, for example, are primarily understood as state obligations.

Nevertheless, the inclusion of indigenous feminisms and other post-colonial scholars requires that we problematize the centrality of the state, something that feminist international law scholars have also called for, albeit for different reasons.<sup>152</sup> While an intersectional approach can be 'helpful for assessing the complex situation of indigenous women and the discrimination they face'<sup>153</sup>, it must also challenge settler colonialism and promote inquiry into how a particular 'field of study and the academy at large "may participate in the dispossession of Indigenous peoples' lands, livelihoods, and futures"'.<sup>154</sup>

<sup>147</sup> Ibid.

<sup>148</sup> Vera Regina Meinhard and José Henrique de Faria, 'Representatividade das mulheres na hierarquia de empresas: estudo de caso com base no women's empowerment principles' (2020) 19:1 *Revista Eletrônica de Ciência Administrativa* 33, 55.

<sup>149</sup> Ibid, 56.

<sup>150</sup> Ibid, 55–56.

<sup>151</sup> Russell, note 135, 94.

<sup>152</sup> Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3:2 *Transnational Law and Contemporary Problems* 293, 308–309.

<sup>153</sup> Liesbeth van der Hoogte and Koos Kingma, 'Promoting Cultural Diversity and the Rights of Women: The Dilemmas in "Intersectionality" for Development Organisations' (2004) 12 *Gender and Development* 47, 55.

<sup>154</sup> Dhamoon, note 118, 32 citing Maile Arvin, Eve Tuck and Angie Morrill, 'Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy' (2013) 25 *Feminist Formations* 8, 25.

This requires questioning the assumption of the legitimacy of the nation-state, including as the protector of women.<sup>155</sup> Indigenous feminist scholar Isabel Altamirano-Jiménez, in describing the legislative response of the Mexican state to the exclusion of women from participation in politics under Zapotec customary law, explains that there is a danger of constructing the ‘state as the saviour who rescues women from their own cultures’, with national law presented as ‘neutral and objective’.<sup>156</sup> Altamirano-Jiménez illustrates how ‘indigenous law [can be] simultaneously constructed as a set of practices for asserting Indigenous rights and as “customs” that are “inconsistent” with national laws and international human rights’.<sup>157</sup> Indigenous law must be approached as ‘a living, intellectual resource’, with the transformation of law ‘as an overt political project led by Indigenous women’.<sup>158</sup>

BHR scholarship, then, should consciously seek to bring to light the views, experiences and knowledge of indigenous women and other marginalized non-state intersectional voices in contestations over the content of BHR norms and interpretations as to their legality,<sup>159</sup> as well as how to prevent and remedy differentiated business-related human rights impacts such as those associated with resource extraction. As Dhamoon explains, settlers in colonial societies must take into consideration how they have benefited from dispossession,<sup>160</sup> ‘[b]e open to the rejection of the nation-state as a feminist site of liberation’ and ‘[q]uestion the presumed ontologies and epistemologies that frame practices of liberation and goals of collective organizing, including the divide between human and non-human life forms’.<sup>161</sup>

At the same time, BHR scholarship should shed light on the normativity of international law doctrine through the eyes of non-state intersectional voices. For example, the recognition of indigenous rights is an important step; however, rethinking the legal personality of indigenous peoples in international law is equally crucial.<sup>162</sup> This especially challenges the dominant interpretations of BHR norms, which like international human rights law, generally relies on the nation-state as the primary regulator, protector and enforcer of human rights.<sup>163</sup>

### *Intersectionality is Not Additive or Ornamental*

Scholars caution against superficial engagement with the concept of intersectionality, where it is co-opted in the service of the neoliberal agenda.

<sup>155</sup> Nora Berenstain ‘White Feminist Gaslighting’ (2020) 35:4 *Hypatia* 733, 743–745.

<sup>156</sup> Isabel Altamirano-Jiménez, ‘The State is Not a Saviour: Indigenous Law, Gender and the Neoliberal State in Oaxaca’ in Joyce Green (ed.), *Making Space for Indigenous Feminism*, 2nd edn (Halifax: Fernwood Publishing, 2017) 215, 216.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*, 229.

<sup>159</sup> Seck, *note 96*; Pictou, *note 85*, 388.

<sup>160</sup> Dhamoon, *note 118*, 32.

<sup>161</sup> *Ibid.*, 34.

<sup>162</sup> Natalia Álvarez Molinero, ‘From the Theory of Discovery to the Theory of Recognition of Indigenous Rights: Conventional International Law in Search of Homeopathy’ in Saladin Meckled-García and Başak Çali (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (New York: Routledge, 2005) 152. See also Sara L Seck, ‘Treaties, and the Emancipatory Potential of International Law’ in Michael Coyle and John Borrows (eds.), *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 344.

<sup>163</sup> Álvarez Molinero, *ibid.*, 153.

### Questioning the Business Model

Neoliberalism as a hegemonic paradigm disciplines our understanding of race, sexuality and gender.<sup>164</sup> For example, Deva argues that we should be wary of corporation-led approaches such as the business case for workplace diversity.<sup>165</sup> On the other hand, workplace and corporate board diversity initiatives that take seriously the need for businesses to have human rights competence so as to avoid human rights harms may suggest meaningful engagement with intersectionality.<sup>166</sup>

The rhetoric of intersectionality has been incorporated into liberal-capitalist strategies' political campaigning, marketing and recruitment materials. In the business model, intersectionality is used to denote diversification; intersectional becomes an interchangeable term with 'inclusion', rather than engagement with systems of domination.<sup>167</sup> The neoliberal articulation of intersectionality is what we refer to as 'decaf intersectionality', stripped of its bite and its transformative potential. Decaf intersectionality, or as Bilge calls it, 'ornamental intersectionality',<sup>168</sup> is convenient to neoliberal management. It promotes easily measurable and predictable categories of identity in terms convenient for the market, whose ultimate purpose is efficient business operations and profit-maximization.

Under the façade of intersectional inclusivity, corporations categorize and target specific groups. 'Intersectionality' is then watered-down to signify neoliberal corporate diversity, allowing corporations to market and sell the idea of inclusivity to the consumer. Calvin Klein, the retail, commercial and garment company, has based its social media marketing strategy on posts about intersectionality, specifically, 'the impacts of intersectionality and how to show up'<sup>169</sup> to explain rates of suicidality within diverse marginalized groups.<sup>170</sup> This use of intersectionality theory is hypocritical given its history of human rights and labour rights violations.<sup>171</sup>

This mechanism of 'neoliberal rebranding' is not exclusive to intersectionality. It contaminates many notions and ideas whose origins were radical and had a transformative potential, such as the notion of 'female empowerment'.<sup>172</sup> For example, corporate engagement with the rights of LGBTQI+ persons through the 'Standards of Conduct for Business on Tackling Discrimination against LGBTI people',<sup>173</sup> while having some important impacts, has been used by businesses primarily as a marketing and recruitment tool. Lyons

<sup>164</sup> Ratna Kapur, 'Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India' (2013) 14:2 *Melbourne Journal of International Law* 317, 343.

<sup>165</sup> Business and Human Rights Working Group of the Netherlands Network for Human Rights Research, *Shining a Light on Women Affected by Corporate Activities: The Gender Dimensions of Business and Human Rights* (The Hague: Asser Institute, 2019) 4.

<sup>166</sup> Keith MacMaster and Sara L Seck, 'Mining for Equality: Soft Targets and Hard Floors for Board of Directors?' in Oonagh E Fitzgerald (ed.), *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (Waterloo: CIGI Press, 2020) 191.

<sup>167</sup> Jenny K Rodriguez et al, 'The Theory and Praxis of Intersectionality in Work and Organisations: Where Do We Go from Here?' (2016) 23:3 *Special Issue: The Theory and Praxis of Intersectionality in Work and Organizations* 201, 208.

<sup>168</sup> Sirma Bilge, 'Intersectionality Undone: Saving Intersectionality from Feminist Intersectionality Studies' (2013) 10:2 *Du Bois Review* 405, 408.

<sup>169</sup> Calvin Klein, Instagram (27 July 2021), <https://www.instagram.com/p/CR17BMrDmbi/> (accessed 21 August 2021).

<sup>170</sup> Calvin Klein, Twitter (28 July 2021), <https://mobile.twitter.com/CalvinKlein/status/1420451525403480066> (accessed 21 August 2021).

<sup>171</sup> Amy Woodyatt, 'Tommy Hilfiger and Calvin Klein probe "labor abuses" in Ethiopian factories', *Reuters* (16 April 2019), <https://www.reuters.com/article/us-ethiopia-labour-abuse/tommy-hilfiger-and-calvin-klein-probe-labor-abuses-in-ethiopian-factories-idUSKCNIRS1U9> (accessed 21 August 2021).

<sup>172</sup> Sardenberg, note 143, 21–22.

<sup>173</sup> OHCHR, 'Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business', <https://www.ohchr.org/EN/Issues/Discrimination/Pages/Biz4LGBTI.aspx> (accessed 8 February 2022).

and Christianity note that the majority of public communications on the Standards by corporations ‘emphasize workplace policies and culture, and in many instances, a company’s support for the Standards is mentioned only on its D&I or recruitment pages’.<sup>174</sup>

### *Beyond the Obsession with Measurement and Indicators*

An intersectional approach fits uncomfortably with research that relies solely on quantitative approaches because they do not easily measure power differentials. According to Liebowitz and Zwingel, an obsession with measurement leads to a one-size-fits-all approach that fails to consider gender inequalities, and therefore exacerbates them.<sup>175</sup> Focusing on indicators<sup>176</sup> and standardization ends up excluding social dimensions that are complex, fluid and impossible to box up neatly in artificially defined categories.<sup>177</sup> Numerical obsession and its subsequent over-simplification neglect structural questions of power differentials, invisibilizing unaccounted positive and negative consequences.

BHR scholars have pointed to the need for both normative and empirical research on BHR issues.<sup>178</sup> We would add the need for ethnographic studies that build from the ground up, connecting marginalized communities’ experiences with technocratic approaches, as well as collaborative or participatory action research methods that centre ‘the knowledge of those subordinated by systems of domination “to see how power works,” allowing for coextensive creation and elaboration on the concept [of intersectionality] itself’.<sup>179</sup> Thick descriptions and qualitative and context-specific studies are crucial to feminist knowledge because behaviour is dependent on relations and not on fixed categorizations.<sup>180</sup> Empirical, ethnographic, qualitative research – especially indigenous methodologies and participatory research methods – would allow BHR research to capture with nuance the power differentials and enhance the voices of those with lived experience.<sup>181</sup>

### *Intersectionality is Not Neutral*

Intersectionality is social justice oriented. It is a tool that allows us to be reflexive and question privilege. BHR research that aims to address intersecting forms of oppression cannot be neutral because these structures are an intricate part of a system that is not neutral, but rather profoundly unequal and immiserating. BHR scholars must therefore expose and challenge these structures.

### *Whitewashing Intersectionality and Structural Gaslighting*

Bilge defines the ‘whitening of intersectionality’ as the mechanism by which an intersectional analysis is curated through the lenses of white feminist academics. For example, we, the

<sup>174</sup> Lyons and Christianity, note 21, 149.

<sup>175</sup> Debra J Liebowitz and Susanne Zwingel, ‘Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession’ (2014) 16:3 *International Studies Review* 362, 363.

<sup>176</sup> Sally E Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’ (2011) 52 *Current Anthropology* 583, 584.

<sup>177</sup> Liebowitz and Zwingel, note 175, 363–366.

<sup>178</sup> BHR Working Group of the Netherlands Network for Human Rights Research, note 165, 4–6.

<sup>179</sup> Jane Bailey et al, ‘Getting at Equality: Research Methods Informed by Lessons of Intersectionality’ (2019) 18 *International Journal of Qualitative Methods* 1, 6.

<sup>180</sup> Liebowitz and Zwingel, note 175; Lorena Fuentes and Tara Patricia Cookson, ‘Counting Gender (in)equality? A Feminist Geographical Critique of the “Gender Data Revolution”’ (2020) 27:6 *Gender, Place & Culture* 881; Doris Buss, ‘Measurement Imperatives and Gender Politics: An Introduction’ (2015) 22:3 *Social Politics: International Studies in Gender, State & Society* 381.

<sup>181</sup> See e.g., Horowitz, note 98; Pictou, note 85.

authors of this article, who reside in the Global North may end up ‘excluding from debate or overlooking the contributions of those who have multiple minority identities and are marginalized social actors – women of color and queers of color,’<sup>182</sup> and in the context of BHR scholarship, feminist scholars from the Global South.<sup>183</sup>

Ozkazanc-Pan observes that there is little attention to gender in the corporate social responsibility (CSR) literature and a lack of inclusion of voices coming from the Global South.<sup>184</sup> Grosser et al have produced a systematic bibliographic account of the business ethics (BE) and CSR literature over a 25-year period.<sup>185</sup> They found little reference to gender and a concerning lack of geographical representation by region. Indeed, the field has been dominated by works focusing on Europe, North America and Australasia, whereas regions such as Africa, South America and Central America ‘barely figure in the BE/CSR and gender literature’.<sup>186</sup> The emphasis on scholarship from the Global North, including feminist scholarship, neglects the inclusion of the voice of the ‘other’.<sup>187</sup> There is indeed an urgent need in the BHR field to include more voices from transnational, subaltern and post-colonial feminisms, especially those from states in the Global South.

This whitening process is problematic because it is based on the assumption that ‘racialized women’s structural experience cannot generate theory, it can only be understood as a descriptive category of experience’.<sup>188</sup> Bilge urges feminists and other scholars to ‘stop doing intersectionality in ways that *undo* it’.<sup>189</sup> ‘Undoing intersectionality’ is a process that involves treating it as an overly intellectual quest with no actual applications in real life; and ignoring the genealogy of the concept while simultaneously exerting privilege as academics. We contribute to structural gaslighting when our research hides the systematic relationships between the structures of oppression and the suffering they reify and produce.<sup>190</sup>

Moreover, we must not ‘deracialize’ intersectionality to ‘render it more robust and universally applicable’.<sup>191</sup> Lack of attention to race and racism is pervasive in the field of BHR, which ‘has not yet engaged with critical race theory’.<sup>192</sup> As George puts it, ‘[i]n order to be antiracist, you have to be willing to identify racism and that is something that I’m not sure I’ve seen the BHR community quite reckon with or acknowledge’.<sup>193</sup> Neutrality is complicit with racism. ‘Being antiracist means challenging and deconstructing structures that embed or protect racism by countering racist policies “that produce or sustain racial inequality between racial groups” through new structures and policies that combat such inequality’.<sup>194</sup>

<sup>182</sup> Bilge, note 168, 412.

<sup>183</sup> Ruíz, cited by Nora Berenstain, explains that ‘violence under colonialism is a deeper, cultural, epistemic, and discursive phenomenon that supports the internal consistency of colonial power by limiting the domain of intelligibility – what violence can appear as – to settler colonial logics’; Elena Flores Ruíz, ‘The Secret Life of Violence’ in Dustin J. Byrd and Seyed Javad Miri (eds.), *Frantz Fanon and Emancipatory Social Theory* (Leiden: Brill, 2020) 231, 237; Berenstain, note 155.

<sup>184</sup> Banu Ozkazanc-Pan, ‘CSR as Gendered Neocoloniality in the Global South’ (2019) 160 *Journal of Business Ethics* 851, 852.

<sup>185</sup> Kate Grosser, Jeremy Moon and Julie A Nelson, ‘Gender, Business Ethics, and Corporate Social Responsibility: Assessing and Refocusing a Conversation’ (2017) 27:4 *Business Ethics Quarterly* 541. See also Gathii, note 128.

<sup>186</sup> Grosser, Moon and Nelson, *ibid.*, 550.

<sup>187</sup> *Ibid.*

<sup>188</sup> Bilge, note 168, 412.

<sup>189</sup> *Ibid.*, 411.

<sup>190</sup> Berenstain, note 155, 734–735.

<sup>191</sup> May, note 49, 101.

<sup>192</sup> George et al, note 99, 196.

<sup>193</sup> *Ibid.*, 199.

<sup>194</sup> *Ibid.*, 184, citing Ibram Kendi, *How to Be Anti-Racist* (New York: One World, 2019) 7–9.



### Visibilizing Pervasive Discursive Practices

There is a need to be reflexive when applying an intersectional lens, that is, to be self-aware of privilege and to examine how practices may not be intersectional.<sup>195</sup> For example, in our own work we have used the terms ‘gender-blind’ and ‘gender-blindness’ in analysing BHR norms or rules of international law. In trying to draw attention to the neglect of gender pervasive in BHR, an ableist paradigm was reinforced – albeit unwittingly and unintentionally – marginalizing those who are blind and have visual impairments.<sup>196</sup> An intersectional approach must not be oppressive to disabled people. As Tremain notes when criticizing the metaphor of the ‘blind review’ as a concerning and discriminatory language that widely circulates in academia, “‘blindness’ is used as a rhetorical and representational device to signify lack of knowledge, as well as epistemic ignorance or negligence and the moral downfall it implies’.<sup>197</sup>

The use of the term ‘gender-blind’ in the field and practice of BHR is incompatible with an intersectional perspective.<sup>198</sup> It is not just a matter of semantics or ‘political correctness’.<sup>199</sup> Rather, its current use is illustrative and meaningful to understanding how intersectionality ought to be approached and implemented in the BHR field.

## VI. Conclusions

In this article we have explored what intersectionality, as an analytic tool, can offer BHR scholarship. Intersectionality requires that we refrain from essentializing or simplistically representing actualities, that we embrace complexity, examine structures that sustain oppression and exploitation, remain aware of our own privilege and cautious in our discursive practices. It does not aim to focus on the individual, but on the structures in which our lives are embedded. It can also illuminate the complex and nuanced dynamics of privilege and disadvantage.

It remains crucial to continue to bring a gender lens to BHR issues in order to drive states and businesses to take seriously the differentiated impacts of business activity on women, girls and persons of diverse genders. An intersectional lens can enrich and support gender and other BHR scholarship, allowing us to move beyond a single-axis approach and therefore contribute to problematizing and contesting simplistic representations about gender issues and expose the complexity of human relations. It draws our attention to structures that sustain disadvantage and oppression such as racism, histories of imperialism, colonialism, social and economic marginalization and systematic discrimination, the consequences of which extend across generations. Moreover, intersectionality emphasizes the need to centre the contributions of those who have been marginalized, such as feminist BHR activists and scholars from the Global South.

<sup>195</sup> Natasha S Mauthner and Andrea Doucet, ‘Reflexive Accounts and Accounts of Reflexivity in Qualitative Data Analysis’ (2003) 37:3 *Sociology* 413, 423; Dharmoon, *note* 118, 33.

<sup>196</sup> Gaile Pohlhaus Jr, ‘Relational Knowing and Epistemic Injustice: Toward a Theory of *Willful Hermeneutical Ignorance*’ (2012) 27:4 *Hypatia* 715.

<sup>197</sup> Shelley Tremain, ‘Ableist language and philosophical associations’, *New APPs Blog* (19 July 2011), <https://www.newappsblog.com/2011/07/ableist-language-and-philosophical-associations.html> (accessed 20 August 2021).

<sup>198</sup> See, e.g., Deborah Stienstra, ‘Lost Without Way-Finders? Disability, Gender, and Canadian Foreign and Development Policy’ in Rebecca Tiessen and Stephen Baranyi (eds.), *Obligations and Omissions: Canada’s Ambiguous Actions on Gender Equality* (Montreal: McGill-Queen’s University Press, 2017) 115.

<sup>199</sup> The term has also been used in relation to race: ‘...critical race theory has considered how “race blind” or “race neutral” laws and prohibitions on discrimination can actually perpetuate, ignore, or excuse racism’. George et al, *note* 99, 184.

Adopting an intersectional approach can also assist scholars in problematizing the neoliberal capitalist system and its constructs, in which BHR norms are embedded, calling into question the veneration of economic growth and its detrimental, often deadly, impacts on individuals, communities and the planet. Nevertheless, non-BHR scholars have expressed caution over the way in which human rights ‘privileges neoliberalism’. Therefore, even a human rights-based intersectional approach must be adopted with caution.<sup>200</sup> Others concerned about the multiple intersecting global ecological crises that confront the world we live in point out that the ‘concept of the “human” is a far more complex, interdependent and entangled actuality than is presented/represented by the autonomous, bounded individual assumed by Western legal systems’.<sup>201</sup> It remains to be seen whether intersectional BHR research which pays attention to environmental human rights frameworks,<sup>202</sup> including indigenous environmental justice<sup>203</sup> and the importance of human/non-human relations and reciprocal responsibilities, might also contribute to overcoming the existential environmental crises that we face.

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<sup>200</sup> Pictou, *note* 85, 388. Pictou ultimately argues in favour of Indigenous Intersectional Gender Based Analysis Plus.

<sup>201</sup> Boulot et al, ‘Posthuman Legalities: New Materialism and Law Beyond the Human’ (2021) 12 *Journal of Human Rights and the Environment* 1.

<sup>202</sup> Human Rights Council, ‘Report of the Special Rapporteur’, *note* 140.

<sup>203</sup> Deborah McGregor, ‘Indigenous Environmental Justice and Sustainability’ in Atapattu, Gonzalez and Seck, *note* 92, 58.