



The Efficiency of Intersectionality: Labelling the Benefits of a Rights-Based Approach to Interpret Sexual and Gender-Based Crimes

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Abstract

International criminal law (ICL) has traditionally overlooked sexual and gender-based violence (SGBV) and struggles to understand it. Prosecutions have been largely inefficient and not reflective of gender harms. The Rome Statute requires interpreting SGBV as a social construction (article 7(3)), in consistency with international human rights law (IHRL) and without discrimination (article 21(3)). There is, however, little guidance to implement these approaches. This article argues that intersectionality, an IHRL-based approach that reveals compounded discrimination, is an efficient tool to interpret SGBV and, therefore, should be integrated in ICL. The article traces the origins of intersectionality in feminism and its recognition by IHRL dealing with violence against women. It establishes the applicability of intersectionality in ICL that it demonstrates with a comparative analysis of the *Lubanga* and *Ntaganda* cases. The findings show that intersectionality suits ICL's specific needs which allows labelling and explaining some of those contributions throughout the judicial process.

Keywords Intersectionality · Gender · Discrimination · Sexual and gender-based violence · International criminal law · International human rights law

Introduction

International crimes of sexual and gender-based violence (SGBV) are violations committed due to the “sex and/or socially constructed” identities associated with being a man, woman, boy or girl in a given context (International Criminal Court, Office of the Prosecutor (ICC OTP) Policy 2014, 4). Since the 1990s with the creation of the ad hoc tribunals for the Former Yugoslavia (ICTY) and Rwanda

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(ICTR), international criminal law (ICL) has developed jurisprudence recognising that SGBV underpins many international crimes: torture and outrages against personal dignity (*Furundzija* Trial Chamber (TJ) 1998), terrorism (*RUF* TJ 2009), sexual slavery (*Kunarac* TJ 2001), forced marriage and forced pregnancy (*Ongwen* TJ 2021), persecution (*Al Hassan* Pre-Trial 2019), and acts of genocide (*Akayesu* TJ 1998). Yet, structural reasons have led to underestimate the gravity of SGBV precluding its effective prosecution. Patriarchal stereotypes have associated legal provisions addressing women's harms in armed conflict with the protection of honour, modesty, weakness and vulnerability resulting in a lack of engagement with gender as a socially constructed identity and with systemic gender discrimination underpinning SGBV international crimes (Jarvis and Gardam 2022, 67).

In 2002, the ICC Rome Statute (or Statute) codified a great deal of SGBV harms (articles 7(2)(b)(xxii), 8(2)(b)(xxii) and 8(2)(e)(vi)) and, importantly, required their interpretation according to gender "in the context of society" and in a way "consistent" with international human rights law (IHRL) and non-discrimination (article 21(3)). Underestimation of these provisions has led to inefficient prosecutions of SGBV and impunity in ICC cases such as *Lubanga*, *Kenyatta*, *Katanga*, *Bemba*. In 2014, the Policy Paper on Sexual and Gender-Based Crimes of the ICC Prosecutor disrupted ICL by stating that addressing SGBV requires "understanding the *intersection* of factors [...] which may give rise to multiple forms of discrimination and social inequalities" pursuant to IHRL (SGBC Policy 2014, para 27).¹ Accordingly, the Policy expressly connected the interpretation of SGBV with addressing gender as a social construction from the perspective of compounded inequalities and discrimination according to IHRL. Thenceforward, the ICC Prosecutor has sought to implement a gender analysis from a social and intersectional perspective in cases such as *Ntaganda*, *Ongwen*, *Al Hassan* and *Abd-Al-Rahman*. Further, the Prosecutor has issued policies on children (2016), cultural heritage (2021) and persecution (2022) that support an intersectional perspective. Intersectionality, moreover, is influencing other ICL fora such as the International Impartial and Independent Mechanism examining international crimes in the Syrian African Republic which places intersectionality at the centre of its gender strategy (IIM 2022).

The article seeks to contribute current debates on the practical application of intersectionality in ICL, which it does by clarifying its notion and labelling the specific benefits of using this approach to interpret and apply SGBV crimes. It argues that intersectionality, an IHRL-based approach to uncover the way gender is "inextricably interlinked" with other factors of discrimination (Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) GR28, para 18), should be integrated in ICL's legal analysis. This claim relies on the capacity of intersectionality to uncover the causes and consequences of SGBV providing insight to enhance ICL interpretations substantively and procedurally.

To demonstrate this rationale, the article first addresses the origins of intersectionality in feminist theory stressing the diversity of gender identities and harms. It then considers the influence of this approach in IHRL, especially within the

¹ Emphasis added.

CEDAW Committee, where intersectionality is formally recognised as part of the gender analysis of violence against women. Moving into ICL, the article considers the applicability of intersectionality to this field emphasising certain provisions under the Rome Statute such as the definition of gender (article 7(3)), the duty of consistency with IHRL (article 21(3)), and the principle of legality (article 22). After examining its notion, origins and applicability to ICL, the last section considers the efficiency of intersectionality to interpret SGBV crimes. It compares the ICC cases of *Lubanga* and *Ntaganda* where the Court adopted different approaches to discrimination — narrow v intersectional — to address patterns of violence against girl soldiers. The comparison allows assessing the efficiency of intersectionality throughout the judicial process, including aspects of (i) jurisdiction and charging, (ii) consistency with IHRL and non-discrimination, (iii) linkage evidence, (iv) sentencing and reparations, whose findings set the basis for concluding remarks.

Gender: A Social, Therefore, Intersectional Construction

Patriarchy, the socio-political system that conceives men inherently superior to anyone weak (especially women), endowed to dominate and rule (hooks 2010), has organised gender relations along the male–female binary identifying men and women with their biological sex and naturalising heteronormativity (Bueno-Hansen 2017, 6). Gender binaries have created hierarchies between men and women: assimilating men with decision-makers and protectors and women and girls with the roles of motherhood and reproduction resulting in their association with vulnerability and subordinated position to men (Chinkin and Charlesworth 2000). The male–female binary has implied an essentialist construction of gender identity determined by the biological sex which precludes recognition of the diversity and fluidity of gender identities and the rich experiences of gender subjects (Eisend and Rößner 2022, 58–59). Accordingly, recognising women and girls’ agency and diversity has been a permanent concern of international legal feminism. Since gender (mis)perceptions arise from a (binary)predetermined representation of gender identity, it must be by construing it from its social context that the understanding of gender becomes free, open-ended, non-hierarchical and the fluidity and richness of gender subjects acknowledged (Otto 2005, 126–127).

How should gender be construed to end hierarchies between men and women and achieve real equality cognisant of diverse gendered subjectivities? Scholars have held different views about the means. Early feminists in the 1980s argued for the existence of an ‘essential’ or universal gender identity common to all women. This trend had many strands which claimed women’s uniqueness in different ways — metaphysically, biologically, linguistically, methodologically. Further, essentialism became a tool for strategic activism to achieve international recognition of women’s rights (Young 2004, 136), especially freedom from SGBV (MacKinnon 1982). Essentialism, however, raised a heated debate in the 1990s from different feminist strands that considered it hegemonic and non-representative. One critique was that a universal gender perpetuated a determinist interpretation of women’s gender identity at odds with the elimination of gender binaries that precluded recognition of

women's agency and diversity (Butler 1998, 273). Another critique underscored that an essentialist gender was hegemonic because it only represented the concerns of White Western middle-class women but silenced the subjectivities and agencies of most women worldwide. Women from the Global South, in particular, argued that their gendered harms were inextricable from other statuses, such as ethnicity, class, religion and sexual orientation that must inform gender theory to address the diverse needs of marginalised subjects (Mohanty 1988, 70; Kapur 2002, 2).

Anti-essentialist responses developed as an offshoot of post-structuralism's critique of gender binaries (Woodward et al. 2009). Poststructuralism's deconstruction of gender as a socially created site of power allowed feminism to theorise gender freeing women's agency and diversity from essentialist constraints (Flax 1987, 621). Gender could be built "based on biology but determined by the roles that are traditionally assigned and played by men and women" in society (Rees and Chinkin 2016, 1211). Rather than binary and patriarchally defined, gender could be socially constructed according to the context of social location, giving real meaning to the different experiences of being a man or a woman. As Bartlett (1990) put it, the best way to express what is true in the law is contingent to positionality or social location. And, critically, in any social location, gender *intersects* with factors such as race, class, sexual orientation, religion and contextual circumstances that shape, build and define the discursive identities of men and women making gender inseparable from the political and cultural intersections where it is produced and maintained (Butler 1990, 3). Furthermore, gender implies both context and agency. As Simone de Beauvoir stressed in *The Second Sex*, gender is not only social location (acculturation) but self-positioning and choice of cultural norms expressed through the body as an open field of possibilities, where gender — through the political body — becomes an act of agency and transcendence disrupting the assimilation of women with anatomy (Butler 1986, 41,48).

The concept of 'intersectionality' was created to express the fact that gender, a social construction, *as such* intersects (is intertwined) with social factors that necessarily result in a diversity of gendered subjectivities and experiences and, therefore, do not admit binary or essentialist interpretations. Crenshaw's revolutionary work formalised the term intersectionality and integrated it in the legal discourse framing its main characteristics around the concepts of multi-layered identities, compounding discrimination and complex harms in the context of Black American women (Crenshaw 1989, 1991). Individuals belonging to this group, she stressed, experience discrimination simultaneously on various identity grounds — sex, race, class — which aggravate their harms and marginalisation. Accordingly, an efficient remedy requires tackling the intersecting dynamics and effects of compounded discrimination (Ibid).

Intersectionality has been revendedicated from different feminist strands to address diverse concerns overlooked by the mainstream legal system. To that end, intersectionality's empirical capacity to recognise the commonalities between women while accommodating local differences has been the key (Charlesworth 1995). From the West, Otto has challenged the binary heteronormative discourse claiming gender as a hybrid, multiplicitous and changing identity that implies sexual autonomy and diversity, hence, requiring recognition of the intersection between sexual orientation

and gender identity — as a legal right (Otto 2005 *supra*). Also, intersectionality is highly on demand considering the marginalisation of the plurality of gender subjects by mainstream feminism and institutions — i.e., the racial, native, postcolonial, queer, sex worker, and transnational subjects — whose visibility necessitates infusing the legal narrative with gripping stories of intersectional disadvantage to normalise engagement with diverse gender identities and needs (Heathcote and Zichi 2021, 462).

From the Global South, decolonial feminism led by Black Indigenous Women of Colour (BIWOC) has criticised the ‘colonisation’ of their experiences by Western feminism; from constructing ‘Third World’ women as oppressed by Third World men to confusing the liberation of North African women with their unveiling in contemporary France (Wagner 2021). By adding a cultural, geopolitical and historical lens to unpack how colonial structures shape oppressive societies globally, decolonial feminism gets closer to a more inclusive definition of intersectionality that grasps the different oppressive structures (not just men, also modern colonising) necessary for transformation (Ibid). In this sense, Kapur has claimed the need to focus on the peripheral subject to address the way gender intersects with class, race and sexual orientation, thereby aggravating the harms of most non-Western women and girls (Kapur 2002, 9–10). Also from the Global South, Bueno-Hansen advocates a queer intersectional and decolonial analysis to end impunity for the historical extermination of gender minorities overlapping with poverty in Latin American armed conflicts which, she gathers, is necessary to recognise full citizenship (Bueno-Hansen *supra*).

Recognition of Intersectional Discrimination to Address Violence Against Women

The development of IHRL has not been free from traces of gender binaries that have precluded recognition of gender equality and diversity. An over-protective legal language has naturalised men with heads of household and protectors of women implicit in men’s provision for the well-being of “himself and his family” and the entitlement of motherhood and childhood “to special protection and assistance” (UDHR article 25(1)(2)). IHRL does not regulate circumstances that disproportionately disadvantage women and girls such as informal work (ICESCR article 7) and sex work (CEDAW article 6). The definition of gender-based violence — “violence that is directed against a woman because she is a woman or that affects women disproportionately” (CEDAW GR19 1992, para 6) — does not include men and violence of women against women suggesting binary associations of men as perpetrators and women as victims (Sosa 2017, 5). The regulation of sexuality as violence but not as pleasure — no right to sexual freedom — has led to construct sexuality as a danger (Otto 2005, 126–127) resulting in a gap protecting the diversity of sexual

experiences and causing de facto discrimination against lesbian, gay, transgender, bisexual, intersex, queer/questioning + (LGTBIQ+) people (O'Rourke et al. 2021).²

Positively, the CEDAW Committee's definition of gender-based violence as a crime inherently discriminatory on gender (CEDAW supra, GR19, GR35) has been broadly backed,³ thereby acknowledging that this is a problem of gender inequality, structural and requiring a human rights approach to achieve substantive equality (Freeman 2012, 444). From the outset, the Committee has aimed to eliminate the way gender discrimination disproportionately affects specific marginalised groups such as women with aids (GR15 1990), unpaid women workers in family enterprises (G16 1991) or disabled women (GR18 1991). During the Fourth World Conference on Women in Beijing (1995), 189 States supported the gender differentiated impact of violence against women which essentially derives from harmful cultural practices *linked* to race, sex, language, or religion that perpetuate the lower status of marginalised groups (Beijing Declaration and Platform 1995 paras 116, 118).⁴ While this broadly backed blueprint has provided legitimacy and direction to the CEDAW Committee's strategic work to eliminate compounded gender discrimination affecting diverse marginalised groups,⁵ Beijing's contribution concerning women's subjectivities in armed conflict has been questioned. Its focus on the use of sexual violence as a weapon of war has consolidated, according to Engle, a sexual subordination trend in international human rights, humanitarian and criminal law of grave consequences, entrenching the association of women with passive victims of SGBV and detracting attention from relevant gendered interventions in international law such as equality, labour and culture (Engle 2020, 39).

In 2010, the CEDAW Committee's GR28 on the Core Obligations of States Parties articulated ground-breaking anti-essentialist perspectives on violence against women. First, GR28 defined gender as a social construction differentiating 'sex' (biological differences) from 'gender', the "socially constructed identities, attributes and roles for women and men and society's cultural meaning for these biological differences" (para 5). The Committee's definition of gender thus distances from binary interpretations conditioned by the attributed sex that have contributed to women's subordinated position. Second, GR28 formally recognised intersectional discrimination to explain the fact that gender, a social construction, is "inextricably linked" with other identities and life situations that shape women's experiences of harm, thereby linking intersectionality with acknowledging the plurality of gender identities and harms in international law. Last but not least, GR28 set out the key features of an intersectional gender analysis as a hermeneutic tool to understand the causes, consequences and gravity of gender-based violence, declaring (para 18):

² See, however, relevant progress made by the Yogyakarta Principles (March 2006 and November 2017) and decisions such as *Flamer-Caldera v Sri Lanka* (CEDAW/C/81/D/134/2018) 24 March 2022.

³ See regional jurisprudence, ECtHR, *Opuz v. Turkey*, Judgment, Application no. 33401/02 (June 9, 2009) paras 180, 191, 200; IACtHR, *Case of González et al. ("Cotton Field") v. Mexico*, Judgment (16 Nov 2009) para 401.

⁴ Emphasis added.

⁵ E.g., GR26 on women migrant workers, CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

Intersectionality is a basic concept for understanding the scope of the general obligations [...] The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.⁶

In subsequent general recommendations, the Committee has consistently applied an intersectional perspective to explain the causes and consequences of violence against specific groups of women and recommended addressing the structural dimensions of complex discrimination. This focused work has covered the intersection of gender with many marginalised identities and situations such as older women (GR27 2010), women in conflict (GR30 2013), harmful practices (GR31 2014), refugees, asylum seekers and stateless women (GR32 2014), rural women (GR34 2016), disaster risk reduction in the context of climate change (GR37 2018), trafficking (GR38 2020) and indigenous women and girls (GR39 2022).

The Committee has neither created nor applied a theoretical framework of intersectionality. Yet, its general recommendations allow inferring a consistent use of intersectionality to advance the interpretation of violence against women substantively and procedurally. Substantively, GR28 (Supra) confirmed by G35 on Gender-based Violence against Women (2017) refers to the key components of intersectionality as an analysis of discrimination to unveil (i) the root causes of gender-based violence (compounded discrimination), (ii) the uniqueness of harms (resulting from the intersecting grounds) and (iii) the gravity or impact (more severe due to compounded discrimination). Procedurally, GR33 (2015) on Access to Justice stresses the capacity of intersectionality to ensure non-discriminatory processes by unpacking compounded discrimination rendering access to justice more difficult for marginalised groups, thus recommending justice systems to adapt to victims' specific needs throughout the process, including lodging claims referred to intersectional discrimination (paras 8, 10, 14(c), 60(c)).

The CEDAW Committee's progressive theoretical approach is in stark contrast with the inconsistent application of intersectionality in practice. Individual communications (addressing individual complaints) do not sufficiently explain compounded discrimination or are not coherent recommending how to address the structural dimension of gender discrimination (Campbell 2015; Sosa 2017). Possibly, this lack of practical engagement explains why regional jurisprudence has shown very asymmetrical responses regarding intersectionality. Whereas the approach is expressly recognised by the Inter-American Court, it has only been applied occasionally (not

⁶ Emphasis added.

acknowledged) by the European Court and the African Commission.⁷ This broad landscape conveys that legal recognition for the diversity of subjectivities and harms is still far in international law, and the key role of adjudicating mechanisms for its achievement.

An exceptionally consistent application of intersectionality in the practice is, however, the Committee's inquiry into "grave or systematic" violations of the Convention under article 8 of the Optional Protocol in the case of Canada (CEDAW Inquiry Report Canada 2015).⁸ Here, an intersectional analysis underpinned a consecutive explanation of the causes, harms, gravity and remedy of violations experienced by Aboriginal women. The Committee identified that the disproportionate rates of murder, enforced disappearances and rape affecting Aboriginal women were caused by "intersectional discrimination" based on the gender, sex and Aboriginal identities of the women and exacerbated by their socio-economic marginalisation in a rural area. All these factors catalysed into cultural stereotypes that placed Aboriginal women at a higher risk of violence (Ibid paras 97, 204–205). With this insight, the Committee assessed the scope of violations (the rights to life, health, personal security, physical and mental integrity) which amounted to "grave violations" considering their scale, prevalence, nature, and impact (Ibid paras 211, 214). Accordingly, the Committee recommended structural measures consistent with the elimination of intersectional discrimination, including measures to combat discrimination in the administration, overcome the colonial legacy through meaningful communication, and a national inquiry (Ibid paras 217–220). In turn, the national inquiry adopted an intersectional framework that has been essential to understand violations and inform transformative reparations (National Inquiry, Final Report Vol. 1 a) 2021, 96).

Dealing with armed conflict, an IHRL approach has stressed the continuities between gender discrimination in peacetime and wartime where SGBV results in international crimes. SGBV as a means to perpetuate hierarchies and discrimination (mostly) by men over women and children is not merely an individual act but it becomes structural when it affects women disproportionately (Samara 2002, 32–34). Indeed, statistical studies confirm the link between gender inequality — embedded in societal norms of subordination — and the likelihood of political violence when domestic environments (cultural violence) meet economic grievance/exploitation (structural violence) fostering a sense of group identity that becomes extreme and systematic (Caprioli 2005, 163–164).

The CEDAW Committee neatly endorses the continuum of gender discrimination paradigm. GR30 on women in conflict prevention, conflict and post-conflict situations (2013) recognises the 'exacerbation' of gender discrimination in armed conflict placing women at a heightened risk of SGBV, often used as "a tactic of war" to

⁷ *Gonzales Lluy et al. v Ecuador* (IACtHR Judgment) (1 September 2015) para 290; *B.S. v Spain* (ECtHR Judgment) application n° 47,159/ 08 (24 July 2012) paras 62–63; *Carvalho Pinto de Sousa Morais v. Portugal* (ECtHR Judgment) application no. 17484/15 (25 July 2017); *E.I.P.R and INTERRIGHTS v. Egypt* (African Commission on Human and People's Rights Communication) 323/06 (16 December 2011) paras 152,165–166.

⁸ Also adopting an intersectional approach, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland*, CEDAW/C/OP.8/GBR/3 (Oct. 15, 2019).

humiliate, dominate, instil fear or disperse a target group, even if SGBV may happen everywhere and anytime (GR30 2013, paras. 34–35). Additionally, intersectional discrimination in peacetime is reproduced in wartime requiring to address the “distinct needs of conflict-affected girls that arise from gender-based discrimination” (Ibid paras. 7, 37). In view of GR30, feminist legal scholars consider the CEDAW Convention “a unique framework” to recognise and redress the continuities between human rights violations experienced by women and girls prior, during and after conflict (Swaine and O’Rourke 2015, 11). Furthermore, the ‘continuity’ approach is receiving formal recognition through mutual references between cognate regimes; for instance, GR30’s requirement of States compliance with the Security Council agenda on Women, Peace and Security or (as explained below) the ICC Prosecutor’s SGBC Policy (supra, para 27) declaring willingness to understand, pursuant to IHRL, the intersection of “multiple forms of discrimination and social inequalities” underpinning SGBV crimes.

The Applicability of Intersectionality to International Criminal Law

Is an intersectional approach applicable to ICL? Answering this question requires assessing the key features of intersectionality in the light of ICL, namely, its interpretation of gender as a social construction and its provision of consistency with a rights-based approach to non-discrimination. Interestingly, both aspects are considered by the Rome Statute, yet, they require examination under ICL’s core principle of legality.

The Rome Statute

Two new norms established by the ICC Rome Statute, the definition of gender (article 7(3)) and the duty of consistency with IHRL and non-discrimination (article 21(3)), are interconnected with the application of intersectionality in ICL. On the one hand, article 7(3)’s definition of gender as “the two sexes men and women within the context of society” implies ‘constructive ambiguity’ (Oosterveld 2005, 57). This means that, lacking in a universally accepted definition of gender in ICL the interpretation of gender under article 7(3) may tilt towards conflicting rationales (Atiba-Davies and Nwoye 2022, 133): a social construction (‘in the context of society’) and a binary construction (‘the two sexes men and women’). Yet, the Statute itself answers the dilemma on how to interpret gender. Article 21(3) establishes that the interpretation and application of the law “must be *consistent* with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3 [...] or other status”.⁹

The Court’s duty of consistency with IHRL demands interpreting gender violations in alignment with the most authoritative interpretations in international law.

⁹ Emphasis added.

This suggests consistency with the CEDAW Committee, representing 189 States, which brings about two important consequences for the reading of gender under article 21(3) of the Statute. Firstly, consistency with the CEDAW Committee involves interpreting gender as a social construction, as opposed to a gender binary. Secondly, consistency with the Committee demands that, as a social construction, gender intersects with other identities and circumstances that comport specific and compounded harms (Supra GR28, GR35).

Interpreting gender-based crimes in consistency with IHRL under article 21(3) raises, however, questions of implementation. On the one hand, the ICC has not yet applied a substantive gender analysis of crimes invoking article 21(3). The Court has limited the application of article 21(3) to matters in the ‘periphery’ bordering (not entering) the competence of domestic jurisdictions arguing that the “ICC is not a human rights Court” to judge the quality of national proceedings.¹⁰ On the other hand, for core mandate activities the Court has never set limits to article 21(3) which establishes a consistency test with IHRL as *lex superior* (Irving 2019, 839, 850). The strength of the statutory obligation (“must”) and its breath, affecting all substantive and procedural law, reflects the will of the drafters to subject all statutory matters to article 21(3). Accordingly, consistency includes the core IHRL paradigm of non-discrimination expressly referred to in article 21(3). Thus, a textual, contextual, and teleological interpretation of article 21(3) has been considered a legal basis to protect groups by adopting an intersectional rights-based approach to discrimination (Maucec 2021, 45–46).

An intersectional and rights-based interpretation of gender in ICL has been gaining support. The ICC Prosecutor’s SGBC Policy (Supra) endorses an interpretation of gender consistent with IHRL, in particular, the CEDAW Committee. Accordingly, the Policy acknowledges (i) interpreting gender under article 7(3) as a social construct,¹¹ (ii) the gender discriminatory nature of SGBV and (iii) the importance, pursuant to article 21(3), of “understanding the intersection of factors” including gender and other statuses and identities that compound multiple forms of discrimination and inequalities (Ibid paras 15, 26–27).

Another example of prosecutorial support for intersectionality in ICL (not the only one as explained below) is the IIIM Gender Strategy (Supra) that enshrines this approach as a pillar. The IIIM Gender Strategy shows unprecedented commitment to eliminate gender discrimination in ICL and, as part of this aim, adopts an intersectional perspective to advance cross-cutting issues as important as the substantive interpretation of international crimes, sensitive and non-discriminatory proceedings, and institutional capacity (IIIM Gender Strategy 2022). These issues capture the benefits of integrating intersectionality into ICL substantively, procedurally and systemically. Substantively, its value revealing the root causes and consequences of international crimes improves the legal analysis regarding the identification of

¹⁰ E.g., *Prosecutor v. Germain Katanga* (Decision on Interim Release) ICC-01/04-01/07-3405-tENG, (1 October 2013) paras. 27 and 62.

¹¹ The Policy “acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys” para 15.

reflective charges, multi-faceted (gendered) harms and the attribution of criminal responsibility. Procedurally, intersectionality helps understanding victims and perpetrators' marginalisation contributing access to justice without discrimination. From a systemic perspective, intersectional discrimination can help in ending the perpetuation of structural biases and hierarchies within ICL, freeing the legal system from the scourge of discrimination that it seeks to address.

The crime against humanity of persecution is setting an example that intersectionality enhances the interpretation of certain elements of the crimes such as the discriminatory intent. This is a defining element of persecution, a crime involving the severe deprivation of fundamental rights by reason of group identity for discriminatory grounds (Elements of Crimes 2011 art 7(1)(h)). In *Al Hassan*, concerning the situation in Mali, the Court confirmed persecution charges on religious and/or gender grounds. However, the Court addressed these grounds separately — cumulatively — failing to recognise that the intersection of gender and religious discrimination was inextricable from perpetrators' common plan to establish an Islamic State ruled by the Sharia with severe gender consequences for men and women (*Al Hassan* 2019, paras 688–702; Martin 2020, 158). Even so, the *Al Hassan* pre-trial judges endorsed the intersection of gender and race during the attack noting that women and men of darker skin had been particularly affected in gendered ways (Ibid para 702). In two other cases, *Abd-Al-Rahman* (situation in Sudan) and *Said* (situation in the CAR), ICC pre-trial judges have confirmed persecution charges based on the intersection of political, ethnic and gender discrimination (*Abd-Al-Rahman* 2019 paras. 80, 116) and political, ethnic, religious and/or gender grounds (*Said* 2019 p. 60).

Advancing this approach, in December 2022, the ICC Prosecutor issued a specific Policy on the Crime of Gender Persecution that (following the steps of the IIM) formally integrates an intersectional analysis of discrimination in prosecutorial strategy as part of investigations, the charging strategy and gravity assessment, while stressing specific intersections such as gender compounding race, ethnicity, culture and age (Policy 2022). The Policy on gender persecution crucially unpacks how the question of gender is used in ICC prosecutorial strategy (Oosterveld 2023) resulting in strong reliance on an intersectional approach. The Policy intends to 'test' an intersectional analysis throughout the prosecutorial stages of gender-based persecution as a forerunner crime in alignment with article 21(3) of the Statute requiring consistency with IHRL and non-discrimination interpreting the crimes. The consequences of implementing the Gender Persecution Policy seem considerable. For, positive results would pave the way to a broader integration of intersectionality — a discrimination and rights-based approach — in the legal analysis of international crimes.

The Principle of Legality

One of the difficulties of interpreting unforeseen situations in ICL has been the legality of resorting to external sources. This applies to IHRL norms where the assumption of coexistent protected interests has led, on occasions, to transplant IHRL standards directly into ICL at the expense of the principle of legality

(Robinson 2008, 946). In *Furundzija*, the ICTY Trial Chamber adopted the definition of torture of the Convention against Torture requiring the perpetrator's official capacity (*Furundzija* 1998, para 163).¹² In *Kupreškić*, ICTY trial judges admitted the existence of “a set of basic rights appertaining to human beings” in the Universal Declaration of Human Rights and 1966 Covenants whose violation would amount to the crime against humanity of other inhumane acts (*Kupreškić* 2000, para 566). However, a direct export of IHRL standards into ICL is considered unacceptable. As the ICTY Trial Chamber put it, it breaches the principle of legality guaranteeing the fundamental right of the accused to a fair trial by foreseeing with certainty the punishable conduct and requiring a strict interpretation of the criminal conduct (*Hadžihasanović* 2002, para 25).

To harmonise the need to fill gaps in ICL interpretations and the principle of legality, it is relevant to assess both procedural issues on the transposition of external standards and substantive issues on the quality of the admitted standards. Procedurally, ICL has a *legal propium* (the criminal conducts and modes of liability) which does not admit the direct and subsidiary application of IHRL norms, but which allows complementary interpretations that enhance, complete or perfect ICL as a legal system (Pinto Soares 2012, 179, 182, 186). Complementary interpretations involve that foreign norms “impart meaning to *existing* law” but do not create the law (*Katanga* 2014, para 52),¹³ thus helping the “process of interpretation and clarification” of the criminal conducts (*Alekovski* 2000, para 127). Substantively, to avoid distorting the legal system, international courts must analyse whether external standards (as IHRL) have crystallised into general principles or customary international law (CIL) which apply to ICL as legal sources (Pinto Soares *supra*, 187). The ICTY appeals judges in *Furundzija* stated that undefined situations require drawing upon general concepts common to all major legal systems identifying their common denominators (*Furundzija* 1998, para 178). Similarly, in *Ntaganda*, the ICC Appeals Chamber found that the Court must ensure consistency with the elements of crimes that have evolved into CIL whose application “does not violate the principle of legality” (*Ntaganda* 2017, para 54).

The articulation of intersectionality with the principle of legality respects the above procedural and substantive standards. Firstly, intersectional analysis involves a complementary rather than subsidiary interpretation of ICL. It is not a legal standard susceptible of transplantation in ICL. Rather than a norm, the CEDAW Committee considers intersectionality a *tool* — “a basic concept for understanding the scope of the general obligations” — by revealing the way gender is “inextricably linked” with other identities and circumstances compounding discrimination beyond gender-based violence (GR 28 *supra*, para 18). Thus, the focus of an intersectional analysis situates *ex ante*, supporting the contextualisation of violence, improving understanding of the facts and, in that regard, clarifying, enhancing, supporting and complementing ICL's application of the law according to interpretations acceptable by the jurisprudence.

¹² The *Kunarac* Trial Chamber corrected this approach considering state capacity irrelevant, para 470.

¹³ Emphasis in the original.

Secondly, intersectionality's object of study is compounded discrimination whose prohibition is a general principle of international law. Indeed, the prohibition of discrimination by all IHRL treaties "denotes a comprehensive assent to its emergence as a principle of customary international law" (*Lubanga*, Separate Opinion Judge Pikić 2006, para 3). More concretely, the prohibition of gender-based violence as an act inherently discriminatory (on gender) is considered, after decades of States practice, having "evolved into a principle of customary international law" (CEDAW GR35, para 2; ECtHR *Volodina v Russia* 2019, para 55). This status means that the prohibition of (intersectional) discrimination on gender and other grounds is not a foreign standard but part and parcel of customary standards applicable to ICL. Accordingly, it is argued that intersectionality's contextualisation of violence respects and, further, promotes ICL's principle of legality, firstly, by providing rich insight to interpret violations and, secondly, by interpreting the crimes through the lens of non-discrimination.

The Efficiency of Intersectionality in ICL: *Lubanga v Ntaganda*

An intersectional approach to discrimination should be integrated in ICL due to its efficiency. The insight it provides uncovering the compounded causes and consequences of gender-based crimes enhances the hermeneutic capacity of the prosecutor and judges in ways that uniquely suit ICL. A comparison of the ICC cases of *Lubanga* and *Ntaganda* demonstrates this claim. Both cases concerned similar patterns of gender-based violence against child soldiers committed by the UPC/FPLC armed group during the DRC's non-international armed conflict, namely, the sexual abuse and exploitation of girls and the use of boys to fill in the ranks. However, *Lubanga* and *Ntaganda* represent different rationales to interpret discrimination against child soldiers — narrow in *Lubanga*, intersectional in *Ntaganda* — that resulted in clearly distinct results in terms of the ICC's efficiency adjudicating the crimes. A comparative analysis of the two cases is compelling. It demonstrates that adopting intersectionality in ICL results in substantive and procedural benefits throughout the judicial process that this section explains by focusing on: (i) the establishment of jurisdiction and reflective charges, (ii) ensuring consistency with IHRL and non-discrimination, (iii) providing linkage evidence, and (iv) informing sentencing and reparations.

(i) Jurisdiction and Reflective Charges

Lubanga's narrow approach to discrimination, treating all children collectively based on their age but overlooking their distinct gender identities, precluded an adequate understanding of their differentiated harms and their reflection in the charges, which only included the war crimes of enlisting, conscripting and using children in hostilities. Initially, the Prosecutor overlooked gender, failing to investigate abundant evidence of rape and resulting in his decision not to bring charges for SGBV against girl soldiers (*Lubanga* TJ, paras 629). Then, gender was side-lined by the

Trial Chamber's refusal to examine evidence of SGBV as part of the existing charge 'using' children (Ibid para 630). The legitimacy of these decisions has been questioned. They left crimes discriminating against a whole *group* (violations of heightened gravity) unpunished, in so doing, diminishing the expressive rationale of ICL to condemn the worst atrocities (De Guzmán 2018, 43–44).

In *Ntaganda*, an intersectional approach inclusive of age and gender discrimination prevailed. The Prosecutor brought charges more reflective of children's experiences of discrimination, namely, the war crimes of enlisting, conscripting, and using children (protecting age) and the rape and sexual slavery of girl soldiers by members of the militia (protecting gender identity). The Prosecutor, however, did not charge forced pregnancy whose elements (as the *Ongwen* case later clarified) are very close to sexual enslavement — i.e., unlawful confinement (of a victim forcibly made pregnant) for the specific intent of altering the ethnic composition of the group or carrying out other grave violations of IHRL, such as rape, sexual enslavement, neatly present in *Ntaganda*. Charging forced pregnancy in *Ntaganda* would have meant protecting the specific harm of violating the victims' personal, sexual and reproductive autonomy considered "values of central importance" to ICL and IHRL (Amici curiae 2021, para. 39).

The Defence in *Ntaganda* challenged the Court's jurisdiction over charges of SGBV against girl soldiers arguing that international humanitarian and criminal law do not attribute jurisdiction for crimes committed against members of the same armed group (Transcript 2014 27, lines 15–17). ICC judges, however, confirmed jurisdiction over the crimes. Importantly, their analysis considered entitlement to protection from sexual violence *in light of* the girl soldier identity. Accordingly, the trial and appeal judges interpreted the rationale of protection factoring in the intersection of gender and age in armed conflict, which they considered established by principles of international law,¹⁴ as explained below.

Trial Chamber VI first invoked the Martens Clause granting protection under the laws of humanity both to civilians and combatants in unregulated situations. Then, the Chamber stressed that article 75 of Additional Protocol (AP) I to the Geneva Conventions establishes the fundamental guarantee of humane treatment in all circumstances to all persons in the power of a Party. Accordingly, the *Ntaganda* trial judges concluded that raping and sexually enslaving children is "contrary to the *rationale*" of international humanitarian law (IHL) to mitigate the suffering and can never be justified by military advantage or necessity (TJ Second Decision 2017, paras 47–48, emphasis added). Furthermore, the judges noted the *jus cogens* nature of the prohibition of sexual slavery and rape having "similarly attained" the status of peremptory norms which admit no derogation and are "prohibited at all times" (Ibid paras 51–52).

The Appeals Chamber examined the existence of status requirements to protect girl soldiers from sexual violence in the "established framework of international law" which, it stressed, includes customary IHL and conventional law under article

¹⁴ The Pre-Trial Chamber also established jurisdiction, see *Prosecutor v. Ntaganda*, Confirmation of Charges, ICC-01/04-02/06 (9 June 2014) para 79.

21 of the Statute (Appeals Judgment (AJ) Second Decision 2017, paras. 53–54). It noted that Geneva Conventions (GC) I and II provide protection irrespective of affiliation and that Common Article 3 has been interpreted in this sense by the International Committee of the Red Cross (Ibid paras. 59–61). The appeals judges backed the Trial Chamber’s core finding that “there is never justification” under humanitarian and international law principles to engage in sexual violence against any person. Accordingly, the Appeals Chamber concluded “the absence of any general rule” excluding from intra-group protection and, alternatively, it stressed the “nexus requirement” with the armed conflict as the cornerstone to grant protection for war crimes (Ibid paras. 65–68).

The *Ntaganda* Appeals Jurisdiction decision has been considered “incorrect” and “unprecedented”. Heller (2017) finds legal contradictions therein. The Geneva Conventions apply to the sick, wounded and shipwrecked in international armed conflicts — not to girl soldiers — and, further, Common Article 3 and Article 4 of AP II (applicable to non-international armed conflicts) would limit protection from rape and sexual slavery to persons taking no direct part in hostilities (Ibid). Thus, Heller considers the Appeals Chamber’s decision granting protection a breach of the requirement that war crimes be based on IHL violations. Despite the strength of these critiques, Heller does not engage with the core argument underpinning the Appeals Chamber’s *key* finding (which, admittedly, the Court should have developed further, as noted below): the existence of additional norms of *customary* law in the “established framework of international law” that the ICC must respect and apply (paras. 1, 54, emphasis added):

If customary or conventional international law stipulates in respect of a given war crime set out in article 8 (2) (b) or (e) of the Statute an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an *additional* element into it. In the view of the Appeals Chamber, this does not violate the principle of legality recognised in article 22 of the Statute.

(ii) Consistency with Customary International Law

The key finding of the *Ntaganda* Appeals Chamber establishing jurisdiction over the rape and sexual slavery of girl soldiers stresses an “additional” element of customary or treaty law with which the Court must ensure consistency. However, the appeals judges did not motivate sufficiently the substance of such additional element. They merely endorsed the Trial Chamber’s finding “there is never justification” to engage in sexual violence but failed to elaborate on the precise norms of customary international law raised by the trial judges to sustain their finding; e.g., *jus cogens*, the Martens Clause, and fundamental guarantees.

Articles 21(1) and (3) of the Statute, requiring consistency with CIL and IHRL respectively, provided a solid basis for ICC judges to establish ‘additional’ elements

of CIL or conventional law justifying the protection of girl soldiers from sexual violence within their own armed group. According to Viseur Sellers, the Court could have neatly demonstrated the existence of the customary norm protecting girl soldiers in those situations through a *combined* reading of articles 77(1) of AP I (protecting children from “any form” of indecent assault) and articles 4(2) and (3) of AP II (prohibiting rape and slavery and establishing the special protection of children under fifteen even if they participate in hostilities) (Sellers 2017, 16). Crucially, this reading involves an intersectional gender analysis of IHL provisions protecting both age and gender as a result of which a clear protection mandate can be inferred. This interpretation aligns the protection of girl soldiers from sexual violence with the requirement of article 21(1) to ensure consistency with conventional and customary law, thus, giving full sense to the key finding of the Appeals Chamber that interpretations must ensure consistency with ‘additional’ elements in the established framework of international law.

The prohibition of sexual violence against children is prohibited always, in peace and armed conflict, and enshrined in treaty and soft law.¹⁵ This includes, *inter alia*, the Convention on the Rights of the Child (articles 34 and 35) and the International Convention for the Suppression of the Traffic in Women and Girls whose codification conveys prohibition both as general principles of international law (Separate Opinion Judge Pikis *supra*) and as *jus cogens* whose protection extends to the most essential human rights (Charlesworth and Chinkin 1993, 68). In view of these fundamental rights, the *Ntaganda* Appeals Chamber could have confidently invoked the international prohibition of raping and sexually enslaving girl soldiers under article 21(3) of the Statute requiring consistency with IHRL when interpreting the law (Prosperi 2017; O’Rourke 2022, 368). Article 21(3)’s duty of non-discrimination (on gender) when interpreting and applying the law would have provided the *Ntaganda* judges with an additional argument to support ICC jurisdiction. *Lubanga*’s decision not to prosecute sexual violence against girl soldiers had raised critiques of gender bias because the crimes, left unaddressed, had a clearly differentiated negative impact on girls (*Supra*, Separate Opinion, paras. 20–21) and because sexual violence was a “key feature” of the functioning of the armed group (Brunger 2019, 427–428). Although *Ntaganda* ended this discussion by establishing jurisdiction, invoking a duty of non-discrimination on gender under article 21(3) would have contributed with expressive value reflecting that the Court takes this obligation seriously.

(iii) Linkage Evidence

Assessing the intersection of gender and age discrimination in *Ntaganda* enabled a sensitive contextualisation of violations against girl soldiers. A sensitive contextualisation clarified that the patterns of rape and sexual slavery were a foreseeable consequence of perpetrators’ common plan to destroy the Lendu ethnic group (TJ para 811), thereby, providing linkage evidence with the accused for the purpose of

¹⁵ See, The Paris Principles, February 2007, and The Cape Town Principles, 30 April 1997.

establishing individual criminal responsibility. As part of their contextualisation, the *Ntaganda* judges considered the testimony of girl soldiers declaring that “anyone who wanted” could rape you (Ibid para 407). They considered the social construction of the roles assigned to girl soldiers, called “*guduria*” (a large cooking pot) meaning that “any soldiers could sleep with them at any time” (Confirmation of Charges 2014, para 81). The trial judges found that young female recruits and soldiers were regularly raped and at continuous risk of sexual abuse, and that those acts were largely unpunished, and even discussed within the armed group (TJ supra, para 792). Accordingly, contextualisation considering factors revealing the intersection of gender and age discrimination underpinned the Trial Chamber’s key finding on the existence of linkage evidence with the Accused. The Chamber found that co-perpetrators were “virtually certain that the implementation of their plan” (i) would lead to the recruitment and use of children in hostilities and (ii) that the rape and sexual slavery of these children, whose occurrence, considering the circumstances prevailing, “was not simply a risk that they accepted, but crimes that they foresaw with virtual certainty” (TJ para 811). Accordingly, *Ntaganda* was convinced under article 25(3)(a) of the Statute as an indirect co-perpetrator for his control over the crimes committed by UPC/FPLC soldiers which he did not prevent and, taken cumulatively, constituted an essential contribution (paras. 856–857).¹⁶

Co-perpetration theories are useful tools to demonstrate that international crimes are not isolated but part of a common plan instigated by superiors who can be held responsible despite not being physical perpetrators (Goy et al. 2016, 220). However, the ICC’s interpretation of co-perpetration (joint criminal enterprise) as control over the crimes theory (used in *Lubanga*, *Gbagbo* and *Blé Goudé*, *Ntaganda* and *Onwgen*) has been contested. This applies in particular to indirect co-perpetration “through another person” under article 25(3)(a) of the Statute which the ICC has interpreted (a divided majority in *Ntaganda*) as control over an Organised Structure of Power and, thus, not over the physical perpetrator (AJ 2021). As van Sliedrecht and Weißer (2022) note, the application of the control theory at the ICC poses several loose ends. First, it draws from just one domestic system (Germany) questioning its legitimacy. Second, it involves a complex participation model difficult to implement by domestic courts. Third, the control theory interprets article 25(3)(a) extensively. If control is exercised ‘through’ an organisation, the essential contribution is made at a preparatory stage and the capacity to thwart the crime of the front men is not required. This situation seems at odds with the Statute because “there is no indirect perpetration through fully responsible agents, as article 25(3)(a) requires, which brings back to the legality problem” (ibid 8).

Other commentators consider *Ntaganda*’s gender-sensitive approach to contextualise the crimes positive to interpret co-perpetration situations requiring to establish that superiors could foresee the crimes as a result of a common plan. This is often the case of SGBV. Since its establishment by the ICTY in *Tadic* (AJ 1999, paras.

¹⁶ *Ntaganda* was found guilty as a direct perpetrator of murder as a war crime and as a crime against humanity and of persecution as a crime against humanity. He was convicted as an indirect perpetrator for all the remaining crimes.

227–228), foreseeability theory has been questioned for the risk that, given the broad nature of the common plan, participants be imputed crimes that they did not intend but of which they were only aware (Fry and van Sliedrecht 2020, 719). Yet, according to SáCouto, Sadat and Sellers (2020), *Ntaganda*'s contextual approach uncovering the dynamics of violence against girl soldiers — unpacking the intersection of gender and age discrimination — allowed inferring the foreseeability of the crimes from the objective environment. Even if sexual violence was not part of perpetrators' original plan, the judges considered it foreseeable with “virtual certainty” in light of the *circumstances* of exacerbated discrimination against girl soldiers (Ibid 239–240). The establishment of “virtual certainty” from the very context is positive because it brings foreseeability to the level of acceptance that the crimes ‘will happen’ rather than ‘risk acceptance’. This standard conveys knowledge from the accused and diminishes the risk of attributing foreseeability for crimes based on mere awareness but not intended (Fry and van Sliedrecht *supra*).

Advocates of a contextual approach to foreseeability, as SáCouto, Sadat and Sellers, consider *Ntaganda* a good example where a gender-sensitive understanding of the environment allowed inferring foreseeability from the continued perpetration of violations, thereby linking the crimes with the common plan or purpose, in alignment with precedents such as *Kvočka* and *Kristić* at the ICTY. These scholars consider a contextual analysis (which stressed gender and age discrimination, hence, intersectional) more “logical, thoughtful and non-discriminatory” than a narrow interpretation of article 25(3)(a) that prevailed, for instance, in *Bemba* and *Katanga*, precluding the successful prosecution of SGBV (SáCouto et al. *supra*, 241). It is then the capacity of a contextual and intersectional analysis demonstrating certainty that the crimes will follow the implementation of the common plan that makes intersectionality a valuable tool to establish linkage evidence in co-perpetration situations — notwithstanding the need to perfect co-perpetration theory.

(iv) Sentencing and Reparations

By unpacking discrimination against marginalised identities, intersectionality addresses relevant factors of the gravity assessment of the crimes which are relevant for sentencing purposes. These factors — indeed, object of study of intersectionality — include perpetrators' discriminatory intent, the gravity of the harm, and victims' particular defencelessness — read marginalisation and risk of discrimination (Rules of Procedure and Evidence 145). In *Ntaganda*, intersectionality informed the gravity assessment of SGBV against girl soldiers which is the most important consideration for sentencing (Statute *supra*, article 78), whereas in *Lubanga* the judges refused to address the gravity of the harms against girl soldiers because these had not been addressed as evidence (Sentencing Judgment 2019, paras 74, 81). Differently in *Ntaganda*, the same intersectional approach that underpinned the legal findings was drawn upon by the trial judges to inform the sentence, resulting in greater accuracy assessing the gravity of the crimes (*Ntaganda* Sentencing Judgment 2019).

Ntaganda's Sentencing Decision on SGBV is informed by an intersectional analysis of the girl soldier identity in various ways. First, the judges considered

the intersectional identity of girl soldiers — their gender and age — in the gravity assessment. The gender component was reflected in the recognition of the quality of the suffering, ‘the physical, psychological, psychiatric and social consequences’ for the individual victims, their families and communities. And the age component was factored in the identification of victims’ defenceless due to their very young age as an aggravating factor (ibid paras 102, 121). Second, the judges found Ntaganda’s *compounded* discriminatory intent against girl soldiers a gravity factor inferred from his awareness with virtual certainty (lower-degree intent) that raping and enslaving girl soldiers would follow from the execution of the common plan and he left unpunished (Ibid paras. 118–119). These considerations align *Ntaganda* with progressive precedents where a contextual intersectional analysis revealing the links between sexual violence (gender discrimination) and the criminal campaign against an identity group has enabled a more accurate assessment of complex discrimination underpinning perpetration to inform gravity during sentencing (*Kunarac* TJ 2001, paras 592, 867; *RUF* Sentencing Judgment 2009 paras 131–133; *Ongwen* Sentence 2021 paras. 331–333, 371, 377).

In March 2021, the *Ntaganda* Reparations Order of Trial Chamber VI expressly recognised intersectionality for the first time in ICL stating that “[a] gender-inclusive and sensitive perspective should integrate intersectionality as a core component” (para 60). This requires considering “the views, experiences and needs of all individuals with diverse sexual orientation and gender identities while acknowledging the complexity and intersectionality of their experiences and maintaining a holistic and relational focus” (Ibid footnote 151). The Court’s statement endorses scholarly views upholding intersectionality to advance transformative reparations. Intersectional reparations — grounded in victims’ participation and views — are valued for their capacity to appreciate victims’ nuanced identities and experiences in order to address their different layers of marginalisation and achieve an effective remedy (Butti and McGonigle Leyh 2019, 773).

The Court’s recognition of intersectionality to inform reparations in *Ntaganda* confronts the ICC with the challenge of operationalising an IHRL-based approach to compounded discrimination. As already mentioned, the Rome Statute contains a legal basis for this task where article 21(3) establishes a robust interaction between ICL and IHRL (O’Rourke 2022, 347) providing the Court with a powerful female legal method that requires consistency with IHRL and non-discrimination (Otto 2022, 393). Implementing this approach poses structural dilemmas though. IHRL, especially the CEDAW Committee, lacks guidance to inform ICL decisions on reparations to advance gender rights in armed conflict (O’Rourke supra, 369). Also, a focus on individual criminal responsibility has diverted ICL’s attention from the structural and political causes of discrimination resulting in resistance to feminist methods to end discrimination (Otto supra, 390). Further, the ICC’s legitimacy to address structural discrimination is questioned on many fronts such as the absence of responsibility of the convicted person for structural inequalities, lack of means for implementation, and the ICC’s absence of mandate for socio-political reform traditionally operated by States (O’Donohue and Grey 2022, 319–320).

While acknowledging these challenges, the ‘disruptive’ recognition of intersectionality in ICC reparations opens up a space to craft ICL-IHRL interactions which

is unambiguously based on the statutory mandates requiring to interpret gender as a social construction and in consistency with IHRL (articles 7(3) and 21(3)). The Court seems to be making important steps in this regard. The *Ntaganda Reparations Order* has identified the multi-faceted gendered harms of girl soldiers victims of rape and sexual enslavement from an IHRL approach (aligned with the rights-based approach to enslavement harms clarified in *Ongwen*, Amici, supra, para. 39) which includes the physical, mental, and socio-economic consequences for victims, and consideration for the children born of SGBV (Supra para.175). Then, *Ntaganda's* First Decision on the Draft Implementation Plan for Reparations (2023) has declared the latter “priority harms” and, accordingly, designed reparations measures that address the different spheres of marginalisation in the lives of girl soldiers, namely, measures for physical and mental resilience, to improve socio-economic status through long-term education and income generating activities, and community measures to address stigma. *Ntaganda* is therefore an excellent example of the ICC’s application of intersectionality, from beginning to end of the judicial process, resulting in the identification of girl soldiers as a marginalised group and an efficient contextualisation of their harms decisive to convict the accused and establish an effective remedy.

Conclusion

Amidst increasing discussion on intersectionality in ICL, this article clarifies the notion and specific benefits of adopting this approach to interpret SGBV crimes. Accordingly, the origins of intersectionality were traced in feminist scholarship linked to the goal of ending gender binaries and to affirm the diversity of gender subjectivities and experiences of discrimination. The article explained the legal recognition of intersectionality in IHRL focusing on the CEDAW Committee, positing that intersectionality has become a theoretical paradigm (not so much in practice) to interpret the causes, harms, and gravity of violence against marginalised women. From this legal framework, the article considered intersectionality in ICL affirming its applicability to interpret SGBV crimes based on inherent features of the Rome Statute — a socially constructed and non-discriminatory interpretation of SGBV — under articles 7(3) and 21(3). It was argued that intersectionality respects and even enhances ICL’s principle of legality by clarifying the context of violations resulting in improved interpretation and application of the law and a rights-based and non-discriminatory perspective.

The comparison between *Lubanga* and *Ntaganda* demonstrated the efficiency of an intersectional approach as a tool to interpret SGBV in ICL by improving the quality of the information throughout the judicial process. The article ‘labelled’ and explained some of those benefits supported by the *Ntaganda* case study, namely: (i) revealing the nature and gravity of the harms justifying the establishment of jurisdiction and charges; (ii) interpreting SGBV in consistency with IHRL and without discrimination; (iii) identifying the link between SGBV and the common plan through a gender-sensitive contextualisation revealing foreseeability of the crimes with virtual certainty; (iv) informing the gravity assessment during sentencing for factors

such as perpetrators' discriminatory intent, victims' vulnerability and impact, and (v) identifying the multi-faceted harms of intersectional discrimination against girl soldier victims necessary to design an effective remedy.

The findings establish the efficiency of criminological perspectives in ICL unpacking intersectional discrimination to explain gender as a social construction, thus, suggesting the potential of integrating intersectionality as a *method* to interpret SGBV international crimes. Focused on establishing individual criminal responsibility, ICL has not paid much attention to structural discrimination underpinning gender-based crimes. This article demonstrates the opposite. A socio-legal analysis of intersectional discrimination provides unique insight that suits ICL specific needs throughout the judicial process. The efficiency of intersectionality — an anti-discrimination approach — to address SGBV is exciting. It predicts increasing relevance for articles 7(3) and 21(3) of the Statute to support a gender analysis of violence. This is a fabulous opportunity for key ICL-IHRL interactions to advance gender equality in conflict settings from a non-discriminatory and rights-based perspective.

Data Availability The data that support the findings of this study are available on request from the corresponding author.

Declarations

Competing Interests The author has no conflict of interest to declare.

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