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# Reparations for Sexual and Gender-Based Crimes: A Premiere Applying an Intersectional Approach at the International Criminal Court?

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## Abstract

Crimes of sexual and gender-based violence have experienced tremendous interest in international justice mechanisms and transitions from violence. Following their recognition and first convictions, gender justice is facing reparations as a new challenge that aims at effective remedies for victims. In the *Ntaganda* case, the International Criminal Court recently allocated reparations for girl soldier victims of rape and sexual slavery applying the principle of gender-sensitive reparations and stating that ‘intersectionality’ should be a core component. Intersectionality is a human rights-based approach to understand the structural dynamic of discrimination underpinning gross violations against marginalized groups in order to obtain an effective remedy. This chapter answers the question whether the International Criminal Court is entitled to and is effectively applying an intersectional approach to reparations for crimes of sexual and gender-based violence in what amount would be true to engagement with effective remedies tackling the root causes of gross violations.

**Keywords:** sexual and gender-based violence, reparations, intersectionality, child soldiers, international crimes, human rights

## 1. Introduction

This chapter seeks to explain the value of reparations for sexual and gender-based crimes from the perspective of intersectional discrimination, meaning the understanding of complex patterns of discrimination underpinning violations to obtain the right insight for effective reparations. The chapter demonstrates the validity of this approach by investigating the war crime of sexual and gender-based violence against girl soldiers within armed groups. In so doing, it relies on the *Ntaganda* case study, undergoing reparations at the International Criminal Court (ICC or Court) at the moment, for which the Court has adopted a gender-sensitive and intersectional approach to reparations [1]. The chapter seeks to highlight the relevance of the

*Ntaganda* precedent to advance reparations for crimes of sexual and gender-based violence against girl soldiers— at the intersection of discrimination on gender, age and socio-economic grounds; whilst noting the potential of this approach to broadly inform reparations for other gross violations affecting the most marginalized identities whose harms are at the intersection of complex discrimination.

Intersectionality is a method to understand the causes, dynamic and effects of violence whose recognition is increasing in academia and accountability mechanisms. The approach was first established by feminist legal scholars who highlighted that discrimination is not just produced on a single ground but, often, on intersecting grounds against the most marginalized identity groups; for instance, discrimination against Black American women [2] or lesbian, gay, bisexual, trans, intersex, queer and other (LGBTIQ+) in the context of decolonization [3] whose complex dynamic requires understanding and visibility to address those harms.

Legal accountability mechanisms incorporate intersectionality as a method to understand the linkages between complex discrimination against marginalized groups, the resulting harms and effective reparations measures. In the field of international human rights law, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) states that discrimination based on sex and gender is ‘inextricably linked’ with other factors such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation that affect women belonging to those groups in different ways to men, resulting in an aggravated impact due to the compounded factors of discrimination involved [4]. Amongst these intersecting identities ‘girls’ stand out because their gender and age identities place them at a particular risk of sexual violence, including during armed conflict.

Sexual violence in armed conflict—disproportionately affecting women and girls and, thus, due to their gender—is a continuation and exacerbation of preexisting discrimination against women in peacetime [5]. Yet, gender discrimination against women and girls—which also affects men and boys—has been traditionally silenced due to unequal power relations between men and women that have kept the issues mostly affecting women (e.g., violence, domestic work, family care, sexual and reproductive health) hidden and unregulated [6]. Likewise, sexual violence against girls in armed conflict has been downplayed regardless of its devastating effects in terms of physical and emotional development, mortality, social stigma, personal humiliation, trauma, unwanted pregnancies and its resulting economic and psychosocial consequences [7].

International crimes of sexual and gender-based violence have received tremendous attention in recent years by international courts and tribunals. The Rome Statute establishing the ICC, the first permanent international court operating from 2002 with competence to prosecute genocide, crimes against humanity, war crimes and aggression, has considerably expanded the codification of conducts considered crimes of sexual violence (including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution as war crimes and crimes against humanity) [8]. This acknowledgment reflects the influence of feminist scholarship, international human rights law and the jurisprudence of prior international criminal tribunals for the former Yugoslavia and Rwanda that sexual and gender-based crimes are amongst the gravest, must be made visible and punished.

The growing interest in international prosecutions for sexual and gender-based crimes has resulted in the crucial question for accountability mechanisms of understanding these harms and where intersectionality is playing an ever-important role in underpinning advances in gender justice. The ICC defines gender as ‘the two

sexes, male and women, within the context of society', thus opening the door to its interpretation as a social construction, and it recognizes the right of victims to reparations, including for sexual and gender-based crimes [8]. The policies of the ICC Prosecutor have been crucial pointing at how gender should be interpreted. The Prosecutor's Policy on Sexual and Gender-Based Crimes, of 2014, stresses that gender (contrary to a biological or sex-based interpretation) refers to the social construction of the 'roles, behaviors, activities, and attributes assigned to women and men, and girls and boys'. Moreover, it endorses that the interpretation of sexual and gender-based crimes must be consistent with international human rights law and, therefore, the Prosecutor will adopt an *intersectional* approach to understand these crimes, namely, considering how 'the intersection of factors such as gender, age, race, disability, religion [... etc.]' give rise to the multiple forms of discrimination and inequality underpinning this form of violence [9]. Likewise, in 2016, the Prosecutor's Policy on Children acknowledged the intersection of age, gender and other grounds compounding multiple discrimination and inequalities at the root of crimes against children, noting children's special vulnerability to sexual violence and connecting these approaches with child-sensitive reparations [10]. In practice, these concerns have catalyzed in the *Ntaganda* case where the ICC first used an intersectional approach to recognize the harms of sexual violence committed against girl soldiers, in 2019, and is now allocating gender-sensitive reparations for those crimes that 'integrate intersectionality as a core component' [11].

The chapter initially presents the *Ntaganda* case explaining how ICC judges identified the harms of sexual violence committed against girl soldiers using an intersectional approach to unpack the root causes of the harms and opening the door to reparations (Section 2). Then, the chapter engages in a critique of intersectionality as a method to inform reparations for gross violations and it responds to the same critique by validating the intersectionality as a tool to achieve effective reparations (Section 3). With this insight, the investigation examines the process of reparations for girl soldier victims of sexual violence in the ICC case *Ntaganda* (Section 4) aiming to assess the Court's application of intersectionality which it measures according to the three-tier test established by Butti and McGonigle [12]. It concludes with a positive assessment of the intersectionality test (Section 5) and ends with some reflections about the contribution of intersectionality to advance reparations stressing the value of measures with a socio-economic component.

## **2. ICC case *Ntaganda*: an intersectional approach to protect girl soldiers from sexual violence**

ICC case *Ntaganda* is a breakthrough in international criminal justice where the Court recognized having jurisdiction over rape and sexual slavery committed against girl soldiers by members of their own armed group [13]. The case concerned the crimes of the FPLC/UPC armed group in the DRC from 2002 to 2003, under the command of Bosco Ntaganda who was convicted as a direct and indirect perpetrator of numerous crimes against humanity and war crimes. These crimes included, among others, murder, deportation, directing attacks against the civilian population and protected objects, displacement, and conscripting and enlisting children to actively participate in hostilities [14]. Sexual and gender-based violence was pervasive both by soldiers and commanders who raped and sexually enslaved civilian women and girls during the main attack on Bogoro and abducted and enlisted girls in the militia for



sexual exploitation [14]. As other ICC precedents have confirmed (e.g., *Lubanga* and *Katanga* regarding the DRC, and *Ongwen* in Uganda) the enlistment (voluntary), conscription (involuntary) and use of children in hostilities serves the strategic purposes of armed groups in gendered ways, in particular, filling military ranks (mostly boys) and sexual exploitation through rape, forced marriage and sexual slavery (mainly girls).

ICC judges in *Ntaganda* reasoned differently than in past cases concerning crimes against children. In *The Prosecutor v. Thomas Lubanga*, ICC judges only convicted the accused of the war crimes of enlisting, conscripting and using children in hostilities [15]. Problematically, in *Lubanga*, the Prosecutor and then the Trial Chamber adopted a narrow approach overlooking a gender analysis of the crimes. As a result, the charges did not include crimes of sexual violence against girl soldiers—of which evidence was abundant—and the trial judges considered that they lacked the competence to examine facts that had not been included in the charges [15]. Conversely, in *Ntaganda*, concerning similar patterns of crimes committed by the same armed group, the Prosecutor and judges showed a sensitive understanding that the intersection of gender and age discrimination in armed conflict made girl soldiers highly vulnerable to sexual violence. Accordingly, the Prosecutor charged the war crimes of rape and sexual slavery against these children. Which movement resulted in the challenge for the Court to decide whether it had jurisdiction over these war crimes that, according to the defense, intended to protect enemy soldiers of the opposite camp and not members of the same militia. Interestingly, on this occasion—propelled by prosecutorial submissions—the judges *shifted* from a narrow interpretation of the violence (excluding a gender analysis) to interpret gender as a social construction *intersecting* with other identities of the victims such as their age and socio-economic status.

An intersectional approach undergirded *Ntaganda*'s interpretation of the legal gap in the protection of girl soldiers from sexual violence where the judges did not lose sight of the girl soldier's identity in the legal analysis throughout the process [16]. The pre-trial judges found that the sexual nature of the crimes 'logically precludes' considering girl soldiers actively participating in hostilities (thus losing protection from attack) and, further, that depriving child soldiers of protection would 'contradict[s] the very *rationale* underlying the protection of children from hostilities' [17]. The trial judges complimented the protection approach. Finding that rape and sexual slavery are subject to a general prohibition at all times under treaty and customary law, they convened that not granting protection from these crimes would be 'contrary to the *rationale*' of humanitarian law which only accepts harm in case of military advantage, which can never happen by raping and sexually enslaving children [18]. Finally, the appeal judges stressed that what matters to determine protection is not the victim status within the armed group but rather the nexus of the rapes and sexual slavery against girl soldiers with the armed conflict, of which there was clear evidence, resulting in the establishment of ICC jurisdiction over the crimes and a precedent allowing to prosecute crimes of sexual violence against girl soldiers committed by members of the same militia [19].

Once jurisdiction was established, the *Ntaganda* judges continued a consistent application of an intersectional perspective during the trial in view of establishing the individual criminal responsibility of the accused. Indeed, the judges recorded many indicia revealing understanding that sexual violence against girl soldiers within the armed group was underpinned by the intersection of gender, age and socio-economic status as factors whose compounded effects determined the vulnerability of girl soldiers to rape and sexual slavery. To begin with, children (boys and girls) were

recruited in large numbers in what amounted to patterns of abduction for the purpose of military training and sexual violence [20]. This circumstance was concomitant with the children's socio-economic status since the UPC/FPLC put pressure on families to contribute the war effort by providing children; while other children joined the armed group due to the coercive circumstances in which they found to cover for basic needs as protection and food [20].

Commanders and soldiers alike raped young female recruits routinely during military trainings and after the battles, and exploited girls for domestic chores, cooking and sex. Actually, girls in the militia were called *guduria*, a large cooking pot to mean that 'they could be used for sex wherever the soldiers wanted' [20]. As a result, some girls became pregnant. Rape and sexual violence were a common practice 'known and discussed' within the armed group and it was left largely unpunished. All this happened in a coercive military environment where girl soldiers had no possibility to leave [14]. Such evidence was key for the trial judges to conclude that rape and sexual slavery against girl soldiers were not simply a risk but, in the prevailing circumstances, crimes that perpetrators 'foresaw with virtual certainty'. This insight was key to establish the knowledge and intent of the accused resulting in Ntaganda's criminal responsibility as a military commander who exercised control over the crimes but did nothing to prevent their occurrence.

An intersectional approach to discrimination against girl soldiers underpinned a very substantive contribution of the *Ntaganda* judgment to international justice. It gave visibility to the grave and specific harms experienced by girl soldiers, a traditionally marginalized group whose harms had been silenced. Further, the large-scale nature of the crimes revealed that sexual violence in the militia played a crucial role in the functioning of the armed group. Consequently, sexual abuse was acknowledged amongst the complex reasons—engrossing the ranks, easy indoctrination and cheap labor—pushing armed groups to massively recruit children. These findings made it evident the need to interpret the war crimes against children—apparently, gender-neutral crimes—as non-gender neutral, seeing the different harms and impacts on boys and girls [21]. Critically for the purpose of this chapter, the Court's conviction for rape and sexual slavery resulted in the possibility for girl soldier victims to claim reparations which (as will be explained below) have led to new breakthroughs on the aegis of intersectionality.

### **3. The value of an intersectional approach to discrimination for reparations of gross violations**

Reparations have become a right of victims of international crimes emerging from the attribution of international criminal responsibility which the ICC Rome Statute has enshrined under Article 75. The right to reparations for international crimes has been strongly influenced by the development of international standards to ensure a remedy and reparation for victims of gross violations of international human rights law and humanitarian law [22]. These standards have expanded initial forms of reparations for internationally wrongful acts such as restitution (re-establishment of the situation), compensation (for economic damage and loss of profit) and satisfaction (like acknowledgment or apology) [23] with a new modality, 'guarantees of non-repetition', that seeks to prevent the recurrence of gross violations by taking measures to address the structural causes of violations [22].

Seeking the non-repetition of gross violations, the international regime of reparations has developed two fundamental principles over the last 15 years, namely, transformative and gender-sensitive reparations, that international courts and scholars have endorsed widely. In the landmark case *Cotton Field* (2009), addressing patterns of sexual violence and murder against marginalized girls in Ciudad Juárez, the Inter-American Court of Human Rights first established that, in contexts of structural discrimination, ‘reparations must be designed to change this situation, so that their effect is not only restitution, but also rectification’ [24]. Moreover, the Inter-American Court found that reparations should take into account a gender perspective ‘bearing in mind the different impact that violence has on men and on women’ [24]. The implications of these adjudicated principles are, according to Sandoval and Rubio Marín, twofold. Whilst reparations aim at the restitution of victims, if there is discrimination, they should also help subvert those structures that made the violation possible and, furthermore, reparations should redress gender-specific harms to help victims cope with the concrete effects of violations in their lives [25].

A transformative and gender-sensitive approach to reparations was endorsed by the ICC from its very first decision, in *Lubanga*, in 2012, establishing the principles and procedures of reparations concerning crimes against child soldiers [26]. The Court declared that, although Article 75 of the Rome Statute only lists restitution, compensation and rehabilitation as forms of reparations, the list is not exhaustive and may include other forms such as symbolic, preventative and transformative reparations [22]. Notwithstanding, the application of transformative reparations to international crimes has not been exempted from critique in a field primarily concerned with the establishment of individual criminal responsibility and not with the elimination of discrimination, or competence of the State as a human rights obligation.

One critique addressed to transformative reparations of gross violations is that it risks displacing the victim-centered approach underpinning reparative justice with a different agenda. According to Walker, aiming at societal transformation places the bar of gender-just reparations too high and establishes a superior objective that is distant from the needs and dignity of individual victims. There is a false dilemma that restorative reparations return the victim to the prior state of inequality while, in practice, the multiform evolution of reparations measures would not preclude addressing the economic and social rights of individual victims to reduce the inequality gap [27].

Another critique of transformative reparations for international crimes concerns the application of international human rights standards on the elimination of discrimination (addressed to the State) to the field of international criminal law concerned with the attribution of criminal responsibility. International courts are not human rights courts. Thus, the incorporation of human rights standards on structural discrimination into the regime of reparations would threaten core principles of international criminal law, first and foremost, the principle of legality which requires a strict interpretation of the law and the prohibition of analogy [28]. Moreover, the critique goes on, that transformative reparations concern legal and institutional measures targeting the collective which are close to development and are competence of the State [27]. Individuals who perpetrate international crimes are responsible for the deeds for which they are convicted not for preexisting discriminatory structures rendering individuals vulnerable to such violations.

Refuting these critiques on the application of transformative reparations to international crimes—as sexual and gender-based violence—is intimately connected with the value that intersectionality can bring to reparations in the field, namely, as



explained below: identifying the root causes of individual harms and consistency with international human rights law standards.

### **3.1 Surfacing individual needs linked to their root causes in transitional contexts**

In answering to the first critique that transformative reparations dilute restorative justice for individual victims, there are arguments in favor of establishing a middle way to address the concrete needs of victims (Walker's concern) without losing sight of a transformative approach. In this, intersectionality plays two important roles. The first role is its capacity as a tool to connect victims' individual needs with patterns of structural discrimination. As Butti and McGonigle posit, intersectionality unpacks individuals' multifaceted vulnerabilities in conflict situations exposing how these are underpinned by preexisting patterns of discrimination and marginalization [12]. In other words, intersectionality links the holistic with its concrete manifestations. It allows addressing individuals' experiences of harm with sensitive measures that tackle their root causes of structural discrimination, thus, with the potential to transform the concrete lives of victims [12]. For example, Butti and McGonigle stress the value of an intersectional approach to achieve effective reparations for young people in the context of the Colombian conflict whose experience is at the crossroads of marginalization, stigma and violence. Even if the Colombian law on reparations adjusts to international standards, disengaging these youth from violence will not depend on medical rehabilitation but on providing them with vocational training and jobs to overcome the scourges of marginalization and stigma and get out of the cycle of violence [12].

A second role of intersectionality supporting effective reparations is its capacity to address the underenforcement of transitions for victims. Transitional agreements tend to uniformize individuals' identities resulting in the impossibility of grasping the needs of the most disadvantaged in armed conflict, especially women and children. Yet, as Ní Aoláin and Rooney note, there is an 'organic link between the exclusions made visible by intersectionality discourse and tracking the failures of transition in relation to women' [29]. As Security Council Resolution 1325 (2000) symbolically recognizes, exclusions in transitions from conflict should be addressed by the meaningful participation of those directly affected in negotiated solutions to influence the redistribution of benefits [29, 30]. By articulating the way gender intersects with social inequalities and discrimination revealing issues of poverty and deprivation at the root of vulnerability in conflict, intersectionality exposes the exclusions of the marginalized which have been historically silenced determining the underenforcement of effective transitions from conflict. The merit of intersectionality thus lies in its capacity to uncover the structures of discrimination underpinning individual harms in conflict as key knowledge that points to the effective way for individual and societal transformation.

### **3.2 Implementing consistency with human rights standards on reparations and non-discrimination**

Answering to the second critique that human rights standards on transformative reparations are inadequate for international criminal law, the ICC Rome Statute itself establishes a clear alignment on the side of international human rights law. Article 21(3) establishes the duty of the Court to interpret the law 'in a manner that must be *consistent* with internationally recognized human rights, and without any



adverse discrimination founded on grounds such as gender [...] or other status' [8]. Accordingly, this provision establishes a legal obligation at the ICC to interpret international crimes—including reparations for sexual and gender-based violence—in alignment with international human rights standards, including the paramount principle of non-discrimination on gender and other internationally recognized grounds.

Human rights mechanisms are progressively recognizing intersectionality as an approach to inform adjudication and reparations that seek to transform discriminatory structures. This is, in particular, the case of gross violations of sexual and gender-based violence where intersectionality is fertilizing across different levels of jurisdiction. Intersectionality has been used by adjudicating bodies regionally (Inter-American Court of Human Rights in *Cotton Field* 2009 [24] and *Gonzales Lluy* 2015) [31], domestically (*Sepur Zarco* 2016) [32] and internationally (CEDAW Inquiry Reports on Canada 2015 [33] and the UK 2018 [34]). Additionally, the CEDAW Committee recognizes that the interpretation of sexual and gender-based violence must be consistent in peace and armed conflict settings, which includes an intersectional approach. Its General Recommendation N° 30 (2013) on women in conflict prevention, conflict and post-conflict introduced the interpretation of violence against women in the field of transitional justice [35]. And, General Recommendation N° 35 (2017) on gender-based violence against women affirms the intersectional nature of discrimination, including in conflict situations, and endorses all forms of reparations explicitly mentioning satisfaction and guarantees of non-repetition [36]. Notwithstanding this formal recognition, the Committee's allocation of economic, social and cultural reparations measures remains underdeveloped and its individual practice unsteady, especially in dealing with measures of non-repetition and a design inclusive of all forms of reparations [37].

There is increasing recognition that institutional inaction concerning gross violations of sexual and gender-based violence results in discrimination in access to justice on gender grounds, thereby breaching the prohibition of gender discrimination recognized by human rights law (CEDAW Convention) and international criminal law (Rome Statute). Precedents in both fields confirm this argument. In her dissenting opinion in the ICC case *Lubanga*, Judge Odio Benito was critical that the refusal by the Trial Chamber to consider evidence of the harms of sexual violence against girl soldiers was discriminatory on gender because it failed to recognize the different impact of violations resulting in the impossibility to repair for those harms [15]. In *Alonzo et al.*, the CEDAW Committee reached the same conclusion regarding the reparations of the Malaya Lolas, comfort women victims of the wartime sexual slavery system established by the Japanese during World War II. The Committee declared the Philippines responsible for continuous discrimination due to inaction in providing reparations to women victims of sexual violence crimes, contrary to war veterans, a majority of whom were male. Recommended measures included full reparations covering all the harms suffered by the victims – recognition, redress, official apology, compensation and guarantees of no recurrence [38]. These arguments suggest that failing to consider a gender approach to interpret the sexual and gender-based crimes resulting in the impossibility of obtaining reparations violates the prohibition of gender discrimination. By flagging patterns of complex discrimination, intersectionality allows those adjudicating identifying gender harms and, consequently, providing reparations for those harms ensuring respect for the prohibition of discrimination—on gender and other grounds.

The ICC itself exemplifies the influence of international human rights standards in the design and implementation of reparations—including through an intersectional approach—aiming at a transformative effect. This is precisely happening regarding crimes against children through the Court's explicit recognition of a child and gender-sensitive approach to reparations. From the first-time addressing reparations in *Lubanga*, the ICC's decision establishing the principles applicable to reparations to child soldiers established that these must be transformative, be guided by the best interests of the child and gender inclusive [26]. The Prosecutor's 2016 Policy on Children acknowledges, in consistency with human rights, willingness to understand the way attributes like age 'intersect with other factors' of discrimination underpinning child violations and, by the same token, endorses human rights standards to reparations that are child-sensitive, gender-sensitive, promote the participation of children and reintegration in their communities [10]. Critical for the purpose of this chapter, in *Ntaganda*, the Court deepened the meaning of transformative reparations concerning crimes of sexual violence against girl soldiers stating that a gender-inclusive and sensitive perspective 'should integrate intersectionality as a *core* component' [11]. This statement engages the ICC to adopt an intersectional approach to achieve effective reparations for girl soldiers. The purpose of the next section is to explore whether the ICC—ahead of other international bodies adjudicating reparations—is living up to the purpose of designing and implementing transformative reparations using, for such a high aim, an intersectional approach to discrimination.

#### **4. Gleaning key steps toward inclusive reparations in ICC case *Ntaganda***

The ICC Trial Chamber has recently adopted relevant decisions in the *Ntaganda* case concerning reparations for sexual crimes committed against girl soldiers. In the Reparations Order (March 2021), the Court set out the principles applicable to reparations, defined the harms and modality of reparations and ordered the Trust Fund for Victims (the body providing reparations and assistance) to draft a plan to give effect to the order [11]. In its Decision on the Initial Draft Implementation Plan elaborated by the Trust Fund (July 2021), the Court adopted concrete measures for priority victims which included girl soldier victims of rape and sexual slavery [39]. Recently, in the First Decision on the Draft Implementation Plan for Reparations (August 2023), addressing all potential beneficiaries, the Court approved the objectives, outcomes and concrete activities to implement reparations [40]. The process is still ongoing and pending appeal. Yet, these decisions are pioneering the design and implementation of reparations which are opening the door to enshrining a *gender and intersectional* dimension as a principle of reparations for gross violations of sexual and gender-based violence.

Given the potential relevance of these decisions it is worth asking: Is the Court in *Ntaganda de facto* applying an intersectional approach to reparations? This question is answered in light of the three-tier test for intersectional reparations suggested by Butti and McGonigle regarding the youth involved in violence in Colombia, but more broadly applicable to other harms rooted in intersectional discrimination against marginalized identities [12]. This three-tier test posits that reparations should, firstly, be flexible and consider victims' intersecting identities. In other words, instead of uniformizing experiences of violence, reparations should be sensitive to identify the way intersecting factors of identity and discrimination position particular individuals in a situation of extreme vulnerability and, thus, high risk of experiencing violence

and harm. Secondly, intersectional reparations require the effective input of victims throughout the process as the best place to know the measures needed to transform the factors pushing them to violence. Thirdly, reparations measures should address all the layers of marginalization underpinning the harms of victims as the only way to be effective in tackling the root causes of conflict and ensuring non-repetition [12].

This section examines the value of the *Ntaganda* case operationalizing intersectional reparations according to the above three-legged test. Interestingly, in considering the framework of reparations in *Ntaganda* (which included the establishment by the Court of principles, harms, modalities of reparations and implementation measures), it is possible to ascertain the ingredients of a methodology with qualitative and quantitative approaches and underpinned by an intersectional consideration of the girl soldier identity—of which the Court did not lose sight throughout the process, in coherence its judgment decision. Accordingly, this section addresses the key moments of the *Ntaganda* reparations process, which are also more talking about the contribution of intersectionality to advance reparations for international crimes of sexual violence: the establishment of reparations principles, a representative sample of victims, identifying the harms and types of reparations and implementation measures for victims.

#### 4.1 A principled framework for reparations

The first step of the Court to establish reparations in *Ntaganda* was to define the principles informing their design and implementation, which have the ingredients of a qualitative framework consistent with human rights standards. The *Ntaganda* trial judges relied on the key principles previously identified in the *Lubanga* Reparations Order first addressing reparations for child soldiers who had been conscripted, recruited and used in hostilities [26]. Accordingly, in *Ntaganda*, the Court drew upon *Lubanga*'s overarching consideration that reparations must be consistent with international human rights law, in line with Article 21(3) of the Statute, thereby reaffirming reparations based on the principles of dignity and non-discrimination, gender inclusivity, participation and consultation and a child-victim approach guided the 'best interests of the child' enshrined by the Convention on the Rights of the Child [26].

The *Ntaganda* Reparations Order went, however, further than *Lubanga* developing the notion of gender-sensitive reparations. The Order clarifies the notion of gender-sensitive reparations by which reparations should consider the specific needs of individuals with diverse sexual orientations and gender identities and, moreover, 'should integrate intersectionality as a *core* component' [11]. In an explanatory note, the Court referred to intersectionality as 'acknowledging the complexity and intersectionality of their [victims'] experiences and maintaining a holistic and relational focus' [11]. Critically, this statement acknowledges that gender-sensitive and intersectional reparations should inform the principles framing reparations under the Rome Statute, and it progressively aligns the Court's practice with international human rights standards and feminist scholarship.

#### 4.2 A representative sample of victims

A second step toward reparations in *Ntaganda* was the establishment of a representative sample of victims. Using a quantitative approach, the Court intended to set out the parameters of the future eligibility of victims, the types of harms and the estimated cost of repairing to the potential beneficiaries [41]. The sample included



171 victims (5% of child soldiers victims and 5% of the victims of the attacks) and, crucially, was considered representative of gender and age [41]. Thus, amongst the various identity groups represented, the sample included as a specific category child soldier victims of rape and sexual slavery, children born out of these crimes and the indirect victims (close family members or those with a close personal relationship and suffering a personal harm as a result of the harm caused to the direct victims). Accordingly, with this representative sample, the Court was conducting a holistic assessment of the specific harms affecting girl soldier victims of sexual violence.

The victims participating in the sample demonstrated their eligibility by providing evidence of a set of criteria, namely, identity, the harm suffered and the causal link between the harm and the crimes according to a balance of probabilities [41]. The trial judges concluded that the representative sample of harms had enabled the Court to conduct an individual analysis of each dossier according to a methodology regarding the evidentiary criteria and standard of proof [41]. What this sample revealed was a judicial concern to consider the intersection of gender and age identities as a key criterion to identify the harms of a particularly disadvantaged group. Furthermore, the sample shows engagement with the principle of victim-centered reparations (previously recognized) [11] creating a space to consider victims' testimonies from the outset and as a step necessary to draw the bigger lines of the harms and types of reparations.

#### 4.3 Identification of the harms and types of reparations

In the third step of the reparations process, the *Ntaganda* trial judges identified the harms of victims and the types of reparations to be awarded on the basis of the evidence obtained throughout the process and informed by the reparation's principles. Importantly, as a result of examining both, the judges identified – for the first time in international justice—the harms of girl soldier victims of sexual violence from an intersectional perspective taking into account their experiences of compounded discrimination.

An intersectional approach to understand victims' experiences resulted in the Court's identification of multi-dimensional harms arising from the rapes and sexual slavery for which *Ntaganda* was convicted. These included physical, psychical, psychiatric and socio-economic harm. The latter also included the social stigma affecting the children born out of sexual violence and transgenerational harm, a phenomenon by which social violence is passed on from ascendants to descendants with traumatic consequences for the latter [11]. This multifaceted recognition of harms for crimes of sexual and gender-based violence is very distant from the mere recognition of physical harm that feminist legal scholars have traditionally critiqued to international criminal law. O'Rourke has noted that the *Ntaganda* judgment failed short of identifying the human rights violations of girl soldier victims of sexual violence that must have followed the Court's decision to protect them, in line with Article 21(3) of the Rome Statute [42]. This gap is significantly filled by the *Ntaganda* Reparations Order recognizing the multi-faceted harms of girl soldiers relevant to social, economic and cultural dimensions of human rights that the Court is then due to implement with concrete reparations measures.

Whilst a gender and intersectional perspective identifying the harms of girl soldiers in the Reparations Order is commendable, this recognition would have greatly benefited had the judges included a gender narrative in the process accounting for victims' experiences of harm, honoring the *expressive* value of reparations, *inter alia*, the roles of truth-telling, recognition and satisfaction for victims. The urgency and



feasibility of expressing a gender narrative during reparations would have certainly been stronger had the *Ntaganda* judgment previously recognized these multi-faceted gendered harms and experiences more accurately, as O'Rourke noted [42]. For this reason, it would be important that in future cases both the prosecutor and judges take care to convey victims' gender experiences of intersectional discrimination and harm with more sensitivity throughout the process, especially in the judgment decision, as evidence that can be used in reparations with a unique value expressing the meaning of the harms for victims.

A logical consequence of the Court's identification of harms for the specific category of child soldier victims of sexual violence was the design of 'collective reparations with individualized components' focused on the individual needs of victims within the group [11]. The Chamber justified this choice on the 'holistic approach to the multi-faceted harms' and on the sustainability of reparations in the long-term and in terms of gains [11]. Given the multi-faceted nature of the harms, the judges established that reparations should include different modalities – restitution, compensation, rehabilitation, satisfaction and symbolic reparations – and, crucially, should be transformative and 'strive to tackle the cultural meaning and understanding of violence as the structural barriers leading to victims' stigmatization' [11]. The Court thus links transformative reparations to the elimination of structural barriers which resonates with an intersectional approach to discrimination.

#### **4.4 Implementation**

The implementation of reparations started with an 'initial' Draft Implementation Plan elaborated by the Trust Fund and approved by the judges in July 2021. It addressed exclusively the most urgent needs of victims such as immediate medical care and financial hardship endangering the person's life, and had a temporary scope [39] pending its reintegration into the 'definite' Implementation Plan [40]. Interestingly, the initial Implementation Plan focused on the harms of child soldier victims of rape and sexual slavery and the children born out of these crimes as a specific category. By considering that these harms required urgent attention, the Court showed an understanding of the relationship between intersectional discrimination against girl soldiers and the enhanced gravity of their harms of sexual violence. The trial judges approved two of the assistance projects proposed by the Trust Fund's initial plan which addressed many of the multi-faceted harms of girl soldiers previously identified by the Reparations Order: the 'Psychosocial and socio-economic reintegration of girl-mothers of the wars in Ituri'. These projects included rehabilitation measures in the form of medical and psychological assistance and had a strong focus on socio-economic measures. This socio-economic component is outstanding in addressing social issues and stigmas like family mediation and community sensitization (i.e., early marriage, peace, conflict and education) and economic reintegration with measures such as providing microcredit, income-generating activities, schooling for vulnerable children and nurseries for children whose mothers attend these activities [39].

In August 2023, the priority measures for girl soldiers were complemented by the Court's approval of the Draft Implementation Plan for Reparations containing comprehensive reparations for all victims [40]. The Implementation Plan establishes objectives addressing the multi-faceted harms identified in the Reparations Order which touch upon the different spheres of the victim person, namely: physical and mental rehabilitation, socio-economic status and outlook, satisfaction and acceptance of the program as adequate by families and communities. In terms of concrete

measures, on the one hand, the Implementation Plan provides for rehabilitation imparted by experts and tailored to the needs of beneficiaries (including relative to sexual violence, trauma and transgenerational harm) while, on the other hand, it reaffirms a strong socio-economic component clearly intended as guarantees of non-repetition and satisfaction.

Socio-economic reparations measures for girl soldiers in *Ntaganda* commence with a starter sum to enable victims to realistically attend the different programs. The latter includes educational assistance, from literacy courses to university degrees (covering their related costs) for a five-year period. In this way, the Court seeks to 'rectify' the economic harm suffered by direct victims of rape and sexual slavery, and fulfill the aim of providing victims with 'sustainable and long-term livelihood means' [40]. Alternatively, victims can pursue income-generating activities such as vocational training (supported with material and expert assistance) and a cooperative of beneficiaries [40]. Last but not least, the Implementation Plan includes measures to overcome social stigma such as community outreach to raise awareness of the seriousness of the crimes, the building of community centers for former child soldiers to 'provide satisfaction to the harm caused to [girl soldiers] victims of rape and sexual slavery,' and administrative measures like the issuance of identity cards for children born out of rape [40]. The experiences of discrimination of girl soldiers rooted in gender, age and socio-economic status seem thus present across the Court's implementation measures addressing the multi-faceted harms of these persons.

## **5. Living-up to gender and intersectional reparations? A preliminary assessment**

Do ICC reparations measures for girl soldier victims of sexual violence in *Ntaganda* effectively address their harms at the intersection of discrimination? This section answers this question by applying the three-tier test for intersectional reparations proposed by Butti and McGonigle where reparations should (i) identify intersectional discrimination, (ii) include victims' meaningful participation and (iii) address all layers of marginalization [12].

Taking into account the first condition—the identification of intersectional discrimination—reparations measures in *Ntaganda* can be deemed to do so. They are flexible in addressing the specific category of harms of girl soldier victims of sexual violence within the UPC/FPLC armed group arising from intersectional discrimination against these identities on gender, age and socio-economic status. Indeed, throughout the reparations process, the trial judges did not lose sight of the girl soldier identity whose unique vulnerability was highlighted in all relevant reparations decisions; namely the identification of principles, types of harm and reparations and implementation measures. Since the different steps of the reparations process address the specific perspective of girl soldiers in view of informing their multi-faceted harms, first as priority victims (Initial Implementation Plan) and then more comprehensively (Implementation Plan), it can then be affirmed that the *Ntaganda* reparations are flexible and intersectional providing for the specific category of the girl soldier identity.

An intersectional approach to reparations in *Ntaganda* was made possible, first of all, because the judgment decision (refer to section two) had previously adopted this perspective identifying the particular vulnerability of girl soldier victims of sexual and gender-based harms resulting in the conviction of the accused and opening the

door to reparations for those crimes. It may be thus convened that implementing intersectional reparations for sexual and gender-based crimes requires, in line with what Rubio Marín and Sandoval consider as conditions for gender-sensitive reparations, of two necessary steps at international courts: first identifying the facts and violations (for which the judgment and conviction in *Ntaganda* were preconditions) and, as a result, identifying gender-sensitive measures—where intersectionality is a ‘core’ component—allowing victims to cope with the *concrete* effects of the violations in their lives [25] (purpose of the reparations process).

Considering the second leg of the test for intersectional reparations—a victim-centered approach based on the input of victims—the *Ntaganda* process does incorporate such meaningful participation. The Reparations Order recognized the principle of a victim-centered approach giving them a voice in design and implementation so that measures taken reflect their own needs [11]. In consistency with this approach, the *Ntaganda* trial judges created space for the participation of girl soldier victims of sexual violence—to a greater or lesser extent—at these stages. Concerning the design, victims' participation was rather *sui generis*. Mainly, participation took place through the establishment of a representative sample of victims where the Court examined individual dossiers which included the specific category of child soldier victims of sexual and gender-based violence. Whilst, on the one hand, the sample had the advantage of being representative of victims' identity groups thereby enabling the Court a holistic understanding of the harms of girl soldier victims of sexual violence, on the other hand, it had the disadvantage of not being inclusive of all individual victims belonging to this category.

Is it, however, realistic to expect that the ICC would revisit the dossiers of all individual victims of the crimes for which *Ntaganda* was convicted at the design stage of reparations? A more realistic and, probably, useful approach at this stage, considering the extensive number of victims, would be able to achieve the most accurate understanding of the types of harm in view of achieving the most representative – inclusive – design for each of the represented groups. No doubt, this representative design would then need to provide the basis for all eligible victims to express their own voice on how to best implement reparations measures according to their specific needs. This was indeed the modality of reparations chosen by the Court by ordering ‘collective reparations with individualized components’ focused on responding to individual needs within the group [11]. This modality suits well an intersectional approach because it seeks individual redress without losing sight of structural discrimination affecting individual victims as members of a marginalized group due to common identity traits. Here, too, intersectionality played a role because both the design and implementation of reparations were informed by the input of girl soldier victims of sexual violence either in a representative manner (the sample) or, more meaningfully, individually (via implementation measures). Victims' input informing an intersectional perspective of reparations took place holistically and individually. Additionally, the Reparations Order noted that the collective design with individualized components did not preclude the possibility of victims to apply for individual reparations, thereby leaving the door open for an individual design if needed [11].

The implementation stage more neatly provided for a victim-centered process creating the possibility that they express their own individual preferences across the different reparations measures. The Implementation Plan was explicit that rehabilitation measures (physical, mental and social) would be ‘tailored’ to the individual needs of beneficiaries and, likewise, that socio-economic measures (from vocational training and education to income-generating activities) were aimed to adapt to victims'



preferences in order to provide for 'sustainable and long-term' livelihood means for victims [40]. Yet, despite their formal approval, it is worth noting that these provisions will not guarantee *per se* (at the time of writing the process is undergoing) victims' effective participation in the implementation measures. The Court will face challenges. One challenge is outreach to victims, carried out by the ICC's Registry (its administrative body) whose Public Information and Outreach Section (PIOS) will need to work in the field with sensitivity adopting the intersectional approach, that has animated the Court and the Trust Fund, to reach out effectively to victims and communities [40]. Another challenge is the context of continuous insecurity in the DRC which complicates the capacity of victims to demonstrate their eligibility (proving identity, harms and their causal link with the crimes); for which the judges are accepting alternative documents and testimonies and presuming harms (material, physical and psychological) for child soldier victims of rape and sexual slavery [40].

With regards to the third leg of the test for intersectional reparations—addressing all layers of marginalization—the implementation measures approved in *Ntaganda* address the compounding factors—gender, age and socio-economic marginalization—underpinning the harms of girl soldier victims of sexual violence. Ending cycles of complex marginalization exposing individuals to a high risk of violence requires reparations measures that tackle the way inequality structures perpetuate oppression and, alternatively, create opportunities for personal transformation. This is the only realistic way out of individual involvement in violence and a necessary step to halt patterns of violence [12]. The multi-faceted measures foreseen by the Initial and Implementation Plans, specifically designed for child soldier victims of sexual violence, target gender, age and socio-economic issues underpinning their oppression with measures that leverage and develop the different dimensions of their harms, namely, programs for physical and mental health, social and economic reintegration.

Especially, the *Ntaganda*'s component of 'socio-economic status and outlook' featured in the Implementation Plan is strongly supplied. Its explicit aim is to provide victims with 'sustainable and long-term livelihood' and satisfaction, where transformation of personal circumstances can realistically take place. The approval of generous economic and social measures seems adequate to fulfill this aim by means of solid (vocational) education programs and income-generating activities fully supported, family mediation, community training on gender relations and centers for former child soldiers, amongst others. Accordingly, *Ntaganda*'s approach to reparations for girl soldiers does not conceive transformation as an abstract entity disconnected from victims' lives (critiqued by Walker) [27]. On the contrary, the measures approved can trigger transformation for girl soldiers because they tackle the structural impediments in their concrete lives (gender, age and socio-economic issues) which they *transform* into opportunities for change. The Court's 'socio-economic outlook and status' component makes a commendable effort to achieve this aim. In this effort, it is remarkable that reparations measures for girl soldiers combine gender and age sensitivity with measures seriously addressing their situation of *poverty and deprivation* which, observers have noted, are central to address the underenforcement of transitions from conflict for the most marginalized, principally, women and girls [29].

## 6. Conclusion

The chapter has demonstrated the ICC's adoption of a gender and intersectional approach to reparations for girl soldier victims of sexual violence within armed



groups—a premiere in international justice mechanisms. Through this approach, the Court in *Ntaganda* seeks to seriously engage in reparations that address the compounding causes of discrimination underpinning sexual and gender-based violations—gender, age and socio-economic disadvantage—to achieve effective reparations that transform the concrete lives of victims. The chapter explained how this process was possible. It first addressed the Court’s establishment of jurisdiction and judgment as prerequisites allowing to engage with intersectional reparations. Progressively, in these previous stages, the *Ntaganda* judges did not lose sight of the marginalized identities of girl soldiers in the analysis of their experiences of rape and sexual slavery, resulting in convictions for these harms and opening the door to reparations. The chapter then inquired whether the *Ntaganda* reparations process for girl soldier victims of sexual violence really lives up to the application of an intersectional approach with the potential to transform the lives of victims. This query was answered by applying the three-tiered test established by Butti and McGonigle—identification of intersectional discrimination, victims’ participation and addressing all layers of marginalization—whose analysis in the light of the Court’s key decisions concluded with a positive assessment.

The ICC’s adoption of an intersectional approach to reparations is a great step forward for international justice and, in particular, for crimes of sexual and gender-based violence against girls in armed conflict. Intersectionality in *Ntaganda* provided judges with key insight into structural patterns of complex discrimination underpinning the violations of girl soldiers within the armed group. This insight was critical to design and implement effective reparations where individual measures—targeting girl soldiers as a specific category of victims—tackle the root causes of discrimination—gender, age and socio-economic status—thus providing understanding on how to transform these obstacles into sustainable and long-term opportunities. In other words, intersectional reparations in *Ntaganda* allowed linking individual needs with the structural dimension of discrimination underpinning the harms to achieve change in personal status and outlook.

Remarkably, ICC judges in *Ntaganda* established a framework of reparations with intersectional ingredients which is likely to influence other reparations mechanisms (including non-judicial) addressing crimes against children and, beyond, affecting other intersecting identities vulnerable to gross violations, such as minorities whose gender identity intersects with ethnicity, religion, sexual orientation, etc. This intersectional framework of reparations for girl soldier victims includes, firstly, principles that affirm a child-centered and gender-sensitive approach and has intersectionality as a core component. Secondly, it applies quantitative and qualitative approaches to inform the design of reparations; namely, a sample of victim’s representative of gender and age—where child soldiers victims of sexual violence are a specific category—to obtain a holistic and inclusive perspective of their multi-faceted harms. Third, this insight underpins the design and implementation of collective reparations for girl soldiers with individual components thus, focusing on their individual needs but without losing sight of structural discrimination underpinning their most representative harms. Lastly, the Court gave particular attention to reparations measures that target the socio-economic reintegration ‘outlook and status’ of girl soldiers seeking, through education, income-generating activities and community outreach, to get them out of poverty and stigma as essential components of reparations that ensure non-repetition and satisfaction.

Last but not least, the resulting reparations framework in *Ntaganda* is consistent with international human rights law with which the ICC must align according to


Article 21(3) of the Rome Statute. It is worth noting that despite its alignment with human rights standards on reparations, this framework fully respects the principle of legality applicable to international crimes as it does not affect the interpretation of the criminal conduct nor the rights of the accused. Rather than directly transposing human rights standards to international criminal law, this framework is flexibly used by the Court to understand the context of discrimination where violations take place and victims' experiences of harm. Further, the *Ntaganda* reparations framework is *sui generis* and goes ahead of international human rights standards in certain aspects of victim protection. These include an explicit acknowledgment of a child and gender-sensitive approach to reparations where intersectionality is a 'core' component, a methodology for a holistic representation of the harms of identity groups, and prioritization of socio-economic issues critical to achieve a 'sustainable livelihood' as a key expressive value of reparations.

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