Applying Intersectionality to the Adjudication of Persecution in the International Criminal Court

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ABSTRACT

This thesis conducts a theoretical, doctrinal, and normative analysis of the features, role, legal basis, and potential normative value of intersectionality theory in the adjudication of the crime against humanity of persecution in the International Criminal Court (ICC). It summarises the features of intersectionality theory developed in domestic discrimination law and international human rights law, and provides an intersectional framework for the international criminal law context. It identifies and assesses ICC case law implicating intersectionality, concluding that the theory has growing relevance in the arrest warrant, confirmation of charges, trial, sentencing, and reparations decisions of the ICC Chambers. It argues that a defensible legal basis for intersectionality can be found in Article 21(3) of the Rome Statute of the ICC, based on an interpretation of this provision as a human rights consistency test. Finally, it argues that intersectionality brings benefits to the contextual elements of crimes against humanity, actus reus, mens rea, sentencing, and reparations stages of persecution cases, as well as expressive value, that outweigh the potential limitations of the proposal. The thesis concludes that intersectionality has significant potential as a legal tool in persecution cases and should be further explored by the ICC.

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TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CERD Committee	Committee on the Elimination of Racial Discrimination
CRPD Committee	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces Démocratiques pour la Libération du Rwanda
FPLC	Forces Patriotiques pour la Libération du Congo
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OTP	Office of the Prosecutor of the International Criminal Court
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

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I INTRODUCTION

1 Introduction to the research problem

Intersectionality theory has been accorded increasing relevance by international criminal courts and scholars[1] as an analytic tool to ensure comprehensive and accurate adjudication of international crimes involving victims targeted based on multiple protected characteristics such as ethnicity, gender, and age. Intersectionality theory centres on the myriad characteristics held by every human being, which may form intersecting, mutually reinforcing grounds of discrimination.[2] The theory provides a framework for assessing how the complex intersection of multiple protected characteristics creates a unique and compounded form of discrimination: intersectional discrimination.[3]

Intersectionality may be of particular relevance in the context of the crime of persecution in the Rome Statute of the International Criminal Court (ICC), a crime against humanity committed with the intention to discriminate on 'political, racial, national, ethnic, cultural, religious, gender', or other grounds.[4] Judges of the ICC have begun to mention intersectionality in their arrest warrant, confirmation of charges, trial, sentencing, and reparations decisions,[5] suggesting judicial interest in incorporating a new

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1 See eg Office of the Prosecutor, 'Policy Paper on Sexual and Gender-based Crimes' (International Criminal Court 2014), para 27; M Isaac and O Jurasz, 'Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY' (2018) 18 *International Criminal Law Review* 853.

2 PH Collins and others, 'Intersectionality as Critical Social Theory' (2021) 20 *Contemporary Political Theory* 690, 693.

3 K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 *University of Chicago Legal Forum* 139, 140.

4 See Rome Statute of the International Criminal Court, 2187 UNTS 3 (entered into force 1 July 2002), art 7(1)(h) and (2)(g).

5 See Chapter III(5).

understanding of discrimination into adjudication of crimes such as persecution.[6] The recent Office of the Prosecutor (OTP) policy on gender persecution,[7] and the International Law Commission's Draft Articles on Prevention and Punishment of Crimes Against Humanity[8] are also providing impetus for dialogue about the appropriate approach to international crimes that involve discrimination.

Yet, existing jurisprudence, prosecutorial policies, and literature vary in their understanding and application of intersectionality in the ICC context, and only rarely identify legal bases for the theory's application.[9] This risks intersectionality as a theory, and intersectional discrimination as a concept, being rendered much-debated buzzwords without substantive legal meaning in persecution cases.[10] Conversely, identifying and applying intersectionality as a substantive legal framework to the crime of persecution would allow the benefits and limitations of the theory in the ICC to be assessed. These include claimed improvements to the assessment of complex discriminatory intent, sentencing, and reparations in cases where discrimination is based on intersecting protected characteristics.[11] An examination of the substantive legal nature, current role,

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6 See eg *The Prosecutor v Al Hassan*, Decision on the Confirmation of Charges, ICC-01/12-01/18-461-Corr-Red (13 November 2019).

7 Office of the Prosecutor, 'Policy on the Crime of Gender Persecution' (International Criminal Court 2022), para 29.

8 General Assembly, 'Report of the International Law Commission: 71st session', A/74/10 (2019) 10–140. See also General Assembly Resolution A/C.6/77/L.4 (14 November 2022).

9 See eg *The Prosecutor v Ntaganda*, Reparations Order, ICC-01/04-02/06-2659 (8 March 2021) [25]–[27]. Cf V Oosterveld, 'Gender at the Intersection of International Refugee Law and International Criminal Law' (2014) 12 *Journal of International Criminal Justice* 953, 963–964.

10 See K Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful' (2008) 9 *Feminist Theory* 67, 69.

11 See G Maučec, 'The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis' (2021) 21 *International Criminal Law Review* 1, 19.

legal basis, and normative desirability of intersectionality in judicial adjudication of persecution cases at the ICC would contribute much-needed clarity to this debate.[12]

2 Research questions

This thesis proposes to assess the following research questions. First, what is the legal content of intersectionality theory in the international criminal law context? Secondly, what is the current role of intersectionality theory in the case law of the Chambers of the ICC? Thirdly, does the Rome Statute provide a legal basis for intersectionality in the adjudication of persecution cases? Fourthly, is it normatively desirable to incorporate intersectionality into adjudication of persecution in the ICC? The thesis relies on theoretical and doctrinal methodologies to address these questions.

3 Thesis structure and research contributions

In Chapter II, the thesis will make a theoretical contribution. The chapter will, first, assess seminal intersectionality scholarship[13] and explore the theory's development in domestic discrimination law, international human rights law, and, more recently, international criminal law. Secondly, it will respond to preliminary objections to using intersectionality in international criminal law, including the argument that the colonial power dynamics reflected in the ICC and international criminal law are ill-suited to intersectionality as an activist framework.[14] Thirdly, it will propose a framework comprising the features of intersectionality that are most relevant to international crimes involving discrimination. This will include consideration of multiple grounds versus intersecting grounds of

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12 This thesis focuses on the relevant Chambers of the ICC, although OTP practice and policy remain relevant insofar as these sources impact the practice of ICC Judges.

13 See eg Crenshaw (n 3) 140; PH Collins and S Bilge, *Intersectionality (Key Concepts)* (2nd edn, Polity Press 2020) 12; S Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 36.

14 See eg J Reynolds and S Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 *Journal of International Criminal Justice* 959, 962–970.

discrimination; the nature of intersectional discriminatory intention; the 'contextual' comparator inquiry as a means to establish intersectional discrimination;[15] and the unique and compounded disadvantage that results from intersectional discrimination.[16]

In Chapter III, the thesis will provide a doctrinal contribution by identifying and evaluating intersectional analysis in the case law of the ICC to date, with a particular focus on persecution cases. This chapter will also identify examples of cases where intersectionality is notably absent from adjudication despite multiple protected characteristics being relevant on the facts. The chapter concludes that ICC judges display a burgeoning interest in intersectionality but thus far have given little attention to the substantive legal content of the theory.

In Chapter IV, the thesis will provide a further doctrinal contribution by assessing whether the Rome Statute provides a legal basis for, or otherwise prohibits, an intersectional approach to the adjudication of persecution cases. First, it will demonstrate that an interpretation of the Rome Statute's persecution provisions does not support an intersectional approach to persecution. Secondly, it will discuss the contested interpretation of Article 21(3) of the Rome Statute, which requires the applicable law of the ICC to be interpreted and applied consistently with internationally recognised human rights.[17] Thirdly, it will advocate for an interpretation of Article 21(3) as a 'human rights consistency test',[18] which can serve as a legal basis for incorporating intersectionality into ICC proceedings. Fourthly, the chapter will consider whether the proposed

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15 S Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 *Legal Studies* 379, 390–393.

16 Crenshaw (n 3) 151; Atrey (n 13) ch 1; S Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law' (European Commission 2017) 28.

17 See K Ambos (ed), *Rome Statute of the International Criminal Court* (4th edn, Oxford University Press 2022) 1146–1147.

18 E Irving, 'The Other Side of the Article 21(3) Coin: Human Rights in the Rome Statute and the Limits of Article 21(3)' (2019) 32(4) *Leiden Journal of International Law* 837, 839.

interpretation of Article 21(3) breaches the principle of legality as set out in Articles 22 and 23 of the Rome Statute, ultimately arguing that the provisions do not conflict.

In Chapter V, the thesis will make a normative contribution by assessing the benefits and drawbacks of incorporating intersectionality into the adjudication of persecution in the ICC. It will argue that the theory offers benefits for the assessment of the contextual elements of crimes against humanity, actus reus, mens rea, sentencing, and reparations,[19] and also provides expressive value by centring intersectional discrimination in judicial decisions.[20] The chapter will then respond to the possible misapplication of intersectionality by the ICC, the burden of intersectionality training for ICC judges, the problems posed by the ICC's limited caseload, and the potential resistance of states parties.

This thesis concludes with the following overall insights. First, that intersectionality theory provides a range of tools that are salient to the adjudication of persecution at the ICC. Secondly, that intersectionality is growing in relevance at the ICC as a means to identify and assess discrimination based on multiple protected characteristics. Thirdly, that Article 21(3) of the Rome Statute provides a legal basis for ICC judges to use an intersectional framework when adjudicating persecution cases. Finally, that incorporating intersectionality into the ICC's adjudication of persecution is a proposal that brings more benefits than limitations. It is hoped that this thesis will contribute added clarity and substantive legal analysis to the growing body of scholarship about intersectionality in international criminal law.

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19 G Maučec, 'Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities' (2021) 12 *Journal of International Dispute Settlement* 42, 51–56.

20 See C Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020).

II THE THEORETICAL FRAMEWORK: INTERSECTIONALITY UNCOVERED

This chapter will begin with a summary of influential intersectionality scholarship (section 1). It will then assess the development and normative value of intersectionality as a key analytic tool in domestic discrimination law, international human rights law, and international criminal law (section 2). Next, it will assess (section 3) and respond to (section 4) preliminary obstacles to employing intersectionality theory in this thesis. Finally, it will propose a framework of the features of intersectionality theory that are most relevant to international criminal law (section 5).

1 Introduction to intersectionality theory

Intersectionality theory eludes uniform definition. As Patricia Hill Collins and Sirma Bilge recognise in their seminal text *Intersectionality*, scholars, advocates, and lay-people provide 'varied and sometimes contradictory answers' as to the essential features, purposes, and desired outcomes of the theory.[21] Intersectionality is variously used 'as a metaphor, as a heuristic, and as a paradigm'.[22] Nevertheless, a commonality of all accounts of intersectionality is analytic attention to the protected characteristics held by every human being, including a person's race, age, gender, disabilities, and sexual orientation.[23] Whether in academic circles or social movements, intersectionality has

21 Collins and Bilge (n 13) 1.

22 Collins and others (n 2) 693.

23 Collins and Bilge (n 13) 4; Atrey (n 13) 36.

been seen as a tool to analyse the power relations that shape the lived experiences of those discriminated against on the basis of multiple, intersecting protected characteristics.[24]

Intersectionality was introduced into the academic arena[25] with the publication of Kimberlé Crenshaw's articles of 1989 and 1991, the first focusing on intersectionality as an analytic tool to criticise the inability of United States discrimination law to address the disadvantages experienced by Black women on account of both race and sex.[26] As seen in *DeGraffenreid v General Motors* and Crenshaw's other selected cases, United States courts were largely resistant to or ignorant of the unique nature of discrimination and disadvantage against Black women arising from the intersection of race and sex.[27] Black women were unable to prove discrimination *qua* Black women due to courts' inattention to multiple protected characteristics,[28] but were also blocked from making claims of single-ground discrimination (of solely racism or sexism), due to the courts' concern that they were not sufficiently representative as claimants.[29] Black women's experiences of discrimination in these cases were similar to those of white women and Black men, yet different in important ways due to the interaction between their race and sex.[30] Certain social identities and connected forms of disadvantage were therefore not recognised in discrimination law since they did not fit into singular protected characteristic categories.

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24 See A Harris and Z Leonardo, 'Intersectionality, Race-Gender Subordination, and Education' (2018) 42 *Review of Research in Education* 1, 4–5.

25 Although note that the essence of intersectionality can be traced back to the work of Black, Latina, Chicana, indigenous, and Asian-American scholars and activists, as Collins and Bilge demonstrate: Collins and Bilge (n 13) 63. See eg TC Bambara (ed), *The Black Woman: An Anthology* (Washington Square Press 1970).

26 Crenshaw (n 3); K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

27 Crenshaw (n 3) 141; *DeGraffenreid v General Motors Assembly Division* (1976) 413 F Supp 142.

28 ibid.

29 Crenshaw (n 3) 140 and 144; Atrey (n 13) 78.

30 Crenshaw (n 3) 149.

Crenshaw situated intersectionality as a legal tool for analysing the gap in discrimination law raised in cases such as *DeGraffenreid*, where intersectional discrimination (discrimination caused by multiple, intersecting protected characteristics) goes unidentified and unremedied.[31] Atrey's definition clarifies the dimensions of intersectional discrimination, namely cases of discrimination that reflect:[32]

> the dynamic of sameness and difference in patterns of group disadvantage based on multiple identities understood as a whole, in their full and relevant context, and requiring transformative ways of redressing such disadvantage.

This definition captures the essence of intersectionality as a framework: centring on comparative group disadvantage, assessment of multiple protected characteristics holistically and with integrity, attention to context, with an ultimate goal of transforming structures that perpetuate discrimination.[33]

The problem of intersectional discrimination was theorised in Crenshaw's work using two metaphors. First, she presented discrimination as a traffic intersection, with the cars on different roads representing different protected characteristics.[34] If a car crash occurs at an intersection, the cause may be cars 'traveling from any number of directions and, sometimes, from all of them'.[35] For Crenshaw, this metaphor demonstrates how discrimination and resulting disadvantage may arise from any one of a person's protected characteristics, or from a complex interaction of some or all of their protected characteristics. Legal analysis that fails to provide relief unless a claimant can show discrimination arose from a particular protected characteristic 'is analogous to calling an

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31 ibid 151; Crenshaw (n 26) 1278. See also Atrey (n 13) ch 3.

32 Atrey (n 13) 78.

33 ibid ch 3.

34 Crenshaw (n 3) 149.

35 ibid.

ambulance…only after the driver responsible for the injuries is identified'.[36] In contrast, intersectionality theory accepts the complex causes (multiple, intersecting grounds of discrimination) of car crashes (discrimination and disadvantage) and encourages courts to fully comprehend this complexity.[37]

Secondly, Crenshaw introduced the metaphor of a basement, containing 'all people who are disadvantaged' based on their protected characteristics.[38] Those without disadvantage based on their characteristics are on the floor above. Those disadvantaged by a singular protected characteristic stand on the shoulders of others, nearing the hatch allowing exit from the basement. Those 'multiply-burdened' are stacked below them, 'feet standing on shoulders'.[39] This basement analogy demonstrates the value of intersectional analysis in allowing recognition of, first, the relative privilege enjoyed by 'singularly-disadvantaged' individuals;[40] secondly, the power relations that lead to different and often compounded discrimination against those multiply-disadvantaged; and thirdly, the pressure on those multiply-disadvantaged to 'pull themselves' into more relatively privileged groups in order to 'squeeze through the hatch' and access legal protection.[41] The metaphor demonstrates how a non-intersectional analysis of victimhood in discrimination law can fail to account for the social reality of discrimination and leave people disadvantaged by multiple protected characteristics without adequate legal protection.

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36 ibid.

37 ibid.

38 ibid 151.

39 ibid 151–152.

40 ibid 145.

41 ibid 152.

Central criticisms of intersectionality include that the theory's focus on identity categories leads to essentialism,[42] unconstructive debates about identity politics, and failure to capture the fluidity of privilege and disadvantage over time and in different social contexts.[43] The identity-focus of intersectionality also raises the concern that it produces 'infinitely divisible' sub-categories of identities with little impact on structural harms,[44] also known as 'infinite regress'.[45]

Acknowledging this critique, this thesis follows Crenshaw's argument that analysing categories is a 'fruitful' means to assess similarities and differences in the disadvantage experienced by groups in light of where categories intersect.[46] As Atrey explains, intersectionality uses protected characteristics as a form of shorthand or 'markers' of disadvantage and inequality.[47] This use of categories allows the changeable nature of identity to be acknowledged, without removing identity categories as analytical tools altogether.[48] The infinite regress concern can be resolved on a similar basis. Atrey convincingly argues that intersectionality focuses on 'the universal and the particular': it is attentive to the different lived experiences of individuals, but in the context of the broader identity categories and sub-categories to which those individuals belong.[49] From this perspective, anchored in the interaction between group identity and inequality, the infinite regress problem is unlikely to arise.

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42 R Delgado, 'Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory' (2010) 96 *Iowa Law Review* 1247, 1268.

43 P Kwan, 'Intersections of Race, Ethnicity, Class, Gender and Sexual Orientation: Jeffrey Dahmer and the Cosynthesis of Categories' (1997) 48 *Hastings Law Journal* 1257, 1276.

44 Delgado (n 42) 1264–1265.

45 See Atrey (n 13) 54.

46 Crenshaw (n 26) 1299.

47 Atrey (n 13) 59.

48 ibid.

49 ibid.

Since Crenshaw's foundational work, intersectionality has become a 'travelling' theory that has been used in connection with a variety of disciplines and social issues.[50] The theory is primarily associated with domestic discrimination law and has also found a significant role in international human rights law. Its normative value in these fields supports its applicability to international criminal law, in particular for assessing mens rea and the nature of harm in international crimes underpinned by discrimination.

2 Development of intersectionality as a legal tool

This section traces intersectionality's development and value in domestic discrimination law and international human rights law, highlighting features that may be relevant to international crimes underpinned by discrimination. It then addresses the theory's growing relevance in international criminal law.

A Intersectionality in domestic discrimination law

This sub-section will first assess the problems posed by a 'single-axis' approach to intersectional discrimination as a category in domestic discrimination law.[51] Secondly, it will consider the normative value of intersectionality theory when applied to intersectional discrimination. This lays the foundation for this thesis' later assessment of intersectionality's normative value with respect to the crime of persecution, which requires discriminatory intent.

i The problems raised by intersectional discrimination

Intersectional discrimination can be analysed in domestic discrimination law via a range of frameworks; from a 'single-axis' approach which centres primarily on a singular

50 S Bilge, 'Intersectionality Undone: Saving Intersectionality from Feminist Intersectionality Studies' (2014) 10 *Du Bois Review: Social Science Research on Race* 405, 410.

51 Crenshaw (n 3) 140.

ground of discrimination;[52] to an additive approach which acknowledges multiple grounds of discrimination but fails to conceive of their interaction in an intersectional manner; to an intersectional framework.[53] Amongst these, a single-axis approach to discrimination analysis can be termed a 'typical response'[54] to intersectional discrimination, common in jurisdictions such as the United States and the United Kingdom.[55] Domestic discrimination law's focus on single grounds of discrimination creates three main pitfalls for intersectional discrimination cases.

First, a single-axis analysis of an intersectional discrimination claim is incomplete and inaccurate due to courts excluding relevant grounds of discrimination. For example, in *DeGraffenreid*, the Court prevented the Black female claimant from pursuing a sex discrimination claim because white women were not similarly affected by the impugned seniority system.[56] The case was simplified to a pure race discrimination issue, and consolidated with a similar case which addressed discrimination against Black men.[57] The Court therefore missed a critical dimension of the original claim: the different experiences of Black women subject to race *and* sex discrimination, which were then excluded from attention at trial and denied recompense through remedies.[58] United States 'sex plus' and 'race plus' jurisprudence since *DeGraffenreid* allows analysis of discrimination on grounds of sex or race and another ground, but this excludes cases where discrimination is based on more than two protected characteristics, and

52 ibid.

53 Atrey (n 13) 78.

54 ibid 86. Note single-axis approaches may include 'strictly single-axis', 'substantially single-axis', 'capacious single-axis' and 'contextual single-axis' approaches: ibid 84.

55 ibid 80.

56 *DeGraffenreid* (n 27) 144.

57 ibid.

58 Crenshaw (n 3) 149.

mischaracterises cases where discrimination arises from the intersection between different characteristics.[59]

Secondly, single-axis approaches risk prioritising the experiences of relatively more privileged members of identity categories to the exclusion of the unique discrimination experienced by victims of intersectional discrimination. Crenshaw highlights this issue in her analysis of *Payne v Travenol*, in which a group of Black female employees were prevented from bringing a class action on behalf of Black employees, with the Court stating that Black women's interests were too particularised to accurately represent the interests of Black men.[60] Similarly, in *Moore v Hughes Helicopters*, Black women were prevented from referring to overall statistics about alleged sex discrimination in the positions in question.[61] Because Moore had not claimed 'that she was discriminated against as a female, *but only* as a Black female', she was considered unlikely to 'adequately represent white female employees'.[62] Thus, in each case, Black men, as the more privileged members of the race category, and white women, as the more privileged members of the sex category, were seen as the paradigm victims of discrimination, marginalising the particular discrimination and disadvantage experienced by Black women.[63]

Thirdly, the dominance of single-axis approaches is reflected in discrimination law's predominant use of a singular comparator group to establish discrimination, which poses problems for adjudicating intersectional discrimination claims. Direct

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59 Atrey (n 15) 381; see eg *Coleman v B-G Maintenance Management* (1997) 108 F3d 1199 (10th Cir).

60 *Payne v Travenol Laboratories* (1976) 416 F Supp 248.

61 *Moore v Hughes Helicopters* (1983) 708 F2d 475 (9th Cir).

62 ibid 480 [emphasis added]; Crenshaw (n 3) 144.

63 Crenshaw (n 3) 144–145.

discrimination claims (where a claimant alleges less favourable treatment based on a protected characteristic)[64] largely adhere to the 'likes should be treated alike' principle.[65] A 'comparator group', similarly situated to the claimant except for the protected characteristic, is identified in order to assess whether the claimant has been treated less favourably because of the protected characteristic.[66] For example, the treatment of white women alleging sex discrimination in the workplace would be assessed against the treatment (hypothetical or otherwise) of white men in the same workplace and position, to determine whether sex caused the less favourable treatment. Judges are responsible for identifying the appropriate comparator group and assessing the similarities and differences in treatment between the claimant and the comparator group.[67] This process often relies on the existence of a 'strict' or 'mirror' comparator: a *singular* group of people similarly situated to the claimant, except for the protected characteristic at issue.[68]

Cases involving intersectional discrimination do not lend themselves to this single comparator approach. As Atrey notes, courts have struggled to find a comparator for a claimant alleging multiple intersecting grounds of discrimination.[69] Problematic approaches have included using a 'single dominant comparator group' which holds none of the protected characteristics of the claimant (i.e. comparing the claimant's treatment to that of a white, cisgender, heterosexual, non-disabled man).[70] Atrey argues, *inter alia*, that this approach excludes consideration of similarities and differences in group

64 See eg *Essop v Home Office* (2017) UKSC 27. Note that indirect discrimination is less relevant to this thesis, as the crime of persecution requires intentional discrimination and does not cover broader discriminatory impact.

65 S Fredman, *Discrimination Law* (Oxford University Press 2011) 248.

66 ibid.

67 ibid.

68 ibid 171; Atrey (n 15) 383.

69 Atrey (n 15) 380–381.

70 ibid 384. See also *Bahl v Law Society* [2004] EWCA Civ 1070.

disadvantage, and is 'unrepresentative' of intersectional claimants, who may fit into none of the privileged categories represented by this comparator.[71] Alternatively, courts have used a different comparator for each protected characteristic.[72] But this fragmentary and often unreasoned approach to selecting comparators can invite inconsistency and confusion among judges, while separating protected characteristics in this way obscures consideration of their intersections.[73] Intersectional discrimination therefore challenges the single-axis understanding of the comparator requirement.

ii Intersectionality as a solution to flawed discrimination analyses

The above examples show how the predominant single-axis approach in domestic discrimination law creates inaccuracy and inconsistency in intersectional discrimination cases. The problem is how to 'render visible and properly remedy' the harms experienced by victims of intersectional discrimination.[74] Intersectionality demonstrates its value by addressing these weaknesses in the following ways, with reference to examples from South African jurisprudence.

First, intersectionality allows courts to recognise the unique nature of intersectional discrimination as a distinct and often more severe form of discrimination. Fredman distinguishes between 'sequential multiple discrimination', involving discrimination on different grounds in different instances of discrimination; 'additive multiple discrimination', involving two or more grounds of discrimination that add on to each other and may be established independently; and 'intersectional discrimination'.[75]

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71 Atrey (n 15) 384–385.

72 ibid 385, discussing *DeGraffenreid* (n 27).

73 ibid 386.

74 Fredman (n 16) 28.

75 ibid 27.

Intersectional discrimination is 'qualitatively different' from the other types of multiple discrimination: it involves two or more grounds intersecting to cause a cumulative and intense form of discrimination and resulting disadvantage that cannot be captured by treating the grounds separately or additively.[76] As the South African Constitutional Court held in *Mahlangu*, an intersectional analysis is essential to identify and address intersectional discrimination.[77] Discrimination against Black female domestic workers in that case could only be accurately addressed in law by an intersectional analysis that recognised how these grounds interact to result in discrimination distinct from sex, race, class, or social status discrimination alone.[78]

Secondly, intersectionality requires courts to comprehensively consider the grounds of discrimination that may be relevant to a given discrimination claim, rather than spending time identifying a 'lead' or 'primary' ground for discrimination under a single-axis approach. As seen above in *DeGraffenreid*, without attention to each ground of discrimination that is present and relevant on the facts, the legal analysis will obscure intersectional discrimination and will fail to remedy the full spectrum of disadvantage encountered.[79] Conversely, in the *Mahlangu* decision, the Court held that an intersectional approach that recognised each of the claimant's identities as a Black, female, domestic worker, was needed to 'shed light on the experiences and vulnerabilities of certain groups that have been erased or rendered invisible'.[80] Intersectionality thus

76 ibid.

77 *Mahlangu v Minister of Labour and Others* [2020] ZACC 24 [74].

78 ibid.

79 Crenshaw (n 3) 149.

80 *Mahlangu* (n 77) [85].

encourages courts to recognise the social reality that discrimination rarely neatly arises from individual characteristics.[81]

Thirdly, intersectionality explicitly connects discrimination analyses to surrounding structures that perpetuate discrimination. Fredman terms this approach 'structural intersectionality',[82] recognising that discrimination 'can operate vertically, diagonally and in layers' in terms of power relations.[83] In this way, intersectionality identifies that white women have power derived from their race due to systemic racism, but remain disadvantaged based on sex due to patriarchy, while Black women are disadvantaged based on both their sex and race. For example, in *Mahlangu*, the Court relied on intersectionality to recognise the surrounding social context of heteropatriarchy, racism, the legacy of apartheid, and the economic and social precarity of domestic workers in concluding that Ms Mahlangu was particularly vulnerable to discrimination.[84] Intersectionality therefore ensures that discrimination analyses assess protected characteristics in context, remaining cognisant of overlapping power structures such as white supremacy and heteropatriarchy.[85]

Fourthly, intersectionality can overcome the problematic focus on a 'mirror comparator' in cases involving discrimination based on multiple protected characteristics, through the 'contextual' approach to comparison.[86] Atrey states that contextual comparison can be broken down into a two-stage process, citing the South African case

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81 Atrey (n 13) 113.

82 Fredman (n 16) 31. See S Cho, K Crenshaw, and L McCall, 'Towards a Field of Intersectionality Studies: Theory, Applications and Praxis' (2013) 38 *Signs* 797.

83 Fredman (n 16) 8.

84 *Mahlangu* (n 77) [65].

85 Atrey (n 13) 78.

86 Atrey (n 15) 390.

of *Hassam*.[87] Courts should begin by comprehensively identifying all comparators that could be relevant to the claimant in an intersectional discrimination case.[88] Visualising a Venn diagram containing all the protected characteristics of the claimant gives a sense of the range of comparators available, from those matching all the protected characteristics of the claimant at the centre, to those sharing no protected characteristics with the claimant outside the bounds of the diagram.[89] *Hassam* involved a Muslim widow in a polygynous marriage who claimed discrimination on grounds of gender, religion, and marital status.[90] These facts give rise to seven available comparators, including Muslim men and widows in monogamous Muslim marriages.[91] In the second stage, courts should examine the evidence available about each of the comparator groups to determine the similarities and differences between the disadvantage experienced by comparator groups and the claimant.[92] This allows the discrimination analysis to more accurately determine whether differentiation has occurred based on certain grounds, and whether that differentiation amounted to unlawful discrimination.[93]

In these ways, intersectionality can be seen as an essential tool for accurate adjudication of intersectional discrimination cases under domestic discrimination law. The theory has also gained influence in international human rights law on discrimination, as will be discussed next.

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87 ibid; *Hassam v Jacobs NO and Others* [2009] ZACC 19.

88 Atrey (n 15) 390.

89 ibid 392.

90 *Hassam* (n 87) [2], [8].

91 ibid [10], [31]. Atrey provides a formula to allow calculation of the number of possible comparators in an intersectional claim: $C_N \coloneqq \sum_{k=1}^{N} \binom{N}{k}$ where N is the number of characteristics: Atrey (n 15) 381, fn 6.

92 Atrey (n 15) 390.

93 ibid 394.

B Intersectionality in international human rights law

Intersectionality has developed a role in international law discourse and, particularly since the 1990s and early 2000s, in international human rights law.[94] Intersectionality's roots in domestic discrimination law have led to relatively uncontested application of the theory to the right to equality and non-discrimination by a variety of international human rights law institutions and scholars.[95]

References to intersectionality have been included in various international human rights law non-discrimination instruments, among them the Beijing Declaration at the 1995 Fourth World Conference on Women which mentioned women and girls 'who face multiple barriers to their empowerment and advancement' based on their protected characteristics.[96] Further, Crenshaw's work was influential in preparations for the 2001 United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, which addressed the impact of gender, sexual orientation, class, and poverty in racism.[97] Certain human rights courts have also addressed intersectionality.[98] Most notably, the Inter-American Court of Human Rights (IACtHR) explicitly applied intersectionality in the case of *Gonzales Lluy v Ecuador*.[99] The Court found that the particularly severe discrimination and disadvantage at issue arose from the 'intersection' of the victim being a young girl, with HIV, experiencing poverty, so that 'if

94 Collins and Bilge (n 13) 89.

95 Intersectionality is also relevant to other human rights beyond equality and non-discrimination, but this thesis focuses on discrimination due to the nature of the crime of persecution: see eg S Atrey and P Dunne (eds), *Intersectionality and Human Rights Law* (Hart Publishing 2020).

96 United Nations, 'Beijing Declaration and Platform of Action' (Fourth World Conference on Women 1995), para 32.

97 Collins and Bilge (n 13) 89.

98 Eg the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights: see J Bond, *Global Intersectionality and Contemporary Human Rights* (Oxford University Press 2021) ch 4.

99 *Gonzales Lluy v Ecuador*, Judgment, IACtHR Series C No 298 (1 September 2015).

one of those factors had not existed, the discrimination would have been different'.[100] Judge Poisot also put forward a definition of intersectional discrimination, noting that in intersectional cases, grounds of discrimination are 'analytically inseparable' and create disadvantage that is 'unique' compared to the disadvantage experienced by those suffering 'only one form of discrimination'.[101]

In recent decades, treaty bodies addressing non-discrimination have also begun including intersectional analysis in general comments and communications. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) stated in its General Recommendation 28 that intersectionality is foundational to states parties' obligations under Article 2 of the Convention, and that intersectional discrimination must be acknowledged, prohibited, and eradicated by states parties.[102] The Committee on the Elimination of Racial Discrimination (CERD Committee) has similarly affirmed in its General Comment 25 that racial discrimination may impact women and men differently due to the intersection between gender and race.[103] The most detailed recognition of intersectionality by a treaty body comes from the Committee on the Rights of Persons with Disabilities (CRPD Committee).[104] The Convention on the Rights of Persons with Disabilities (CRPD) recognises 'multiple or aggravated forms of discrimination',[105] including the interaction between gender, age, and disability.[106] The treaty's focus on multiple grounds of discrimination has been expanded by the CRPD

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100 ibid [290].

101 ibid, concurring opinion of Judge Poisot [11]–[12].

102 CEDAW Committee, 'General Recommendation No 28: Core Obligations of States Parties under Article 2', CEDAW/C/GC/28 (16 December 2010), para 18.

103 CERD Committee, 'General Recommendation 25: Gender-Related Dimensions of Racial Discrimination', UN Doc A/55/18 (20 March 2000), para 1.

104 Maučec (n 11) 5.

105 CRPD, 2515 UNTS 3 (entered into force 3 May 2008), preamble.

106 ibid arts 6 and 7.

Committee's acknowledgement of intersectionality. Importantly, the Committee's General Comment No 3 defined intersectional discrimination as the phenomenon whereby discriminatory grounds 'operate and interact with each other at the same time in such a way that they are inseparable',[107] and identified developing intersectional analysis in the Committee's practice.[108]

These various statements suggest that international human rights bodies centred on discrimination increasingly recognise intersecting grounds of discrimination.[109] The CRPD Committee's contribution is particularly consistent with intersectionality theory. However, the recognition of intersectionality in the other bodies has largely been sporadic in practice,[110] and risks reducing intersectionality to an 'additive exercise' where different protected characteristics are referred to in combination, but their intersection is not fully analysed in line with an intersectional framework.[111]

In short, intersectionality is of growing relevance in international human rights law concerning equality and non-discrimination. Intersectionality's value in this context suggests that it may be equally useful with respect to international crimes which involve discrimination on multiple grounds.

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107 CRPD Committee, 'General Comment No 3: Women and Girls with Disabilities', CRPD/C/GC/3 (2 September 2016), para 4.

108 ibid para 13. See eg CRPD Committee, 'Concluding Observations on the Initial Report of Mauritius', CRPD/C/MUS/CO/1 (30 September 2015), para 10.

109 PYS Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16(3) *Human Rights Law Review* 453, 480.

110 M Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination' (2015) 11 *Revista Direito GV* 479, 481.

111 Chow (n 109) 480; Maučec (n 11) 14.

C Intersectionality in international criminal law

Certain international criminal courts and tribunals have referred to intersecting grounds of discrimination when adjudicating cases involving genocide and persecution. In genocide cases, the intersection between gender and ethnicity has been relevant in determining whether a 'national, ethnical, racial or religious group' has been subject to acts intended to destroy the group as such.[112] The International Criminal Tribunal for Rwanda (ICTR) famously recognised in *The Prosecutor v Akayesu* that sexual violence against women could be a means of perpetrating genocide, provided it was committed with specific intent to destroy the ethnic group.[113] A similar approach, highlighting the relationship between gender and ethnicity, was taken by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *The Prosecutor v Kunarac*, where it was noted that Mr Kunarac committed rape as a crime against humanity with 'the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls'.[114]

The persecution case law of both the ICTY and ICTR has also considered intersecting discriminatory grounds.[115] The ICTY in *Prosecutor v Krstić* examined the intersections between race, religion, political affiliation, and, incidentally, gender due to sexual violence being considered a 'natural and foreseeable consequence' of the acts of persecution.[116] Similarly, in *The Prosecutor v Nahimana,* the ICTR held that Tutsi women were targeted based on both political affiliation and ethnicity, which made sexual violence

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112 See eg Rome Statute (n 4) art 6.

113 *The Prosecutor v Akayesu*, Trial Judgment, ICTR 96-4-T (2 September 1998) [731]–[734].

114 *The Prosecutor v Kunarac*, Trial Judgment, IT-96-23-T & IT-96-23/1-T (ICTY, 22 February 2001) [654].

115 See Oosterveld (n 9) 62.

116 *The Prosecutor v Krstić,* Trial Judgment, IT-98-33-T (ICTY, 2 August 2001) [616]–[617]. Note the ICTY statute does not include gender as a ground of persecution.

a 'foreseeable consequence'.[117] Domestic criminal courts have also applied features of intersectionality, including the Extraordinary Chambers in the Courts of Cambodia.[118]

In line with these developments in ad hoc tribunals and domestic courts, the relevant Chambers of the ICC have referenced intersectionality at various stages of the proceedings, as will be discussed further in Chapter III. Intersectionality has also been endorsed through statements in ICC policy. The 2014 Policy Paper on Sexual and Gender-based Crimes states that the OTP will 'understand the intersection of factors…which may give rise to multiple forms of discrimination and social inequalities'.[119] This attention to intersectionality has been strengthened in the Policy on Children in 2016,[120] and in the recent Policy on Gender Persecution which commits the OTP to 'an intersectional approach to discrimination to fully reflect the inter-relationship between gender, age and other aspects of an individual's identity or circumstances'.[121] This indicates a commitment to actively promote some form of intersectionality, although the substantive nature of the OTP's concept of intersectionality remains somewhat ambiguous.

Beyond these developments in practice, principled arguments for incorporating intersectionality into international criminal law are becoming more common in scholarship. First, scholars point out that intersectional analyses can promote more accurate prosecution and adjudication of international crimes involving intersectional

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117 *The Prosecutor v Nahimana*, Trial Judgment, ICTR-99-52-T (3 December 2003) [118].

118 See eg *The Co-Prosecutor v Nuon Chea and Khieu Samphan*, Judgment, Case 002/19-09-2007/ECCC/TC (16 November 2018) (concerning the ethnic and gender implications of the crime against humanity of rape and forced marriage).

119 Office of the Prosecutor (n 1) para 27.

120 Office of the Prosecutor, 'Policy on Children' (International Criminal Court 2016) paras 37 and 51.

121 Office of the Prosecutor (n 7) para 29.

discrimination.[122] The commission of international crimes frequently involves complex discrimination based on ethnicity, gender, political affiliation, and other protected characteristics.[123] Intersectionality as a framework is presented as a means to more accurately identify and analyse the actus reus and mens rea of crimes involving intersectional discrimination,[124] challenging single-axis approaches to international crimes.[125]

Secondly, an intersectional approach may pose practical benefits for victims of international crimes involving intersectional discrimination. Some consider that an intersectional approach to assessing the harm experienced by victims of intersectional discrimination will contribute to more accurate reparations that reflect the scale of the harm experienced.[126] Further, intersectionality in adjudication may bring emotional benefits for victims by highlighting the moral culpability of the perpetrator and recognising the heightened disadvantage resulting from intersectional discrimination.[127]

These arguments, combined with the above assessment of intersectionality's utility in domestic discrimination cases and international human rights law cases, support the idea that intersectionality may be of significant value in international criminal law.

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122 See V Oosterveld, 'Gender Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' (2006) 17 *Duke Journal of Comparative and International Law* 49; V Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 49, 72.

123 Maučec (n 19) 42–43.

124 M Isaac and O Jurasz (n 1) 862–863.

125 ibid 855. Maučec (n 11) 9 and 17.

126 AN Davis, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 *Harvard Human Rights Journal* 205, 222.

127 AM Beringola, 'Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC' (2017) 9 *Amsterdam Law Forum* 84, 93.

This thesis now assesses possible objections to applying intersectionality to the field of international criminal law generally and proceedings in the ICC specifically.

3 Objections to applying intersectionality theory in international criminal law

This section will first discuss the objection that intersectionality's feminist roots and attention to structural harms are opposed to international criminal law's focus on individual prosecutions. It will then consider the objection that intersectionality's anti-colonial focus is incompatible with the colonial dynamics of international criminal law and the ICC.

A Anti-carceral feminist critiques of international criminal law

Anti-carceral feminist critiques broadly argue that prosecution and incarceration of individuals creates significant harm and fails to respond to broader social issues that drive criminal activity.[128] Intersectionality displays some commonalities with anti-carceral critiques, due to its roots in Black feminism, development by feminist scholars, and focus on transforming structures that perpetuate discrimination.[129] On first glance, intersectionality may therefore appear incompatible with international criminal law's paradigm of individual prosecution.

Criminal law, whether domestic or international, may be considered an inherently limited and 'contradictory' field for feminist analysis such as intersectionality.[130] To begin with, criminal law has the capacity to inflict violence on marginalised groups, whether

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128 See eg ME Kim, 'Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle' (2019) 35 *Journal of Women and Social Work* 309, 310.

129 Collins and Bilge (n 13) 63.

130 D Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409, 415. See also C Smart, *Feminism and the Power of Law* (Routledge 1989) 43.

by police targeting of racial minorities for arrest, re-traumatisation of victims in court, or lengthy, non-rehabilitative sentences.[131] Further, punishment of individuals through incarceration largely fails to address deep-seated structural inequalities that perpetuate discrimination and disadvantage.[132] Anti-carceral scholars may argue that more effective approaches—which would also be more consonant with intersectionality—include proactive education and social security policies that aim to prevent crime, and restorative justice processes that seek community reconciliation.[133]

This critique of individual punishment is particularly relevant in international criminal law, where crimes are often committed during complex conflicts fuelled by ingrained ethnic, religious, and political tensions. As Buss notes, incarcerating an individual perpetrator can be a significant victory for individual victims, but these prosecutions leave untouched the systemic discrimination that may facilitate a perpetrator's crimes.[134] Incorporating feminist reforms such as intersectionality may lead to international criminal law growing in reach and authority through 'apparent responsiveness to feminist demands', without tangible benefits for victims of international crimes.[135]

Thus, the violent impacts of criminalisation, and its limited capacity to respond to systemic discrimination, seem to be fundamentally inconsistent with the transformative goals of intersectionality theory.

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131 See eg R Hunter, 'Law's (Masculine) Violence: Reshaping Jurisprudence' (2006) 17 *Law and Critique* 26, 33.

132 Buss (n 130) 416.

133 ibid.

134 ibid 419.

135 D Otto, 'Is International Criminal Law Particularly Impervious to Feminist Reconstruction?' in I Rosenthal, V Oosterveld, S SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press 2022) 387, 393. See also Smart (n 130) 45–49.

B Colonial critiques of international criminal law and the ICC

This thesis must also discuss the objection that applying intersectionality theory to international criminal law is inappropriate due to the colonial dynamics of the field. Although intersectionality theory and postcolonial critiques differ in terms of epistemology and focus, the approaches share fundamental similarities.[136] Both are concerned with structural inequalities, analyse power dynamics, and have transformative goals aimed at social justice and substantive equality.[137]

Third World Approaches to International Law (TWAIL) scholars criticise international criminal law based on the unequal power dynamics between colonising states in the Global North and Global South states, and the resulting focus of criminal prosecution on peoples that have experienced colonisation.[138] Reynolds and Xavier, quoting Crane, note how the global South generally, and Africa specifically, are presented by certain international criminal law institutions and actors as 'dark corners of the world', which must be 'civilized' by the rule of law in the form of international criminal law.[139] Ad hoc criminal tribunals centre on so-called 'weak or pariah' global South states,[140] descriptions of the crimes committed may perpetuate stereotypes of Africa's 'savagery' and 'primitivism',[141] and international criminal law discourse may centre on restraining

136 S Wallaschek, 'In Dialogue: Postcolonial Theory and Intersectionality' (2015) 4 *Momentum Quarterly* 218, 219; Atrey (n 13) 51.

137 Collins and Bilge (n 13) 51; Reynolds and Xavier (n 14) 962–970.

138 The author recognises the reductivity of 'third world' and 'global South' as terms for a huge region of diverse states, but uses the terms to denote scholarship directed at challenging the marginalisation of non-western states.

139 Reynolds and Xavier (n 14) 961. See D Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts' (2005) 37 *Case Western Reserve Journal of International Law* 1, 3–4.

140 Reynolds and Xavier (n 14) 964.

141 G Anders, 'Testifying about "Uncivilized Events": Problematic Representations of Africa in the Trial against Charles Taylor' (2011) 24 *Leiden Journal of International Law* 937, 946.

'evil' individuals.[142] Conversely, international crimes allegedly perpetrated by nationals of Western states have largely not been subject to international criminal law scrutiny.[143]

Similar concerns apply to the ICC as an institution, which displays flaws of selective application and western hegemony. Despite the original 'euphoria' at the ICC's inception, which included support from many African states, the ICC has seemingly been selective in ensuring that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[144] The majority of situations investigated by the ICC have been in Africa, with 10 of the 17 current investigations taking place in African states.[145] The African Union has expressed concern about the ICC targeting Africa since at least 2009.[146] Although some of the situations have been self-referred by African states, these are not the majority.[147] This suggests that African states have been targeted for ICC scrutiny, possibly due to enduring colonial attitudes and their perceived lack of diplomatic and economic influence.[148]

Conversely, there has been little to no action from the ICC with regard to alleged crimes by nationals of Western states in Israel and Colombia, by British forces in Iraq,

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142 ibid 959.

143 Reynolds and Xavier (n 138) 965.

144 Rome Statute (n 4) preamble. See also PI Labuda, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity' (2015) 20 *African Yearbook of International Law* 289, 292.

145 Democratic Republic of the Congo, Uganda, Sudan, Central African Republic, Central African Republic II, Kenya, Libya, Côte d'Ivoire, Mali, Burundi: see International Criminal Court, 'Situations Under Investigation' (*International Criminal Court*, 2022) <https://www.icc-cpi.int/situations-under-investigations> accessed 12 April 2023.

146 African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court' Assembly/AU/Dec.245(XIII) (3 July 2009), para 10.

147 Self-referrals make up 5 out of the 10 current investigations in African states: the Democratic Republic of the Congo, Uganda, the Central African Republic (twice), and Mali: see P Hobbs, 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) 31 *Criminal Law Forum* 345.

148 See T Murithi, 'Pan-Africanism and the Politicization of the International Criminal Court' (2014) 3 *Journal of African Union Studies* 61.

and by Canadian nationals against Afghan detainees.[149] Further, under Chapter VII of the United Nations Charter, the Security Council may refer situations to the Prosecutor of the ICC if one or more crimes in the Rome Statute seem to have been committed.[150] This means that the dominance and political interests of the United States, United Kingdom, France, Russia, and China may be mirrored in the ICC's actions through Security Council referrals, including by excluding the conduct of nationals of these states from scrutiny.[151]

On one view, this inherent coloniality of international criminal law and the ICC suggests incompatibility with intersectionality theory, which, as noted above, evinces a strong anti-colonial commitment linked to its roots in Black feminist and critical race theory. Purporting to apply intersectionality in international criminal law's colonial context could frustrate the theory's transformative goals, rendering intersectionality a powerless 'handmaiden' of colonisation and racism.[152]

4 Response to the preliminary objections

This section responds to the above objections, concluding that neither objection is fatal to the thesis' proposal for the use of intersectionality theory in international criminal law.

First, anti-carceral critiques clearly demonstrate that international criminal law has inherent limits due to its focus on individual criminalisation rather than wider reform. This limitation is, on its face, contrary to the ethos of intersectionality, which aims to

149 Reynolds and Xavier (n 138) 965.

150 See Rome Statute (n 4) art 13(b); Charter of the United Nations, 1 UNTS 16 (entered into force 24 October 1945), art 41.

151 For example, the Security Council referred the situations in Sudan and Libya to the ICC, but excluded from assessment the acts of western military forces in those states: Security Council Resolution 1593 (31 March 2005), para 6; Security Council Resolution 1970 (26 February 2011), para 6.

152 JM Iyi, 'Is International Criminal Justice the Handmaiden of the Contemporary Imperial Project? A TWAIL Perspective on Some Arenas of Contestations' in F Jeßberger, L Steinl, and K Mehta (eds), *International Criminal Law—A Counter-Hegemonic Project?* (Asser Press 2022) 13.

challenge discriminatory structures. Nevertheless, certain feminist scholars recognise that, in the absence of more drastic reform of international and domestic criminal justice systems, smaller reforms that aim to identify the flaws and address the negative impacts of these systems are necessary and meaningful.[153] It is argued that intersectionality may be one such reform, with the potential to highlight international criminal law's failings as a justice system and to promote more accurate, comprehensive, and victim-sensitive application of international criminal law in situations of intersectional discrimination.[154] Anti-carceral critiques call for the acknowledgement of international criminal law's limitations, but do not mandate dismissing a reform that may bring material benefits for victims.

Secondly, the anti-colonial critique can be responded to in a similar way. The selectivity and western influence of the ICC and international criminal law has been demonstrated above. But it is arguably the fields and institutions that perpetuate the most inequality that are most in need of incorporating an intersectional approach. Crenshaw's application of intersectionality to flawed United States discrimination law is an obvious example.[155] Further, many TWAIL scholars and social movements espouse a 'surprisingly reformist agenda' that demonstrates some confidence in the capacity of international criminal law and its institutions to deliver justice for victims of international crimes.[156] As the only permanent international criminal court to date, the ICC has an inescapable

153 See Otto (n 135) 414; C McGlynn, 'Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking' (2022) 93 *Women's Studies International Forum* 1.

154 See Maučec (n 11) 17.

155 Crenshaw (n 3).

156 L Eslava and S Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 *Trade, Law & Development* 103, 105. See also Reynolds and Xavier (n 138) 960, discussing the Palestinian and Tamil social movements.

significance in international criminal law, making it an influential 'focal point' for intersectionality's reformist goals.[157]

5 An intersectionality framework for this thesis

This section distils an intersectionality framework for the purposes of this thesis. Some authors consider that attempts to strictly define intersectionality misunderstand the theory's essence: it is flexible, 'never done' and hindered by rigidity.[158] Certainly, strictly demarcating the features of intersectionality may reduce its ability to be used as a flexible tool for understanding and remedying discrimination. However, identifying the features of intersectionality theory that are most relevant to this thesis is necessary in order to structure questions of compliance with the Rome Statute[159] and the later analysis of the theory's benefits and limitations in the ICC's adjudication of persecution.[160]

The below framework relies on the jurisprudence and scholarship explored in the prior sections and particularly draws from the work of Crenshaw, Collins and Bilge, and Atrey. The following are identified as key features of intersectionality theory in the context of international criminal law and the crime of persecution:

1. Discrimination as a social phenomenon is often targeted to impact people that are disadvantaged based on multiple protected characteristics, or 'minorities within minorities'.[161]

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157 TM Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010) 4.

158 DW Carbado and others, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 *Du Bois Review* 303, 304. See also Cho, Crenshaw, and McCall (n 82).

159 See Chapter IV.

160 See Chapter V.

161 Maučec (n 19) 43.

2. Discrimination caused by two or more intersecting grounds of discrimination can be termed 'intersectional discrimination'.[162]
3. Intersectionality theory provides a framework to address intersectional discrimination, by allowing analysis of 'sameness and difference in patterns of group disadvantage', 'considered as a whole', in context and with a transformative goal.[163]
4. Domestic and international courts and other bodies often take either a single-axis approach to discrimination, or an additive approach that neglects the intersection between different grounds of discrimination. This approach risks over-simplifying factual situations and excluding victims of intersectional discrimination from legal attention, rendering invisible more complex discrimination.[164]
5. Considering all relevant grounds of discrimination in a discrimination analysis is necessary but not sufficient. Discriminatory grounds should be considered as inseparable and mutually reinforcing under an intersectional approach, rather than as separately identifiable under an additive approach.[165]
6. A hierarchy of grounds of discrimination must be avoided to prevent more relatively privileged groups being centred in discrimination analyses to the exclusion of other groups.[166]
7. The search for a singular 'mirror' comparator relies on a single-axis approach to discrimination and will not accurately establish intersectional discrimination. Rather, an evidence-based, 'contextual' comparator approach that assesses all possible

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162 See Atrey (n 13) ch 3.

163 ibid 36.

164 Davis (n 126) 209.

165 Chow (n 109) 480.

166 Crenshaw (n 3) 140.

comparators is necessary to accurately determine the existence of intersectional discrimination.[167]

8. A perpetrator of intersectional discrimination has a fundamentally different form of discriminatory intention compared to one who discriminates based on a single protected characteristic.[168] This suggests intersectionality may be relevant to the assessment of mens rea in international crimes.
9. Intersectional discrimination is often more severe than discrimination on single grounds due to cumulative disadvantage.[169] Intersectionality may therefore impact the assessment of the gravity of crimes involving discrimination, with potential relevance for the sentencing and reparations stages of criminal proceedings.
10. Intersectional discrimination creates a unique harm and may need to be compensated through reparations in different ways to other forms of discrimination.[170]

This thesis will now proceed to review the instances, and notable absences, of this intersectionality framework in the jurisprudence of the ICC.

167 Atrey (n 15) 390.

168 Fredman (n 16) 27.

169 ibid.

170 ibid.

III INTERSECTIONALITY (AND ITS ABSENCES) IN ICC CASE LAW

This chapter will analyse the ICC's approach to adjudicating cases where facts indicating intersectional discrimination are raised. It will address judicial decisions at various stages of the proceedings, in cases involving both persecution as a crime against humanity and other crimes where intersectionality is potentially relevant on the facts.[171]

First, it will summarise the elements of the crime of persecution in the Rome Statute (section 1). Secondly, it will identify and analyse a selection of cases exemplifying the ICC Chambers' approach to multiple grounds of discrimination prior to 2014 (sections 2 and 3). Thirdly, it will highlight the significance of the 2014 Policy Paper on Sexual and Gender-Based Crimes for the ICC gaining greater understanding of intersectionality (section 4).[172] Fourthly, it will assess the relevant Chambers' intersectionality jurisprudence since the publication of the 2014 Policy Paper, comprehensively identifying all explicit acknowledgement of intersectionality (sections 4 and 5).

1 The crime of persecution

Article 7(1) of the Rome Statute provides that certain acts, when committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', amount to crimes against humanity. Persecution as a crime against humanity is defined in Article 7(2)(g) as 'the intentional and severe deprivation of

171 See Rome Statute (n 4) art 7(1)(h).

172 See Office of the Prosecutor (n 1); G Maučec, 'On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court' (2021) 21 *International Criminal Law Review* 534.

fundamental rights contrary to international law by reason of the identity of the group or collectivity'.

The elements of the crime against humanity of persecution are:[173]

1) a perpetrator 'severely deprived, contrary to international law, one or more persons of fundamental rights';[174]
2) the perpetrator targeted the victims 'by reason of the identity of the group or collectivity' to which the victims belonged;[175]
3) the targeting was based on 'political, racial, national, ethnic, cultural, religious, gender' or other grounds 'universally recognized as impermissible under international law';[176]
4) the conduct was perpetrated 'in connection' with acts in Article 7(1) of the Rome Statute (such as murder and torture) or other crimes within the ICC's jurisdiction;[177]
5) the conduct formed part of a 'widespread or systematic attack directed against any civilian population';[178]
6) the perpetrator 'knew the conduct was part of or intended the conduct to be part of' such an attack.[179]

The following discussion will consider how the relevant Chambers of the ICC have treated facts indicating intersectional discrimination, in the context of the crime of persecution and other crimes involving multiple grounds of discrimination.

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173 See Rome Statute (n 4) art 7(1)(h) and (2)(g); International Criminal Court, 'Elements of Crimes' (2011) 10.

174 International Criminal Court (n 173) 10.

175 ibid; Rome Statute (n 4) art 7(2)(g).

176 Art 7(1)(h); International Criminal Court (n 173) 10.

177 ibid.

178 ibid art 7(1).

179 International Criminal Court (n 173) 10.

2 Pre-Policy Paper case law

A Predominant single-ground focus

Before the 2014 Policy Paper on Sexual and Gender-Based Crimes, ICC case law took a largely 'single-ground' approach to crimes involving multiple potential discriminatory grounds.[180] This meant that crimes that appeared to target victims based on multiple protected characteristics were analysed based on a singular ground of discrimination only, without attention to the role of multiple, intersecting grounds of discrimination.

The Prosecutor v Lubanga is the ICC's first case, and the first example of a single-ground approach. The charges against Mr Lubanga consisted of the war crime of conscripting, enlisting, and using children under the age of fifteen in the Forces Patriotiques pour la Libération du Congo (FPLC).[181] The OTP considered that the evidence of sexual violence against child soldiers did not satisfy the contextual requirement of systematicity in order to be charged as a crime against humanity.[182] This exclusion of the intersection between age and gender in *Lubanga* was criticised by dissenting Judge Benito, who considered that the legal definition of 'using [child soldiers] to participate actively in the hostilities'[183] should have been interpreted broadly to include sexual violence.[184] Failure to account for sexual violence against child soldiers rendered

180 See Maučec (n 19) 68.

181 *The Prosecutor v Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN (7 February 2007) [9]. See also Rome Statute (n 4) art 8(1)(b)(xxvi).

182 T Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 *German Law Journal* 878, 884. See also Rome Statute (n 4) art 7(1)(g).

183 Rome Statute (n 4) art 8(1)(b)(xxvi).

184 *The Prosecutor v Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC 01/04-01/06-2842 (14 March 2012), Separate and Dissenting Opinion of Judge Benito [16].

'this critical aspect of the crime invisible'.[185] She reinforced the essential intersection between gender and age by stating that:[186]

> Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

In her view, refusing to include sexual violence in the Chamber's analysis was 'discriminatory' because the 'use of young girls[']…bodies' through sexual violence has 'a clear gender differential impact from being a bodyguard or porter', which were jobs given primarily to male child soldiers.[187] This view, however, was rejected by the majority, which interpreted the crime narrowly as limited to situations where a child soldier was subject to 'real danger as a potential target'.[188] It considered itself constrained by the OTP decision not to charge the crime against humanity of sexual violence.[189]

A further example of the Chambers' commitment to a single-ground approach in early jurisprudence is *The Prosecutor v Muthaura, Kenyatta, and Ali* confirmation of charges decision, set against the backdrop of post-election violence in Kenya which displayed political, ethnic, and gender tensions.[190] It was the OTP's view that incidents of 'forcible circumcision' and penis mutilation experienced by ethnic minority men were gendered and amounted to sexual violence as a crime against humanity under Article

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185 ibid. See also G Atiba-Davies and LC Nwoye, 'Children, Gender, and International Criminal Justice' in Rosenthal, Oosterveld, and SáCouto (n 135) 127, 145–147.

186 *The Prosecutor v Lubanga* (n 184) Separate and Dissenting Opinion of Judge Benito [16].

187 ibid [21].

188 *The Prosecutor v Lubanga* (n 184) [627]–[628].

189 ibid [629]–[630].

190 *The Prosecutor v Muthaura, Kenyatta, and Ali*, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red (23 January 2012).

7(1)(g) of the Rome Statute.[191] The Prosecutor argued that the mutilations were 'intended as attacks on men's identities as men within their society'.[192] The Pre-Trial Chamber rejected this characterisation, stating that there was no evidence that the acts were of a 'sexual nature', but instead were motivated solely by 'ethnic prejudice and…cultural superiority of one tribe over the other'.[193] The genital mutilations were therefore held to be 'other inhumane acts' and the Prosecutor's charge of sexual violence as a crime against humanity was rejected.[194]

The persecution cases prior to 2014 also showed a focus on singular grounds of discrimination, usually ethnicity. Decisions on arrest warrants in persecution cases including *The Prosecutor v Hussein*,[195] *The Prosecutor v Al Bashir*,[196] and *The Prosecutor v Harun and Abd-Al-Rahman*[197] mentioned rape of women from ethnic minorities, indicating the potential for an intersectional analysis of gender and ethnicity, but only directly addressed persecution on grounds of membership of the Fur ethnic minority.

This predominantly single-ground approach is tempered by some acknowledgement from the relevant Chambers of discrimination on multiple grounds. In the arrest warrant decision in *The Prosecutor v Mbarushimana*, the Pre-Trial Chamber held there were reasonable grounds to believe Mr Mbarushimana persecuted 'women and

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191 ibid [264]. See also Maučec (n 172) 540.

192 ibid.

193 Whether an act is of a sexual nature was held to be 'inherently a question of fact': ibid [265]–[266].

194 ibid. See Rome Statute (n 4) art 7(1)(k).

195 *The Prosecutor v Hussein*, Decision on the Prosecutor's Application under Article 58 relating to Abdel Raheem Muhammad Hussein, ICC-02/05-01/12-1-Red (1 March 2012) [13(ix)].

196 *The Prosecutor v Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3 (4 March 2009) [108].

197 *The Prosecutor v Harun and Abd-Al-Rahman*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr (27 April 2007) Counts 10, 13, 14.

men seen to be affiliated with the [Forces Démocratiques pour la Libération du Rwanda (FARDC)] on the basis of their gender', indicating relevant grounds of gender and (perceived) political affiliation.[198] However, this opportunity for the relevant Chambers to assess multiple grounds in *The Prosecutor v Mbarushimana* was limited by OTP decision-making. By the time of the confirmation of charges decision, the OTP had altered the charges to focus solely on persecution on the ground of political affiliation.[199] The OTP asserted that Forces Démocratiques pour la Libération du Rwanda (FDLR) troops only targeted civilians 'perceived as having called for, collaborated with or supported the FARDC's and/or the RDF's [Rwandan forces] efforts to defeat the FDLR'.[200] The majority held there was insufficient evidence to meet the 'substantial grounds to believe' standard, and none of the charges were confirmed.[201]

3 Analysis of pre-Policy Paper case law

A Single-ground approach obscures discrimination on other grounds

This pre-Policy Paper case law displays a tendency for the relevant Chambers to centre a single ground of discrimination in their 'uni-sectional' analysis, often to the exclusion of other relevant grounds of discrimination.[202] *The Prosecutor v Kenyatta, Muthaura, and Ali* case is a key example of facts and charges that raised multiple, intersecting grounds of discrimination. Yet, the confirmation of charges decision relied on a narrow interpretation of acts of a 'sexual nature', holding that the forcible circumcisions and

198 *The Prosecutor v Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1 (28 September 2010) Count 11.

199 *The Prosecutor v Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red (16 December 2011), Dissenting opinion of Judge Monageng [35].

200 ibid.

201 *The Prosecutor v Mbarushimana* (n 199) [339].

202 Maučec (n 172) 538.

penis mutilations suffered by Luo men were driven solely by ethnic prejudice.[203] Contrary to intersectionality, this statement gives the impression that 'sexual violence and ethnically motivated violence are mutually exclusive'.[204] It prioritises a limited focus on crimes driven by ethnic hostility, failing to account for possible intersections.[205] Not only did this finding prevent any discussion of the intersection between gender and ethnicity, it also misunderstood the nature of gender discrimination and sexual violence. The Chamber's statement that the acts were not of a 'sexual nature' gives rise to the implication that sexual and gender-based violence requires a level of sexual desire on the part of the perpetrator. This mischaracterises gender discrimination, which is typically centred more in dominance and reinforcement of gender roles than sexual desire.[206] This decision therefore demonstrates the risk of charging and adjudication prioritising a 'more "traditional" ground' (such as ethnicity) and excluding opportunities for intersectional analysis.[207]

As a result of these exclusions, multiple grounds of discrimination were only rarely charged or assessed in decisions at the pre-trial, trial, sentence, and reparations stages prior to 2014.

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203 *The Prosecutor v Muthaura, Kenyatta, and Ali* (n 190) [264]. See also Maučec (n 172) 540–541.

204 Altunjan (n 182) 887.

205 D Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25 *Windsor Yearbook of Access to Justice* 3, 14.

206 See eg in the sexual harassment context, Vicki Schultz' critique of the 'sexual desire-dominance paradigm' which focuses on sexual desire as explaining gendered harms: V Schultz, 'Reconceptualizing Sexual Harassment, Again' (2019) 128 *The Yale Law Journal Forum* 22, 27.

207 V Oosterveld, 'Prosecuting Gender-Based Persecution as an International Crime', in AM de Brouwer and others (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 57, 73.

4 The significance of the 2014 Policy Paper

The publication by the OTP of its 2014 Policy Paper on Sexual and Gender-Based Crimes (the 2014 Policy Paper) had a 'potentially game-changing' impact on the gender-sensitivity of various proceedings at the ICC, and the OTP and Chambers' openness to intersectional analysis.[208] The 2014 Policy Paper cemented the relevance of intersectionality theory in the ICC in two broad ways: through a gender-focus that incorporates aspects of intersectionality, and an explicit commitment to intersectionality more broadly.

First, the 2014 Policy Paper demonstrates an intersectional understanding of gender as a ground of discrimination, laying the foundation for a more nuanced and comprehensive analysis of intersectional discrimination cases involving gender as a ground. The key messages include an understanding of gender as a social construct, a distinction between the broad category of gender-based crimes and the more limited category of sexual violence, and an acceptance that women and girls are the main, but not the only, victims of gender-based and sexual crimes.[209] The OTP also committed to bringing cumulative charges of sexual and gender-based crimes as genocide, crimes against humanity, and war crimes, to 'reflect the severity and *multifaceted* character of these crimes fairly'.[210] The OTP further pledged to adopt a 'gender analysis' of all crimes falling within its jurisdiction.[211] The proposed gender analysis encourages consideration of current gender norms, patterns of inequality, and how power dynamics shape gender

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208 V Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law' (2018) 24 *William & Mary Journal of Race, Gender, and Social Justice* 443, 457. See also Maučec (n 172) 535–536.

209 Office of the Prosecutor (n 1) paras 15–16.

210 ibid para 72 [emphasis added].

211 ibid para 20.

roles and stereotypes.[212] This attention to wider power dynamics aligns with intersectionality's focus on structural causes of discrimination.

Secondly, the 2014 Policy Paper expressly acknowledges and commits to an intersectional approach in ICC proceedings generally. It first acknowledges the intersection of multiple grounds of discrimination, noting that sexual and gender-based crimes may be driven by 'underlying inequalities, as well as a multiplicity of other factors, *inter alia*, religious, political, ethnic, national, and economic reasons'.[213] Later, it declares that under Article 21(3) of the Rome Statute,[214] the OTP will '[u]nderstand the intersection of factors…which may give rise to multiple forms of discrimination and social inequalities'.[215] This express commitment has been termed a 'hopeful sign towards the institutionalization of critical and anti-discriminatory approaches' at the ICC,[216] and has been expanded in the Policy on Children in 2016[217] and the 2022 Policy on the Crime of Gender Persecution.[218]

Although Policy Papers are not binding on the OTP, nor are they within the remit of the Chambers, the 2014 Policy Paper indicated a budding interest in and aspiration towards engaging in intersectional approaches at the ICC. Whether due to the influence of the 2014 Policy Paper, a broader societal interest in intersectionality, or both, increased attention to intersectional approaches can be seen in the Chambers' case law since 2014.

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212 ibid.

213 ibid para 19.

214 See Chapter IV(1).

215 Office of the Prosecutor (n 1) para 27.

216 Altunjan (n 182) 888.

217 Office of the Prosecutor (n 120) paras 37 and 51.

218 Office of the Prosecutor (n 7) para 29.

5 Post-Policy Paper case law

Following the 2014 Policy Paper, the relevant Chambers have had increased opportunities to assess multiple grounds of discrimination and have begun mentioning intersectionality directly. These instances are comprehensively assessed below.

A Multiple grounds of discrimination charged

Since 2014, there has been a range of ICC cases involving persecution as a crime against humanity where multiple grounds of discrimination have been included in the charges and confirmed. Later the same month as the publication of the 2014 Policy Paper, the Pre-Trial Chamber confirmed charges of political, ethnic, national, and religious persecution in *The Prosecutor v Gbagbo*.[219] The confirmation decision referenced the interaction between these grounds: that those of certain ethnic, national, or religious affiliations were perceived as supporters of the incumbent President Gbagbo's opponent, Ouattara, and targeted in the post-election violence in Côte d'Ivoire on the basis of this assumption.[220]

To the author's knowledge, there have since been four cases involving the confirmation of persecution charges on multiple grounds. *The Prosecutor v Al Hassan* resulted in the first confirmed charges of gender persecution in the ICC, alongside religious persecution.[221] However, the grounds of discrimination were addressed

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219 *The Prosecutor v Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red (12 June 2014) [205]–[206].

220 ibid [174].

221 *The Prosecutor v Al Hassan* (n 6) [702], [704], [707].

sequentially rather than in relation to a single group or incident.[222] The arrest warrant decision stated that Ansar Dine and Al Qaeda in the Islamic Maghreb (AQIM):[223]

> targeted, in the first place, the population of Timbuktu on religious grounds, in that they perceived it as not adhering to their vision of religion. In the second place, they targeted women and girls in Timbuktu on gender grounds...

This approach separated the analysis of gender from the analysis of religion. Nevertheless, in the *Al Hassan* confirmation of charges decision, the Pre-Trial Chamber highlighted how the intersection of ethnicity and gender may result in increased disadvantage.[224] The Chamber noted that violence against women during the conflict likely varied in severity according to skin colour, with evidence suggesting that women with darker skin experienced greater violence than women with lighter skin.[225]

Further cases involved multiple grounds of discrimination being charged cumulatively: with multiple grounds at issue for the same group or incident. In *The Prosecutor v Yekatom and Ngaïssona*, charges of political, ethnic, and religious persecution were confirmed with respect to Muslim people in the western Central African Republic.[226] This group were perceived as 'collectively responsible…complicit with, or supportive of the Seleka [rebel group]'.[227] Proceedings in *The Prosecutor v Abd-Al-Rahman* also led to confirmation of charges of political, ethnic, and gender persecution.[228]

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222 See Fredman (n 16) 27.

223 *The Prosecutor v Al Hassan*, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest, ICC-01/12-01/18-35-Red2-tENG (22 May 2018) [95].

224 *The Prosecutor v Al Hassan* (n 6).

225 ibid [702]. See also Maučec (n 172) 551.

226 *The Prosecutor v Yekatom and Ngaïssona*, Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Red-Corr (14 May 2020) [241].

227 ibid [64].

228 *The Prosecutor v Abd-Al-Rahman*, Decision on the Confirmation of Charges against Ali Muhammad Ali Abd-Al-Rahman, ICC-02/05-01/20-433-Corr (9 July 2021).

The confirmation of charges decision noted in particular the interaction between gender and ethnicity, stating that:[229]

> The victims' Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators' perception of them as rebels or rebel sympathisers.

More recently, in *The Prosecutor v Said*, the charges of political, ethnic, religious, and gender persecution against 'perceived BOZIZE supporters'—largely Christian males from certain ethnic minorities and neighbourhoods—were confirmed.[230]

B Intersectionality recognised

Post-Policy Paper case law displays both growing attention to intersectional approaches and explicit references to intersectionality. *The Prosecutor v Ongwen* took an implicit intersectional approach, particularly in the assessment of the charges of forced marriage and enslavement as crimes against humanity, sexual slavery as a crime against humanity and war crime, and conscripting and using child soldiers to participate actively in hostilities as war crimes.[231] The trial judgment recognised that the gender and age of the child soldiers interacted to create unique disadvantage:[232] children were targeted based on their youth as they could be easily 'indoctrinated' and controlled.[233] Boys were targeted to be used as fighters due to stereotypes about male aggression,[234] while girls

229 ibid [80].

230 *The Prosecutor v Said*, Decision on the Confirmation of Charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Red (9 December 2021) [25].

231 *The Prosecutor v Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red (4 February 2021) [35]–[36].

232 See Atiba-Davies and Nwoye (n 185) 151.

233 *The Prosecutor v Ongwen* (n 231) [2369].

234 ibid [2319].

were targeted to serve as both fighters and providers of domestic and sexual labour due to gender stereotypes.[235]

Explicit mention of intersectional approaches has also increased in ICC case law since the publication of the 2014 Policy Paper. This occurred at various stages of the proceedings in *The Prosecutor v Ntaganda*, which involved charges of persecution. The Trial Chamber judgment recognised the concept of discrimination based on multiple protected characteristics, a necessary precursor to intersectional analysis.[236] In discussing Article 7(1)(h) and (2)(g) with reference to the alleged persecution of members of the Lendu ethnic group, the Chamber observed that while targeting may occur on one discriminatory ground, 'a combination of more than one may equally form the basis for the discrimination'.[237]

Intersectionality was later explicitly accepted in the context of reparations. In the *Ntaganda* reparations order, the Trial Chamber stated unequivocally that a 'gender-inclusive and sensitive perspective should integrate intersectionality as a core component'.[238] This displays the link emphasised in the 2014 Policy Paper between a comprehensive understanding of gender discrimination and a broader intersectional approach. The sources cited for this statement also show an awareness of the important distinction between multiple discrimination and intersectional discrimination, including the seminal definition of intersectionality in *Gonzales Lluy v Ecuador*.[239] The reparations

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235 ibid [2115].

236 *The Prosecutor v Ntaganda*, Judgment with Public Annexes A, B, and C, ICC-01/04-02/06-2359 (8 July 2019).

237 ibid [1009]. Note multiple grounds of discrimination were not charged in *The Prosecutor v Ntaganda*, so the substantive adjudication at trial did not contribute to the ICC's intersectionality jurisprudence.

238 *The Prosecutor v Ntaganda* (n 9) [60].

239 *Gonzales Lluy v Ecuador* (n 99) concurring opinion of Judge Poisot [11].

order displays not only clarity as to the meaning of intersectionality, but also a defensible application of the theory in the reparations context. The Trial Chamber noted:[240]

> The Court should take into account the existence of previous gender and power imbalances, as well as the differentiated impact of harm depending on the victim's sex or gender identity. It is thus necessary to identify and address specific harms that victims may suffer because of their gender.

This approach to gender discrimination incorporates key aspects of intersectionality, including attention to power dynamics and the unique harms that follow from intersectional discrimination. The Trial Chamber also commented that reparations should have a transformative aim, aligning with intersectionality's focus on structural change to eliminate discrimination.[241]

Intersectionality has also been mentioned at the sentencing stage, with reference to both the perpetrator and victims. Judge Carranza noted in the sentence appeal in *The Prosecutor v Ongwen* that Mr Ongwen's experiences of 'abduction, conscription, violent indoctrination' as a child soldier made him a 'victim-perpetrator', in need of a 'holistic and intersectional' sentencing analysis in light of his protected characteristics.[242] Additionally, in Mr Ongwen's trial judgment appeal, the Appeals Chamber referenced in a footnote the importance of maintaining a non-discriminatory, substantive equality approach to the crime of forced pregnancy which 'should be cognizant of and seek to

240 *The Prosecutor v Ntaganda* (n 9) [61].

241 ibid [94].

242 *The Prosecutor v Ongwen*, Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 6 May 2021 Entitled 'Sentence', ICC-02/04-01/15-2023-Anx1 (15 December 2022), Partly Dissenting Opinion of Judge Carranza [ii].

overcome the often exacerbated impact that intersectional discrimination has on the realization of the right to sexual and reproductive health'.[243]

No other case involving multiple grounds of discrimination has proceeded far enough since the 2014 Policy Paper to assess the ICC's approach to intersectionality in a trial judgment.

6 Analysis of post-Policy Paper case law

The post-Policy Paper case law demonstrates that the relevant Chambers have gained a greater understanding of intersectional discrimination but have also made some movements towards additive and sequential approaches.[244]

A Improved understanding of intersectional discrimination

The post-Policy Paper case law displays increased consideration of the intersection between different discriminatory grounds. The intersectional analysis is particularly marked in *The Prosecutor v Ntaganda*, which explores intersectionality for the purpose of reparations, and *The Prosecutor v Abd-Al-Rahman* and *The Prosecutor v Al Hassan*, which apply intersectional concepts in confirming charges.

The trial briefs of the OTP indicate that this attention to intersectionality is likely to continue in trial judgments. In particular, in the trial brief in *The Prosecutor v Abd-Al-Rahman*, the Prosecutor urges the Trial Chamber to consider how discriminatory grounds interact, noting that Fur males were impacted by the triple vulnerability of ethnicity, gender, and perceived political affiliation, due to the stereotype that men from this ethnic

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243 *The Prosecutor v Ongwen*, Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 4 February 2021, Entitled 'Trial Judgment', ICC-02/04-01/15-2022-Red (15 December 2022), fn 2341.

244 See Chapter II(2)(A)(i).

minority would support or associate with rebels.[245] This 'fledgling intersectionality jurisprudence' of the ICC suggests the OTP and the various Chambers have a burgeoning understanding of and interest in intersectional approaches.[246]

B Potential for additive and sequential approaches

Notwithstanding the gradual recognition of intersectionality by various Chambers of the ICC, the case law to date demonstrates some inconsistencies with intersectionality theory as summarised in Chapter II. Certain statements of the Chambers suggest that the ICC may take additive or sequential approaches rather than intersectional approaches in its adjudication. Analysing discrimination on multiple grounds in an additive or sequential way precludes assessment of the intersections between different protected characteristics and the unique intersectional discrimination that results.[247]

For example, the statement in the *Ntaganda* trial judgment that 'a combination' of grounds may be the basis for discrimination implies an additive understanding, where different grounds are considered but not analysed in a mutually reinforcing, intersectional sense.[248] The separation of the gender and religion grounds in *The Prosecutor v Al Hassan* arrest warrant decision implies a sequential, non-intersectional approach.[249] It would be more consistent with intersectionality to explicitly state that discriminatory grounds are not siloed, and that their intersections should be considered on a multi-axis framework.[250] The difference between an additive approach and intersectionality was highlighted in the

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245 *The Prosecutor v Abd-Al-Rahman*, Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Exp-Corr (4 February 2022) [181].

246 Maučec (n 172) 536.

247 See Chapter II(2)(A)(i).

248 *The Prosecutor v Ntaganda* (n 236) [1009].

249 *The Prosecutor v Al Hassan* (n 223) [95].

250 Maučec (n 172) 540.

Ntaganda reparations order,[251] but it remains unclear whether the Chambers will incorporate additive, sequential, or intersectional approaches in their jurisprudence going forward.

The relevant Chambers have therefore had several opportunities to note the unique and compounded discrimination flowing from the intersection of multiple protected characteristics, but have only rarely taken these opportunities explicitly.

7 Summary

Before the 2014 Policy Paper, intersectionality did not have a role in ICC case law. Analytical attention to discrimination based on multiple protected characteristics was scant. However, intersectionality has gained increasing visibility after the 2014 Policy Paper, and the Chambers are making the beginning steps towards a body of intersectionality jurisprudence. These developments raise the question of the legal basis for resorting to intersectionality in the ICC, which will now be discussed.

251 *The Prosecutor v Ntaganda* (n 9) fn 153.

IV EVALUATING THE LEGAL BASIS FOR INTERSECTIONALITY IN THE ROME STATUTE

This chapter will consider whether there is a defensible legal basis in the Rome Statute for incorporating intersectionality into the adjudication of persecution. It will first demonstrate that interpreting the Rome Statute's persecution provisions using the interpretative rules in the Vienna Convention on the Law of Treaties (VCLT) supports a single-axis rather than intersectional understanding of persecution (section 1). Secondly, it will provide an overview of Article 21(3), a provision requiring the application and interpretation of the ICC's applicable law to be consistent with internationally recognised human rights (section 2). Thirdly, it will assess whether this provision's reference to 'internationally recognized human rights' can be interpreted to include intersectionality, as an aspect of the right to equality and non-discrimination (section 3). Fourthly, it will interpret the powers granted to ICC judges under Article 21(3), concluding that the provision is a mandatory test of consistency with human rights (section 4).[252] Fourthly, it will evaluate a possible obstacle to using Article 21(3) to deploy intersectionality: the principle of legality (section 5).

1 Interpretation of Article 7(1)(h) and (2)(g)

A VCLT analysis[253] of the Rome Statute's provisions on persecution implies a single-axis approach to persecution. This suggests that intersectionality cannot be conclusively read into these provisions through interpretation. There is no commentary as to the intended interaction between the discriminatory grounds in Article 7(1)(h), but the use of the

252 Irving (n 18) 839.

253 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 27 January 1980), arts 31–33.

disjunctive 'or' when listing the grounds gives some support to a single-axis approach.[254] The ordinary meaning of '*the identity* of the group or collectivity' in Article 7(2)(g) also suggests a focus on a singular identity, and therefore a single-axis approach.[255] There are no contextual arguments based on the surrounding provisions that would either exclude or support an intersectional approach.[256] Reasoning centred on the Statute's purpose of ending impunity for the 'most serious crimes of concern to the international community' may provide general support for including intersectional discrimination in the crime of persecution.[257] But there is no evidence in subsequent agreements, state practice, or the drafting history of the Rome Statute that intersectionality is to be included in the interpretation of persecution.[258]

This indicates that incorporating intersectionality via a traditional VCLT interpretation of Article 7(1)(h) and (2)(g) is unlikely. However, an alternative legal basis for intersectionality may be available. This thesis now explores whether Article 21(3) of the Rome Statute can act as a legal basis for incorporating intersectionality into the adjudication of persecution.

254 See Ambos (n 17) 229.

255 Emphasis added.

256 Subject to the principle of legality which will be discussed in Section 5.

257 Rome Statute (n 4) preamble.

258 Ambos (n 17) 228–229.

2 Overview of Article 21(3)

Article 21 specifies the applicable law in the ICC. Article 21(1) is hierarchical,[259] providing that '[i]n the first place' the ICC is to apply the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence.[260] 'In the second place', it may apply applicable treaties, principles, and rules of international law.[261] 'Failing that', the ICC may apply general principles of law from domestic legal systems.[262] In light of this hierarchical language in the provision, Article 21(1)(b) and (c) have been interpreted by the Chambers to be solely applicable when:[263]

> (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute.

Article 21(1) therefore creates a framework in which the Rome Statute and its supporting instruments dominate. At first glance, with neither the Rome Statute nor supporting instruments making mention of intersectionality, this framing leaves very little room for intersectionality to be applied in the ICC. Article 21(3) further provides, however, that:[264]

> The *application and interpretation of law* pursuant to this Article must *be consistent with internationally recognized human rights*, and be without any

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259 D Akande, 'Sources of International Criminal Law', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 45.

260 Rome Statute (n 4) art 21(1)(a).

261 ibid art 21(1)(b).

262 ibid art 21(1)(c).

263 *The Prosecutor v Al Bashir* (n 196) [126].

264 Emphasis added.

> adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

This provision prima facie has potential to serve as a route for incorporating intersectionality into the adjudication of persecution under the Rome Statute.[265] Yet, the operation of Article 21(3) remains contested in scholarship.[266] The two key questions raised by this provision in the intersectionality context concern the definition of 'internationally recognized human rights', and the nature of Article 21(3)'s role in the 'application and interpretation' of the ICC's applicable law.[267]

3 Does intersectionality fall within 'internationally recognized human rights'?

Article 21(3)'s reference to 'internationally recognized human rights' has been criticised as containing a 'worrying degree of vagueness'.[268] Several scholars have found that an analysis under the VCLT has not clarified the meaning of the phrase.[269] Based on the ordinary meaning, 'internationally recognized' can be interpreted as requiring a degree of 'broad acknowledgement and acceptance'.[270] This can be assessed flexibly in light of a right's presence in treaties or soft law instruments, and the consideration of its possible

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265 See Maučec (n 11) 29–31.

266 M deGuzman and V Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing 2020) 343.

267 See G Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 411, 434.

268 Akande (n 259) 47.

269 See R Young, '"Internationally Recognized Human Rights" before the International Criminal Court' (2011) 60 *International and Comparative Law Quarterly* 189; S Bailey, 'Article 21(3) of the Rome Statute: A Plea for Clarity' (2014) 14(3) *International Criminal Law Review* 513.

270 Young (n 269) 193.

customary status in international law.[271] Logically, acceptance of the right need not be universal, as the provision does not specify this, and it is rare for 100 per cent of states to voluntarily accept an international law norm.[272]

The Statute's *travaux préparatoires* show that the consideration of the fair trial rights of the accused was at the forefront of the sparse discussions about Article 21(3).[273] Yet, internationally recognised human rights are not limited to the rights of the accused in the Rome Statute. That the Statute refers to fair trial rights as simply 'rights', without the phrase 'internationally recognized', indicates that the category of internationally recognised human rights is broader than that of fair trial rights.[274]

This interpretation of internationally recognised human rights is reflected in the case law of the ICC. Judge Pikis described 'internationally recognized human rights' as 'those human rights acknowledged by customary international law and international treaties and conventions'.[275] The relevant Chambers commonly consider key human rights treaties under Article 21(3), such as the International Covenant on Civil and Political Rights (ICCPR), as well as the jurisprudence of human rights courts, primarily the European Court of Human Rights (ECtHR).[276] The Chambers most frequently invoke

271 ibid 199.

272 ibid 203.

273 United Nations High Commissioner for Human Rights, 'The High Commissioner's Position Paper on the Establishment of a Permanent International Criminal Court' (United Nations, 15 June 1998), paras 46–50.

274 See Rome Statute (n 4) arts 54, 55, 67; Bailey (n 269) 526.

275 *The Prosecutor v Lubanga*, Decision on the Prosecutor's 'Application for Leave to Reply' to 'Conclusions de la Défense en Réponse au Mémoire d'Appel du Procureur', ICC-01/04-01/06-424 (12 September 2006), Separate Opinion of Judge Pikis [3].

276 This focus on 'concomitant sources' is described as the 'shotgun method' in Bailey (n 269) 532. See also G Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute' (2014) 12(4) *Journal of International Criminal Justice* 655, 674–675.

the provision with regard to the rights of the accused,[277] but increasingly reference the rights of victims and witnesses as well. Victims' and witnesses' rights to privacy and dignity,[278] an effective remedy,[279] non-refoulement,[280] and legal victimhood after death,[281] have all been accepted as internationally recognised human rights by the relevant Chambers. Rights have been held to be internationally recognised by reference to both binding and non-binding instruments, including soft law principles[282] and general principles of human rights law.[283]

Although intersectionality is not a stand-alone right, it is an increasingly accepted approach to, and integral aspect of, the right to equality and non-discrimination.[284] The right to equality and non-discrimination, first enshrined in the Universal Declaration of Human Rights (UDHR),[285] has been included in all major human rights instruments and is recognised in Article 21(3) of the Rome Statute itself.[286] It can therefore easily be

277 See eg *The Prosecutor v Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 (14 December 2006) [37].

278 *The Prosecutor v Katanga and Chui*, Decision on the Prosecutor's Request Relating to Three Forensic Reports, ICC-01/04-01/07-988-tENG (25 March 2009) [5].

279 *The Prosecutor v Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320 (12 December 2008) [17].

280 *The Prosecutor v Katanga and Chui*, Decision on an Amicus Curiae Application, ICC-01/04-01/07-3003-tENG (9 June 2011) [68].

281 *The Prosecutor v Bemba* (n 279) [40].

282 *The Prosecutor v Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119 (18 January 2008) [35].

283 *The Prosecutor v Katanga and Chui*, Decision on 'Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008', ICC-RoR217-02/08-8 (10 March 2009) [31]; Young (n 269) 205.

284 Atrey and Dunne (n 95) 2.

285 UDHR, General Assembly Resolution 217A(III) (10 December 1948), art 7.

286 Rome Statute (n 4) art 21(3); 'without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'. See also Atrey (n 13) 29.

termed an internationally recognised human right.[287] Arguably, intersectionality is also sufficiently well-recognised and accepted to be captured within the consideration of the right to equality and non-discrimination under Article 21(3). Intersectionality is included in cases of human rights courts, the practice of human rights treaty bodies, and soft law guidance issued by human rights treaty bodies.[288] Further, intersectionality has already been incorporated into the ICC's case law,[289] indicating that the Chambers consider it is sufficiently well-recognised to merit consideration. It is therefore argued that intersectionality can be included within internationally recognised human rights for the purposes of Article 21(3).

4 What power does Article 21(3) give ICC judges to incorporate intersectionality?

A Introduction

Even if intersectionality falls within the scope of 'internationally recognized human rights', the effect of Article 21(3) on the interpretation and application of the Rome Statute's provisions is contested. Two broad perspectives emerge from scholarly debate on the legal effect of Article 21(3). The first is that Article 21(3) is an interpretative principle that guides the interpretation of Rome Statute provisions but cannot justify changing or disapplying them. Under this approach, Article 21(3) requires ICC judges to select human rights-consistent interpretations when multiple interpretations of the applicable law are available.[290] However, there are 'inherent limits' to Article 21(3)'s

287 Maučec (n 11) 29.

288 See Chapter II(2)(B).

289 See Chapter III(5).

290 G Hafner and C Binder, 'The Interpretation of Article 21(3) ICC Statute, Opinion Reviewed' (2004) 9 *Austrian Review of International and European Law* 163, 171.

relevance.[291] If a Rome Statute provision cannot be interpreted consistently with internationally recognised human rights without altering the Statute's obligations, the Statute prevails.[292] The second perspective is that Article 21(3) is a mandatory 'human rights consistency test'.[293] Under this perspective, Rome Statute provisions may be disapplied if they cannot be interpreted consistently with internationally recognised human rights, and external human rights standards may be applied in ICC proceedings.[294]

The interpretation of Article 21(3) therefore remains unsettled. To determine the implications for the intersectionality proposal, this thesis will now interpret Article 21(3).

B Interpretation of Article 21(3)

This sub-section provides an interpretation of Article 21(3), with reference to the VCLT interpretative rules.[295] The three major questions to be answered are as follows: first, is Article 21(3) a general interpretative principle, or a human rights consistency test? Second, does Article 21(3) empower ICC judges to disapply provisions of the Rome Statute? Third, does Article 21(3) allow application of external human rights standards in ICC proceedings? The consequences of this interpretation for the intersectionality proposal will then be assessed.

The ordinary meaning of Article 21(3)'s text is that all sources of law in Article 21(1)–(2) 'must' be interpreted and applied consistently with internationally recognised

291 ibid 172.

292 ibid.

293 Irving (n 18) 839. See also Hochmayr (n 276) 676.

294 Bitti (n 267); Bailey (n 269).

295 A minority of scholars argue against Articles 31–33 of the VCLT being used for interpreting the Rome Statute, in part due to the argument below that the principle of legality in the Rome Statute prevails over the VCLT's interpretation tools. For the reasons given below, this thesis rejects this minority view: see Chapter IV(4)(C).

human rights.[296] To give effect to the word 'must', Article 21(3) is interpreted as containing a mandatory rule requiring all applicable law to be interpreted and applied consistently with human rights.[297] The use of both 'interpreted' and 'applied' in the provision indicates that Article 21(3) has two different goals:[298] first, that provisions of the Rome Statute be interpreted consistently with internationally recognised human rights, and, second, that the application of relevant provisions to facts, including when arriving at a decision on the merits, must incorporate 'the content or objective of the relevant human right'.[299] Unlike Article 21(1)(b), which is conditioned by the words 'in the second place', Article 21(3) 'directly' provides for the interpretation and application of the applicable law to be consistent with internationally recognised human rights.[300] Counter-arguments based on the placement of Article 21(3) at the end of Article 21, or the drafters' intentions as to the primacy of the Rome Statute,[301] act 'to avoid interpretation of the provision as drafted and to speculate on what is not drafted'.[302] Therefore, Article 21(3) conditions the interpretation and application of the ICC's applicable law. This gives the provision a form of 'super-hierarchy',[303] or, differently put, a status as 'lex superior' in the Rome Statute context.[304]

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296 Akande (n 259) 47.

297 T Dias, *Beyond Imperfect Justice: Legality and Fair Labelling in International Criminal Law* (Brill 2022) 218–219. See also deGuzman and Oosterveld (n 266) 342.

298 Bitti (n 267) 437.

299 Dias (n 297) 219.

300 Hochmayr (n 276) 677.

301 See Hafner and Binder (n 290) 175.

302 Akande (n 259) 47. See also L Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *European Journal of International Law* 543, 560.

303 A Pellet, 'Applicable Law' in A Cassese, P Gaeta, and J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1051, 1080–1081.

304 KJ Zegers, 'International Criminal Tribunals and Human Rights Law: Adherence and Contextualization' (PhD thesis, University of Amsterdam, 28 May 2015) 82.

The next contentious part of Article 21(3) is whether it allows for other provisions of the Rome Statute and supporting instruments to be disapplied when a human rights-consistent interpretation cannot be reached. In line with the above understanding of Article 21(3) as lex superior, ICC judges are required to satisfy the human rights consistency test by selecting human rights-consistent interpretations of Rome Statute provisions. However, when a human rights-consistent interpretation of a provision is not available (due to an unavoidable norm conflict between the provision and the internationally recognised human right),[305] Article 21(3) allows ICC judges to resolve the conflict by disapplying inconsistent provisions of the Rome Statute.[306] Article 21(3), as written, creates an obligation for all applicable law, including the provisions of the Rome Statute, to be interpreted and applied consistently with internationally recognised human rights.[307] There are no evident exceptions to this obligation in the provision's text, context, purpose or *travaux préparatoires*.[308] As Akande notes, a logical corollary of the mandatory requirement for human rights consistency in Article 21(3) is that the applicable law 'cannot be applied where inconsistent with human rights norms'.[309] To conclude otherwise would contravene the terms of Article 21(3), allowing the ICC to act

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305 See M Milanovic, 'Norm Conflict in International Law: Whither Human Rights' (2009) 20 *Duke Journal of Comparative & International Law* 69, 72–75: regarding the outcome of norm conflicts, including conflict avoidance via interpretation, conflict resolution by giving one norm priority, or acceptance of truly unresolvable norm conflicts.

306 See Zegers (n 304) 82; Irving (n 18) 839; Akande (n 259) 47; Dias (n 297) 220; Pellet (n 303) 1080; Maučec (n 11) 29.

307 Dias (n 297) 220; Akande (n 259) 47.

308 Article 21(3) was achieved by consensus during negotiations, with no recorded state objections to the rule that the 'law applied should be consistent with certain internationally recognized values': United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF.183/13 (Vol II) (1998) 222.

309 Akande (n 259) 46–47.

inconsistently with human rights whenever an unavoidable conflict arises between Rome Statute provisions and internationally recognised human rights.[310]

Further, looking at context, the power to apply as a secondary source[311] 'where appropriate', treaties, principles, and rules of international human rights law already exists in Article 21(1)(b).[312] To avoid an interpretation that renders the two provisions duplicative, Article 21(3) must contribute something different from Article 21(1)(b)'s secondary power to apply international human rights in suitable cases.[313] It is argued that this additional power is a norm conflict resolution mechanism:[314] empowering the ICC to hold a human rights-inconsistent norm to be '"ultra vires" and thus inapplicable'.[315] Although the principle of effectiveness mandates that effective meaning should be given to Rome Statute provisions wherever possible through human rights-consistent interpretations,[316] the status of Article 21(3) as lex superior in the Rome Statute context justifies disapplying provisions that are unavoidably inconsistent with human rights.

The final point of contention is whether Article 21(3) allows ICC judges to go beyond disapplying provisions of the Rome Statute in cases of unavoidable norm conflict, to directly applying human rights standards in ICC proceedings. As Dias notes, merely disapplying the provisions of the Rome Statute may not ensure that the ICC acts consistently with internationally recognised human rights under Article 21(3).[317] For example, the Trial Chamber in *The Prosecutor v Katanga* disapplied Article 93(7) of the

310 Zegers (n 304) 85.

311 Recall the hierarchy of sources in Article 21(1): Chapter IV(1).

312 Dias (n 297) 220.

313 ibid.

314 ibid 175. See also Milanovic (n 305) 72.

315 Pellet (n 303) 1080.

316 See R Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 169.

317 Dias (n 297) 220.

Statute (requiring witnesses to be returned to their home state after testifying) due to inconsistency with the right to asylum and non-refoulement 'as required by Article 21(3)'.[318] But this disapplication of Article 93(7) created separate human rights issues regarding the legality of the witnesses' resulting lengthy detention in the ICC detention centre.[319] In order for the words of Article 21(3) to be effective, it is therefore argued that Article 21(3) requires ICC judges to 'give effect to' internationally recognised human rights.[320] This means incorporating the requirements of rights such as the right to equality and non-discrimination (including intersectionality) into ICC processes to render the interpretation and application of the applicable law human rights-consistent.[321]

This interpretation of Article 21(3) finds support in ICC case law. The Appeals Chamber in *The Prosecutor v Lubanga* clarified that '[h]uman rights underpin the Statute; every aspect of it', meaning that the Rome Statute's provisions must be 'interpreted and more importantly applied in accordance with internationally recognized human rights'.[322] Further, in *The Prosecutor v Katanga* trial judgment, Article 21(3) was described as one of the 'restrictions expressly laid down by the Statute', reinforcing that '[t]he outcome of the interpretation undertaken by the Chamber must not therefore run counter to such rights.'[323]

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318 *The Prosecutor v Katanga and Chui* (n 280) [62], [73].

319 See *The Prosecutor v Katanga*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ICC-01/04-01/07-3405-tENG (1 October 2013). See also Irving (n 18) 842.

320 Dias (n 297) 221.

321 Hochmayr (n 276) 677.

322 *The Prosecutor v Lubanga* (n 277) [37].

323 *The Prosecutor v Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG (7 March 2014) [50].

In short, Article 21(3) is interpreted as subjecting the applicable law to a human rights consistency test,[324] calling for the disapplication of Rome Statute provisions which are unavoidably inconsistent with internationally recognised human rights, and for ICC judges to give effect to those rights.[325]

C Implications for intersectionality and the crime of persecution

Under the above interpretation of Article 21(3), ICC judges are required to adopt a human rights-consistent interpretation of the crime of persecution in Article 7(1)(h) and (2)(g). As intersectionality is an aspect of an internationally recognised human right, Article 21(3) therefore provides a legal basis for the relevant Chambers to consistently adopt an intersectional interpretation of Article 7(1)(h) and (2)(g). This interpretation also clarifies the interaction between intersectionality and the principle of legality, which will be discussed in Section 5.

The potential implications of this approach can be seen in ICC case law which adopts this interpretation. An instructive example is the Appeals Chamber's decision in *The Prosecutor v Katanga*, which used Article 21(3) to justify an interpretation of Rule 81(4) to include 'persons at risk on account of the activities of the Court'.[326] This interpretation was not evident on the text of the provision,[327] and expanded its protective scope in line with the imperatives of internationally recognised human rights, impliedly the rights to life, liberty and security, and privacy of 'innocent third parties'.[328]

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324 Irving (n 18) 839.

325 Dias (n 297) 221.

326 *The Prosecutor v Katanga*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', ICC-01/04-01/07-475 (13 May 2008) [56]–[57].

327 ibid. Rule 81(4) refers only to 'the safety of witnesses and victims and members of their families'.

328 ibid [40], [57].

In the persecution context, first, the relevant Chamber would identify intersectionality as an aspect of an internationally recognised human right under Article 21(3). Secondly, the Chamber would seek an interpretation of Article 7(1)(h) and (2)(g) that encompasses persecution based on multiple, intersecting grounds.[329] Finally, an intersectional approach to the legal analysis would be adopted, so that the elements of the crime of persecution would be applied consistently with the requirements of intersectionality as set out in international human rights law instruments and case law.[330]

This conclusion is subject to the potential obstacles of Articles 22 and 23 of the Statute, which are explored next.

5 Does the principle of legality preclude this preferred interpretation of Article 21(3)?

The above section has concluded that Article 21(3) obliges ICC judges to incorporate the requirements of intersectionality when interpreting and applying Article 7(1)(h) and (2)(g). What, then, does the Rome Statute require in the event of a possible conflict between the requirements of two internationally recognised human rights: on the one hand, intersectionality as an aspect of the right to equality and non-discrimination, and, on the other hand, the principle of legality as embodied in Articles 22 and 23 of the Rome Statute? This section will introduce the principle of legality in the Rome Statute, advocate for an interpretation of its requirements, assess any possible conflict between intersectionality and the principle of legality in the persecution context, and provide a preferred approach to resolving any conflict.

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329 See Chapter V(1).

330 ibid. Note that if the Chamber concluded a genuine norm conflict existed between the persecution provisions and the requirements of Article 21(3), Article 21(3) would prevail as lex superior: Hochmayr (n 276) 677.

A Overview of the principle of legality in the Rome Statute

The principle of legality is a core concept in international human rights law and criminal law.[331] It governs the acts of the criminal justice system, ensuring that the criminal law's highly invasive interferences with the liberty of the accused are prospectively prescribed by law and strictly interpreted in favour of the accused person.[332] The principle has both a legislative and an interpretative meaning: it requires legislators to clearly and prospectively set out crimes in law, and it prevents the judiciary from intruding into a person's liberty 'beyond the extent that a reasonable individual could understand from the words of the relevant prohibition'.[333]

The Rome Statute's iteration of the principle of legality is set out most relevantly in Articles 22 and 23 of the Rome Statute.[334] Article 22 provides the *nullum crimen sine lege* principle (no crime without law), stating in relevant part:

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended

331 See eg UDHR (n 285) art 11(2); ICCPR, 999 UNTS 171 (entered into force 23 March 1976), art 14; European Convention on Human Rights (ECHR), ETS 5 (entered into force 3 September 1953), art 7.

332 Ambos (n 17) 1153. See also F von Liszt, 'The Rationale for the Nullum Crimen Principle' (2007) 5 *Journal of International Criminal Justice* 1009.

333 Ambos (n 17) 1153. The interpretative aspect is most relevant for this thesis. See also C Kreß, 'Nulla Poena Nullum Crimen Sine Lege' in A Peters and R Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law* (February 2010) <www.mpepil.com> accessed 1 June 2023, paras 3–7.

334 Additionally, although less relevantly for the purposes of this thesis, under Article 11, the ICC only has jurisdiction for crimes committed after the Statute entered into force, and Article 24 reinforces that no person shall be held retroactively criminally responsible for conduct occurring before the Statute entered into force: Rome Statute (n 4).

by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 23 articulates the *nulla poena sine lege* principle (no punishment without law), declaring that '[a] person convicted by the Court may be punished only in accordance with this Statute'. The principle of legality, as expressed in Articles 22 and 23, can be broken down into five components:[335]

1) *nullum crimen sine lege* as defined in Article 22(1) above;
2) the principle of strict construction as defined in Article 22(2), including the prohibition of extension by analogy;[336]
3) the *in dubio pro reo* (in doubt, for the accused) principle, requiring ambiguities to be interpreted in favour of the accused person;
4) the implicit requirement of specificity (comprising foreseeability and accessibility): an 'intrinsic component' of the principle of legality aimed at guaranteeing that individuals have reasonable notice of criminalisation;[337] and
5) *nulla poena sine lege,* as defined in Article 23.

The question raised by the principle of legality is whether any of its components, such as the *in dubio pro reo* principle, are obstacles to the preferred interpretation of Article 21(3) set out above.

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335 See D Jacobs, 'International Criminal Law', in J Kammerhofer and J D'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 451, 452–453; *The Prosecutor v Vasiljević,* Trial Judgment, IT-98-32-T (ICTY, 29 November 2002) [193].

336 Some scholars class the prohibition on analogies as a separate element, but here the prohibition on analogies is categorised as an integral aspect of the principle of strict construction.

337 Dias (n 297) 48.

B Views on the interpretation of Articles 22 and 23

Scholars express a range of views on the interpretation of Articles 22 and 23 in the Rome Statute, which would have varying implications for incorporating intersectionality via Article 21(3).

One interpretation of the principle of legality that would prevent the incorporation of intersectionality can be termed the 'strict approach'. This approach relies on an interpretation of the applicable law hierarchy in Article 21(1), in which the Rome Statute and its supporting instruments have primacy over all other sources.[338] In general international law, the principle of legality is somewhat 'tolerant of imprecision', due to the lack of universal legislative instruments at the international level.[339] As formulated in the Rome Statute, however, the principle has the potential to be more rigid. The strict approach also focuses on the ordinary meaning of Article 22, which specifies that the Statute's crimes 'shall' be strictly construed and not extended by analogy.[340] On this interpretation, provisions of the Statute should be applied as they are written, in accordance with the principles of *nullum crimen sine lege* and strict construction.[341] Where there is any ambiguity in the definition of a crime in the Statute, the *in dubio pro reo* principle requires the judges to adopt the interpretation that most favours the accused.[342] ICC judges are barred from progressively developing the law through the use of Article 21(3) or otherwise.[343]

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338 Jacobs (n 335) 467.

339 Ambos (n 17) 1154.

340 Rome Statute (n 4) art 22(2). See also discussion in WA Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2012) 94–95.

341 See eg *The Prosecutor v Chui*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-4 (18 December 2012), Concurring Opinion of Judge Van den Wyngaert [18].

342 ibid.

343 ibid [19].

On this approach to the principle of legality, Article 21(3) could not be used to incorporate intersectionality. To do so would involve interpreting persecution to include a concept that is not evident on the text of the provisions, with reference to a form of analogy: that if single-ground discrimination is covered, so too should intersectional discrimination be covered. This would breach the principle of strict construction and its prohibition on analogy, as well as the *in dubio pro reo* principle, due to intersectionality's primary relevance for the victims' experiences rather than the interests of the accused.

However, the strict approach is not the only possible interpretation of Articles 22 and 23. What is largely lacking from the scholarship is a systematic interpretation of the five components that make up the principle of legality in the Rome Statute, and an assessment of their interaction with Article 21(3). This thesis will therefore interpret the above five components of the principle of legality, determining whether Articles 22 and 23 are an obstacle to incorporating intersectionality into persecution adjudication via Article 21(3).

C Interpreting the principle of legality and its implications for the intersectionality proposal

This sub-section considers whether the proposal to incorporate intersectionality into the adjudication of persecution, including the preferred interpretation of Article 21(3), would breach the principle of legality in Articles 22 and 23 of the Rome Statute. The following interpretation of the principle of legality's five components will rely on the VCLT interpretative rules.

i Interpretation of nullum crimen sine lege

Article 22(1) requires a finding of criminal responsibility if the accused's conduct amounts to a crime within the ICC's jurisdiction when it is committed. The *nullum crimen sine lege* principle centres primarily on prohibiting retroactive criminalisation: that no criminal responsibility should exist without an antecedent provision criminalising the conduct.[344] The ordinary meaning of Article 22(1) embodies the more robust formulation of *nullum crimen sine lege scripta* (no crime without *written* law), meaning crimes must be defined in the Rome Statute at the time of being committed.[345] It could be argued that incorporating intersectionality would breach the *nullum crimen sine lege* principle by introducing a legal concept that is not set out in the definition of the crime of persecution.

However, whether Article 22(1) requires a crime to be *exhaustively* defined in the Rome Statute can be debated. Article 22(1) provides that a person will not be held criminally responsible 'unless *the conduct* in question constitutes' a crime.[346] This suggests that provided the conduct at issue is criminalised under the relevant Rome Statute provision, ICC judges may be able to elaborate and clarify certain other aspects of the crimes.

Although the Rome Statute's drafters intended to limit judicial freedom through the provisions on the principle of legality,[347] it seems wholly improbable that the drafters intended to remove the 'margin of judicial appreciation' that is inherent in domestic and

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344 AS Galand, *UN Security Council Referrals to the International Criminal Court* (Brill 2019) 104.

345 K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2008) 335.

346 See *The Prosecutor v Hadzihasanovic*, Decision on Joint Challenge to Jurisdiction, IT-01-47-PT (ICTY, 12 November 2002) [62].

347 United Nations, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I' (August 1996) [52], [180], [185]; Ambos (n 17) 1151.

international justice systems.[348] Judicial interpretation of the definitions of crimes is envisaged by the Statute itself, as ICC judges may have recourse to other treaties, customary international law, and general principles of international law in interpreting even purportedly clear provisions.[349] This point of principle is usefully summarised by the ECtHR, which states that, 'however clearly drafted a provision of criminal law may be, in any legal system, there is an inevitable element of judicial interpretation'.[350] The ECtHR also reinforces the important point that elaboration and development of criminal law to meet changing circumstances[351] is a 'well entrenched and necessary part of legal tradition'.[352] In light of the interpretative role of judges, and for the provisions of the Rome Statute to meet new and changing factual circumstances, the *nullum crimen sine lege* principle must therefore be qualified.

Additionally, a contextual argument in support of a qualified *nullum crimen sine lege* principle is that the Rome Statute's definitions of crimes, including persecution, are subject to consistency with internationally recognised human rights under Article 21(3).[353] The requirements of these rights are not necessarily explicit in the Statute's definitions of crimes, suggesting the Statute does not envisage a strict *nullum crimen sine lege* principle.

A further principled reason for interpreting *nullum crimen sine lege* as qualified and conduct-focused lies in the 'distinctive' nature of the principle of legality in

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348 A Grabert, *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlad 2015) 22.

349 Rome Statute (n 4) art 21(1).

350 *CR v United Kingdom*, Judgment, Application No 20190/92 (ECtHR, 22 November 1995) [34].

351 *X Ltd and Y v United Kingdom*, Judgment, Application No 8710/79 (ECtHR, 7 May 1982) [9].

352 *CR v United Kingdom* (n 350) [34]; *KHW v Germany*, Judgment, Application No 37201/97 (ECtHR, 22 March 2001) [45].

353 See Chapter IV(3)(B).

international criminal law.[354] As the ICTY noted, international criminal courts and tribunals have the 'objective of maintaining a balance between the preservation of justice and fairness towards the accused[,] and taking into account the preservation of world order'.[355] This distinctiveness requires a qualified form of the principle of legality, centred on:[356]

> the factual criminality of a particular *conduct*…it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.

This view is elaborated by the extra-judicial argument of Judge Shahabuddeen that, if the accused's acts bear 'the fundamental criminality of the crime charged, it does not appear to be necessary to show…they exhibited every detail of that crime'.[357]

This qualified view of *nullum crimen sine lege* logically does preclude international criminal courts and tribunals from 'creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification'.[358] Otherwise, courts would trespass into a law-making role and create 'unfair surprise' for the accused.[359] Accordingly, the ICC would breach the *nullum crimen sine lege* principle if it

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354 *The Prosecutor v Delalić*, Trial Judgment, IT-96-21-T (ICTY, 16 November 1998) [405].

355 ibid.

356 *The Prosecutor v Hadzihasanovic* (n 346) [62] [emphasis in original].

357 M Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2(4) *Journal of International Criminal Justice* 1007, 1010.

358 *The Prosecutor v Milutinović*, Decision on Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72 (ICTY, 21 May 2003) [38].

359 C Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court' (2017) 91 *St John's Law Review* 37, 86.

created ‘new criminal offences’, either via substantively new definitions of crimes or criminalisation of conduct that was not criminal previously.[360]

This conduct-focused interpretation of *nullum crimen sine lege* has some support in the case law of the ICC. For example, in *The Prosecutor v Ntaganda*, the defence claimed a breach of *nullum crimen sine lege* due to an alleged expansion of the war crimes of rape and sexual slavery of child soldiers,[361] which were originally ‘understood as committed only by an opposing party who had captured child soldiers’.[362] The Pre-Trial Chamber did not uphold the legality argument, so that the child soldiers were protected regardless of which party to the conflict perpetrated the sexual violence.[363]

ii Nullum crimen sine lege*: does intersectionality change the definition of persecution?*

It is likely that incorporating intersectionality into persecution adjudication does not breach the *nullum crimen sine lege* principle. The conduct defined and criminalised by Article 7(1)(h) and (2)(g) is the perpetration of underlying acts (such as murder, torture, and others in Article 7(1)) that constitute severe deprivation of fundamental human rights, committed on discriminatory grounds. Incorporating intersectionality does not change the factual conduct that is criminalised. Whether discrimination is single-ground or intersectional, if the conduct meets the definition for persecution, it is criminal. Therefore, the crime of persecution is not problematically broadened by the incorporation of intersectionality.

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360 *The Prosecutor v Vasiljevic* (n 335) [196].

361 *The Prosecutor v Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309 (14 June 2014) [79].

362 Otto (n 135) 403.

363 *The Prosecutor v Ntaganda* (n 361) [79]–[80].

Instead, intersectionality would amount to a limited and principled development in the interpretation of the *approach* taken to assessing discriminatory grounds, relying on Article 21(3).[364] This would allow ICC judges to consider the way in which discriminatory grounds intersect, rather than assessing them singly or separately. The purpose of the *nullum crimen sine lege* principle, to prevent retroactive criminalisation of conduct, is not offended by this approach.

iii Interpretation of strict construction and the prohibition on analogies

The ordinary meaning of the requirement of strict construction in Article 22(2) is that the definitions of crimes in the Rome Statute must be construed strictly and without extension by analogy. In general international law, the purpose of strict construction can be formulated as both ensuring 'fair warning' of criminalisation and respecting legislative choice.[365] In the Rome Statute's *travaux préparatoires*, the principle of legality, and the requirement of strict construction in particular, was supported as a potential 'constraint on [judicial] law-making'.[366] This was partly driven by a concern about the ambiguity in customary international law on international crimes, and prospective states parties' desire to limit the powers of an institution which could target 'even their highest-ranking officials'.[367] These factors support an approach of strict textual primacy.

However, there are strong reasons to interpret strict construction as qualified in the Rome Statute, allowing limited departures from a textual primacy approach and controlled extensions by analogy. The same contextual argument as above applies, that

364 AM Beringola, 'Intersectionality and Sexual and Gender-Based Violence: Applicability and Benefits for International Criminal Law' (PhD thesis, Ulster University 2022) 64.

365 Davidson (n 359) 43 and 57.

366 Ambos (n 17) 1151. See also United Nations (n 347).

367 Ambos (n 17) 1151.

Article 21(3) envisages a departure from a strict textual primacy approach, by providing a power to subject Rome Statute provisions to a human rights consistency test.

Further, points of principle favour a qualified approach to strict construction. As noted above, interpretation is an inescapable aspect of the judicial process, which cannot be eliminated by strict construction of the Rome Statute's text. As one scholar notes, '[t]extual clarity does not transform adjudication into a simple and entirely predictable mechanical process'.[368] Judges, whether international or domestic, necessarily clarify the law during its interpretation and application. This need for flexibility in judicial interpretation is arguably increased in international criminal law, a field in which treaties such as the Rome Statute can only be changed by a drawn-out amendment process.[369] A qualified approach to the requirement of strict construction is also supported by the 'identity crisis' created by international criminal law's strong connections with international human rights law and international humanitarian law. This causes the field to balance strict legality approaches with the aims of preventing impunity and protecting human dignity.[370]

Interpreting Article 22(2) as absolutely preventing 'progressive judicial clarification of the contents of an offence'[371] would therefore be unrealistic.[372] But such clarification should nevertheless respect the purposes of strict construction: preventing judicial law-making (the creation of essentially new crimes) or interpretations that result

368 J Powderly, *Judges and the Making of International Criminal Law* (Brill 2020) 456.

369 Grabert (n 348) 23.

370 See D Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925. See also F Tulkens, 'The Paradoxical Relations between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577.

371 Ambos (n 17) 1162.

372 Davidson (n 359) 86.

in ‘unfair surprise’ to the accused.[373] This interpretation of strict construction furthers the principle’s purposes, while taking realistic account of the nature of the judicial interpretative function and international criminal law more broadly.

This qualified approach to strict construction finds support in ICC case law. For example, the Trial Chamber in *The Prosecutor v Bemba* observed that the Rome Statute itself envisages that judges will take an active interpretative role in ‘identifying, in other primary or even secondary sources of law, the required elements for the definition of specific conduct’.[374] This may involve ‘controlled’ extensions by analogy such as in defining ‘other inhumane acts of a similar character’ in Article 7(1)(k) of the Statute.[375] While this provision is explicitly residual and anticipates judicial elaboration, the ICC has also taken a qualified approach to strict construction in other contexts. One example is the Chambers’ jurisprudence on Article 25(3)(a), concerning the concept of indirect co-perpetration.[376] The Court departed from the strict text of the provision to consider whether a person, although ‘removed from the scene of the crime, control[s] or mastermind[s] its commission’.[377] For some, this approach was taken ‘to afford coherence, consistency and predictability’ to interpreting the provision, ‘with such considerations outweighing a purely textual approach’.[378]

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373 Davidson (n 359) 87.

374 See *The Prosecutor v Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343 (21 March 2016) [85].

375 Ambos (n 17) 1163.

376 See E van Sliedregt, ‘Perpetration and Participation in Article 25(3)’ in C Stahn (n 267) 499.

377 *The Prosecutor v Lubanga* (n 181) [330].

378 Powderly (n 368) 479.

iv Strict construction: does intersectionality depart inappropriately from the text of the persecution provisions?

As noted earlier,[379] the ordinary meaning respectively of Article 7(1)(h) and (2)(g) suggests a single-axis rather than intersectional approach to persecution. However, the above interpretation of strict construction indicates that incorporating intersectionality may be an acceptable extension of the provisions' language. A 'previously unknown', 'substantially new' crime is not being created by using Article 21(3) to incorporate intersectionality into Article 7(1)(h) and (2)(g).[380] Discrimination on various grounds is an integral part of the text of these provisions. The inclusion of intersectionality, despite its absence in the text of the relevant provisions, meets changing understandings of discrimination without straying into judicial legislation at the cost of strict construction.

v Interpretation of in dubio pro reo

The ordinary meaning of the *in dubio pro reo* principle in Article 22(2) is that where the definition of a crime is ambiguous, the interpretation that most favours the accused must be adopted.[381]

However, this thesis does not interpret *in dubio pro reo* as an absolute requirement that ICC judges adopt whichever interpretation is most favourable to the accused. Otherwise, the Chambers 'would be compelled automatically to apply the provisions of the Statute in favour of the accused', which would significantly constrain the interpretative process and preclude 'any attempt to interpret in good faith'.[382]

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379 See Chapter IV(1).

380 Ambos (n 17) 1163.

381 ibid 1164.

382 *The Prosecutor v Katanga* (n 323) [53].

If it is accepted that Article 21(3) acts as a human rights consistency test, rather than a general interpretative principle, it becomes clear that the provision has a mandatory effect on the interpretative process, *requiring* a human rights-consistent interpretation.[383] These human rights-consistent interpretations may or may not be favourable to the accused. But *in dubio pro reo*, due to its reliance on the existence of an ambiguity, logically operates later in the interpretative process, requiring judges to choose the human rights-consistent interpretation that is most favourable to the accused. It is therefore only when ICC judges are faced with multiple plausible interpretations despite recourse to the VCLT rules and Article 21(3)'s human rights consistency test, that the interpretation that most favours the accused must be adopted.[384]

This interpretation of *in dubio pro reo* is adopted in ICC case law and commentary. In *The Prosecutor v Katanga*, the Trial Chamber specified that *in dubio pro reo* applies only 'in case of ambiguity' and 'should be relied on only after an unsuccessful attempt at interpretation effected in good faith and in accordance' with the VCLT's interpretative rules.[385] One commentary reinforces that *in dubio pro reo* only operates as the 'final step in an interpretative sequence', where any remaining ambiguity must be resolved in favour of the accused.[386]

vi In dubio pro reo*: does adopting intersectionality inappropriately favour victims over the accused?*

In light of the above interpretation of the *in dubio pro reo* principle, it is argued that incorporating intersectionality through Article 21(3) does not breach the principle.

383 See Chapter IV(3)(B).

384 Ambos (n 17) 1163; Akande (n 259) 45.

385 *The Prosecutor v Katanga* (n 323) [51].

386 Ambos (n 17) 1164.

Intersectionality via Article 21(3) operates as part of a human rights consistency test applicable to all the sources of law in Article 21, while *in dubio pro reo* resolves any remaining interpretative ambiguities in favour of the accused. Article 21(3) therefore operates prior to the finding of an ambiguity, requiring an intersectional approach as the most human rights-consistent interpretation of Article 7(1)(h) and (2)(g). Article 21(3) and *in dubio pro reo* are separate aspects of the interpretative process, mutually contributing to interpretation rather than conflicting with each other.

In any case, although intersectionality is most often associated with the treatment of victims, the approach can also benefit the accused at the sentencing stage, as will be discussed in Chapter V of this thesis. Adopting intersectionality is therefore not necessarily an interpretation that is unfavourable to the accused.

vii Interpretation of specificity (including foreseeability and accessibility)

Specificity is not an explicit requirement in the text of Articles 22 and 23 of the Rome Statute. However, it is widely acknowledged as an essential aspect of the principle of legality, along with its two component elements of foreseeability and accessibility.[387] Foreseeability and accessibility require criminalisation of conduct to be reasonably foreseeable and criminal provisions to be publicly available, respectively.[388] The purpose is to allow a person 'to regulate [their] conduct' in line with the foreseeable consequences of certain acts, so that a person who commits a crime knows, or reasonably should have known, that criminal consequences would result from their actions.[389] Prospective states parties agreed in the 1996 Rome Statute Preparatory Committee that crimes in the Statute

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387 Gallant (n 345) 363–364. See also *The Prosecutor v Lubanga* (n 181) [294].

388 Dias (n 297) 48.

389 *Sunday Times v United Kingdom*, Judgment, Application No 6538/74 (ECtHR 26 April 1979) [49].

needed to be 'defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality'.[390]

It is also broadly accepted, however, that the requirements of specificity are reduced in the international criminal law context.[391] This is due to the inherent ambiguities in the formation, identification, and application of public international law discussed above, and owing to the dual purposes of securing justice and protecting legality.[392] Specificity is therefore only required as far as is needed 'to provide reasonable notice of crimes, penalties and other substantive rules of criminal law'.[393] This interpretation is also supported in other courts and tribunals. At the ECtHR, for example, interpretations of criminal law provisions will be consistent with the principle of legality where the interpretation 'could reasonably be regarded as consistent with the essence of the offence and could reasonably be foreseen by the offender at the material time of the offence'.[394]

viii Specificity (accessibility and foreseeability): does intersectionality make criminal consequences for persecution unforeseeable or inaccessible?

While intersectionality is not explicit in the definition of persecution in Article 7(1)(h) and (2)(g), this level of specificity is likely not required to meet the accessibility and foreseeability standards. Rather, it is reasonably foreseeable that a perpetrator of intersectional discrimination rising to the level of persecution would be subject to

390 Ambos (n 17) 1151; United Nations (n 347) [52], [180], [185].

391 Dias (n 297) 48.

392 Grover (n 302) 551; Robinson (n 370).

393 Dias (n 297) 48. See also *The Prosecutor v Vasiljevic* (n 335) [193], [201]–[203]; B van Schaak, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown Law Journal* 119, 178.

394 *Jorgić v Germany*, Judgment, Application No 74613/01 (ECtHR, 12 July 2007) [114].

criminal provisions and penalties. Whether the conduct is assessed through an intersectional framework or not, there is no doubt that the Rome Statute criminalises the act of severely depriving fundamental human rights via underlying acts motivated by discriminatory intention.[395] A perpetrator would therefore have reasonable notice that their acts are criminal, even if they did not anticipate an intersectional framework would be applied to their discriminatory crimes by the ICC. Even if reasonable notice of an interpretation incorporating intersectionality were essential to satisfy the accessibility and foreseeability principles, courts applying these principles have found a concept's inclusion in binding and non-binding international law instruments is sufficient.[396] Intersectionality has likely attained sufficient legal recognition to meet this.[397]

ix *Interpretation of* nulla poena sine lege

Article 23 makes clear that punishment for crimes must occur only in accordance with the provisions of the Rome Statute at the time the offence was committed. New punishments for crimes cannot be introduced, and the penalties cannot be increased retroactively.[398]

x Nulla poena sine lege*: does intersectionality change the punishment for persecution?*

As will be discussed in Chapter V of this thesis, intersectionality is relevant in the assessment of harm for the purposes of sentencing and reparations, and intersectional discrimination can be an aggravating factor during sentencing. Yet, intersectionality does

395 See Rome Statute (n 4) art 7(1)(h), (2)(g). AM Beringola (n 364) 64.

396 *Kononov v Latvia*, Judgment, Application No 36376/04 (ECtHR, 17 May 2010) [235]–[238].

397 See Chapter II(2)(B) and (C).

398 Gallant (n 345) 341–342.

not alter the nature of the punishments available, nor increase the maximum penalty for the crime of persecution.[399] It therefore does not offend the *nulla poena sine lege* rule.

xi Summary

Based on the above analysis, it can be concluded that the Rome Statute's principle of legality does not pose any obstacle to incorporating intersectionality into persecution adjudication via Article 21(3).

D If intersectionality and the principle of legality did conflict, how could this be resolved?

Given the variety of existing interpretations of the principle of legality in the Rome Statute, some scholars may disagree with the conclusion that the intersectionality proposal would not offend the principle. To address these views, this thesis will now respond to the question of avoiding or resolving an apparent conflict between intersectionality and the requirements of the principle of legality.[400]

There are a range of views in scholarship as to how an apparent conflict between Article 21(3) and the principle of legality could be addressed. On the strict approach to the principle of legality outlined above,[401] the principle prevails over other internationally recognised human rights, thus resolving any conflict.[402] Another perspective, which this thesis terms the 'middle-ground' view, is that the requirement in Article 21(3) could be

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399 See *The Prosecutor v Bemba*, Judgment on the Appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII Entitled 'Decision on Sentence pursuant to Article 76 of the Statute', 01/05-01/13-2276-Red (8 March 2018) [77].

400 See Milanovic (n 305) 72–75: recall that conflict avoidance is effected by interpretation, and conflict resolution involves giving one norm priority.

401 See Chapter IV(4)(B).

402 Jacobs (n 335).

read as being limited by the principle of legality, and *in dubio pro reo* in particular.[403] This view interprets Article 21(3) as only requiring the application and interpretation of the Rome Statute consistently with the accused's, but not victims', human rights.[404]

The correct approach proposed is that neither the principle of legality nor another internationally recognised human right would automatically supersede the other if in conflict. Article 21(3) applies to *all* applicable law of the ICC, including Articles 22 and 23 of the Rome Statute. Although the principle of legality is explicitly mentioned in the Statute, while intersectionality is incorporated as an aspect of a right via Article 21(3), both must be complied with in the ICC's processes.[405] From a principled perspective, it is arguably an 'absurdity' to automatically prefer one internationally recognised human right to the exclusion of another, when both require application under Article 21(3).[406] As there is no principled basis for prioritising either intersectionality under Article 21(3) or the principle of legality under Articles 22 and 23, the relevant Chambers are logically required to consider how to interpret the ICC's applicable law consistently with *both* the principle of legality and the right to equality and non-discrimination.

The practical consequence of this argument can be seen in ICC case law. The ICC has been cautious not to undertake, or to appear to undertake, the functions of a human rights court against the intentions of its states parties.[407] In practice, however, Article 21(3) has given rise to a type of rights-balancing exercise when the rights of victims and

403 Grover (n 302) 560.

404 ibid.

405 See Gallant (n 345) 331–332; Grover (n 302) 559.

406 Powderly (n 368) 518.

407 See eg *The Prosecutor v Gaddafi and Al-Senussi*, Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility of the Case against Abdullah Al-Senussi', ICC-01/11-01/11-565 (24 July 2014) [219].

witnesses come into an apparent conflict with the rights of the accused. For example, in *The Prosecutor v Katanga*, the Appeals Chamber held that the operation of Article 21(3) meant that 'the withholding of certain information from the Defence may be necessary to preserve the fundamental rights of an individual put at risk by the activities' of the ICC.[408] This resulted in the interpretation of Rule 81(4) to allow 'persons at risk on account of the activities of the Court' to have their identities protected from disclosure.[409] Importantly, the Appeals Chamber stated that these measures to ensure consistency with human rights should not be granted on a blanket basis. Instead, any measures granted that restrict the accused's rights should be 'strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber'.[410]

Thus, where an apparent conflict between intersectionality and the principle of legality exists, the human rights consistency test under Article 21(3) requires an interpretation that is consistent as far as possible with both rights. This is subject to the need to take precautions to ensure the balance does not tip too far in favour of one of the rights.

408 *The Prosecutor v Katanga* (n 326) [58].

409 ibid [56].

410 ibid [59].

V BENEFITS AND LIMITATIONS OF INCORPORATING AN INTERSECTIONAL FRAMEWORK INTO ADJUDICATION OF PERSECUTION

The final chapter of this thesis assesses the potential benefits and limitations of an intersectional framework being adopted in the adjudication of persecution at the ICC. First, it will analyse the practical and expressive benefits of the proposal to adopt an intersectional framework in ICC persecution cases (section 1). This section will briefly outline relevant elements of the crime of persecution in Article 7(1)(h) and (2)(g) of the Rome Statute, and analyse how intersectionality would impact the evaluation of these elements at the pre-trial, trial, sentencing, and reparations stages. The Chapter will then consider potential limitations to the proposal, including the issue of 'intersectionality-washing', the funding and time required for judicial education, the low case output of the ICC, and hostility from states parties (section 2).

1 Benefits of the proposal

This section explores the main benefits of the proposal: intersectionality's implications for the systematic and policy aspects of the contextual elements, the 'severe deprivation' element of actus reus, the mens rea inquiry, sentencing, and reparations,[411] as well as the expressive benefit of taking an intersectional approach to adjudication of persecution.[412]

411 Rome Statute (n 4) art 7(1), (1)(h), (2)(g).

412 See Stahn (n 20).

A Contextual elements of crimes against humanity: establishing a 'systematic attack' pursuant to a 'policy'

Adopting an intersectional framework will assist ICC judges in the establishment of the contextual elements of crimes against humanity at the pre-trial and trial stages.[413] To amount to a crime against humanity, the acts in Article 7(1) of the Rome Statute[414] must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[415] An attack directed against a civilian population is defined in Article 7(2)(a) as requiring, first, 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population',[416] and, second, the course of conduct to be 'pursuant to or in furtherance of a State or organizational policy to commit such attack.'[417]

An intersectional framework will support ICC judges to accurately assess whether an attack is systematic, and whether it is committed pursuant to or in furtherance of a state or organisational policy. The systematic and policy criteria require a broad evaluation of the alleged attack's degree of planning and organisation, including consideration of whether the violent acts could be a 'random occurrence'.[418] This assessment will be enhanced by intersectionality, as recognition of the scale and pattern of violence against persons disadvantaged based on multiple protected characteristics

413 To the 'substantial grounds to believe' and 'beyond reasonable doubt' standards, respectively.

414 Including murder, extermination, persecution, and others.

415 Rome Statute (n 4) art 7(1).

416 See *The Prosecutor v Bemba*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (15 June 2009) [75].

417 See *The Prosecutor v Gbagbo* (n 219) [213].

418 ibid [223].

may give added evidential support for the existence of a policy to commit the attack.[419] Identifying an attack's grave consequences for such persons gives credence to the allegation that such attacks are not random, but systematic and pursuant to an overarching policy.[420] For example, Maučec argues[421] that if the OTP had demonstrated the intersection of political affiliation and gender that was driving the violent acts in *The Prosecutor v Mbarushimana*, the Pre-Trial Chamber would have more easily established the policy criterion at the confirmation of charges stage.[422] Admittedly, such a characterisation is largely dependent on the OTP's sensitivity to intersectionality, as the Trial Chamber's judgments cannot 'exceed the facts and circumstances' specified in the charges.[423]

B Establishing the actus reus of 'severe deprivation of fundamental rights'

An intersectional framework will be valuable in establishing the actus reus of persecution at the pre-trial and trial stages. The actus reus of persecution is 'severe deprivation' of the fundamental rights of any identifiable group or collectivity[424] contrary to international

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419 See eg *Situation in the Republic of Kenya*, Corrigendum to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr (31 March 2010) [96]–[97].

420 Maučec (n 19) 76.

421 ibid.

422 See *The Prosecutor v Mbarushimana* (n 199).

423 Rome Statute (n 4) art 74(2).

424 Note that intersectionality has limited usefulness at the stage of establishing the existence of an identifiable group or collectivity, because the identifiable group inquiry and the discriminatory grounds inquiry are separate. For example, in the *Al Hassan* confirmation of charges, the Pre-Trial Chamber noted that the identifiable group was civilians opposed to Ansar Dine/AQIM, while the relevant discriminatory grounds were gender and religion: *The Prosecutor v Al Hassan* (n 6) [707]. Intersectionality is more salient to the discriminatory grounds inquiry, discussed in the next sub-section on mens rea. See also Ambos' criticism of the conflation of the discriminatory grounds and identifiable group criteria: Ambos (n 17) 225–226.

law, in connection with an underlying act in Article 7(1) or any other crime within the jurisdiction of the ICC.[425]

An intersectional framework would clarify and enhance the assessment of whether there has been a 'severe deprivation of fundamental rights'.[426] Examples of fundamental rights for the purposes of Article 7(2)(g) include the right to life, the right to liberty and security, the right to be free from cruel, inhuman, or degrading treatment or punishment, and the right to be free from arbitrary arrest, detention, or exile.[427] The standard of 'severe deprivation' of fundamental rights is not defined in the Rome Statute.[428] The ICC has adopted the somewhat ambiguous ICTY descriptor of 'gross or blatant denial' of fundamental rights.[429] This must be determined on a 'case-by-case basis'[430] in light of the underlying acts 'in their context and with consideration of their cumulative effect'.[431]

Intersectionality has relevance in this assessment of context and effect. As Ambos observes, the assessment of whether there has been a 'severe deprivation' of fundamental rights requires an examination of the seriousness of the discrimination involved, citing the ICTY's definition of persecution as a 'violation of the right to equality in some serious

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425 Rome Statute (n 4) art 7(2)(g). See also *The Prosecutor v Ongwen* (n 231) [2734]; K Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (Oxford University Press 2014) 105.

426 Rome Statute (n 4) art 7(2)(g).

427 *The Prosecutor v Ntaganda* (n 236) [991].

428 Ambos (n 17) 294.

429 *The Prosecutor v Kupreškić et al*, Trial Judgment, IT-95-16-T (ICTY, 14 January 2000) [621]; *The Prosecutor v Ntaganda* (n 236) [992].

430 *The Prosecutor v Ntaganda* (n 236) [992].

431 *The Prosecutor v Kupreškić et al* (n 429) [621]. Underlying acts that fall under Article 7(1), such as murder, extermination and others, will automatically be sufficiently severe deprivations of rights: see *The Prosecutor v Ntaganda* (n 236) [994].

fashion that infringes on the enjoyment of a basic or fundamental right'.[432] An intersectional framework will support ICC judges to identify intersectional discrimination whenever it is present in a persecution case, resulting in a more accurate assessment of whether the right to equality has been violated in a 'serious fashion' amounting to severe deprivation of a fundamental right.[433] Due to the compounded gravity of intersectional discrimination,[434] rights violations in the context of targeting based on multiple protected characteristics may be held by ICC judges to be more severe. This could result in the severe deprivation criterion being more easily met in situations of intersectional discrimination.

C Establishing mens rea: structuring the assessment of discriminatory intent

A key benefit of taking an intersectional approach lies in the improved accuracy and clarity of the mens rea inquiry at the pre-trial and trial stages. Persecution requires three forms of mens rea:[435]

1) 'specific intent to commit the underlying act';[436]
2) 'general intent'[437] under Article 7(1), indicating that the perpetrator had objective knowledge of the context in which they acted ('a widespread or systematic attack' directed against a civilian population); and

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432 Ambos (n 17) 294, citing *The Prosecutor v Tadić*, Trial Judgment, IT-94-1-T (ICTY, 7 May 1997) [697].

433 ibid.

434 See Chapter II(1).

435 *The Prosecutor v Kordić and Čerkez*, Trial Judgment, IT-95-14/2 (ICTY, 26 February 2001) [212]. See also Cassese, Gaeta, and Jones (n 303) 364.

436 *The Prosecutor v Kordić and Čerkez* (n 435) [212]. See also Rome Statute (n 4) art 30(2)(a).

437 *The Prosecutor v Kordić and Čerkez* (n 435) [212].

3) discriminatory intent, defined as intentionally causing a severe deprivation of an individual's human rights due to their membership of an identifiable group or collectivity, based on the grounds in Article 7(1)(h).[438]

Intersectionality is particularly useful for the assessment of discriminatory intent.

The first main benefit of an intersectional mens rea inquiry is more accurate identification of the type of discriminatory intent present on the evidence. As discussed in Chapter II, intersectional discriminatory intent is fundamentally different than intent to discriminate on a single ground.[439] Intent in persecution cases is often complex and involves multiple grounds, reflecting the tendency of violence and discrimination to impact 'minorities within minorities'.[440] The OTP is increasingly recognising this fact by charging persecution on multiple grounds, where one charge of persecution is based on intersecting grounds of ethnicity, gender, or others.[441] Taking an intersectional approach to the mens rea requirement would allow ICC judges to ensure that their identification of discriminatory intent is capable of encompassing the often-complex intention held by perpetrators of discriminatory crimes.

While mens rea can be satisfied (and charges confirmed or a conviction secured) based on a single ground of discrimination under Article 7(1)(h), accurate identification of intersectional discriminatory intent will prevent the following problems. At an extreme, in the absence of an intersectional framework, the Chambers could misinterpret intent to discriminate based on intersecting protected characteristics as amorphous hostility towards civilians generally, lacking the precision needed to satisfy the

438 Rome Statute (n 4) art 7(1)(h) and (2)(g). See also *The Prosecutor v Ongwen* (n 231) [2739].

439 See Chapter II(2)(C).

440 Maučec (n 19) 42. See also Chapter II(5).

441 See Chapter III(5)(A).

discriminatory intent criterion.[442] This misapprehension of intersectional discriminatory intent could lead the Chambers to wrongly find that discriminatory intent is not present at all, and therefore that the crime of persecution has not been committed.

Alternatively, mens rea could be established based on a combination of some but not all of the grounds of discrimination motivating the perpetrator, resulting in adjudication that is over or under-inclusive of persecution victims. For example, if the persecution charges in *The Prosecutor v Abd-Al-Rahman* had been limited to political and ethnic grounds, then the targeted pool would have been all those of Fur ethnicity in the Mukjar District, rather than male members of the group.[443] While mens rea would be satisfied, this classification would fail to identify Fur men as the targeted pool due to the intersection of ethnicity and stereotypes of men as rebel fighters.[444]

Conversely, a persecution case involving intersectional discrimination could be simplified into a single-ground case, missing an important component of the intention behind the crime and the resulting harm. This was the case in *The Prosecutor v Muthaura, Kenyatta, and Ali,* where evidence of intersecting gender and ethnic discrimination was reduced by the Pre-Trial Chamber into acts solely 'motivated by ethnic prejudice'.[445] An inaccurate understanding of mens rea in intersectional persecution cases will produce a skewed approach to sentencing and reparations, as will be explored in the next two sub-sections.

The second main benefit is that intersectionality will provide a structured framework for comparison, thereby increasing the clarity, transparency, and rigour of the

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442 *The Prosecutor v Ongwen* (n 231) [2739].

443 See *The Prosecutor v Abd-Al-Rahman* (n 228) [80].

444 ibid.

445 *The Prosecutor v Muthaura, Kenyatta, and Ali* (n 190) [266]. See also Chapter III(2)(A).

inquiry into discriminatory intent. To determine whether discriminatory intent is present, the Trial Chamber must assess whether the perpetrator intended to target an identifiable group on one or more of the grounds in Article 7(1)(h).[446] Currently, the relevant Chambers only implicitly compare evidence about the treatment of the targeted group versus other groups, concluding holistically that intentional targeting on grounds of ethnicity, gender, or others, is present.[447] Yet, this discriminatory intent analysis necessarily requires a form of comparison: has the identifiable group that is allegedly targeted on grounds of their protected characteristic(s) been treated less favourably than those that do not share the protected characteristic(s)? Has the group been subjected to harm that others not sharing the protected characteristic(s) have been spared? An intersectional framework provides the tools to make this comparison explicit and structured.

In practical terms, an intersectional framework will facilitate the assessment by ICC judges of how different protected characteristics factually impacted the criminal activity. This will allow identification of the full set of discriminatory grounds in Article 7(1)(h) that may be applicable. ICC judges could build upon Atrey's 'contextual' comparison approach:[448] starting by establishing whether any of the enumerated grounds in Article 7(1)(h) or other 'universally recognized' grounds of persecution are potentially relevant on the facts, then identifying the full range of potential comparators.[449] Next, ICC judges would methodically examine the evidence on the treatment of each of the comparator groups to determine whether those with certain protected characteristics were

446 *The Prosecutor v Ongwen* (n 231) [2739].

447 See eg *The Prosecutor v Ntaganda* (n 236) [749].

448 See Chapter II(2)(A)(ii).

449 See Chapter II(2)(A)(ii): recall Atrey's formula to allow calculation of the number of possible comparators in an intersectional claim: $C_N := \sum_{k=1}^{N} \binom{N}{k}$ where N is the number of protected characteristics present: Atrey (n 15) 381, fn 6.

treated differently.[450] Differential treatment can then be used as evidence for the existence of discriminatory intent.

This structured comparison analysis will increase the length and complexity of judgments that address the mens rea of persecution. However, it will also regularise the mens rea inquiry, supporting ICC judges to identify the full range of relevant grounds of persecution under Article 7(1)(h), and to provide more robust reasoning for establishing discriminatory intent. An intersectional framework will therefore assist the relevant Chambers to address the complex nature of discriminatory intent in persecution cases with greater clarity and accuracy.

D Sentencing: gravity, aggravating factors, and mitigating factors

Another benefit of intersectionality in the persecution context is the impact of an intersectional framework on sentencing. Under Article 76(1) of the Rome Statute, in the case of a conviction, the Trial Chamber determines the appropriate sentence in light of the evidence and submissions before it.[451] The Trial Chamber may impose imprisonment up to a maximum of 30 years, life imprisonment in cases of 'extreme gravity' in light of the convicted person's circumstances,[452] or a fine and/or forfeiture of the proceeds of the crime(s).[453]

The Rome Statute and the Rules of Procedure and Evidence provide several opportunities for intersectionality to positively impact the sentencing process: the

450 See Chapter II(2)(A)(ii).

451 See *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171 (27 September 2016) [65]–[68].

452 Rome Statute (n 4) art 77(1).

453 ibid art 77(2).

assessment of the crime's gravity,[454] aggravating factors, or mitigating factors.[455] Intersectionality necessarily impacts the assessment of a crime's gravity for the purpose of sentencing, as intersectional discrimination is often more severe in its impact than single-ground discrimination.[456] An intersectional lens may therefore assist ICC judges to determine the gravity of the convicted person's offending, so that crimes involving intersectional discrimination are carefully assessed for the compounded gravity usually associated with discrimination on multiple, intersecting grounds.

Alternatively,[457] intersectionality may be useful in the assessment of aggravating factors during sentencing. The Rules of Procedure and Evidence explicitly include 'commission of the crime for any motive involving discrimination' as an aggravating factor which may justify a heightened sentence (subject to any mitigating factors).[458] Intersectional discrimination could fall under this provision as an aggravating factor. Otherwise, it could be counted as an additional aggravating factor under the generic provision for circumstances 'similar to those mentioned' in Rule 145(2).[459] The compounded discrimination and disadvantage that arises from intersectional discrimination[460] would make its presence in the commission of a crime a particularly weighty aggravating factor. Adopting an intersectional framework could therefore lead to sentences that more accurately capture the nature of intersectional discrimination by

454 ibid art 78(1).

455 International Criminal Court, 'Rules of Procedure and Evidence' (2013), r 145(1)(b) and (1)(c).

456 See Chapter II(2)(A)(ii); Maučec (n 11) 9.

457 Note that a factor (such as the discrimination being intersectional) cannot be 'double-count[ed]' under both assessment of gravity and aggravating factors: *The Prosecutor v Al Mahdi* (n 451) [70].

458 International Criminal Court (n 455) r 145(2)(b)(v).

459 ibid r 145(2)(b)(vi).

460 See Chapter II(2)(A)(ii); Maučec (n 11) 9.

giving this form of discrimination explicit attention and significant weight as an aggravating factor.

Intersectionality may also be relevant to the assessment of the circumstances and characteristics of the perpetrator. Considering the convicted person's protected characteristics, and any resulting disadvantage or vulnerability, may lead to a reduction in sentence where their circumstances indicate that their culpability has been lessened. Judge Carranza correctly argued in her partly dissenting opinion in *The Prosecutor v Ongwen* that determining a sentence requires 'both a holistic and intersectional analysis that takes into consideration both the blameworthiness of the convicted person and his or her individual circumstances'.[461] An intersectional framework may be used to ensure that the vulnerability of the perpetrator (in Mr Ongwen's case based on his age and gender when abducted and conscripted as a child soldier) is considered and, where appropriate, included as a mitigating factor.

E Reparations: assessing harm and means of reparation

An intersectional framework will also improve the reparations stage of proceedings, allowing more accurate assessment of the harm caused and more victim-centric analysis of the appropriate means of reparation. This use of intersectionality is starting to be acknowledged by the ICC in its reparations orders.[462]

Article 75(1) of the Rome Statute obliges the ICC to establish principles for reparations to those affected individuals that are officially designated 'victims'.[463] The relevant Chambers assess the nature of harm arising from the convicted person's

461 *The Prosecutor v Ongwen* (n 242) Partly Dissenting Opinion of Judge Carranza [ii]. See also Chapter III(5)(B).

462 See *The Prosecutor v Ntaganda* (n 9).

463 See for the definition of victims: International Criminal Court (n 455) r 85(a).

actions[464] and may directly order them to make reparations to victims.[465] Monetary compensation may also be secured through the Trust Fund for Victims.[466] Reparations can take the form of restitution, compensation, rehabilitation, or satisfaction, including remedies such as apologies or memorials to victims.[467] *The Prosecutor v Lubanga* established the first set of principles on ICC reparations,[468] which were subsequently used in *The Prosecutor v Katanga* and *The Prosecutor v Al Mahdi* reparations orders.[469] These principles highlighted the two core purposes of reparations under the Rome Statute: that those responsible for causing harm should remedy that harm and be held accountable for their actions.[470]

Drawing from *The Prosecutor v Lubanga*, intersectionality is relevant to the following principles guiding the reparations process: [471]

1) liability for reparations shall be proportionate to the harm and the level of participation of the convicted person;
2) all victims shall be treated without discrimination and reparations granted without adverse distinction;
3) the needs of all victims shall be considered;
4) more vulnerable victims may be given priority support, including through affirmative action initiatives;

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464 Rome Statute (n 4) art 75(1).

465 ibid art 75(2).

466 For example, if the convicted person is impecunious: ibid art 79.

467 See *The Prosecutor v Ntaganda* (n 9) [199], [201]–[203].

468 *The Prosecutor v Lubanga*, Order for Reparations, ICC-01/04-01/06-3129-AnxA (3 March 2015).

469 See *The Prosecutor v Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (24 March 2017); *The Prosecutor v Al Mahdi*, Reparations Order, ICC-01/12-01/15-236 (17 August 2017).

470 *The Prosecutor v Lubanga* (n 468) [2].

471 ibid [14]–[19], [21], [41].

5) the dignity and human rights of victims shall be respected;
6) reparations shall avoid stigmatising victims or re-creating discriminatory structures; and
7) a gender-inclusive approach to creating reparations principles shall be maintained.

This flexible approach to reparations already incorporates a foundation for an intersectional framework by reinforcing the importance of non-discrimination and recognising that certain victims are particularly vulnerable.[472]

The reparations order in *The Prosecutor v Ntaganda* further demonstrates three main improvements that intersectionality can bring to the process of determining reparations.[473] First, explicit attention to intersectionality changes the assessment of the victims' vulnerabilities and the nature of the harm caused by the convicted person. The *Ntaganda* order evolves the principles in *Lubanga* by adopting a 'victim-centred approach' focused primarily on the scale of harm to the victims.[474] The harm experienced by child soldiers in *The Prosecutor v Ntaganda* case included both direct physical and psychological trauma, as well as ostracization from the victims' communities.[475] The Chamber acknowledged that 'the intersection of different factors of discrimination increase[s] the victims' comparative disadvantages', highlighting the connection between the intersecting grounds of age and gender, the resulting vulnerability of the victims to exploitation, and the gravity of the harm experienced.[476] This intersectional approach led

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472 See Chapter II(1).

473 *The Prosecutor v Ntaganda* (n 9).

474 M Lostal, 'The Ntaganda Reparations Order: a Marked Step Towards a Victim-Centred Reparations Legal Framework at the ICC' (*EJIL:Talk!*, 24 May 2021) <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/> accessed 5 May 2023. See also *The Prosecutor v Ntaganda* (n 9) [98].

475 *The Prosecutor v Ntaganda* (n 9) [145].

476 ibid fn 151, citing *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v Brazil*, Judgment, IACtHR Series C No 407 (15 July 2020) [191]–[197].

the Chamber to find that the harm to victims was 'multiple, diverse, and multi-faceted', and that this compounded disadvantage should be reflected in the reparations.[477]

Secondly, intersectionality can clarify and structure the ICC's assessment of the needs of victims when determining the means of reparation. The *Ntaganda* order used intersectionality to develop the gender-inclusive approach articulated in *Lubanga*,[478] proposing that there is a 'duty to consider and address the views, experiences, and needs of all individuals with diverse sexual orientation and gender identities'.[479] It then 'integrate[d] intersectionality as a core component' of this approach,[480] 'acknowledging the complexity and intersectionality of [victims'] experiences and maintaining a holistic and relational focus'.[481] In this way, accepting intersectionality as a framework allows the means of reparation to be more accurately tailored to reflect the complex harms experienced by victims of intersectional discrimination and to meet the victims' current needs. This assessment resulted in the Trial Chamber in the *Ntaganda* order adopting a combination of restitution, compensation, rehabilitation, satisfaction, and symbolic reparations to remedy the 'various harm suffered', in light of the victims' psychological, medical, social and other needs.[482]

Thirdly, an intersectional approach to reparations furthers the structural, transformational purpose of going beyond assistance to individual victims when remedying harm. As part of its attention to intersectionality, the Trial Chamber in the *Ntaganda* order cited the 'transformative purpose' of reparations as 'dismantling

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477 *The Prosecutor v Ntaganda* (n 9) [183], [198].

478 *The Prosecutor v Lubanga* (n 468) [18].

479 *The Prosecutor v Ntaganda* (n 9) fn 151.

480 ibid [60].

481 ibid fn 151.

482 ibid [183], [198].

discriminations [sic], stereotypes, and practices that may have contributed to create the conditions for the crime to occur'.[483] Intersectionality's focus on transformation can therefore act as a tool to support structural change through reparations, contributing to the prevention of discriminatory crimes going forward.[484]

As these reparations principles are elaborated in future cases, intersectionality is likely to continue to play a significant beneficial role in the assessment of the harm, the needs of the victims, and the transformational purpose of reparations.

F Expressive value: benefits to victims and states

The use of an intersectional framework in persecution cases offers expressive benefits. Expressivist theories argue that the value of law is rooted in 'its ability to convey social meaning'.[485] Trials have a performative aspect, in the non-pejorative sense of the term: they communicate which moral and legal values are worthy of being defended, which harms require punishment, and which victims are entitled to reparations for the harm suffered.[486] The act of holding a trial, and the social meaning of that process, 'may sometimes be more important than whom [courts] try or what conviction they achieve'.[487] The ICC has a wide audience of victims, counsel, academics, affected communities, and others, and is able to use its influence to 'send messages', including about the value of international criminal norms, the importance of repairing harm, and, specifically, the significance of intersectional discrimination.[488]

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483 ibid [94].

484 See Chapter II(1).

485 Stahn (n 20) 6.

486 ibid 8.

487 ibid 10. See also RH McAdams, 'A Focal Point Theory of Expressive Law' (2001) 86 *Virginia Law Review* 1649.

488 Stahn (n 20) 11–13 and 19.

The expressive benefits of an ICC trial explicitly incorporating intersectionality are as follows. First, some proponents of the expressive benefits of international criminal law, including the ICC Assembly of States Parties, consider that the trauma experienced by victims of persecution may be eased by criminal proceedings.[489] Contributing to submissions and testifying about the complex harm experienced by persons targeted based on multiple protected characteristics may support victims to achieve a sense of closure and catharsis.[490] Recognition by an international court as a victim of intersectional discrimination may also have the effect of re-affirming both the dignity of the victim and the significance of the harm they have experienced.[491] It should be noted, however, that individuals may be filtered out, and thereby denied the benefits of catharsis, by the ICC's definition of victims,[492] vetting of victims,[493] the selection of situations, the prosecutor's determination of charges, and the selection of oral testimony.[494] Additionally, if the ICC essentialises victims' experiences through stereotypes of 'vulnerability, passivity and dependence',[495] this may preclude the above benefits of restored dignity and catharsis.[496]

489 ICC Assembly of States Parties, 'Court's Revised Strategy in Relation to Victims', ICC-ASP/11/38 (5 November 2012), para 10.

490 See Stahn (n 20) 304.

491 ibid 267; CH Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 *Northwestern Journal of International Human Rights* 459, 463–464.

492 International Criminal Court (n 455) r 85(a). See also B Sander, 'The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law' (2019) 19 *International Criminal Law Review* 1014, 1025.

493 Sander (n 492) 1026: for example, in *The Prosecutor v Mbarushimana* 470 victim applications were processed too late for inclusion in the confirmation of charges hearing.

494 Rome Statute (n 4) art 69(2).

495 See Sander (n 492) 1023, discussing the depiction of victimhood in the ICC Prosecutor's statement on the situation in Darfur.

496 See C Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC' (2016) 15 *Journal of Human Rights* 40.

A positive expressive benefit can be maintained by the ICC highlighting victims' autonomy and avoiding stereotypes about helpless victims.[497]

Secondly, ICC adjudication that uses an intersectional framework may communicate to states and affected local communities the significance of both intersectionality as a legal tool, and intersectional discrimination as a form of harm. Identifying intersectional discrimination as a salient legal category worthy of the attention of international criminal law carries 'symbolic relevance',[498] reinforcing that discrimination based on multiple, intersecting protected characteristics should attract both the punishment of international criminal law and the 'moral condemnation' of states.[499] This attention to intersectional discrimination in ICC adjudication may also have expressive value for affected communities, by affirming the importance of accountability for discriminatory crimes targeting certain groups.

2 Limitations of the proposal

A Risk of 'intersectionality-washing'

A potential limitation of this proposal is the risk that the ICC would adopt intersectionality in a way that legitimises ICC processes without creating substantive changes in its legal approach to persecution. A situation of 'intersectionality-washing' involves an institution presenting a façade of commitment to intersectionality, without a proper understanding of the theory or a tangible impact on legal outcomes.[500] This would prevent intersectionality from providing any concrete value to victims or benefitting the

497 Sander (n 492) 1024.

498 Stahn (n 20) 324.

499 ibid.

500 Beringola (n 364) 60–61; Davis (n 10) 67. See also a discussion of intersectionality-washing in a different context: F Sobande, 'Woke-washing: "intersectional" femvertising and branding "woke" bravery' (2019) 54(11) *European Journal of Marketing* 2723.

accuracy and clarity of adjudication in persecution cases. Intersectionality being mentioned more explicitly in ICC adjudication of persecution, but without any further changes in the judicial process, would also risk damaging its integrity as a legal framework. This could contribute to the potential identified in Chapter II for intersectionality to become a powerless 'handmaiden' of institutions that perpetuate discrimination.[501]

The concern of intersectionality-washing can be mitigated by the Chambers of the ICC using the intersectional framework outlined in Chapter II. This framework is rooted in the scholarship of intersectionality theorists and tied to substantive legal tools drawn from the theory's development in domestic discrimination law and international human rights law.[502] An intersectional approach along these lines will provide the demonstrable benefits outlined above, notably, increased accuracy, clarity, victim-sensitivity, and expressive potential. This active and substantive adoption of intersectionality is the antithesis of a vague commitment to be sensitive to the interests of people disadvantaged based on multiple protected characteristics. Adopting and building on the intersectional framework suggested in Chapter II would allow the ICC to develop its current 'fledgling' references to intersectionality into consistent intersectionality jurisprudence.[503] Intersectionality-washing can therefore be combatted by the ICC displaying a nuanced understanding of intersectional discrimination, through the lens of intersectionality as a substantive, structured legal framework.

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501 See Iyi (n 152).

502 See Chapter II(2).

503 Maučec (n 172) 536.

B Time and resource burden of intersectionality training for judges

The proposal relies on judges being informed and empowered to apply an intersectionality framework. This will require either centralised training to be offered by the ICC, or training to be provided to international criminal judges by expert organisations.[504] This process will be time and resource-intensive. The training would require an intersectionality framework to be developed, likely in consultation with experts in intersectionality theory, victims' rights experts, and NGOs working in international criminal law. Training material adapted for use by judges would then need to be developed from the expert consultations, and training sessions would need to be administered to judges in a manner that respects their obligations of impartiality and independence.[505] Amid a global economic downturn, the increased effort and funding required to train judges to use intersectionality as a legal framework may be poorly received by states parties. Further, the ICC already attracts the criticism of producing very little value (in terms of convictions) for the cost involved of maintaining it.[506] Adding increased costs via intersectionality training may fuel arguments that the ICC is a costly and ultimately unproductive institution.

However, the benefits noted above justify this time and funding burden. An investment in judicial education about intersectionality will result in more accurate, victim-sensitive, and structured persecution jurisprudence. Importantly, there is evidence that ICC judges would support further education on these issues. ICC judges regularly

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504 See eg International Nuremberg Principles Academy, 'The Nuremberg Academy Hosts ICC Judges' Retreat' (*Nuremberg Academy*, 2015) <https://www.nurembergacademy.org/events/detail/eca3fde73e3cb2d5a84cc9059a3e0e30/the-nuremberg-academy-hosts-icc-judges-retreat-20/> accessed 10 July 2023.

505 Rome Statute (n 4) art 40.

506 See eg J Silverman, 'Ten Years, $900m, One Verdict: Does the ICC Cost Too Much?' (*BBC News*, 14 March 2012) <https://www.bbc.co.uk/news/magazine-17351946> accessed 5 June 2023.

attend retreats and seminars on various topics relevant to the judicial role.[507] The Paris Declaration of 16 October 2017 involved a commitment on the part of the ICC to prioritise 'continuing education' for judges.[508] The increasing references to intersectionality in ICC judgments display judicial interest in intersectionality,[509] indicating the topic may be a strong candidate for continuing judicial education. In any case, the funding burden of training judges in intersectionality could potentially be alleviated by increased voluntary contributions. The current climate of interest in intersectional issues in international criminal law[510] may incentivise states, NGOs, and philanthropists to make voluntary contributions in support of intersectionality training under Article 116 of the Rome Statute.[511]

C The ICC's limited caseload

Another limitation to adopting the proposal is that the ICC has a small output of judgments, with only very few trial judgments being issued on persecution since its inception.[512] Therefore, an objection to this proposal is that adopting intersectionality in persecution cases would have little practical or expressive benefit due to the rarity of the ICC's treatment of these issues. However, the ICC's identity as the world's sole

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507 See eg International Criminal Court, 'ICC Judges Complete Assessment of IER Recommendations Concerning the Judiciary at their Annual Retreat' (*International Criminal Court*, 5 June 2023) <https://www.icc-cpi.int/news/icc-judges-complete-assessment-ier-recommendations-concerning-judiciary-their-annual-retreat> accessed 1 July 2023.

508 Various representatives of international criminal courts and tribunals, 'Paris Declaration on the Effectiveness of International Criminal Justice' (16 October 2017), para 31.

509 See Chapter III(5) and (6).

510 See Chapter I(1).

511 Note also that states parties including Andorra, Austria, Bulgaria, Chile, Sweden, and the United Kingdom have recently committed further funds to the ICC, with particular focus on supporting children and victims of gender-based violence: see eg International Criminal Court, 'Andorra Makes Voluntary Contribution to the Trust Fund for Victims' (*International Criminal Court*, 3 March 2023) <https://www.icc-cpi.int/news/andorra-makes-voluntary-contribution-trust-fund-victims> accessed 23 July 2023.

512 See eg *The Prosecutor v Ntaganda* (n 236).

permanent international criminal court gives its actions significance in the jurisprudence of international and domestic criminal courts and tribunals.[513] The ICC is an example of Stahn's expressive 'paradox': that international criminal justice maintains 'high social relevance, despite selectivity, normative authority despite non-compliance'.[514] If the ICC adopts an intersectional approach, it may influence ad hoc international criminal tribunals and domestic criminal courts to follow a similar path, and stimulate further discussion of intersectionality by international criminal law scholars. The proposal therefore has the potential to globally amplify the role of intersectionality in the adjudication and scholarly analysis of persecution as an international crime.

D Risk of hostility from states parties

A final potential risk is that explicitly adopting an intersectional framework could expose the ICC to increased hostility from certain states parties. Due to intersectionality's connection with feminist theory, hostility might stem from states parties that have expressed dissatisfaction with the inclusion of 'gender' in the Rome Statute and that oppose so-called 'gender ideology'.[515] Opposition to the use of intersectionality as a legal framework could lead states parties to become uncooperative with the ICC, or, in the worst case, to withdraw from the Rome Statute, weakening its integrity.[516]

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513 Funk (n 157) 4.

514 Stahn (n 20) 7.

515 The Holy See, Bahrain, Egypt, Iran, Libya, Saudi Arabia, Syria, United Arab Emirates, and others: V Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 55, 65.

516 See United Nations Under-Secretary-General and Special Adviser on the Prevention of Genocide, 'Why Withdrawing from the Rome Statute Undermines International Justice for Everyone' (24 January 2017).

However, this concern is likely overstated. The Prosecutor's attention to intersectionality so far, and mentions of intersectionality in Chambers' judgments,[517] have not led to withdrawals from the Rome Statute. Most withdrawals have followed announcement of preliminary examinations in states[518] or general concern with the ICC's credibility,[519] which are separate problems from ICC judges using an 'unpopular' legal tool in their judgments. Thus, it is unlikely that increased focus on intersectionality as a legal framework would be the tipping point for states' commitment to their Rome Statute obligations.

3 Summary

The proposal for the use of an intersectional framework has significant potential to increase accuracy and clarity in the adjudication of the crime of persecution, particularly with respect to the mens rea, sentencing, and reparations stages. Further, the proposal will likely have expressive value, supporting catharsis for victims and communicating to states the significance of identifying, punishing, and remedying intersectional discrimination. The potential limitations identified above are arguably outweighed by the benefits of the proposal, and can be mitigated by ICC judges adhering to a robust intersectionality framework.

517 See Chapter III(5).

518 See eg *Situation in the Republic of the Philippines*, Decision on the Prosecutor's Request for Authorisation of an Investigation pursuant to Article 15(3) of the Statute, ICC-01/21-12 (15 September 2021) [110].

519 See eg M Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' in CC Jalloh and I Bantekas (eds), *The International Criminal Court and Africa* (Oxford University Press 2017) 214, 220.

VI CONCLUSION

This thesis has assessed the features, role, legal basis, and potential normative value of intersectionality theory in the adjudication of the crime against humanity of persecution in the ICC. Using theoretical and doctrinal methodologies, it explored four research questions: assessing first, the features of intersectionality theory in the international criminal law context; secondly, the current role of intersectionality theory in ICC case law; thirdly, whether the Rome Statute provides a legal basis for intersectionality in persecution cases; and fourthly, whether it is normatively desirable to incorporate intersectionality into the ICC's adjudication of persecution.

1 Research contributions

International criminal courts and tribunals, as well as scholars, display growing interest in the opportunities offered by intersectionality theory to render international criminal law more accurate and victim-sensitive. This thesis has contributed to this development by conducting a theoretical, doctrinal, and normative assessment of intersectionality theory as applied to the crime against humanity of persecution at the ICC.

First, this thesis reviewed legal scholarship on intersectionality, assessing the theory's trajectory from domestic discrimination law to international human rights law, culminating, for the purposes of this thesis, in a nascent relevance in international criminal law. After responding to preliminary objections, including anti-carceral and colonial critiques of international criminal law, it set out a framework of the features of intersectionality theory that are most relevant to international criminal law.

Secondly, this thesis analysed the ICC's approach to cases involving potential intersectional discrimination prior to the 2014 Policy Paper, concluding that multiple

grounds of discrimination were addressed only rarely in case law at that time, obscuring possibilities for intersectional analysis. The ICC's post-Policy Paper case law was then reviewed, concluding that intersectional concepts and explicit attention to intersectionality are becoming more common in the ICC.

Thirdly, this thesis put forward a legal basis for applying intersectionality to ICC persecution cases. It provided an interpretation of Article 21(3) of the Rome Statute as a human rights consistency test, applied this interpretation in the context of an intersectional approach to persecution, and rebutted the objection that the principle of legality prevents this use of Article 21(3).

Finally, this thesis evaluated the benefits and limitations of applying intersectionality to persecution. It analysed the benefits for the contextual elements, actus reus, mens rea, sentencing, and reparations stages, before considering the expressive advantages of an explicit intersectional framework. It also responded to potential limitations to the intersectionality proposal, concluding that the proposal will not damage the theory's credibility, create an undue funding burden, or stoke state hostility.

This thesis therefore concludes that intersectionality theory's current role in ICC proceedings should be developed into an explicit intersectional framework, similar to that identified in Chapter II. This proposal has a defensible legal basis in Article 21(3) of the Rome Statute, and would bring greater accuracy, structure, and victim-centrism to persecution cases. The findings of this thesis also suggest that assessment of intersectionality's broader potential with respect to other international crimes, courts, and tribunals, may prove fruitful. It is therefore hoped that this thesis progresses the dialogue about intersectionality in international criminal law, contributing to greater understanding of international crimes that involve intersectional discrimination.

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