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NAVIGATING THE ROME STATUTE: FROM INVESTIGATION TO PROSECUTION IN INTERNATIONAL CRIMINAL PROCEEDINGS

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1. INVESTIGATION AND PROSECUTION BEFORE THE INTERNATIONAL CRIMINAL COURT

Introduction

The establishment of the International Criminal Court (ICC) under the Rome Statute of 1998 represents a significant development in the enforcement of international criminal law. The Court is a permanent institution established to prosecute individuals responsible for the most serious crimes of concern to the international community, namely genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute provides not only substantive definitions of these crimes but also a comprehensive procedural framework for their investigation and prosecution. Part 5 of the Rome Statute, particularly Articles 53 to 61, regulates the investigation and prosecution process before the ICC. The process may begin with the receipt and assessment of information and proceed through investigation by the Office of the Prosecutor, judicial supervision by the Pre-Trial Chamber, arrest warrants or summonses, confirmation of charges and, ultimately, trial.¹

The investigation and prosecution system of the ICC seeks to reconcile two important objectives: accountability for serious international crimes and protection of the fundamental rights of suspects and accused persons. Investigating international crimes is particularly difficult because they frequently occur in situations of armed conflict, political instability and widespread violence. Evidence may be destroyed, witnesses may be displaced or threatened, and national authorities may be unwilling or unable to prosecute those responsible. The Rome Statute therefore grants significant investigative responsibilities to the Prosecutor while simultaneously establishing judicial and procedural safeguards.²

Initiation of Investigation

An investigation before the ICC may arise through three principal mechanisms. First, a State Party may refer a situation to the Prosecutor under Article 14 of the Rome Statute where one or more crimes within the jurisdiction of the Court appear to have been committed. Secondly, the United Nations Security Council may refer a situation to the Prosecutor under Article 13(b), acting pursuant to Chapter VII of the United Nations Charter. Such a referral may concern a State that is not a party to the Rome Statute. Thirdly, the Prosecutor may initiate an investigation *proprio motu* under Article 15 on the basis of information concerning crimes within the jurisdiction of the Court. In such circumstances, however, authorisation from the Pre-Trial Chamber is required.³

Before proceeding to a full investigation, the Prosecutor undertakes a preliminary examination to determine whether the statutory requirements for investigation are satisfied. The Prosecutor considers whether the alleged conduct falls within the subject-matter jurisdiction of the ICC, whether territorial or personal jurisdiction exists, whether the requirements of complementarity are satisfied, whether the alleged crimes possess sufficient gravity and whether there are substantial reasons for concluding that an investigation would not serve the interests of justice.⁴

The principle of complementarity is central to the ICC system. Under Article 17, the Court is intended to complement national criminal jurisdictions rather than replace them.

Consequently, a case may be inadmissible where a State possessing jurisdiction is genuinely investigating or prosecuting the matter, unless that State is unwilling or unable genuinely to carry out the proceedings. Complementarity therefore establishes a relationship between domestic criminal justice systems and international criminal justice.⁵

Investigation by the Office of the Prosecutor

Once an investigation is properly authorised or initiated, the Office of the Prosecutor (OTP) collects evidence relating to the alleged crimes and seeks to identify persons who may bear individual criminal responsibility. Article 54 imposes an important duty upon the Prosecutor to investigate both incriminating and exonerating circumstances. The Prosecutor is therefore not merely required to collect evidence capable of establishing guilt but must also investigate circumstances that may affect the responsibility of the suspect.⁶

Investigative activities may include interviewing victims and witnesses, collecting documentary evidence, photographs, videos and digital material, obtaining forensic evidence, examining military and governmental records, analysing financial records where relevant and conducting crime-scene investigations. Cooperation with States, international organisations and other bodies may also be necessary. The international character of ICC investigations often requires evidence to be collected remotely or through cooperation with national authorities and other organisations.⁷

Rights of Suspects

The Rome Statute incorporates important procedural safeguards for persons under investigation. Article 55 provides, among other protections, that a person shall not be compelled to incriminate himself or herself or to confess guilt. The suspect is also entitled to legal assistance in circumstances prescribed by the Statute and must be informed of the grounds for believing that he or she has committed a crime within the jurisdiction of the Court. These provisions reflect the importance of due process and fair-trial guarantees even at the investigative stage.⁸

Arrest and Summons to Appear

Where the Prosecutor considers that sufficient grounds exist, an application may be made to the Pre-Trial Chamber for an arrest warrant or summons to appear under Article 58. The Pre-Trial Chamber may issue an arrest warrant where there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and where arrest appears necessary, including for ensuring the person's appearance, preventing interference with the investigation or preventing the continuation of the alleged criminal conduct.⁹

A major practical limitation is that the ICC does not possess its own police force. The execution of arrest warrants consequently depends substantially upon the cooperation of States. This dependence upon State cooperation affects the practical effectiveness of the Court's investigative and prosecutorial functions.¹⁰

Confirmation of Charges

After the accused appears before the Court, the proceedings move towards confirmation of charges. Under Article 61, the Pre-Trial Chamber determines whether the evidence establishes

substantial grounds to believe that the accused committed each of the crimes charged. The Prosecutor must present sufficient evidence, while the defence has an opportunity to challenge the evidence and raise objections. The Chamber may confirm the charges and commit the accused to trial, decline to confirm some or all charges, or adjourn the hearing and require further evidence or amendments to the charges. The confirmation stage therefore operates as an important judicial filter between investigation and trial.¹¹

Individual Criminal Responsibility

The ICC prosecutes individuals rather than States. Article 25 establishes the principle of individual criminal responsibility and recognises several modes through which a person may incur responsibility, including committing a crime individually, jointly with another person, through another person, ordering, soliciting or inducing its commission, aiding or abetting its commission, or contributing to a crime committed by a group acting with a common purpose.¹²

Article 28 additionally recognises command or superior responsibility under specified circumstances. Military commanders and other superiors may incur responsibility where forces under their effective command or control commit crimes and the relevant requirements concerning knowledge and failure to prevent or punish the crimes are established.¹³

Transition to Trial

Once charges have been confirmed, the case proceeds to the Trial Chamber. The Prosecutor must establish the individual criminal responsibility of the accused beyond reasonable doubt. The prosecution may rely upon witness testimony, documentary evidence, expert evidence, forensic material, electronic and digital evidence and evidence concerning the broader context in which the alleged crimes occurred. The defence is entitled to challenge the prosecution's evidence, call witnesses and present its own evidence.¹⁴

The investigation and prosecution process therefore represents a multi-stage judicial framework involving preliminary examination, investigation, arrest, confirmation of charges, trial, judgment and appeal. Its effectiveness, however, remains closely connected with international cooperation, particularly because the ICC depends upon States for arrests, evidence collection and enforcement of its decisions.¹⁵

2. TRIAL PROCEDURE UNDER THE ROME STATUTE

Introduction

The trial procedure before the ICC is principally governed by Part 6 of the Rome Statute, particularly Articles 62 to 76. These provisions establish the procedure applicable after the Pre-Trial Chamber has confirmed the charges. The trial process seeks to balance accountability for international crimes with the accused's right to a fair and impartial trial, while also recognising the participation and protection of victims and witnesses.¹⁶

Commencement and Composition of the Trial Chamber

The trial begins after confirmation of charges under Article 61. Once charges are confirmed, the case is committed to a Trial Chamber. Article 39 provides for Trial Chambers composed of three judges.¹⁷ Under Article 62, the place of trial shall ordinarily be the seat of the Court unless the Court determines otherwise.

The accused is generally required to be present during the trial under Article 63. This requirement reflects the accused's right to participate directly in the proceedings and understand the evidence and arguments presented against him or her. However, where an accused seriously disrupts proceedings and other reasonable alternatives are inadequate, the Trial Chamber may remove the accused for the period strictly necessary. Even in such circumstances, arrangements must be made to enable the accused to observe the proceedings and communicate with defence counsel.¹⁸

Powers and Functions of the Trial Chamber

Article 64 requires the Trial Chamber to ensure that the trial is conducted fairly and expeditiously while respecting the rights of the accused and giving due regard to the protection of victims and witnesses. The Chamber has broad powers to regulate proceedings, determine questions of admissibility and relevance, order the production of documents and evidence, require witnesses to attend and testify, protect confidential information and adopt measures necessary for the protection of participants.¹⁹

The Trial Chamber therefore does not operate merely as a passive recipient of evidence. It has an active judicial role in ensuring that the proceedings are fair, orderly and capable of producing a reliable determination of the case. At the same time, procedural efficiency cannot be achieved at the expense of the rights of the accused or the interests of victims and witnesses.²⁰

Public Nature of Proceedings

ICC trials are generally conducted in public. Public hearings promote transparency and accountability in international criminal justice. However, publicity is not absolute. The Trial Chamber may conduct particular proceedings *in camera* where necessary to protect victims and witnesses or to safeguard confidential and sensitive information. This is particularly significant in cases involving sexual violence, children and other vulnerable witnesses.²¹

Opening of Trial and Admission of Guilt

At the commencement of the trial, the charges confirmed by the Pre-Trial Chamber are read to the accused, and the Chamber must satisfy itself that the accused understands their nature. The accused is then given an opportunity to plead guilty or not guilty.²²

Article 65 establishes a specific procedure where the accused makes an admission of guilt. Such admission does not automatically result in conviction. The Trial Chamber must determine whether the accused understands the nature and consequences of the admission, whether it was made voluntarily after sufficient consultation with defence counsel and whether the admission is supported by the facts of the case. If these requirements are not satisfied, the ordinary trial procedure continues.²³

Presumption of Innocence and Rights of the Accused

The presumption of innocence is a fundamental principle of ICC proceedings. Article 66 provides that every person shall be presumed innocent until proven guilty according to law. The Prosecutor bears the burden of proving guilt beyond reasonable doubt. Consequently, the accused is not required to prove his or her innocence.²⁴

Article 67 establishes minimum guarantees for the accused, including the right to a fair and public hearing, the right to be informed in detail of the charges, adequate time and facilities to prepare the defence, legal assistance, examination of prosecution witnesses, attendance and examination of defence witnesses, and interpretation and translation where necessary. The accused also has the right not to be compelled to testify or confess guilt and the right to remain silent.²⁵

Presentation and Evaluation of Evidence

Evidence constitutes the foundation of the ICC trial. The prosecution may present oral testimony, documentary evidence, expert evidence, forensic evidence, photographs, videos and electronic or digital evidence. The defence may challenge the prosecution's evidence through cross-examination and may present evidence in support of its case.²⁶

Article 69 regulates evidence before the Court. Witnesses are ordinarily required to testify in person, although the Court may permit oral or recorded testimony through video or audio technology and may allow documents or written transcripts to be introduced in accordance with the Statute and the Rules of Procedure and Evidence. The Trial Chamber assesses relevance, admissibility, probative value and possible prejudice to the fairness of the proceedings.²⁷

Judgment, Sentencing and Reparations

After the presentation and examination of evidence, the Trial Chamber determines whether the accused is guilty or not guilty of the charges. Under Article 74, the decision must be based upon the evidence submitted and discussed before the Chamber, with the standard of proof beyond reasonable doubt remaining central to conviction.²⁸

Where an accused is convicted, Article 76 governs sentencing. Article 77 permits imprisonment for a specified number of years up to 30 years or, where justified by the extreme gravity of the crime and the individual circumstances of the convicted person, life imprisonment. The Court may additionally order a fine or forfeiture of proceeds, property and assets derived directly or indirectly from the crime.²⁹

The Rome Statute also incorporates a remedial dimension through Article 75. The Court may establish principles relating to reparations, including restitution, compensation and rehabilitation. Reparations may be ordered against a convicted person and may, where appropriate, be implemented through the Trust Fund for Victims.³⁰

Appeal

The trial process does not necessarily conclude with the judgment of the Trial Chamber. Under Article 81, the Prosecutor and convicted person may appeal on grounds including procedural error, error of fact or error of law affecting the fairness or reliability of the proceedings. The

Appeals Chamber may confirm, reverse or amend the decision or order another trial where the requirements of the Statute are satisfied.³¹

Thus, the trial procedure under the Rome Statute establishes a structured process combining criminal accountability with due process, victim participation, witness protection, evidentiary safeguards, reparations and appellate review.³²

3. IMPORTANCE OF CUSTOMARY INTERNATIONAL LAW IN PROSECUTING INTERNATIONAL CRIMES

Introduction

Customary international law has played a foundational role in the development and prosecution of international crimes. Before the establishment of the ICC and the extensive codification of international criminal law through treaties, international criminal responsibility developed through customary rules, State practice and judicial decisions. The historical development of international criminal law can be traced through the Nuremberg and Tokyo Tribunals, domestic courts exercising universal jurisdiction, the ICTY and ICTR, hybrid tribunals and ultimately the ICC.³³

Customary international law remains important because international crimes often involve conduct that transcends national boundaries and affects the international community as a whole. Custom has contributed to recognising that certain conduct may be prohibited under international law even where comprehensive treaty provisions did not previously exist. At the same time, its application in criminal proceedings raises questions concerning legality, foreseeability and the principle of *nullum crimen sine lege*.³⁴

Development through International Criminal Tribunals

The Nuremberg proceedings were particularly important in establishing that individuals could bear criminal responsibility directly under international law. This represented a significant development because traditional international law had largely focused upon relations and responsibilities between States. Nuremberg contributed to the recognition that international law could impose obligations upon individuals and that individuals could be held criminally responsible for violations of international law.³⁵

The development continued through the ICTY and ICTR. Their jurisprudence contributed to clarification of international crimes, modes of individual responsibility and principles of international humanitarian law. Judicial decisions helped identify and clarify customary rules and demonstrated the interaction between customary international law and treaty provisions.³⁶

Customary International Law and Codification

The relationship between customary international law and codification is particularly important in contemporary international criminal law. Codification provides greater certainty and accessibility because criminal rules are expressed in written legal instruments. The Rome Statute illustrates this approach by defining genocide, crimes against humanity, war crimes and aggression and establishing provisions concerning individual criminal responsibility and procedure.³⁷

However, codification cannot necessarily anticipate every factual and legal circumstance. Treaties may contain provisions that require further interpretation, and treaty amendment can be a lengthy diplomatic process. Customary international law can therefore contribute to the clarification and development of legal principles in response to changing international practice. The relationship is consequently not one of complete replacement: codified law provides the principal written framework, while customary law may contribute to interpretation, clarification and the filling of gaps.³⁸

Principle of Legality

The use of customary international law in criminal prosecution must remain consistent with the principle of *nullum crimen sine lege*, or the principle that there can be no crime without law. Individuals should not be punished for conduct that did not constitute a criminal offence at the time it was committed. Customary international law therefore cannot legitimately be used to create criminal responsibility retrospectively.³⁹

The Nuremberg proceedings generated debate concerning this principle because some forms of conduct prosecuted at Nuremberg had not been comprehensively codified in treaty law.

The Nuremberg Tribunal nevertheless considered that the absence of complete codification could not necessarily operate as a legal loophole for conduct regarded as criminal under

international law. The contemporary ICC framework places greater emphasis upon legality and foreseeability, demonstrating the movement towards greater precision and codification.⁴⁰

Filling Gaps in International Criminal Law

One of the important functions of customary international law is to assist where treaty law is incomplete or silent. The attached material identifies international humanitarian law and the development of principles relating to personal and command responsibility as examples. The Martens Clause also demonstrates the continuing relevance of general principles of international law where treaty law does not completely regulate a particular situation.⁴¹

The development of command responsibility illustrates the interaction between customary law and judicial interpretation. The jurisprudence of the ICTY contributed to the development and application of principles of command responsibility in relation to non-international armed conflicts. Customary law can therefore prevent gaps in treaty law from becoming opportunities for impunity.⁴²

Role of International Tribunals and Domestic Courts

International criminal tribunals have played an important role in identifying and interpreting customary international law. Judicial decisions do not automatically create customary international law; rather, tribunals examine State practice, *opinio juris*, treaties, previous decisions, general principles and other relevant materials when determining whether a customary rule exists.⁴³

Customary international law is also relevant to domestic prosecution of international crimes. Domestic courts may prosecute international crimes through universal jurisdiction or other mechanisms where national law permits. Domestic legislation and judicial decisions may provide evidence concerning international practice and legal recognition, although domestic criminalisation alone does not automatically establish that conduct constitutes an international crime. International crimes may contain additional contextual requirements, such as the widespread or systematic attack required for crimes against humanity.⁴⁴

Continuing Importance under the Rome Statute

The establishment of the ICC has strengthened codification but has not eliminated the relevance

of customary international law. Article 21 of the Rome Statute identifies the law applicable by the Court and recognises applicable treaties, principles and rules of international law. Customary international law therefore retains a supplementary and interpretative role within the ICC framework.⁴⁵

At the same time, reliance upon customary international law presents challenges. Customary rules require an assessment of State practice and *opinio juris*, which may be difficult where State practice is inconsistent. Excessive reliance upon evolving customary rules may also raise legality concerns because accused persons must be able to foresee the circumstances in which their conduct may attract criminal responsibility. These difficulties explain the increasing importance of codification while preserving the continuing supplementary role of custom.⁴⁶

4. WITNESS PROTECTION IN INTERNATIONAL CRIMINAL PROCEEDINGS

Introduction

Witnesses are indispensable to international criminal proceedings because international crimes frequently occur in circumstances where documentary or physical evidence is limited. Witnesses may provide first-hand accounts of genocide, war crimes, crimes against humanity and sexual and gender-based violence. At the same time, participation in international criminal proceedings may expose witnesses and their families to threats, intimidation, retaliation and psychological trauma. Effective witness protection is therefore connected both with individual safety and with the integrity of the judicial process.⁴⁷

Legal Framework for Protection

Article 68 of the Rome Statute requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Particular attention is required in cases involving sexual violence and children.⁴⁸

Article 43(6) establishes the Victims and Witnesses Unit within the Registry. The Unit provides protective measures, security arrangements, counselling and other assistance to witnesses, victims appearing before the Court and other persons at risk because of testimony.

It is also required to include personnel with expertise in trauma, including trauma resulting from

sexual violence.⁴⁹

Physical and Psychological Protection

Witness protection may involve security arrangements, secure accommodation, police escorts, relocation and, where appropriate, identity-related protective measures. Protection may extend to family members because threats may be directed against relatives in order to intimidate witnesses. Psychological assistance is also important because witnesses may experience fear, anxiety and trauma from recounting violent experiences during judicial proceedings.⁵⁰

The *Prosecutor v. Thomas Lubanga Dyilo* proceedings illustrate the use of protective arrangements for vulnerable witnesses, including the assignment of pseudonyms and the provision of in-court psychological assistance. Such mechanisms can reduce exposure and assist witnesses in participating in proceedings.⁵¹

Protective Measures during Proceedings

Article 68 permits the Court to conduct parts of proceedings *in camera* or to allow evidence to be presented through electronic or other special means. Such measures are particularly important where public testimony could expose a witness to danger or serious psychological harm. The Statute gives specific attention to victims of sexual violence and child victims or witnesses.⁵²

The Court may also permit victims whose personal interests are affected to present their views and concerns at appropriate stages of proceedings. Victim participation and protective measures, however, must remain consistent with the rights of the accused and the requirements of a fair and impartial trial.⁵³

Confidentiality and Anonymity

Confidentiality is an important component of witness protection. Article 68(5) permits the Prosecutor, before the commencement of trial, to withhold certain evidence or information where disclosure could seriously endanger the security of a witness or the witness's family, subject to the rights of the accused.⁵⁴

The ICC has also employed anonymity and confidentiality measures. In the *Prosecutor v.*

Thomas Lubanga Dyilo proceedings, pseudonyms were assigned to witnesses in order to protect their identities and reduce the risk of reprisals. However, anonymity cannot be absolute because the defence must retain a meaningful opportunity to challenge prosecution evidence and assess witness credibility.⁵⁵

Witness Intimidation and Tampering

Witness intimidation and tampering remain significant challenges. Persons accused of international crimes may have access to political, military, financial or social networks capable of exerting pressure upon witnesses. Intimidation may take the form of threats, harassment, bribery, coercion or threats against relatives. The *Prosecutor v. Jean-Pierre Bemba Gombo* proceedings illustrate the continuing risks of witness intimidation and harassment even where protective measures have been implemented.⁵⁶

Witness tampering can also affect the integrity of judicial proceedings. If witnesses are influenced to alter or withdraw their evidence, the fact-finding process may be distorted. Witness protection therefore serves a dual purpose: protecting individuals and preserving the reliability of evidence.⁵⁷

Limitations and the Fair-Trial Balance

The ICC's witness protection framework nevertheless faces practical limitations. The Court lacks unlimited independent enforcement capacity, and many protective measures require cooperation from States and local authorities. Long-term relocation may disrupt family relationships, employment, education and social connections. Maintaining anonymity can also be difficult in small or closely connected communities.⁵⁸

There is also an important tension between witness protection and the rights of the accused. Excessive restrictions on disclosure or witness identity may make it difficult for the defence to challenge prosecution evidence. The Court must therefore continuously balance the safety of witnesses with the accused's right to a fair and impartial trial.⁵⁹

Effective witness protection encourages witnesses to come forward, preserves the integrity of evidence, protects individuals from retaliation and further trauma and contributes to public confidence in international criminal justice. It is particularly significant in sexual and gender-

based violence cases, where survivors may face stigma, psychological trauma and fear of retaliation.⁶⁰

5. CHALLENGES IN PROSECUTING SEXUAL AND GENDER-BASED VIOLENCE

Introduction

Sexual and gender-based violence (SGBV) constitutes a serious category of international criminality, but its effective prosecution continues to face legal, procedural, evidentiary, cultural, institutional and political barriers. Although international criminal law has increasingly recognised sexual violence as an international crime, prosecution remains difficult because these crimes frequently occur in conflict and post-conflict situations and are embedded within wider social, political, cultural and economic structures.⁶¹

An important dimension identified in the material is the need for an intersectional approach. The concept of intersectionality, associated with Kimberlé Crenshaw's work, emphasises that gender cannot always explain the complete nature of discrimination or violence. Gender may interact with ethnicity, religion, class, age, nationality, economic status, political status and colonial history. A gender-only analysis may consequently overlook factors that influence both the commission of the crime and the harm suffered by survivors.⁶²

Legal Barriers

A major legal challenge is inconsistency in the definition and treatment of sexual violence across legal systems. Although the Rome Statute provides a comprehensive framework, national legal systems may continue to employ vague or outdated concepts that understand sexual violence through morality or honour rather than bodily autonomy and human rights. Such differences may create difficulties in investigation and prosecution.⁶³

Complementarity may create another difficulty. The ICC generally intervenes where national jurisdictions are unwilling or unable genuinely to prosecute. Where domestic institutions are weak, unwilling or ineffective, survivors may consequently face barriers in obtaining justice.⁶⁴

International jurisprudence has nevertheless contributed significantly to the recognition of sexual violence. In *Prosecutor v. Jean-Paul Akayesu*, the ICTR recognised that rape and sexual

violence could constitute acts of genocide. In *Prosecutor v. Anto Furundžija*, the ICTY recognised rape as a form of torture in the circumstances established in that case.

Prosecutor v. Kunarac et al. further addressed rape, sexual slavery and enslavement and recognised that sexual violence could constitute a war crime and a crime against humanity depending upon the circumstances.⁶⁵

Procedural Barriers

Procedural practices may create additional obstacles. Many systems lack gender-sensitive mechanisms capable of protecting survivors from retraumatisation. Hostile questioning, victim-blaming and inadequate psychological or legal assistance may discourage survivors from reporting offences or participating in proceedings. International criminal trials may also be lengthy and complex, leaving survivors in prolonged uncertainty and emotional distress.⁶⁶

The requirement to establish sufficient proof can also be difficult in conflict situations. Records may be destroyed or unavailable, survivors may be displaced and witnesses may face threats or intimidation. Consequently, prosecutors may have difficulty constructing a complete evidentiary case even where serious violations have occurred.⁶⁷

Evidentiary Barriers

Obtaining reliable physical and forensic evidence is one of the major challenges in prosecuting SGBV. Medical facilities may be inadequate, forensic expertise may be unavailable, reporting may be delayed and the passage of time may destroy or weaken physical evidence. Fear, stigma, retaliation and cultural taboos may also prevent survivors from reporting crimes at the time they occur.⁶⁸

Survivor testimony may additionally be affected by gender stereotypes and cultural assumptions. Authorities may incorrectly expect survivors to report immediately, display visible trauma or behave in a particular manner. Such assumptions can lead to the dismissal or undervaluation of testimony. The underrepresentation of women and gender experts within legal institutions may further contribute to inadequate understanding of the dynamics of sexual violence.⁶⁹

Cultural and Institutional Bias

Cultural stigma and patriarchal attitudes can significantly obstruct prosecution. Sexual violence may be associated with shame and dishonour, causing survivors to be blamed rather than perpetrators. In some circumstances, survivors may face ostracism, forced marriage with perpetrators or honour-based violence. These attitudes discourage reporting, access to medical assistance and participation in judicial proceedings and thereby reinforce silence and impunity.⁷⁰

These problems may particularly affect men and boys, LGBTQ+ persons and ethnic or religious minorities, whose experiences of sexual violence may be overlooked or dismissed. Institutional bias may also arise where judges, prosecutors and law-enforcement officials lack specialised training. The absence of specialised investigative and prosecutorial mechanisms may result in inadequate investigations, delays and ineffective prosecution.⁷¹

Political and Power Dynamics

Sexual violence is frequently committed by persons exercising political or military power, including commanders and political leaders. Their access to institutional, military or political structures can make investigation and prosecution difficult. In conflict and post-conflict environments, governments may lack the political will to prosecute sexual violence, particularly where State institutions themselves are involved or implicated. Prosecution may also be subordinated to peace negotiations, reconciliation processes or political settlements.⁷²

International mechanisms face related difficulties. Their effectiveness depends upon State cooperation, access to evidence, adequate resources and specialised expertise. Perceptions concerning uneven application of international justice can also affect confidence in international institutions. Effective prosecution therefore requires institutional independence and impartiality and protection of prosecutorial processes from political interference.⁷³

Intersectional Challenges

An important challenge identified in the material is the traditional reliance upon single-axis approaches, particularly gender-based analysis. Although gender remains an essential component of SGBV analysis, it does not necessarily explain the full circumstances surrounding a crime. Sexual violence may be influenced simultaneously by ethnicity, religion,

nationality, political status, class, age, economic position and historical or colonial structures.⁷⁴

Examples discussed in the material include the experiences of Korean women subjected to sexual slavery, Bosnian Muslim women affected by the Srebrenica atrocities and Tamil men and boys subjected to conflict-related sexual violence. These examples demonstrate how gender may intersect with other structures of power and disadvantage. An intersectional approach therefore seeks to make previously overlooked factors visible and to understand survivors as multidimensional individuals rather than merely members of one category.⁷⁵

Article 21(3) of the Rome Statute provides an important foundation for a human-rights-sensitive approach by requiring interpretation and application of the law consistently with internationally recognised human rights and without adverse distinction on prohibited grounds. The continuing challenge is to translate this principle into actual investigative and prosecutorial practice.⁷⁶

Important Jurisprudence

International jurisprudence demonstrates the progressive development of legal recognition of SGBV. *Akayesu* established the significance of rape and sexual violence in the context of genocide. *Furundžija* contributed to the recognition of rape as torture, while *Kunarac* addressed rape, sexual slavery and enslavement as international crimes. At the ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* demonstrated the relevance and difficulty of command responsibility for crimes committed by troops. *Prosecutor v. Bosco Ntaganda* involved rape and sexual slavery alongside the recruitment and use of child soldiers, while *Prosecutor v. Dominic Ongwen* involved sexual violence, forced marriage and child soldiers and demonstrated the complexities associated with prosecuting an accused who had himself been abducted and forced into an armed group as a child.⁷⁷

The jurisprudence therefore demonstrates that international criminal law has developed considerably in recognising and prosecuting sexual violence. Nevertheless, recognition in law does not automatically remove the evidentiary, institutional, cultural and political obstacles that arise in actual prosecutions.⁷⁸

Measures to Strengthen Prosecution

Strengthening prosecution requires harmonised legal frameworks and comprehensive definitions covering rape, sexual slavery, forced pregnancy, enforced sterilisation and other forms of sexual violence. Investigative and prosecutorial practices should be survivor-centred and gender-sensitive, supported by specialised training in forensic, testimonial and digital evidence and by specialised sexual-violence units. Command responsibility should also be effectively enforced where the necessary legal requirements are established.⁷⁹

Cultural and institutional biases must also be addressed through public awareness, measures against victim-blaming and harmful stereotypes, and specialised training for judges, prosecutors and law-enforcement personnel. Greater representation of women and gender experts may contribute to improved institutional understanding of SGBV. International and regional cooperation should also be strengthened through evidence-sharing, extradition, execution of arrest warrants and cooperation with international courts.⁸⁰

Survivors should receive medical, psychological and legal assistance throughout proceedings, together with measures designed to prevent retraumatisation. Reparations should take account of compensation, rehabilitation and guarantees of non-repetition and should meaningfully consider survivors' needs. At the same time, international prosecutions must remain independent and impartial, while research institutions, NGOs and grassroots organisations can contribute to identifying barriers, supporting survivors and promoting accountability.⁸¹

Conclusion

The prosecution of sexual and gender-based violence has developed substantially within international criminal law, but significant obstacles remain. Legal inconsistencies, procedural shortcomings, evidentiary difficulties, stigma, victim-blaming, institutional weaknesses, gender bias and political interference may all obstruct effective prosecution. These problems become particularly acute in conflict and post-conflict environments where evidence is difficult to obtain and perpetrators may possess political or military power.⁸²

A survivor-centred, gender-sensitive and intersectional approach can assist in addressing these difficulties. Such an approach recognises that survivors' experiences may be shaped by multiple and overlapping forms of disadvantage and that gender should be examined together with other

relevant factors. Effective prosecution consequently requires not merely formal criminalisation but also appropriate investigative practices, witness protection, specialised expertise, international cooperation, survivor assistance and meaningful reparations.⁸³

CONCLUSION

The investigation and prosecution of international crimes before the ICC, the trial procedure under the Rome Statute, the continuing importance of customary international law, witness protection and the prosecution of SGBV are interconnected aspects of contemporary international criminal justice. The Rome Statute establishes a detailed procedural structure beginning with the initiation and investigation of situations and continuing through confirmation of charges, trial, judgment, sentencing and appeal. At every stage, the framework seeks to reconcile accountability with the fundamental rights of the accused and the interests and protection of victims and witnesses.

Customary international law continues to supplement the codified framework by contributing to the interpretation and development of international criminal law, while the principle of legality places important limits upon its use in criminal prosecution. Witness protection is similarly essential because international criminal trials often depend upon persons who may face retaliation, intimidation and psychological harm. The Rome Statute consequently provides institutional and procedural mechanisms for protecting witnesses while requiring those measures to remain consistent with fair-trial rights.

The prosecution of sexual and gender-based violence illustrates both the achievements and continuing difficulties of international criminal justice. International jurisprudence has significantly expanded recognition of rape, sexual slavery, torture, forced marriage and other forms of sexual violence as international crimes. Nevertheless, effective accountability continues to be affected by legal, evidentiary, procedural, cultural, institutional and political barriers. An effective international criminal justice system therefore requires not only clear substantive rules but also reliable investigations, fair trials, effective witness protection, survivor-sensitive procedures, international cooperation and institutional independence.

FOOTNOTES

1. Rome Statute of the International Criminal Court, 1998, arts. 53–61.
2. Ibid., arts. 54–55.
3. Ibid., arts. 13(b), 14–15.
4. Ibid., arts. 53–54.
5. Ibid., art. 17.
6. Ibid., art. 54.
7. Ibid.
8. Ibid., art. 55.
9. Ibid., art. 58.
10. Rome Statute of the International Criminal Court, 1998, arts. 86–89.
11. Ibid., art. 61.
12. Ibid., art. 25.
13. Ibid., art. 28.
14. Ibid., arts. 66–69.
15. Ibid., arts. 54–61, 86–89.
16. Rome Statute of the International Criminal Court, 1998, Part 6, arts. 62–76.
17. Ibid., art. 39.
18. Ibid., art. 63.
19. Ibid., art. 64.
20. Ibid.
21. Ibid., art. 64(7).
22. Ibid., arts. 64–65.
23. Ibid., art. 65.
24. Ibid., art. 66.
25. Ibid., art. 67.
26. Ibid., arts. 67–69.
27. Ibid., art. 69.
28. Ibid., art. 74.
29. Ibid., arts. 76–78.
30. Ibid., art. 75.
31. Ibid., art. 81.
32. Ibid., arts. 62–81.
33. International Military Tribunal, *Trial of the Major War Criminals before the*

- International Military Tribunal*, Nuremberg, 1945–1946; see also Rome Statute of the International Criminal Court, 1998.
34. Rome Statute of the International Criminal Court, 1998, arts. 22–23.
35. International Military Tribunal, *Judgment of the International Military Tribunal*, Nuremberg, 1 October 1946.
36. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998.
37. Rome Statute of the International Criminal Court, 1998, arts. 5–8 ter.
38. Ibid., art. 21; see also *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Judgment, 15 July 1999.
39. Rome Statute of the International Criminal Court, 1998, art. 22.
40. International Military Tribunal, *Judgment of the International Military Tribunal*, Nuremberg, 1 October 1946.
41. Convention Respecting the Laws and Customs of War on Land, 1907, Preamble (Martens Clause).
42. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998.
43. Statute of the International Court of Justice, 1945, art. 38(1)(b)–(d).
44. See generally Rome Statute of the International Criminal Court, 1998, arts. 7 and 21.
45. Rome Statute of the International Criminal Court, 1998, art. 21.
46. Ibid., arts. 21–22.
47. Rome Statute of the International Criminal Court, 1998, arts. 43(6), 68.
48. Ibid., art. 68(1)–(2).
49. Ibid., art. 43(6).
50. Ibid.
51. International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012.
52. Rome Statute of the International Criminal Court, 1998, art. 68(2).
53. Ibid., art. 68(3).
54. Ibid., art. 68(5).
55. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, International

Criminal Court.

56. International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08.
57. Ibid.
58. Rome Statute of the International Criminal Court, 1998, arts. 43(6), 68.
59. Ibid., arts. 67–69.
60. Ibid., art. 68.
61. Rome Statute of the International Criminal Court, 1998, arts. 7–8.
62. Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, 1989, *University of Chicago Legal Forum*, Vol. 1989, p. 139.
63. Rome Statute of the International Criminal Court, 1998, art. 7.
64. Ibid., art. 17.
65. International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Cases Nos. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001.
66. Rome Statute of the International Criminal Court, 1998, arts. 64, 68.
67. Ibid.
68. Ibid., arts. 54, 69.
69. Ibid., arts. 67–69.
70. Ibid., art. 68.
71. Ibid., arts. 43(6), 68.
72. Ibid., arts. 25, 28.
73. Ibid., art. 21(3).
74. Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, 1991, *Stanford Law Review*, Vol. 43, p. 1241.
75. Ibid.
76. Rome Statute of the International Criminal Court, 1998, art. 21(3).
77. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998; *Prosecutor v. Kunarac et al.*, Cases Nos. IT-96-23-T & IT-96-23/1-T, Judgment,

22 February 2001; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08; *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment, 8 July 2019; *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Judgment, 4 February 2021.

78. Rome Statute of the International Criminal Court, 1998, arts. 7–8.

79. *Ibid.*, arts. 25, 28, 54.

80. *Ibid.*, arts. 68, 86–89.

81. *Ibid.*, arts. 68, 75.

82. *Ibid.*, arts. 54, 68.

83. *Ibid.*, arts. 21(3), 68, 75.

