

# The Role of the Prosecutor in the Collection and Evaluation of Evidence in the International Criminal Court

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Received: 2023-04-11

Revised: 2023-06-17

Accepted: 2023-06-25

Published: 2023-07-01

In international criminal practice, the International Criminal Court (ICC) is the most important body for addressing crimes and accusations, operating based on the Rome Statute. For the Court to carry out its functions and activities, it must have standardized criminal procedures, one of which is the collection and evaluation of evidence by the Prosecutor. The Prosecutor is tasked with gathering evidence related to the committed crimes and submitting them for trial. Although the collection and evaluation of evidence by the ICC Prosecutor is derived from the common law legal system, it goes beyond the scope of this legal system by undertaking much broader actions to access available documents and evidence. However, certain challenges are evident in the Court's judicial practice. The aim of this article is to examine these challenges and highlight their weaknesses, which can be observed in various cases. Therefore, through a descriptive-analytical and library-based method, this study examines the role of the Prosecutor in the collection and evaluation of evidence in the ICC. The findings indicate that, based on the Rome Statute, the Prosecutor plays a crucial role in the collection and evaluation of evidence. However, in practice, as seen in the Gbagbo case, the Court may entirely reject the Prosecutor's evidence, which stems from the weaknesses of the Prosecutor and particularly the Office of the Prosecutor. Depending on the different prosecutors, the Court may witness varying practices.

**Keywords:** *Prosecutor, Collection of Evidence, Evaluation of Evidence, International Criminal Court.*

## How to cite this article:

Forati, M., & Tadayyon, A. (2023). The Role of the Prosecutor in the Collection and Evaluation of Evidence in the International Criminal Court. *Interdisciplinary Studies in Society, Law, and Politics*, 2(3), 69-81. <https://doi.org/10.61838/kman.isslp.2.3.9>

## 1. Introduction

As a principle, the criminal justice system may impose an obligation on courts to seek to establish the facts of the case based on substantive objectives. The Statute does not impose any comprehensive obligation on the court or the pre-trial chamber to establish facts through its own investigation of the case. Paragraph 2 of Article 64 of the Statute regarding the functions and powers of the Trial Chamber states that the Trial Chamber must ensure that the trial is fair and

expeditious, and conducted with full respect for the rights of the accused and the rights of the defense. The Trial Chamber, in performing its duties either before or during the trial, may order the presentation of evidence, in addition to the evidence already gathered before the trial or presented by the parties during the proceedings (Article 64(d) of the Statute). Paragraph 3 of Article 69 of the Statute regarding evidence states that the Court has the authority to request the submission of all evidence that it deems "necessary for the determination of the truth" from the parties. This aligns with the idea that the



Prosecutor, as one of the organs of the Court, acts as a truth-seeking entity. These provisions, especially paragraph 3 of Article 69 of the Statute, obligate the Court to establish this principle.

Thus, the Statute reflects a particular understanding of justice. Equality forms the core of the substantive formula for justice. A system that operates internally through pieces of information always has several options to do so. In this regard, the method of obtaining and gathering evidence must be examined so that one of the manifestations and the first steps of applying criminal justice, namely the gathering of investigations and their evaluation, can be highlighted. If the Prosecutor conducts incomplete investigations, the Court's functioning may be called into question, and criminal justice may not be adequately delivered to the victims. Consequently, in this article, we examine the role of the Prosecutor in the collection and evaluation of evidence in the International Criminal Court.

## 2. The Duties of the Prosecutor in the Field of International Criminal Law

According to Articles 41 and 51 of the Nuremberg Charter, each of the four major victorious powers that signed the London Agreement (the United States, the United Kingdom, France, and the former Soviet Union) appointed a Chief Prosecutor for the Court. Accordingly, the Nuremberg Court had four Chief Prosecutors, each forming a committee to investigate and prosecute war criminals under their supervision. The Chief Prosecutors, individually and in cooperation with each other, were responsible for the following duties:

- a) Conducting investigations, collecting, and obtaining all necessary evidence.
- b) Preparing the indictment text for approval by the Committee in accordance with Article 41(c) above.
- c) Conducting preliminary interrogations of all accused persons and witnesses deemed necessary for investigation.
- d) Performing the role of Prosecutor during trial sessions.
- e) Selecting representatives to carry out assigned tasks.
- f) Performing other tasks deemed necessary to prepare for or conduct the trial.

In fact, in both courts, namely the Yugoslav and Rwandan courts, the Prosecutor, by virtue of the powers derived from their position—based on information obtained

through various means, especially from states, United Nations bodies, intergovernmental organizations, or non-governmental organizations—initiates investigations. After evaluating the obtained information, the Prosecutor decides whether it is sufficient to commence proceedings. The Prosecutor has the discretion to decide against whom an indictment should be filed. The Prosecutor's indictment is submitted to one of the judges of the Trial Chamber for review. If the judge agrees that the case prepared and submitted by the Prosecutor demonstrates the occurrence of a crime, the indictment is confirmed; otherwise, it is dismissed. This sensitivity has been further refined in the Statute of the International Criminal Court. Given that the position of Prosecutor has both political and judicial dimensions, one of the main concerns regarding the Prosecutor is the potential for political motivation in prosecutions. This concern is particularly serious in international criminal courts due to the nature of the subject matter and the status of individuals under prosecution. Therefore, the ICC Statute, to prevent such occurrences, includes provisions preventing the Prosecutor or their deputies from participating in any prosecutorial or investigative activities if there are reasonable grounds for questioning their impartiality. Additionally, the Statute requires the Prosecutor to pursue evidence demonstrating the innocence of the accused and even allows for the possibility of appealing or requesting a review in favor of the accused. In adversarial systems of adjudication, the Prosecutor is regarded as one of the parties in the legal battle. However, in inquisitorial systems, the Prosecutor is considered more of an organ of justice than a party to the case and must strive to uncover the truth. Therefore, they must collect all types of evidence, whether favorable or unfavorable to the accused.

The collection and evaluation of evidence have two key features: immediacy and free assessment of evidence. Regarding immediacy, the Trial Chamber must immediately identify all the evidence upon which it bases its judgment. The Statute envisages three different methods for taking witness testimony. First, the witness may testify in person at the Court. Second, evidence may be presented via video or audio link from a location outside the courtroom where the witness is present. Lastly, witness statements may be made outside the Court. The use of such methods as evidence is subject to certain limitations. Priority should be given to hearing

witnesses in the full Court, as it allows the Court to assess the reliability of the witness. The presence of the witness in the courtroom provides the best guarantee for respecting the accused's right to cross-examine the witnesses against them, as stated in Article 67(1)(e) of the Statute.

The second feature is the free evaluation of all evidence. Article 66 of the Statute defines the general standard of proof. The accused must be found guilty beyond a reasonable doubt. Consequently, the burden of proof lies with the Court. The first consequence of the *in dubio pro reo* principle is that the Court must find uncertainty and must be proven beyond doubt. The Trial Chamber is free to evaluate the evidence presented by the parties within the framework of the precise evidence standards provided by the Statute. The rules of evidence apply in all chambers. A chamber must have the authority to freely assess all presented evidence to determine its relevance or admissibility (Rule 63(2) Pre-Trial Chamber). This does not exempt the Chamber from the obligation to substantiate its findings. Judicial evaluation by the Chamber does not include scientific questions. Certain evidence may be deemed inadmissible for reasons considered superior interests. The admissibility of evidence obtained unlawfully is subject to the conditions set out in Article 69(7) of the Statute.

### 3. The Specific Broad Duties of the Prosecutor in Criminal Evidence

#### 3.1. *The Investigation Stage by the Prosecutor*

This stage is provided for in subsections (a) to (c) of paragraph 2 of Articles 35, 45, and 85. If the Prosecutor is convinced that the conditions set out in subsections (a) to (c) of paragraph 2 of Article 35 are met, an investigative procedure may be initiated. According to Article 45, the Prosecutor is responsible for evaluating all collected materials and analyzing the evidence and information to identify potential suspects to be prosecuted. He will also question suspects, witnesses, and victims, according to subsection (b) of paragraph 1 of Article 45. He may cooperate with any state or organization to complete investigations, in accordance with subsections (c) and (d) of paragraph 3 of Article 45. The Prosecutor's role at this stage is as a neutral entity (Riiben, 2003).

Subsection (a) of paragraph 2 of Article 45 states that the Prosecutor must "investigate incriminating and exonerating circumstances equally." As Schabas points out, "such a Prosecutor resembles more a judicial investigator or an instructing judge of the continental legal system rather than an adversarial common law trial lawyer." This is done with the aim of ensuring conviction (Riiben, 2003). The objective role of "seeking the truth" is not limited to the period before charges are confirmed, as the Appeals Chamber affirmed in the Lubanga case ("[Prosecutor v Lubanga, TC I, ICC-01/04-01/06-2595-Red-Corr, 8 March, Corrigendum to Redacted Decision on the Defence Request for the Admission of 422 Documents, 2011](#)"). There is no provision in Article 45 that prohibits the Prosecutor from conducting investigations after confirmation. However, a majority of the judges in the Fifth Court stated that the Prosecutor is expected "to largely complete his investigations before the confirmation hearing" ("[Prosecutor v Lubanga, TC I, ICC-01/04-01/06-2595-Red-Corr, 8 March, Corrigendum to Redacted Decision on the Defence Request for the Admission of 422 Documents, 2011](#)"), and that further investigations should only relate to "evidence that the Prosecutor, with reasonable diligence, could not have discovered or obtained before confirmation." At the end of this process, the Prosecutor decides which cases to prosecute. Before making such a decision, paragraph 2 of Article 35 requires the Prosecutor to meet three criteria: the existence of "legal grounds and sufficient evidence to request an arrest warrant or summons pursuant to Article 85," compliance with the admissibility conditions set out in Article 71, and ensuring that prosecution is not contrary to "the interests of justice." However, subsection (c) of paragraph 2 of Article 35 adds two additional factors to evaluate "the interests of justice": the age or infirmity of the perpetrator and their role in the alleged crime.

#### 3.2. *The Collection of Criminal Evidence*

The Rome Statute sets strict criteria for prosecutorial investigations, including the collection of evidence under Article 45(3)(a), as well as the request for evidence from the suspect under subsection (b) of paragraph 3 of Article 45. In fact, these criteria are fairly comprehensive, especially regarding the authority to gather evidence and how the Prosecutor should proceed with investigations (Safferling, 2018).

Addressing this issue is essential because the collection of evidence by victims and witnesses may conflict with the property rights of states or individual rights. To understand the complex nature of the investigative criteria available to the Prosecutor of the International Criminal Court, we must distinguish between two levels: (1) any mandatory criteria adopted within the territory of a sovereign state imply interference with the sovereignty of that state; and (2) investigative criteria applied against an individual violate the basic and human rights of that individual. Both levels require special authority. On the first level, the Prosecutor, acting as an agent with foreign power, infringes the territorial integrity of a state by merely being present on its territory, as territorial integrity is a component of the principle of sovereignty (De Meester, 2016). No international actor, like a police force, can exercise power within the territory of a state. On the second level, any mandatory investigative criteria imposed on an individual protected by human rights violate their privacy. The Prosecutor needs authority or permission to intervene on both levels: (1) violation of the territorial integrity of a state and (2) infringement on the human rights of individuals. If states or individuals consent in this regard, the necessary authority is obtained. If a state or individual consents, there is no violation of the legal status affected by the investigative criteria. In the absence of consent, this infringement must be legitimized by other legally provided means. By considering these two possible responses, we can identify four different situations. The International Criminal Court offers the Prosecutor various strategies to apply and exercise his investigative powers in all four scenarios. The Court's model is based on cooperation as a universal discourse. Therefore, the framework for these strategies differs from the general provisions on cooperation between the Court and member states, as outlined in the Rome Statute. The Statute provides a range of options for dealing with these scenarios and for the Prosecutor to implement investigative criteria. These criteria, in cooperation with the relevant state, person, or organization, are applicable on the basis of voluntary cooperation. The Prosecutor may enter into an agreement to conduct this under certain conditions of confidentiality for the duration of such an agreement. These criteria can be implemented through section 9 of the Statute as a cooperative standard, particularly Article

93 of the Statute, which provides a list of criteria that can be implemented cooperatively through referral and in accordance with the laws and regulations of the states. The Prosecutor is no longer responsible for the imposed criteria and, if involved, acts as an observer. Under certain conditions, the Prosecutor may operate within the territory of a state without its explicit consent (Article 99(4) of the ICC Statute). The Prosecutor may, with the permission of the Pre-Trial Chamber, conduct investigations in the territory of states without their consent, in cases where the conditions for cooperation under section 9 of the Statute are not publicly met. Generally, a state's unwillingness is not a reason to question sovereignty regarding the conduct of investigations within the relevant state's territory. In such cases, the Prosecutor bears the responsibility and must implement the relevant criteria with the help of his personnel (Caianiello, 2011).

For example, the Prosecutor needs the protocol of the Security Council session of Ecuador prior to the invasion by its neighbor, which is stored in that country's archives. The Prosecutor's country may request Ecuador to voluntarily provide the requested document. If Ecuador does not comply with this request, section 9 of the Statute can be invoked, requesting the relevant country to provide the document to its Prosecutor. The likelihood of successful cooperation, given Ecuador's opposition to voluntary disclosure of the document, is low. The only remaining option is to request the ICC Prosecutor's Office to issue a seizure order for the document under Article 75(3)(d) of the ICC Statute. Therefore, the prerequisite is that Ecuador is unable to provide the document. In the case presented here, it seems that Ecuador is fully capable of providing the document but is unwilling to do so. The term "unwillingness" is not explicitly mentioned in the text except in Article 71 of the Rome Statute.

### 3.3. *Evaluation of Criminal Evidence*

The authority to collect and examine evidence relates to any type of material that is not obtained through personal testimony. This authority extends to all materialized evidence. These items can include documents such as electronic data, photographs, or computer films, and in fact, they can be any movable object. Similarly, immovable items such as property can act as evidence and be subject to examination. For

example, a site where a mass execution took place or a plot of land suspected to be a mass grave, and finally, a human being can also be an object under examination. Blood samples, fingerprints, or genetic information are of forensic interest (De Meester, 2016).

These items can be both collected and examined. Collection means physically obtaining the evidence and establishing clear investigative criteria; examination refers to forensic analysis of the evidence, which presupposes a certain level of scientific interpretation of the subject. The Prosecutor can take a blood sample from a specific individual, but this is only done through a specialized forensic examination, such as determining the alcohol concentration in the blood. As explicitly mentioned in Article 45(3)(c) of the Rome Statute, the Prosecutor can request cooperation from any country or intergovernmental organization at any stage of the investigation. Such authority is inherently discreet because the Court's Presidency typically represents the Court in dealings with countries or intergovernmental organizations. However, Rule 176(2) of the Court specifies that the Prosecutor, as an independent body with its own office, can independently communicate with countries (Section 9 of the Rome Statute). It is worth noting that this power requires that the issue of cooperation be exclusively handled within the jurisdiction of the Office of the Prosecutor (Rule 107 of the Court), and if it extends beyond this jurisdiction, the Presidency must negotiate the agreement (Rule 107 of the Court). The Prosecutor has absolute authority under Articles 45(3)(c)(d)(e) of the Statute because these provisions only pertain to the matter of investigations. Rule 107 of the Court explicitly prioritizes Article 45(3)(d) of the Statute. Therefore, Rule 107(1) of the Court declares that the Prosecutor must inform the Court's Presidency of any preliminary or cooperation agreement. However, confidentiality takes precedence, and the Prosecutor is relieved of the obligation to inform the Court's Presidency (Caianiello, 2011).

Article 45(3)(f) of the Statute provides two specific criteria for establishing a consensual framework for the collection of evidence: (a) the Prosecutor can, as the situation requires, enter into an agreement with a country, intergovernmental organization, or individual to facilitate cooperation under Article 45(3)(d); and (b) pursuant to Article 45(3)(e), the Prosecutor can enter into a confidentiality agreement under specific

conditions. There is an exception in Article 99(4) of the Rome Statute. The general principle that the Prosecutor cannot conduct investigations directly on the territory of a state has an exception, which is Article 99(4) of the Statute, allowing the Prosecutor to enter the territory of a state without its explicit consent. This provision is highly controversial because it clearly contradicts the principle of state sovereignty (De Meester, 2016).

The statutory provision that allows the ICC Prosecutor to conduct investigations should be viewed as one that does not infringe upon individual rights or the sovereignty of states, except for the mere entry of a Court agent into the territory of a member state. Thus, this is a form of cooperation, but from a non-intrusive criteria standpoint (De Meester, 2016), and it differs ontologically from the Pre-Trial Chamber's powers under Article 75(3)(d) of the Statute. The list provided in Article 99(4) of the Statute is not exhaustive, but merely an exemplary list. Two scenarios are explicitly mentioned: (1) interviewing a person or obtaining evidence from them voluntarily, and (2) examining a site or other public location without modification. However, the scope of this norm is very limited in practice. While inspecting a graveyard is permissible, exhuming a mass grave is not. This constitutes an invasion and, thus, violates the territorial integrity of a state. The Prosecutor requires specific justification to implement this criterion (De Meester, 2016).

### 3.4. *Completing Criminal Evidence*

The trial begins with the reading of the charges that have been confirmed by the Pre-Trial Chamber, and the accused is informed of the charges brought against them. The trial proceeds somewhat formally as the accused is informed during the preparatory sessions. The accused must then declare whether they intend to plead guilty or contest the charges (Rome Statute, Article 65). Even though Articles 64 and 56 link this acceptance to the commencement of the trial stage (Rome Statute, Article 56), there is no reason why the accused should not have the right to plead guilty after the trial has moved into the second phase, the presentation of evidence. In such cases, the Trial Chamber accelerates the proceedings according to Article 56 if the accused intends to plead guilty before this stage. Two challenges arise in this regard. First, the Pre-Trial Chamber, which confirmed the charges according to Article 16, does not have the

authority to issue a conviction or to adopt an abbreviated trial process. The second issue is that the charges become accessible after the issuance of the confirmation decision. Until the charges are finalized, no formal indictment exists for the accused to plead guilty to. Thus, implementing Article 56 before the commencement of the main trial is impossible. If the individual in question feels remorse, they can cooperate with the Office of the Prosecutor and thereby expedite the process during the investigation and charge confirmation stages. However, a formal guilty plea is only possible after the commencement of the trial, and if the plea is accepted, its validity is thoroughly examined by the Trial Chamber and tested against the facts of the case. The Chamber has four options:

- 1 Convict the accused under Article 65(2).
- 2 Reject the accused's plea and proceed with the regular trial (Article 65(3)).
- 3 Despite the accused's guilty plea, order the submission of additional evidence (Article 65(4)(a)).
- 4 Despite the valid guilty plea, reject the plea and order the conduct of a regular trial (Article 65(4)(b)).

The Rome Statute's approach to guilty pleas aligns with the procedure followed by the ad hoc International Tribunal for Yugoslavia. Under Article 65(1) of the Rome Statute, the prerequisites for a valid guilty plea are as follows: (a) the accused must be aware of the nature and consequences of their guilty plea, and (b) the guilty plea must be voluntary and made after sufficient consultation with defense counsel.

(a) The guilty plea is related to the charges, not the actual facts of the case. In the European sense, a guilty plea does not mean a confession of guilt. Therefore, the Chamber must be convinced that the accused understands its nature, meaning the elements of the crime, legal requirements, the gravity of the charges, and the possible penalties. Additionally, the accused must be aware of the consequences of pleading guilty, which include waiving their procedural rights.

(b) The guilty plea must be voluntary, free from any threat, coercion, or undue promise. The mandatory condition of consulting with defense counsel is fundamental to the voluntariness of the guilty plea. The requirement to consult with counsel, despite its formal role under Article 65(1), is intended to ensure that the accused is fully aware of the nature and consequences of their guilty plea. The question of how much consultation

is sufficient is determined on a case-by-case basis. The amount of consultation depends on the complexity of the charges, the competency and capacity of the accused, and the level of influence exerted by the prosecuting organizations. This requirement is inherently connected to the accused's right against self-incrimination under Articles 55(1)(a) and 67(1)(g) of the Statute. The obligation to consult with counsel also includes accountability for any failure or inadequacy during this process, which could lead to claims of ineffective assistance of counsel.

If the Trial Chamber believes that the guilty plea is valid and corroborated by the facts of the case, which is the mandatory condition under Article 65(1), it may still proceed with the trial by requesting additional evidence from the Prosecutor or, if the interests of justice so require, order the conduct of a regular trial according to Article 65(4). Before making a decision in this regard, the Chamber must hear the opinions of the Prosecutor and defense counsel under Rule 139(1) of the Court. This provision is somewhat problematic and undermines the idea of an expedited trial in the case of a guilty plea. I could not understand why this provision establishes an important relationship between civil law and common law practices regarding guilty pleas for two reasons. First, Article 65(4) only applies when the Trial Chamber is convinced that the guilty plea is confirmed by the facts of the case. Second, a full trial is unnecessary for determining the accused's guilt based solely on the interests of justice. Therefore, the real danger is that the accused may be subject to prolonged proceedings for a higher purpose, which is justice, and may suffer accordingly. Neither common law nor civil law will condone such a punishment for the accused. Therefore, justifying additional proceedings under Article 65(4) seems difficult and can only be achieved by interpreting the interests of justice as the interests of the victim. Indeed, the victim's interests are explicitly mentioned in this provision. Assuming that the victim has an interest in providing a comprehensive record of the case and expressing their opinion in a public session, it is possible to balance the accused's interest in a speedy trial with the victim's interests and conclude that in certain scenarios, additional evidence supporting the guilty plea will be welcomed. I believe the Court should only invoke Article 65(4)(a) in exceptional circumstances and refrain

from unnecessarily prolonging the proceedings under Article 65.

There may be situations where the accused pleads guilty to some charges but denies guilt for others. Two responses are possible: either the Chamber accepts the partial plea and immediately issues a conviction for those charges while proceeding with the regular trial for the remaining charges, or it continues with the regular trial and evaluates the guilty plea along with the other evidence presented during the trial. I believe that following the latter course is preferable for two reasons: (1) it prevents the conduct of separate trials for a single accused, and (2) this scenario fits the application of Article 65(4)(b), where the interests of justice require a full trial. The Chamber must inquire into the accused's reason for pleading guilty to some charges while denying guilt for others, which necessitates a regular trial (Safferling, 2018). Under Article 64(9)(a) of the Statute, the Trial Chamber has the authority to rule on the admissibility or relevance of evidence. This same wording is repeated in more detail in Article 69(4) of the Statute, which refers to the probative value of evidence and the presumed impact of the admissibility of evidence on the rights of the accused as stipulated in Article 67.

In the Lubanga case, the Trial Chamber devised a three-part test, which the Court must follow to determine the admissibility of non-oral evidence. First, the Court must determine whether the evidence presented is prima facie relevant to the case, and second, if the evidence is relevant, the Court must weigh the probative value of the evidence against its presumed impact. These criteria represent the general requirements for the admissibility of evidence. Additionally, even though legal language suggests that evidence must be relevant and admissible, it is clear that the relevance of evidence is part of its admissibility. Under the Court's jurisdiction, admissible evidence must meet all necessary conditions, meaning it must have probative value and balance the efficiency of the proceedings with the potential prejudice arising from specific evidence on a fair trial. Under Rule 64(1) of the Court, when any piece of evidence is introduced into the case record, its admissibility may be challenged. If the reason for this challenge becomes apparent later, the concerned party can present their arguments against the admissibility of the evidence. Notably, the Court in the Lubanga case correctly declared that if a challenge to the admissibility of evidence is raised, logic dictates that the

burden of proof lies with the party presenting the evidence. Generally, the presenting party has more information about the source of the evidence than the opposing party and is certainly aware of the credibility and reliability of the source (De Meester, 2016).

### 3.5. *The Prosecution Phase*

With the establishment of the above-mentioned factors, the Prosecutor may request a warrant or summons from the Pre-Trial Chamber. There is no specific time by which the Prosecutor must decide to proceed with prosecution. Article 58(1) states that the Prosecutor may "request a warrant of arrest or summons to appear at any time after the initiation of an investigation." Article 61(1) also obliges the Prosecutor to submit the charges for confirmation by the Pre-Trial Chamber before proceeding to trial. In issuing an arrest warrant, "the Pre-Trial Chamber must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that the arrest of the person is necessary" (Schabas, 2006). The Pre-Trial Chamber plays a crucial role before a case proceeds to trial. Therefore, the selection process depends not only on the Prosecutor's discretion but also on the Pre-Trial Chamber's approval. The creation of these requirements, as Stahn argues, was an "institutional response to the establishment of an independent Prosecutor." Consequently, any flaw in this process reflects on the legitimacy of the entire Court, not just the Prosecutor. One issue that has arisen is the fact that neither the Statute nor the Pre-Trial Chamber indicates that an arrest warrant must be formal. The practice of the ICC Prosecutor reflects this, as arrest warrants have been issued in both formal and informal ways (Schabas, 2006).

## 4. **Case Study on Judicial Procedures Related to the Collection and Evaluation of Evidence by the Prosecutor**

### 4.1. *The Bemba Case*

In 2007, the Prosecutor of the International Criminal Court (ICC) opened an investigation into alleged crimes committed in the Central African Republic (CAR) between 2002 and 2003. In May 2008, at the request of the Prosecutor, the Pre-Trial Chamber issued an arrest warrant for Jean-Pierre Bemba Gombo, the commander-

in-chief of the Movement for the Liberation of the Congo, for war crimes and crimes against humanity, including murder, rape, and pillaging, committed by MLC soldiers in the CAR (ICC, 2018). The trial of Mr. Bemba Gombo began in November 2010 and lasted four years, during which the Court heard testimony from 77 witnesses and reviewed more than 5,700 pages of documents presented as evidence. In total, 5,229 individuals were recognized by the Court as victims in this case. In March 2016, the Court unanimously convicted Mr. Bemba Gombo on two counts of crimes against humanity and three counts of war crimes. This was the first ICC conviction for sexual violence based on military command responsibility under Article 28(1)(a) of the Rome Statute. Mr. Bemba Gombo was sentenced to 18 years in prison.

In June 2018, Mr. Bemba Gombo's conviction was overturned on appeal, and he was acquitted of all charges. The Appeals Chamber found that the Trial Chamber had made several errors in its findings, including the conclusion that Mr. Bemba Gombo had failed to take all necessary and reasonable measures to prevent the crimes committed by his soldiers ("[Summary of the Appeal Judgment in the Case The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June, 2018](#)"). The decision of the Appeals Chamber has been heavily criticized by dissenting appellate judges and the ICC Prosecutor for its reasoning and practical implications for future cases. In a separate decision in October 2016, Mr. Bemba Gombo and four others were found guilty of offenses against the administration of justice related to false testimony by defense witnesses in the first Bemba case. The five defendants were sentenced to prison terms ranging from six months to two years and six months and fines ranging from €30,000 to €300,000 ([Human Rights Watch, 2011](#)). What remains noteworthy is the evaluation of the evidence presented to the Prosecutor. The fact that the Appeals Chamber overturned these references and conclusions indicates an issue with how the Prosecutor collected and evaluated the evidence. Based on all the witnesses and evidence gathered, the Prosecutor should have established that the defendant took all reasonable precautions to prevent further crimes. This underscores the necessity for the Prosecutor to exercise due diligence in gathering evidence and, when evaluating the evidence, to simulate the circumstances of the crime based on

witness statements and use this to document and present the evidence to the trial and the Court.

#### 4.2. *The Gbagbo Case*

In October 2011, the ICC Prosecutor was authorized to initiate an investigation into the situation in Côte d'Ivoire under the Prosecutor's proprio motu powers. This decision was made after the Ivorian government reaffirmed its acceptance of the ICC's jurisdiction under Article 12(3) of the Rome Statute earlier in the year. Three weeks after the investigation began, the Prosecutor requested an arrest warrant from the Pre-Trial Chamber against former Ivorian President Laurent Gbagbo ("[Summary of the Appeal Judgment in the Case The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June, 2018](#)"). Gbagbo was transferred to the ICC by Ivorian authorities a month later, marking the first time a former head of state was detained by the ICC. In June 2012, a majority of Pre-Trial Chamber judges found that the Prosecutor had failed to present sufficient evidence to support the charges. Instead of dismissing the case, the judges gave the Prosecutor more time to investigate and provided a list of areas where further evidence was needed. In June 2014, after reviewing the additional evidence presented by the Prosecutor, a majority of the Pre-Trial Chamber judges confirmed the charges against Gbagbo. In December 2014, the Pre-Trial Chamber confirmed charges against Blé Goudé, and later, in March 2014, Ivorian authorities surrendered Blé Goudé to the ICC. The trial date was postponed again in late October 2015 following a defense team request and the accused's demand for an evaluation of his readiness to stand trial. In November, the Trial Chamber heard from both the Prosecutor and the defense attorneys and, based on the unanimous opinion of three medical experts, concluded that Gbagbo was fit to stand trial ("[Summary of the Appeal Judgment in the Case The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June, 2018](#)").

The cases of both accused were joined after the confirmation of the charges for four counts of crimes against humanity (murder, rape, other inhumane acts, and persecution). The trial began in January 2016. Shortly after the Prosecutor closed its case in June 2018, both accused filed "no case to answer" motions, arguing that the Prosecutor had failed to provide sufficient evidence to justify their convictions. The Trial Chamber, by a majority of two to one, granted the defendants'



motions and acquitted both of all charges. Both acquittals were upheld on appeal in March 2021, at which time all conditions imposed on the defendants following their 2019 acquittals were lifted. The Prosecutor stated to the Court that the evidence to be presented included crime scene photos taken by Office of the Prosecutor investigators and staff. Other evidence consisted of digital forensic and forensic pathology evidence. The Prosecutor had government documents, such as registers from the presidential palace, as part of the evidence. The Prosecutor also described events that occurred before or after Gbagbo's visit, which, according to him, demonstrated a shared plan to keep Gbagbo in power by any means necessary ("[Summary of the Appeal Judgment in the Case The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June,](#)" 2018).

The Prosecutor outlined the testimony of one of the 138 witnesses the prosecution would call to show how the violence had affected the residents of Abidjan. He said witness P-350 would testify about the demonstrations in which he participated in support of Ouattara on December 16, 2010. This witness, along with others, marched toward the state television station RTI and was arrested for his political affiliation. He testified that witness P-350 would describe being gang-raped by gendarmes for three days while detained in the province where he was held. The witness also testified that he was held with other women who were also gang-raped ("[Summary of the Appeal Judgment in the Case The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June,](#)" 2018). The Prosecutor identified 38 incidents in and around Abidjan that showed pro-Gbagbo forces' attacks were widespread and systematic. Five of these 38 incidents formed the core of the charges against Gbagbo and Blé Goudé. In court, the prosecutor's lawyer played audio and video clips of Gbagbo and Blé Goudé to demonstrate what the Prosecutor meant when he claimed that the two were part of a joint plan to ensure Gbagbo remained in power by any means necessary. One of the video clips showed Gbagbo speaking at a rally on August 26, 2010, where he explained who the enemy was and told the armed forces that they did not need to be restrained when dealing with enemies. Interviews and other footage featuring the former president were also presented by the lawyer and accepted as evidence by the Prosecutor ("[Summary of the Appeal Judgment in the Case](#)

[The Prosecutor vs Jean-Pierre Bemba Gombo, 8 June,](#)" 2018).

What appears clear is that this case confirmed a broader issue within the ICC. The fact that the acquittal occurred without the defense needing to discredit the Prosecutor's evidence is a sharp rebuke of the Office of the Prosecutor's practices. The challenges of international criminal investigations and the collection of relevant evidence—reliance on witness testimony rather than documentary evidence, political interference, and other factors—are well known. However, the ICC Prosecutor's recurring "evidence problem" raises several specific concerns. Notably, the Gbagbo/Blé Goudé acquittals seem to differ in scope. Bemba was also acquitted, but only after his conviction was overturned on appeal by a slim 3-2 majority. Although the Ruto/Sang case collapsed, most attributed the acquittal to Kenya's blatant non-cooperation and witness intimidation. In contrast, in Côte d'Ivoire, the Prosecutor appeared to enjoy full cooperation from the government (at least initially) in prosecuting Gbagbo. The concern is that if the Office of the Prosecutor cannot gather sufficient evidence to prosecute ousted government actors, the prospect of holding current state officials accountable seems increasingly remote ([Labuda, 2019](#)).

#### 4.3. *The Katanga Case*

Upon examining the practices of the International Criminal Court (ICC), it becomes evident that the evidentiary procedures of the ICC are in fact a continuation of the procedures of ad hoc tribunals, particularly the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICC has followed the same path, which is clearly visible in its cases, especially those like the Lubanga case ([Safferling, 2001](#)). The approach that the ICC adopts in its cases demonstrates flexibility regarding the evidence presented to it, although in some instances, evidence may be excluded due to lack of credibility. In the Katanga case, it was noted that there is no regulation in the Statute or the Rules of Procedure and Evidence that automatically excludes certain evidence from being admissible in the Court ([Safferling, 2001](#)). For the assessment of admissibility, each chamber of the ICC makes decisions on a case-by-case basis. Some may consider this approach contrary to the rights of the accused and the principle of equality of arms, but it is

clear that this method leads to a swift trial and benefits both parties to the proceedings (Safferling, 2001).

Documentary evidence, such as a diary presented by a witness in the Katanga and Chui case or written statements recorded in a notary's office, or when a person with similar authority was present at the time of drafting, is another example, like the evidence presented by the defense counsel in the Lubanga case (Safferling, 2001).

Another issue related to presumptions in international criminal law is the concept of facts of common knowledge. According to Article 69(6) of the Rome Statute, facts of common knowledge do not need to be proven by the presenting party, and the Court may take judicial notice of them. However, no such case has been observed so far, and thus the concept of common knowledge facts is not recognized in relation to the Court. The reasoning behind this provision is to shorten the trial by avoiding the need to prove well-known facts that are part of public common knowledge. Before the trial in the Katanga and Chui case, the Trial Chamber asked the parties if any of them wanted the Court (under Article 69(6) of the Rome Statute) to take judicial notice of the facts presented as evidence. This was explicitly addressed to the Prosecutor and the defense counsel (Safferling, 2001).

Evidence is presented solely for the purpose of confirming the charges, and it should be remembered that any decision on the admissibility of a particular piece of evidence will not prevent subsequent admissibility decisions in later proceedings. In other words, the Trial Chamber is not bound by the findings of the Pre-Trial Chamber and may exercise its discretion. Katanga's defense counsel objected to the admissibility of oral hearings. On January 20, 2006, the suspect was interrogated in Kinshasa without legal representation. His defense counsel argued that this interrogation violated human rights and was also a breach of the Congolese Constitution. The Pre-Trial Chamber, in line with the decision in the Lubanga case, ruled that decisions of national courts regarding procedural issues do not bind this Chamber. Regarding the second legal challenge, the ICC followed the approach of the European Court of Human Rights and stated that if the individual concerned had legal representation during subsequent proceedings, their right to a fair hearing had not been

violated. Therefore, the oral hearing to confirm the charges was deemed admissible (Safferling, 2001).

At the confirmation hearing, the Prosecutor announced that he no longer intended to rely on oral hearings as evidence. The Chamber ruled that this would undermine the Pre-Trial Chamber's authority to determine whether the threshold of basic credibility had been met. Any piece of evidence included in the Prosecutor's list can only be deemed inadmissible by a ruling of the Chamber, and the Prosecutor cannot withdraw it. As mentioned above in the Lubanga case, the same condition applies to the defense counsel's evidence list. Additionally, the defense counsel objected to interviews with minor witnesses conducted without parental or guardian consent. The Pre-Trial Chamber rejected this objection, stating that no provision in codified law explicitly requires prior parental or guardian consent as a mandatory condition for a child to testify. Chui's defense counsel also objected to the testimony of a witness who had died during the investigation phase, arguing that such testimony would not be available during the trial phase. His argument was that since the Trial Chamber would deem this testimony inadmissible during the trial, the Pre-Trial Chamber should also declare it inadmissible. Judge Steiner, acting as the single judge, stated that the Pre-Trial Chamber does not have jurisdiction to rule on the admissibility of evidence during the trial and that the confirmation hearing is not the appropriate stage to debate the admissibility of evidence in the trial. Both defense teams objected to evidence presented by the victims' legal representatives and the use of victim applications as evidence. The Chamber ruled that victim applications were not classified as evidence and therefore could not be deemed inadmissible (Safferling, 2001).

#### 4.4. *The Bumba Bombo Case*

The Pre-Trial Chamber ruled that its discretion in evaluating evidence is limited to the relevance, probative value, and admissibility of each piece of evidence. The crime against humanity of torture was based on the claim that the Prosecutor's conduct could be prosecuted under two separate charges—torture and rape—and that rape could be considered a tool of torture. The Pre-Trial Chamber rejected this cumulative charge, concluding that this approach would harm the defense's rights by imposing an undue burden on it. Such an approach is only possible when the accused's conduct

points to two distinct crimes, meaning each crime must require a different material element. The crime of rape requires the violation of a person's body, which is not necessary for the crime of torture. Therefore, torture fully encompasses the crime of rape. Based on this reasoning, the Chamber did not confirm the war crimes charges of torture and outrages upon personal dignity and rejected the Prosecutor's evidence (Safferling, 2001).

#### 4.5. *The Abou N'marda Case*

In this case, inconsistent or contradictory evidence led the Chamber to a decision not to confirm the charges. However, this conclusion was not based on the application of the principle of doubt regarding the accused's guilt in evaluating the probative value of the Prosecutor's evidence at this stage of the proceedings. The Pre-Trial Chamber's decision not to confirm the charges was based on evidentiary omissions regarding the proof of individual criminal responsibility for Idris. None of the evidence listed in the document containing the charges served as proof of his criminal responsibility, either as a direct perpetrator or as an indirect accomplice to the crime (Safferling, 2001). As a result, the Prosecutor filed a request for appeal regarding the confirmation of charges. The Pre-Trial Chamber, during its review of the Prosecutor's submissions, reminded that the decision to confirm charges was deliberately categorized by the drafters of the Rome Statute as a decision that could be directly appealed to the Appeals Chamber (Safferling, 2001).

#### 4.6. *The Lubanga Case*

During the preparation stage, the Pre-Trial Chamber issued various rulings on different legal challenges and noted that if the Prosecutor were to file dozens of requests running into thousands of pages under Rule 81 in the future, it would be extremely difficult to coordinate the application of guiding principles of the Appeals Chamber with the requirement to expedite proceedings (Safferling, 2001). This view of the Pre-Trial Chamber followed two decisions of the Appeals Chamber regarding multiple items listed in the Prosecutor's evidence list. The Pre-Trial Chamber cannot take these items into consideration when issuing a ruling or decision on the confirmation of charges. Only

exculpatory elements from the above-mentioned documents can be appended.

The Lubanga ruling faced four main legal challenges from the parties:

1. The defense counsel objected to the admissibility of recorded statements taken from a private residence, where the person was in custody at the time of the recording and therefore was not present during the operation. A Congolese appellate court deemed the evidence inadmissible due to a violation of Congolese procedural law and international human rights. The Pre-Trial Chamber responded that it is not bound by the rulings of national courts regarding evidence (Safferling, 2001), and additionally stated that in line with Article 69(7) of the Rome Statute, the seriousness of the violations and the defendant's right to a fair trial must be balanced.
2. The Pre-Trial Chamber, in response to the defense counsel's objection to the admissibility of anonymous hearsay testimony and evidence, stated that there is no provision in the Statute or the Rules that explicitly declares such testimony or evidence from anonymous sources as inadmissible. The defense had argued that redacted statements or anonymous hearsay evidence should be considered inadmissible because the source cannot be accessed. According to the Chamber, such evidence, unless refuted by other evidence, only has low probative value (Safferling, 2001). The Prosecutor, in turn, objected to the admissibility and probative value of some of the evidence presented by the defense counsel. On November 24, 2006, the defense counsel filed a request to withdraw evidence from their own evidence list. The Pre-Trial Chamber ruled that no provision in the Statute or the Rules grants the parties the authority to withdraw evidence listed in their evidence lists. Such a provision would undermine the Chamber's obligation to determine whether the threshold of basic credibility has been met (Safferling, 2001).
5. **Challenges in Evidence Evaluation by the Office of the Prosecutor**

The International Criminal Court (ICC) has a "problem with the collection and evaluation of evidence." This evaluation, stemming from the fifteen-year investigation of the Office of the Prosecutor, has become so evident that it is now considered an obvious issue, even to the Court itself. From the first case before the ICC against Thomas Lubanga, the judges have repeatedly criticized the investigative methods of the Office of the Prosecutor. In one instance, they pointed to "serious issues with the Prosecutor's evidence review system as well as a serious lack of adequate oversight by senior staff in the Prosecutor's Office" (Safferling, 2001). In cases that have progressed beyond the confirmation stage, the judges have occasionally dismissed charges due to insufficient evidence, most notably in the case against Kenyan President Uhuru Kenyatta. More importantly, in seven cases that have gone to trial, the Prosecutor has secured only three main convictions for core crimes (Lubanga, Katanga, and Al Mahdi), while three trials ended in acquittals or dismissal of charges (Ngudjolo, Bemba, and Ruto/Sang). If the acquittal of Gbagbo and Blé Goudé is upheld on appeal, the ICC will have acquitted more "war criminals" than it has convicted. This is a rather uncomfortable outcome for an international criminal court.

In 2013, the Pre-Trial Chamber postponed the Gbagbo case to give the Prosecutor more time for investigation, noting with "serious concern" that the Office of the Prosecutor had heavily relied on NGO reports and press articles for key elements of the case. In one instance, after the trial had started, Judge Cuno Tarfusser, while reading a summary of the decision, confirmed that the Prosecutor "failed to meet the burden of proof according to the required standards." Specifically, after analyzing the evidence, the Chamber found by a majority, with one judge dissenting, that the Office of the Prosecutor had failed to demonstrate several key elements of the alleged crimes, including the existence of a "common plan" to keep Gbagbo in power and the commission of crimes against civilians pursuant to or in furtherance of a state or organizational policy.

## 6. Conclusion

Given the crimes committed in Europe between 1991 and 2000, certain changes were made, and by the end of that decade, the rules of evidence and the proceedings had evolved. These changes laid the foundation for the

evidentiary framework in international claims before the ICC, which played a crucial role in the development of international criminal law. The Rome Statute, which includes procedural and evidentiary rules, has always influenced the ICC's evaluation of evidence. However, through agreements between states, efforts have been made to avoid the issues that plagued previous international tribunals, aiming to facilitate international justice. Most of these problems were related to national sovereignty, which often posed challenges in arresting, prosecuting, and extraditing individuals to the Court, with some states refusing to cooperate with the ICC altogether.

Although the Statute and procedural rules specify that numerous factors may be relevant in evaluating evidentiary value, the reliability and credibility of evidence are paramount under current judicial practices. While the initial assessment concerns the reliability of the evidence, the evaluation of its credibility is based on the information provided by relevant sources and answers the question of whether the information can be trusted. The "evidence problem" in the collection and evaluation of evidence by the ICC is not only an open secret but can also be traced directly to specific policies implemented by the first Prosecutor, Luis Moreno Ocampo. His successor, Fatou Bensouda, has sought to adjust the methods of the Office of the Prosecutor in response to emerging challenges. Most notably, Bensouda abandoned Ocampo's policy of brief, focused investigations led by small teams of investigators in favor of in-depth, open-ended investigations, where cases are expected to be "trial-ready" at the confirmation of charges stage.

There are ongoing legal debates about how to handle international crimes, but one constant in the Office of the Prosecutor's strategy, unchanged since Ocampo's tenure, is the idea that the ICC should pursue only a handful of cases (usually two or three) per situation. Various reasons have been given for this policy, the most significant of which is the Court's (very real) budget constraints. However, it is important to emphasize that this is a policy choice. At its core, it stems from Ocampo's understanding of the ICC's role in global affairs, where the Court is seen as a major international actor and its high-profile arrest warrants (often regardless of the strength of the evidence) serve to strike fear into world leaders. It should be noted that prosecuting those most

responsible is highly significant in terms of securing witnesses.

However, the Gbagbo, Bemba, and Kenyatta cases have once again demonstrated why this policy carries significant risks. The assumption that evidence against high-ranking officials will eventually be found, rather than building arrest warrants on solid evidence against a larger group of suspects over time, may lead to reliance on insufficient evidence. It is unlikely that Gbagbo's arrest warrant, issued just two months after the case against Côte d'Ivoire was opened, was based on fully developed evidence. This policy may reduce the number of active cases and limit the number of defendants before reaching a "critical mass," but it also increases the risk of significant failures, such as the ICC investigations in Kenya and Côte d'Ivoire, thereby undermining the credibility of prosecutorial investigations.

What criteria should be used to judge the performance of the Prosecutor and the Office? Surely, it is unrealistic to expect the Prosecutor to present only evidence leading to convictions. However, the details of the Gbagbo and Blé Goudé case raise several questions. If the evidence was so weak, why did the Prosecutor pursue the case in the first place? "Missed opportunities to gather evidence" during the trial is one issue, but accuracy in gathering evidence, as seen in Katanga and others, is another. More importantly, given the repeated pattern of problems related to the collection and evaluation of evidence, how does the Prosecutor's Office hold itself accountable for its policy and strategic decisions? If the conviction rate versus the acquittal rate is not an appropriate measure, what alternative method should be used to evaluate evidence? Bensouda has attempted to distance herself from Ocampo, partly because of the allegations against her predecessor, but this continuity in the organization, composition, and strategies of the Office of the Prosecutor has persisted through her tenure and continues under Karim Khan.

#### Authors' Contributions

Authors contributed equally to this article.

#### Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

#### Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

#### Acknowledgments

We would like to express our gratitude to all individuals helped us to do the project.

#### Declaration of Interest

The authors report no conflict of interest.

#### Funding

According to the authors, this article has no financial support.

#### Ethical Considerations

Not applicable.

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