

Case Report

Rethinking the Office of the Prosecutor v Jean Pierre Bemba: A Case Note

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Abstract

Principally, *The Office of the Prosecutor v Jean Pierre Bemba Gombo* concerned allegations of war crimes committed in the Central African Republic against Mr. Jean Pierre Bemba, the former Commander of *Mouvement de liberation du Congo* armed forces. The Trial Chamber of the International Criminal Court convicted Mr. Bemba of all charges leveled against him. On appeal, the Appeals Chamber freed Mr. Bemba on the grounds of weak evidence submitted by the Office of the Prosecutor. This article uses Bemba's case at the Appeals Chamber to assess the investigation and collection of evidence by the Office of the Prosecutor. The article argues that weak evidence noted by the Appeal's chamber resulted from a weak investigation by the Office of the Prosecutor. The article further discusses that the Office of the Prosecutor failed to conduct an investigation that could cover all relevant facts and evidence. The article also argues that in Bemba's case, the Office of the Prosecutor failed to receive necessary cooperation from the Central African Republic that would have strengthened the investigation. The article shows that in cases where the Office of the Prosecutor managed to obtain the required cooperation from States, it conducted a thorough investigation and collected strong evidence that enabled successful prosecution before the International Criminal Court. Finally, the article suggests the necessary measures that the Office of the Prosecutor needs to take into account for effective investigation and collection of evidence. In this regard, the article also recommends how States can accord the Office of the Prosecutor all the required cooperation.

Keywords

Prosecution of Cases, International Criminal Court, Investigation and Collection of Evidence, The Office of the Prosecutor

1. Introduction

Principally, *The Office of the Prosecutor v Jean Pierre Bemba Gombo* (hereafter the Bemba's case) [1] concerned allegations of war crimes committed in the Central African Republic (CAR) against Mr. Jean Pierre Bemba, the former Commander of *Mouvement de liberation du Congo* (MLC) armed forces. The Trial Chamber of the International Crimi-

nal Court (hereafter the ICC)¹ convicted Mr. Bemba of all charges leveled against him. On appeal, the Appeals Chamber freed Mr. Bemba on the grounds of weak evidence submitted by the Office of the Prosecutor (OTP).² This article uses

1 The ICC is a permanent international tribunal established to prosecute Individuals for serious crimes such as genocide, crimes against humanity, war crimes, and aggression. The ICC was established in 2002 under the Rome Statute, Article 1.

2 The OTP is established under Article 42 of the Rome Statute, The Office of the

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Received: 9 December 2025; Accepted: 24 December 2025; Published: 19 January 2026



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Bemba's case at the Appeals Chamber to assess the investigation and collection of evidence by the OTP. The article argues that weak evidence noted by the Appeal's chamber resulted from a weak investigation by the OTP. The article further discusses that the OTP failed to conduct an investigation that could cover all relevant facts and evidence. The article also argues that in Bemba's case, the OTP failed to receive necessary cooperation from the CAR that would have strengthened the investigation. The article shows that in cases where the OTP managed to obtain the required cooperation from States, it conducted a thorough investigation and collected strong evidence that enabled successful prosecution before the ICC. Finally, the article suggests the necessary measures that the OTP needs to take into account for effective investigation and collection of evidence. In this regard, the article also recommends on how States can accord the OTP all the required cooperation.

This article is divided into seven sections, of which this introduction carries section one. Section two is the methodology; section three examines the Bemba's case and the implications of the Appeal Chamber's findings. However, for a thorough understanding of the analysis of the Appeal Chamber's findings, it is important to give a brief analysis of the findings of the Trial Chamber's findings. Identification and analysis of the challenges occasioned in the OTP's investigation and collection of evidence is covered in section four. Section five examines the legal implications of the identified challenges. Recommendation for effective investigation and collection of evidence is carried in section six. Section seven is a conclusion.

2. Methodology

This article adopted doctrinal legal methodology. The researcher analyzes and contextualizes both primary and secondary legal sources, as well as other relevant jurisprudence and literature, to elaborate on the topic of this study. This method is thought to be relevant as it could provide quick information relevant to this study.

3. Jean Pierre Bemba v The Office of the Prosecutor: An Analysis

3.1. Facts

Jean-Pierre Bemba Gombo, a national of the Democratic Republic of Congo (DRC), President and Commander-in-Chief of the *Mouvement de Liberation du Congo* (MLC), was arrested on 24 May 2008 by the Belgian authorities fol-

lowing the Court's warrant of arrest. He was surrendered and transferred to the International Criminal Court on 3 July [2]. According to the Prosecution, Jean-Pierre Bemba Gombo was allegedly criminally responsible, jointly with another person or through other persons, for five counts of war crimes (rape, torture, committing outrages upon personal dignity, in particular humiliating and degrading treatment, pillaging a town or place, and murder) and three counts of crimes against humanity (rape, torture and murder), committed on the territory of the Central African Republic (CAR) from on or about 26 October 2002 to 15 March 2003.

In the decision of 3 March 2009, Pre-Trial Chamber II (Pre-Trial Chamber) decided to adjourn the confirmation of charges hearing in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and asked the Prosecutor to consider submitting an amended document containing the charges. In the same decision of 3 March 2009, the Chamber indicated that the evidence submitted by the Prosecutor appeared to establish that a different crime, within the Court's jurisdiction, had been committed. The judges considered, without any pre-determination on the alleged individual criminal responsibility of Jean-Pierre Bemba Gombo (article 25 of the Rome Statute), that the legal characterisation of the facts of the case may amount to a different type of responsibility, namely the criminal liability as a commander or superior (article 28 of the Rome Statute). Therefore, the judges requested that the Prosecutor consider submitting, no later than 30 March 2009, a document amending the charges to address this issue. The Prosecutor submitted the Amended Document Containing the Charges on 30 March 2009, while the Defence responded on 24 April 2009. On the 15th of June 2009, the Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba was responsible for effectively acting as a military commander within the meaning of Article 28(a) for the crimes against humanity of murder under Article 7(1) (a), and rape under Article 7(1) (g), and the war crimes of murder under Article 8(2) (c) (i), rape under Article 8(2) (e) (vi), and pillaging under Article 8(2) (e) (v) of the Rome Statute.³

3.2. The Bemba's Case: The Trial Chamber's Decision

The Trial Chamber dealt with superior and command responsibility. In this regard it stated that, for an accused person to be found guilty and convicted as military commander under superior and command responsibility as enshrined under article 28(a) of the Rome Statute the OTP must establish six elements: firstly, crimes must have been committed by forces; secondly, the accused must have been either a military commander or a person effectively acting as a military commander; thirdly, the accused must have had effective command and control, or effective authority and control, over the forces that

Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

3 Prosecutor v Jean Pierre Bemba Gombo, Judgment Pursuant to Article 74 of Rome Statute ICC-01/05-01/08-3343 21-03-2016, para 2

committed the crimes; fourthly, the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; fifthly, the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; finally, the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.⁴

The Trial Chamber was of the view that the provisions of Article 28 of the Rome Statute impose the responsibility on superiors such as military commanders or civilian superiors who have the power to give orders and to be obeyed by their subordinates.⁵ To this effect, it stated “the crimes for which the commander is held responsible are committed by forces or subordinates under his or her effective command and control or effective authority and control rather than by the commander directly”.⁶

The Trial Chamber elaborated that the individuals who fall under superior and command responsibility principles refer to persons who are formally and legally appointed to carry out the functions of a military commander according to the laws of their states. It emphasised that the phrase ‘military commanders’ also covers the persons appointed as military commanders in non-governmental irregular forces. In this case, article 28(a) of the Rome Statute imposes liability to military commanders, but it also extends to persons effectively acting as military commanders. In this regard, the Trial Chamber stated, “in addition, the phrase military commander or person effectively acting as a military commander includes individuals who do not perform exclusively military functions”.⁷ From the view of the Trial chamber, Article 28(a) does not apply to the commanders of armed forces only, but it is also applicable to superiors at every level. It means that superior and command responsibility, as enshrined under Article 28(a) of the Rome Statute, imposes liability to commanders of armed forces as well as the superiors at every level.

Furthermore, the Trial Chamber had to deal with the standard of control required in the principle of superior and command responsibility. It should be noted that for an accused person to be responsible under superior and command principles, Article 28(a) requires the accused person to have effective command and control. Command is referred to as an authority, especially over the armed forces, but it also refers to the power or rights to give orders and enforce obedience. In this regard, the Trial Chamber stated that liability under superior and command principles does not require a level or standard of control over the subordinates, but rather the focus is on how military commanders, civilian superiors, or persons

who are superiors exercise effective control over his or her subordinates. The Trial Chamber stated that the level of control is the same for all superiors, whether they are military commanders or persons acting as such. Therefore, the Trial Chamber was of the view that effective control imposes the duty to superiors to have the ability to prevent and repress the commission of crimes or to submit the matter to the proper authorities. The failure to exercise the required measures by superiors to their subordinates attracts the superior and command responsibility.

In addition, the exclusive authority and control of a commander does not waive out effective control to be exercised by another commander. In the *Bemba* case, the Trial Chamber emphasized that a military commander or other superior under authority cannot use the defense that while crimes were committed, military forces were under the authority of another commander. Effective control over the forces by one commander does not bar effective control from being exercised by another commander. Moreover, the Trial Chamber, referring to the provisions of Article 28(a) (i)⁸ of the Rome Statute stated that in order to invoke the superior and command responsibility, the commander should have known that the armed forces under his effective control were committing crimes. The question might be what if the commander never knew about the commission of the crimes by his forces. The Trial Chamber emphasised that, according to the circumstances at the time, the commander ought to have known about the commission of crimes. As such, the failure of not knowing about the commission of a crime does not exempt superiors from liability.

The Trial Chamber was of the view that when a commander fails to take all necessary and reasonable measures within his power, he or she will be liable under superior and command responsibility. The Trial Chamber held that necessary and reasonable measures to prevent the commission of crimes depend on the circumstances of each case. According to the Trial Chamber, necessary measures are those measures appropriate for the commander to discharge his obligation, and reasonable measures are those measures reasonably falling within the commander’s material power.⁹

Generally, in this case, the Trial Chamber was of the view that a superior or military commander doesn’t need to have the legal authority or capacity to take measures to stop the commission of the crimes, but rather upon his possession of effective authority and control over his subordinates. The commander or superior will be exonerated from superior and command responsibility when he or she exercises the duty

4 Bemba, para 170.

5 Ibid, para 173

6 Ibid (n 3), para 173.

7 Ibid, para.177.

8 In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes

9 Bemba, (n 3) Para 198.

imposed on him or her with due diligence. The commanders or superiors will be liable under superior and command responsibility when they fail to take necessary and reasonable measures to prevent or repress the crimes committed by their forces or to submit the matter to the competent authorities for investigation and prosecution.

On 21st of March 2016, the Trial Chamber convicted Mr. Bemba, pursuant to article 28 (a) of the Rome Statute, for crimes against humanity and war crimes, including murder, rape, and pillaging committed by the MLC troops between 2002 and 2003 in the CAR.¹⁰

3.3. The Bemba's Case: The Appeal Chamber's Decision

Mr. Bemba filed an appeal against the Conviction on 4 April 2016 and an appeal brief on 19 September 2016, respectively. He alleged that nearly two-thirds of the underlying acts for which he was convicted were not included or improperly included in the amended document containing the charges and fall outside the scope of the charges".¹¹ He asserted that the Trial Chamber erred in law by relying on these acts for the conviction¹². Generally, Mr. Bemba raised six grounds of appeal. In his first ground, Mr. Bemba argued that the trial was unfair. In his second ground, he claimed that the conviction exceeded the charges, while in the third ground, Mr. Bemba stated that he was not liable as a superior. In the fourth ground, Mr. Bemba argued that the contextual elements were not established. In ground five, Mr. Bemba stated that the Trial Chamber erred in its approach to the identification of evidence. In the final ground, Mr. Bemba argued that other procedural errors invalidated the conviction¹³.

The Appeal Chamber's opinion on the conviction of the Bemba was that the conviction of Mr. Bemba at the Trial Chamber in relation to the crimes he was charged with does not, in reality, reflect what Mr. Bemba was convicted of.¹⁴ According to the Appeals Chamber, the decision did not make any reference to individual criminal acts of murder, rape, and pillage.¹⁵ The Appeals Chamber stated that the conviction covered crimes committed by MLC soldiers.

Regarding the principle of superior responsibility on which the Trial Chamber relied to convict Mr. Bemba, the Appeals Chamber thought that: "It was not the case that a commander is required to employ every single conceivable measure within his or her arsenal irrespective of consideration of proportionality and feasibility. It further stated that Article 28 of the Rome Statute only requires a commander to do what is

necessary and reasonable under the circumstances.¹⁶

The Appeals Chamber had the view that necessary and reasonable measures depend on the material ability of the commander to prevent or repress the commission of a crime or to submit the matter to the competent authorities for investigation and prosecution.¹⁷ This is vital because one cannot demand things that a person cannot deliver according to the circumstances and limitations facing him; it is reasonable and good enough to consider the ability possessed by him at the moment, which he was required to take action. The interpretation of the Appeal Chamber's view is two-fold. First, in order to impose liability under superior and command responsibility to the military commander's or superior depends on whether, at the time of the event, the superior had the ability or power to exercise all necessary and reasonable measures to prevent or repress the commission of crimes. Second, whether the military commander or the superior had the ability or power to submit the matter to competent authorities for investigation and prosecution. Therefore, according to the Appeal Chamber, a military commander cannot be responsible for not taking the measures that he had no power to take.¹⁸

Additionally, the Appeals Chamber commented that when the assessment of necessary and reasonable measures is conducted so as to evaluate if the commander falls under superior and command responsibility, they must take into account the commander's power and authority at the moment when crimes were committed. In this sense, the Appeal Chamber's interpretation is to the effect that Article 28 of the Rome Statute is not of strict liability. This interpretation means that the provisions of Article 28 are not solely on the issue that the commander fails to take the necessary and reasonable measures to prevent, repress the commission of crimes, and to hand over the accused to the proper authority for prosecution. Article 28 also looks at measures which were employed by the commander within his powers and ability at the time, and this is enough to establish the necessary measures and steps taken by the commander within his ability at that time.¹⁹

Furthermore, the Appeals Chamber was of the view that it is not proper to place liability under superior and command responsibility on the commander when it happens that the measures which were taken by him to stop the commission of the offence fail in their execution. According to the Appeals Chamber, the measures taken by the commander cannot be taken, as they were nothing because there was a failure on their execution.²⁰ The commander cannot be considered to have not taken any measures simply because there was a failure on the execution of measures employed by military

¹⁰ Ibid para 752.

¹¹ Bemba Summary of the Appeal Judgment, 2018 para 16. Available from: <https://www.scribd.com/document/381348703/ICC-Bemba-Judgment-Summary>, (accessed on 15 May 2024).

¹² Ibid, para 16.

¹³ Ibid (n 11), para 4

¹⁴ Ibid, para 17.

¹⁵ Ibid, para 17.

¹⁶ Bemba, ICC-01/05-01/08-3636-Red 08-06-2018 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" para 8.

¹⁷ Ibid, para 167.

¹⁸ Bemba, (n 16) Para 167-168.

¹⁹ Ibid, Para 170.

²⁰ Ibid, Para 180.

commander or superiors. Therefore, the failure of the independent commission, inquiry or judicial process to accomplish its functions due to some limitations, which were not on the powers of commander, does not wave out the measures, which were employed by commander to stop the commission of crimes and to prosecute the accused persons.²¹

Therefore, according to the Appeals Chamber, the failure of the commander to take all necessary and reasonable measures should not be taken strictly. The limitation, which faced the commander while trying to prevent represses commission of the crimes and prosecute the accused, should also be taken into account. The fact that the commander took some measures to prevent the commission of crimes is important in determining liability of commanders under superior and command responsibility.²² Hence, the Appeals Chamber acquitted Mr. Bemba from all charges brought against him.²³

While the Appeals Chamber's decision is correct considering the evidence brought by the OTP before it, the decision would have been different had the OTP conducted an effective investigation and collected strong evidence. It is worth noting that the OTP has the mandate to initiate investigation and collect the relevant evidence for the situations brought before the ICC. In accordance with Article 54 of the Rome Statute, for the purposes of establishing the truth the prosecutor is required to conduct effective investigation to cover all facts and evidence relevant to establish whether there is criminal responsibility or not. The following sub-section discusses in detail different aspects that reveal the shortfalls of the OTP's investigation and collection of evidence.

4. OTP's Investigation and Collection of Evidence: Shortfalls

4.1. Hearsay Evidence

Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made. Hearsay may be first hand, when a witness says what he heard someone else say, or second hand (or even more distinct)

when he relates to what he was told that someone else said. It may be oral or documentary, of fact or of opinion." On the basis of the foregoing definition, hearsay evidence include written documents (such as expert reports) which are not adduced by its author while testifying as well as words or statements uttered by an individual other than the witness who reports them in court to establish the matter in contention [3]. It was stated in *Prosecutor v Stanslav Galic*²⁴ that hearsay evidence may be oral where a witness relates what someone else had told him out of court, or written, for example an official report written by someone who is not called as a witness is tendered in evidence.²⁵

In the evaluation of the hearsay evidence, the ICC is influenced by the civil law and common law system. Civil and common law jurisdictions differ widely as to the extent of admissibility of such evidence. In civil law countries, hearsay is prima facie admissible, whereas in common law systems, it is only admissible under limited exceptions [4]. The ICC represents the International Community as a whole, thus the rules of evidence governing the ICC are reflected as a compromise between different approaches to criminal procedure of the major legal systems of the world. Thus, it may seem fair for the ICC to follow the Civil law approach to hearsay evidence. However, admitting hearsay evidence may end up doing more harm than good [3].

At the Trial Chamber the OTP relied hugely on the hearsay evidence. The central findings of conviction decision are found at paragraph 563.²⁶ The Trial Chamber found that there was "consistent and corroborated evidence that MLC soldiers committed many acts of rape and murder against civilians throughout the 2002-2003 CAR operation". However, closer inspection of the relevant footnote revealed that the evidence in question consisted mainly of documentary and testimonial hearsay evidence. Although the Trial Chamber accepted the need to be cautious when relying on hearsay evidence,²⁷ it appears that in practice it often throw its own caution to the wind. The Trial Chamber stated in Para 238²⁸ of its decision that:

The Chamber took a cautious approach in assessing evidence originating from hearsay. It did not rule out such evi-

²¹Ibid, Para 180.

²² (n 16) Para 196 states that In the present case, the Appeals Chamber has found, by majority, that the Trial Chamber erred when convicting Mr Bemba for the criminal acts listed above at paragraph 116, as these criminal acts did not fall within the "facts and circumstances described in the charges" in terms of article 74 (2) of the Statute; further, in relation to the remaining criminal acts, the Trial Chamber erred when it found that Mr Bemba had failed to take all necessary and reasonable measures within his power to prevent or repress the crimes committed by MLC troops during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities for investigation and prosecution.

²³ Ibid Para 197 states that In these circumstances, the Appeals Chamber considers it appropriate to reverse 197.the conviction of Mr Bemba and to declare that the criminal acts listed above at paragraph 116 are outside the scope of this case and that the proceedings in that regard are discontinued.

²⁴ *Prosecutor v Stanslav Galic* IT-98-29

²⁵ Ibid para 27

²⁶ Bemba (n 3), para 563, The forces engaged in hostilities during the 2002-2003 CAR Operation, in particular, the MLC and General Bozize's rebels, suffered many casualties, including hundreds killed and wounded in action. Over the course of the 2002-2003 CAR Operation, there is reliable evidence from various sources, including testimony, as corroborated by media articles, NGO reports, and the *procès-verbaux d'audition de victimes* submitted to the Bangui Court of Appeals, that MLC soldiers committed many acts of murder and rape, and many acts of pillaging against civilians over a large geographical area, including in and around Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembele, Dekoa, KagaBandoro, Bossemptele, Boali, Yaloke, and Mongoumba. Within these areas, MLC soldiers allegedly targeted civilians, without regard to age, gender, profession, or social status, in and around schools, homes, fields, and roads. Many CAR civilians used the term "Banyamulengue" (or phonetically similar terms) to refer to the MLC troops. Civilians could identify the MLC troops due to their presence in certain areas and other characteristics, including language, weapons, and uniforms.

²⁷ Bemba (n 3), para 238.

²⁸ Bemba (n 3).

dence *ab initio*, instead assessing the weight to be accorded to it, taking into account the context and conditions in which such evidence was obtained, and with due consideration of the impossibility of questioning the information source in court. The Chamber further notes the Appeals Chamber's finding that "the fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, 'although even this will depend upon the infinitely variable circumstances which surround hearsay evidence."

The Trial Chamber conducted legal mistake on relying on the hearsay evidence, which was tendered. Even if the caution was taken but it was a legal error to rely on the evidence, which its sources could not be established. The OTP's reliance on hearsay evidence in some aspects of the case failed it to strongly establish its case before the Appeals Chamber. A large number of references, which, were tendered and used at the Trial Chamber, which were later used at the Appeals Chamber, based on the hearsay or anonymous hearsay evidence, without any specific indication as to the source of information. Hearsay evidence involves trading a slippery slope because of possible sources of inaccuracy and untrustworthiness [3].

It should be noted that hearsay evidence is not inadmissible per se before the ICC. The ICC has a low threshold when it comes to the admission of hearsay evidence. The ICC unquestionably admits and gives weight to hearsay evidence [3]. It held in *Prosecutor v. Tadic* [5] that "the Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate." [5]

However, this position does not necessarily mean that hearsay evidence is permissible to make findings beyond a reasonable doubt, especially when the Trial Chamber does not seem to have tried to establish the reliability of the source of the information. While evaluating evidence at the ICC, it is for the judges to decide whether to admit certain hearsay evidence or not [3]. The reliance on the hearsay evidence whose source of information was not established demonstrates the weakness on the part of investigation and collection of evidence by the OTP. The OTP has the duty to collect the relevant evidence through the investigations conducted. The act of the OTP to tender a large amount of hearsay evidence whose source of information could not be established weakened the entire process of investigation and collection of evidence. That is the reason the Appeal Chamber found that hearsay evidence did not carry weight of imposing the legal liability for crimes, which Mr Bemba was accused of.²⁹

4.2. Unsworn Evidence

Another shortfall on the part of the OTP that occasioned at the Trial Chamber, which may have made the Appeal Cham-

ber to acquit Mr. Bemba, was the use of unsworn evidence. In the Bemba's trial the OTP used the unsworn evidence. The statements, which were made by individuals before CAR magistrate about the offence committed at CAR by Bemba troops, were unsworn statements but were tendered before the Trial Chamber which relied on them while at the CAR such kind of witness statements were considered to have no evidentiary value.

During the hearing, the prosecutor used article 69(8) of the Rome Statute to justify the unsworn evidence, which was tendered by witnesses before CAR magistrate. Article 69(8) provides that "when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law." However, article 69(8) does not mean that such considerations are irrelevant when attributing evidentiary weight. Indeed, if a magistrate at the domestic level would not consider such *procès-verbaux* as strong evidence for the truth of their content, we believe it is wrong for the Court to place so much confidence in them. In any event, we do not believe that the fact that the person who took them authenticated the out-of-court statements offers any guarantee about the reliability of their content.³⁰

The Trial Chamber erred to rely on the unsworn evidence for the reason that when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.³¹ It should be noted that, this rule is not applied strictly on the evidence, which was obtained without observing legal requirements, and which does not carry any weight.

The Rome Statute under article 68(1) provides that before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness. Therefore, since the Rome Statute establishes the requirement for the truthfulness of the evidence then prosecutor in adhering to this requirement should not rely on the unsworn statements of the witnesses. Moreover, the Trial Chamber should consider the provisions of article 69(8) in conjunction with the provisions of article 69(4), which states:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Furthermore, article 69(2) puts forth that the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the intro-

²⁹ Bemba, ICC-01/05-01/08-3636-Anx2 08-06-2018 1/34 EC A, para 8.

³⁰Bemba, ICC-01/05-01/08-3636-Anx2, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 08-06-2018, para 9.

³¹ Ibid, Transcript of 11 January 2018, ICC-01/05-01/08-T-374-ENG, p. 59, line 1 to p. 67, line 21; p. 87, line 25 to p. 88, line 13.

duction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

It is not shown on the records that, witnesses who gave statements to the CAR magistrate appeared before the Trial Chamber or were otherwise examined by any party in the proceedings. As such, the statements were not carrying any weight. Moreover, the witnesses did not state how they identified persons that attacked them. Caianiello correctly argued that it should be far less difficult to weigh the spontaneity and genuineness of the witness when the witness is present at trial and is subject to cross-examination than to evaluate the reliability of an unchallenged testimonial written statement. The witness's attendance allows the verification of his or her credibility [6].

4.3. Uncorroborated and Unknown Source of Evidence

Corroboration or corroborative evidence is the evidence, which confirms the truth or accuracy of certain other evidence by supporting it in some material particulars [7]. To fulfill this function, the evidence itself must be relevant and credible whose source is independent from the supported evidence [7]. Generally, corroboration occurs when there are independent items of evidence but all of them elaborate the same facts. As such, it cannot be said that the evidence was corroborated if the evidence that corroborates the other does not elaborate or witness the same facts. It is also worth noting that, article 54(3) (a) of the Rome Statute provides that the Prosecutor may collect and examine evidence. The mandate in article 54(3) (a) includes the mandate on the prosecutor to collect evidence from known and reliable sources. It also requires evidence that needs corroboration to be corroborated. Failure of the prosecutor to adhere to this requirement weakens the prosecution of cases and the performance of the OTP.

In the Bemba case it shows that the information, which was collected and tendered before the Trial Chamber, was obtained through and based on the same source of information.³² As such, the information, which was required to be corroborated, was not corroborated. This failure weakened the value and the weight of such information. Furthermore, sources of other aspects of evidence were unknown which made the determination of their evidentiary value difficult.

On the evaluation of such evidence the Appeal Chamber found that:-

“When the evidence is analysed properly, it is only possible to identify seven witnesses who speak directly about the number of criminal acts. The vast majority of this testimony is based on (anonymous) hearsay. The same applies to the documentary evidence the Trial Chamber relied upon. It is true that the evidence shows that a large number of crimes

were reported, but this cannot, in our view, prove beyond reasonable doubt that they actually took place, let alone that the MLC was solely responsible for them. We note, in this regard, that CAR-OTP-0030-0002 - Projet CAF/02/004 “Assistance humanitaire aux femmes et filles victimes de viols et de violences inhérents aux conflits armés du 25 octobre 2002 – Rapport d’activités 25 novembre 2002 au 31 décembre 2003, which explicitly states that the reported crimes were committed by “des Hommes de Jean-Pierre BEMBA et les hommes en tenue (rebelles et militaires centrafricains)” [emphasis added], without, however, providing any indication as to how this was established or providing any indication as to the proportion of crimes committed by the respective groups”.³³

4.4. Challenges of Circumstantial Evidence

It should be noted that the OTP can use circumstantial evidence in the prosecution of cases.³⁴ In the Bemba case, the Trial Chamber stated that circumstantial evidence could only lead to findings beyond a reasonable doubt when the proposed inference is the only plausible one.³⁵ However, the OTP did not adhere to this principle in its actual analysis of the evidence. As a result the large amount of the circumstantial evidence tendered before the Court in relation to a number of key findings was weak.

In the Bemba case the Trial Chamber in its Conviction Decision lists eight circumstantial factors that it considered cumulatively proved the existence of a policy to attack a civilian population from paragraph 676 to 684.³⁶ These factors include: the acts of rape and murder were committed consistent with evidence of a *modus operandi* employed through the 2002-2003 CAR operation, MLC soldiers committed the underlying acts repeatedly, there was consistent evidence of the perpetrators’ general motives, acts of pillaging were carried out with knowledge with the involvement of the MLC hierarchy, punitive attack on Mongoumba by MLC soldiers was known by Mr. Bemba, commanders were aware and authorized MLC troops to exercise vigilance against civilian, inadequacies code of conduct and the inconsistent training of MLC soldiers and senior MLC commanders including Mr. Bemba were aware of the crimes committed by the MLC troops and that Mr. Bemba failed to take necessary and reasonable measures to prevent or repress the crimes or to submit the matter to the competent authorities. Considering these eight factors, Judge Christine Van den Wyngaert and Judge Howard Morrison on their separate opinion clearly stated that they were not persuaded that there was sufficient

³³ Bemba, (n 30), p. 5, footnote 5.

³⁴ Rome Statute, article 69(3).

³⁵ Bemba (n 3), para 239 it was stated that nothing in the statutory framework prevents the Chamber from relying on circumstantial evidence. When based on the evidence available, there is only one reasonable conclusion to be drawn therein; the Chamber has concluded that particular facts have been established beyond reasonable doubt.

³⁶ Bemba, ICC-01/05-01/08-3636-Anx2, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 08-06-2018 para 676 – 684.

³² Bemba, ICC-01/05-01/08-3636-Anx2, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 08-06-2018, para 10.

evidence to support these eight ‘factors’. It has generally been argued that only the material facts must be established beyond a reasonable doubt and that it is unnecessary to establish subsidiary facts to the same standard”.³⁷ While this is legally correct, it does not mean that the quality of the evidence for subsidiary facts is irrelevant from an evidentiary point of view. This is especially true in relation to circumstantial evidence. By definition, drawing inferences from circumstantial evidence only adds uncertainty. Therefore, if the factual basis of the circumstantial evidence is weak, the inferences drawn from it will be even weaker.

Inference drawn from the circumstantial evidence that Mr. Bemba was responsible for crimes committed at CAR for the reason that he failed to take the necessary steps to stop the commission of crimes by his troops was weaker evidence. Based on article 28(a) of the Rome Statute the Trial Chamber convicted Mr. Bemba for superior and command responsibility for failure to control his troops from committing crimes.

It should be noted that the Appeal Chamber changed the position of the Trial chamber by stating that it is not the case that a commander is required to employ every single conceivable measure within his or her arsenal irrespective of consideration of proportionality and feasibility. Article 28 only requires commander to do what is necessary and reasonable under the circumstances. In this sense under Appeal Chamber interpretation of article 28 is not of strict liability. This means that the provisions of article 28 consider measures employed by the commander within his powers and ability at the time as sufficient to establish reasonable measures.

Therefore, the evidence, which does not have weight to prove liability beyond reasonable doubt, which were collected and tendered before the Trial Chamber by the prosecutor, demonstrates weaknesses in the investigation stage by the OTP leading to the collection of weak evidence.

4.5. Documentary and Other Non-oral Evidence

The major principle in dealing with documentary evidence requires their relevance and authenticity to be duly established [8]. If it cannot be demonstrated that an item actually is what it purports to be, it would not be appropriate to rely on it for the making of any findings [8]. Trial Chamber in *Prosecutor v. Katanga & Ngudjolo*³⁸ stated that in relation to documentary evidence, unless its origin and genuineness are apparent from the document itself, the tendering party must offer evidence to prove authorship and integrity of the document.³⁹ The documentary evidence should be proved by the author of such document or by using any form of evidence, which can be accepted, that is able to establish authenticity.

In the *Bemba* case the Trial Chamber assessed the contents of a particular item of documentary evidence, its provenance, source or author, as well as their role in the relevant events,

the chain of custody from the time of the item’s creation until its submission to the Chamber, and any other relevant information. The document’s indicia of reliability were assessed on a broad basis and the Chamber stated that although the document had sufficient indicia of authenticity, it might be unreliable.⁴⁰ The Trial Chamber when assessed the reliability of the documentary evidence tendered before it found that such evidence are unreliable.

5. Legal Implications of the OTP’s Weaknesses in Investigation and Collection of Evidence

5.1. Confirmation of the Charge

Weakness in investigation and collection of evidence can result to the failure of charges against the accused persons to be confirmed. Article 61(7) (a) of the Rome Statute provide that the Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence.

The Prosecutor must diligently and effectively prosecute cases, but must do so in a manner that promotes fairness, in its broadest sense, to the accused. Consistent with his or her duty of objectivity under article 54 of the Rome Statute, the prosecutor should only bring a case when he or she is satisfied that there is credible evidence of guilt [9]. The failure of prosecutor to produce credible evidence before the ICC will result to a non-confirmation of the charge against accused person. Non-confirmation of a charge for the reason of weak evidence would make the victims perceive that justice is not for them and eventually lose confidence with the office of the prosecutor.

5.2. Dropping or Withdrawal of Charges

In cases that have moved beyond the confirmation of charges stage, judges have on several occasions dropped, or the OTP has withdrawn, charges due to insufficient evidence. Article 61(9) of the Rome Statute provides in part that after commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

In the case of *Prosecutor v Laurent Gbagbo* due to weak evidence on the prosecution side, the prosecutor failed to prove beyond reasonable doubt the case against Mr Laurent Gbagbo and Mr Charles Ble Goude regarding crimes against humanity, allegedly committed in the context of post-electoral violence in Côte d’Ivoire between 16 December 2010 and 12 April 2011.

³⁷ Ibid (n 36), para 12

³⁸ ICC-01/04-01/07-2635

³⁹ Ibid para 22-23, 2635

⁴⁰ Bemba (n 3), para 237.

Majority of the judges decided that it was not appropriate for the proceeding to continue while the prosecutor had not met the onus of proof to the extent of requiring the defence side to respond. Thus on 15 January 2019, Trial Chamber I, by majority acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé from all charges of crimes against humanity allegedly committed in Côte d'Ivoire in 2010 and 2011.

In the *Prosecutor v. Uhuru Muigai Kenyatta (Kenyatta case)* [10] former President Uhuru was accused of five counts of crimes against humanity in the context of the 2007-2008 post-election violence in Kenya. On 3 December 2014, ICC Trial Chamber V (b) rejected the Prosecution's request for further adjournment and directed the Prosecution to indicate either its withdrawal of charges or readiness to proceed to trial. On 5 December 2014, the Prosecutor filed a notice to withdraw charges against former President Uhuru.

5.3. Difficulties in Establishing the Truth of the Case

Article 54(a) (b) of the Rome Statute states in part that to establish the truth, and extend the investigation, the prosecutor should cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute. In doing so, the prosecutor should investigate incriminating and exonerating circumstances equally, as well as taking appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. In the *Lubanga* case, the Appeal Chamber clarified that the obligation 'to establish the truth' is not limited to the period of time prior to the confirmation of charges [11]. In the *Kenyatta* case, Trial Chamber V interpreted (Judge Chile Eboe-Osuji dissenting on this point) the prosecutorial duties to 'establish the truth' and to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute, and, investigating incriminating and exonerating circumstances equally' under Article 54(1) (a) imposes an obligation on the prosecutor to investigate properly the case against the accused prior to confirmation.

The above-mentioned obligations entail that "[t]he Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but he or she should present a reliable version of events at the confirmation hearing". Therefore, "[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case" [10]. Article 54(1) (b) should be read in conjunction with article 54(1) (a) on the prosecutor's obligation to establish the truth. The article requires the prosecutor to take appropriate measures to ensure effective investigation and prosecution of crimes, as well as respecting the interest of those involved in the case, such as victims and witnesses. Similarly, article 51 of the Code of Conduct for the Office of

the Prosecutor provides that OTP shall ensure standards of effective investigation and prosecution are upheld. OTP shall act with competence and diligence, make impartial judgments, and fully respect the rights of persons under investigation as well as accused persons. The prosecutor shall not prosecute innocent persons, and he or she shall refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights. If the violation casts substantial doubt on the reliability of the evidence or the admission of evidence, it would be antithetical to and would seriously damage the integrity of the proceedings.

Therefore, establishing the truth depends on the investigation that covers all facts and evidence relevant to an assessment of whether there is criminal responsibility. Weak investigation by the prosecutor will result to weak evidence to be collected hence failure for establishing the truth of the charges against accused persons.

5.4. Difficulties in Establishing the 'Case to Answer'

Insufficient evidence will fail to establish the truth of the charge against the accused person, resulting in no case to answer on the part of the accused person. This situation may cause the charge against the accused person to be dropped for the reason of insufficient evidence, eventually, the acquittal of the accused person. In the case of *Prosecutor v Laurent Gbagbo*, due to weak evidence on the prosecution side, it resulted on a failure of the prosecution to prove beyond a reasonable doubt that Mr Laurent Gbagbo and Mr Charles Ble Goude had committed crimes against humanity, allegedly committed in the context of post-electoral violence in Ivory Coast between 16 December 2010 and 12 April 2011. Hence, the Court acquitted Mr Laurent Gbagbo and Mr Charles Ble Goude from all charges of crimes against humanity.

5.5. Failure to Uphold the Victims' Justice

In many crimes alleged to have been committed, there are a lot of inhuman acts alleged to have been committed, such as rape. If the accused person is found guilty and convicted by the Court, it brings psychological inner relief to the victims. The victims witness justice for the inhuman acts committed against them. To the contrary, when the prosecutor loses the case for the reason of insufficient evidence collected, the victims' pain remains forever. They also keep in mind the idea that justice is not for them. In this regard, Reed⁴¹ stated that "It is very disappointing to note that, as of today, there has not been a single successful conviction for sexual and gender-based crimes" [12]. Starting with the failure to include sexual and gender-based crimes in the charges against Lubanga in 2006, to the subsequent acquittals of Ngudjolo

41 Melinda Reed, Former Executive Director of the Women's Initiatives for Gender Justice

and Katanga for these types of crimes, and now Bemba's acquittal, the stark reality is that the Court has not been able to deliver formal justice to victims of conflict-related sexual violence. Additionally, thousands of victims who had hopes of justice and reparations stemming from Bemba's conviction in 2016 have reason to be greatly disappointed by this outcome [12]. Therefore, the OTP should improve in investigating situations and collect relevant evidence that will be effective in establishing the legal liability of the accused persons.

5.6. Failure to Respect Rights of Persons Arising Under the Rome Statute

The prosecutor should respect the rights of persons when conducting an investigation and collecting evidence. Article 54(1) (b-c) of the Rome Statute states that the prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. In doing so, he or she should respect the interests and personal circumstances of victims and witnesses. These special circumstances include age, gender, health as well as the crimes that involve sexual violence, gender violence or violence against children. He or she should also fully respect the rights of persons as protected in the Rome Statute.

In the *Kenyatta* case, Trial Chamber V found that the Prosecutor failed to fully respect the rights of persons under the Statute, insofar as it failed to conduct a full and thorough investigation of the case against the accused person during its pre-confirmation investigation [10]. Therefore, failure in conducting an effective investigation and collecting relevant evidence has a direct effect on the rights of the persons involved in the case, such as witnesses and victims.

6. Recommendations

6.1. Ensuring Effective Investigation

In conducting an investigation, the OTP should cover all facts and evidence relevant to an assessment of whether there is criminal responsibility. The OTP, in the whole process of investigation, should obtain relevant and strong evidence for the successful prosecution of the case. It should be noted that the Rome Statute directs the Prosecutor in the exercise of his or her duties and powers of investigation to establish the truth by extending the investigation to cover all facts and evidence relevant to the assessment of whether there is criminal responsibility under the Statute. In doing so, the Prosecutor is to "investigate incriminating and exonerating circumstances equally."

6.2. States Cooperation to the OTP

The OTP cannot achieve a high rate of success in the Court if there is no strong cooperation between the OTP and States. For OTP to build its case, they are required to obtain evidence

capable of proving liabilities to the accused persons beyond a reasonable doubt. For that to be possible, States should cooperate with the OTP because the court cannot be successful without active support from States Parties.

6.3. Accurate Assessment of Evidence

The OTP must examine the evidence collected in order to discover the relevance of the evidence to the crimes that the accused person is accused of. In examining the evidence, the OTP will be able to discover if the evidence can prove beyond a reasonable doubt the crimes against the accused person. A key reason for ruling on admissibility when the evidence is being submitted is to ensure that if called upon to assess the sufficiency of such evidence, all the evidence on the record is both relevant and has some minimal probative value.

6.4. Strong Protection of the Victims and Witnesses

The OTP must ensure victims and witnesses are afforded strong protection during the investigation, collection of evidence, and in the whole process of proceedings because they are very vital persons in building the prosecution's case. The international community witnesses the victims and witnesses to the cases being killed as a result of failure on the part of the prosecutor to protect them. The Rome Statute must be reformed to incorporate the strong protective provisions, which emphasize the importance of the OTP to protect victims and witnesses, including the provision of custody for the witnesses. Article 68(1-2) of the Rome Statute provides for the protection of victims and witnesses, but the problem is not solved. The Rome Statute should incorporate provisions that afford opportunity for witnesses to live in other countries (State parties to the ICC) as a means to protect them.

7. Conclusion

The Article has examined the Prosecution of Jean Pierre Bemba Gambo, concerning the proceedings conducted at the Trial Chamber and in the Appeal Chamber. The Appeal Chamber acquitted Mr Bemba on the ground that the Trial Chamber erred in convicting him, since the evidence issued was unable to establish superior liability on Mr Bemba. The analysis has shown that the OTP, through the obligation to prosecute cases, should not base on securing a conviction without finding the truth of the cases before the ICC. Because under article 54(1) (a) the Rome Statute imposes the duty on the prosecutor that in establishing the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, the prosecutor should investigate incriminating and exonerating circumstances equally and take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court. The prosecutor should also respect the

interests and personal circumstances of victims and witnesses, including age, gender, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence, or violence against children.

Through the analysis of the *Bemba* case, the article has revealed the weaknesses of the OTP in conducting an investigation, which causes weak evidence to be collected, hence a failure to prove the legal liability of the accused persons beyond a reasonable doubt. Even though there are some challenges, which the OTP faces, in the whole process of investigation and collecting evidence but the OTP has the obligation of establishing the truth through effective investigation, which covers all facts and evidence relevant to an assessment of whether there is criminal responsibility. In the *Lubanga* case, the Appeal Chamber clarified that the obligation ‘to establish the truth’ is not limited to the period of time prior to the confirmation of charges [11]. In *Kenyatta* case, Trial Chamber V interpreted (Judge Chile Eboe-Osuji dissenting on this point) the prosecutorial duties to ‘establish the truth’ and to ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’ under Article 54(1) (a) as imposing an obligation to properly investigate the case against the accused prior to confirmation. These obligations entail that “[t]he Prosecutor is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing”. Therefore, “[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case” [10]. Article 54(1) (b) should be read together with article 54(1) (a) based on the prosecutor’s obligation to establish the truth. The article directs the prosecutor to take appropriate measures to ensure effective investigation and prosecution of crimes, as well as respecting the interest of those involved in the case, such as victims and witnesses.

It is prudent, therefore, that the OTP broadly adheres to the requirements of article 54(1) (a-b) of the Rome Statute that requires the OTP to conduct an investigation that covers all facts and evidence relevant to assessing whether there is criminal responsibility to the accused person and to take effective measures in ensuring the fruitful prosecution of the case before Trial Chambers. The article has also identified the legal implications resulting from weak investigation and weak evidence. Finally, the article has provided the recommendations that the OTP must take into account for successful prosecution.

Abbreviations

ICC International Criminal Court
OTP Office of the Prosecutor

MLC Mouvement de Liberation du Congo
CAR Central African Republic
DRC Democratic Republic of Congo

Author Contributions

Sem Amin is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflict of interest.

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