

[Article](#)

The ICC's 'evidence problem'

The future of international criminal investigations after the Gbagbo acquittal

18.01.2019

On 15 January, Trial Chamber I [acquitted](#) Laurent Gbagbo and Charles Blé Goudé of crimes against humanity. This is an important decision. Gbagbo is the first former head of state to be tried by the ICC, and his acquittal comes just months after the controversial acquittal of Jean-Pierre Bemba, a rebel-cum-vice-president of the DR Congo. Of course, as with Bemba (see [here](#), [here](#) and [here](#)), international lawyers will disagree on the merits of the majority's ruling. Since the ruling itself is not available (and is likely to be appealed), I would like to offer some preliminary thoughts about the broader implications of this acquittal as regards the Office of the Prosecutor (OTP)'s investigation methods and strategies.

Investigations and Evidence at the ICC

The International Criminal Court (ICC) has an '[evidence problem](#)'. This appraisal of the OTP's fifteen years of investigations has become so self-evident that it no longer raises eyebrows. Starting with the ICC's first case against Thomas Lubanga, the Court's judges have repeatedly criticised the OTP's investigation practices, noting in one instance 'grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff' ([Prosecutor v. Kenyatta](#), ICC-01/09-02/11-728, para. 4). Although the 'confirmation of charges' stage was expected to streamline proceedings at the ICC (nothing equivalent existed at the *ad hoc* tribunals), the Prosecutor has on several occasions failed to clear Article 61's lower evidentiary threshold of 'substantial grounds to believe' that a suspect is responsible for the crimes he or she is charged with (Abu Garda, Mbarushimana, Kosgey and Ali).

In cases that have moved beyond the confirmation of charges stage, judges have on occasion dropped, or the OTP has withdrawn, charges due to insufficient evidence, notably in the case against the Kenyan President, [Uhuru Kenyatta](#). Most importantly, in the seven cases that have gone to trial, the Prosecutor has secured just three core crimes convictions (Lubanga, Katanga and Al-Mahdi) while three trials have led to acquittals or vacated charges (Ngudjolo, Bemba and Ruto/Sang). If Gbagbo and Blé Goudé's acquittal is upheld on appeal, the ICC will have exonerated more alleged 'war criminals' than it has convicted – a rather awkward distinction for an international criminal tribunal.

These figures should be kept in mind when discussing the Gbagbo/Blé Goudé acquittal. It is worth recalling that in 2013 the Pre-Trial Chamber [adjourned](#) the Gbagbo proceedings to give the Prosecutor more time to conduct investigations, noting with 'serious concern' that the OTP 'relied heavily on NGO reports and press articles with regard to key elements of the case' and that such 'evidence cannot in any way be presented as the fruits of a full and proper investigation' (para. 35). In hindsight, maybe the judges should have simply declined to proceed with the case in 2013?

Fast forward to January 2019: almost three years after the trial began, Judge Cuno Tarfusser, reading a summary of the decision, averred that the Prosecutor had 'failed to satisfy the burden of proof to the requisite standard'. Specifically, after analysing the evidence, the Chamber found by majority, one judge dissenting, that the OTP had 'failed to demonstrate several core constitutive elements of the crimes as charged, 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 organisational policy.

New Investigation Methods and Strategies?

A detailed analysis of the legal reasoning underpinning the acquittal will have to wait. At the time of writing, [litigation](#) continues on whether the two Ivorians will be released from custody and, if so, on what conditions. For now, what seems clear is that the Gbagbo/Blé Goudé decision confirms a broader trend at the ICC. The very fact that the acquittal occurred without the defence even having to rebut the prosecution's evidence is a stinging rebuke of OTP's *modus operandi*. The challenges of international criminal investigations – gathering linkage evidence, reliance on witness testimony rather than documentary proof, political interference, etc. – are well known. However, the ICC Prosecutor's recurring 'evidence problem' raises several specific concerns. Below I will address the three that seem to me most salient at this stage.

First, the Gbagbo/Blé Goudé acquittal seems of a different order of magnitude. Bemba was acquitted too, but only after his Trial Chamber conviction was overturned on appeal by a [3-2 plurality decision](#). Although the [Ruto/Sang](#) case collapsed, the majority refused to acquit in large part because of the Kenyan government's blatant non-cooperation and witness intimidation. By contrast, in Cote d'Ivoire, the Prosecutor ostensibly had the government's full cooperation (at least initially) in bringing Gbagbo to trial. The worry is that if the OTP cannot gather credible evidence to prosecute deposed state actors, the likelihood of holding to account sitting government officials seems truly insurmountable. Does the Gbagbo/Blé Goudé acquittal confirm the sceptics' worst fears that the ICC is little more than a tribunal for [non-state actors](#)?

Second, what does this tell us about the OTP's investigation methods and strategies going forward? Not only is the ICC's evidence problem an open secret, it can be traced directly to certain policies put in place by the first Prosecutor, Luis Moreno Ocampo. His successor, Fatou Bensouda, has sought to adjust the OTP's methods in response to emerging challenges. Most notably, Bensouda discarded Ocampo's policy of short, focused investigations led by small teams of investigators in favour of in-depth, open-ended investigations where cases should be as 'trial-ready' as possible by the confirmation of charges stage.

There are legitimate debates about how to investigate international crimes, but one constant in the OTP's prosecutorial strategy which has gone virtually unchallenged since Ocampo's tenure is the idea that the ICC should investigate just a handful of cases (usually 2 or 3) in each situation. A variety of reasons are offered for this policy, most importantly the ICC's (very real) budgetary constraints. But it is important to underscore that this is a policy choice. Most importantly, its origins lie in Ocampo's understanding of the ICC's role in global affairs – one in which the Court is a major player on the international stage and whose high-profile arrest warrants (oftentimes irrespective of their evidentiary foundations) instil fear among world leaders.

Of course, prosecuting those most responsible has intuitive appeal. But the Gbagbo case, like Bemba and Kenyatta before it, reveals yet again why this policy carries significant risks. It assumes that evidence against high-ranking officials can or will eventually be found, rather than basing arrest warrants on actionable evidence developed over time against a larger group of suspects (it is unlikely the Gbagbo arrest warrant, issued just two months after opening the [Cote d'Ivoire situation](#), resulted from a thorough investigation). To be sure, there are unavoidable trade-offs in pursuing a broad investigation strategy within a single situation. It may reduce the number of active situations and produce trials of less spectacular defendants before getting to the 'big fish'. But it would also reduce the possibility of spectacular failures like the ICC's investigations in Kenya, CAR I, and now Cote d'Ivoire. Which prompts the following question...

Third, by what standards should we judge the OTP's performance? To be sure, it is unreasonable to expect the Prosecutor to get only convictions. However, the particulars of the Gbagbo/Blé Goudé case bring to the fore a variety of questions. If the evidence was this weak, why did the Prosecutor bring this case in the first place? It is one thing to 'lose' at trial; it seems quite different to so grossly underestimate the plausibility of one's case. How did this happen?

More importantly, given the recurring pattern of evidentiary problems, how does the OTP hold itself accountable for policy and strategic decisions? If the rate of convictions vs. acquittals is not a suitable metric, what other method of assessment should be used? Prosecutor Bensouda has sought to distance herself from Ocampo, partly because of allegations against her predecessor, but there is also a (surprising?) degree of continuity in the OTP's organisation, composition and strategies. With elections of the next Prosecutor scheduled for December 2020, the performance question arguably needs more attention (see [here](#)).

Conclusion

The Gbagbo/Blé Goudé acquittal has prompted a spirited debate about the value of acquittals. It is suggested that acquittals are ‘integral to the credibility’ of tribunals ([Kersten](#)) and that ‘the fairness of any criminal justice system must be judged by acquittals’ ([Goldstone](#)). This is true. But the Gbagbo case must not be viewed in isolation. It epitomises a set of investigative policies and practices dating back to 2003. So while there is no problem in acquittals *per se*, a thorough evaluation of the Prosecutor’s performance is overdue. There is also the harsh geopolitical reality that an international criminal justice system that acquits more alleged ‘war criminals’ than it convicts is unlikely to retain the support of key international actors. How the OTP responds to the challenges of conducting effective investigations in the coming years will define the Court’s future.

[Patryk J. Labuda](#) is a Hauser Global Fellow at New York University School of Law.

Cite as: Patryk Labuda, “The ICC’s ‘evidence problem’: The future of international criminal investigations after the Gbagbo acquittal”, *Völkerrechtsblog*, 18 January 2019, doi: 10.17176/20190118-145208-0.