Proceedings of the 2nd International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/2024.24794

What Are the Major Obstacles in the International Criminal Court's Pre-trial and Trial Stages?

Di Xiao

Law School, Southwest University of Political Science and Law, Chongqing, China
sydxjhlbdsnmdbyzz@icloud.com

Abstract. The International Criminal Court ("ICC") is an important international institution for dealing with international crimes. The ICC has always been at the front line for pursuing international criminal justice and has accomplished several influential cases. However, problems emerged within the ICC's legal process and need to be solved. This paper focuses on the obstacles encountered during the Pre-Trial and Trial stages of the ICC, which are two critical parts in the whole legal process. The research question is: "What are the major obstacles in the ICC's Pre-Trial and Trial stages?" This research question is fundamental as it could enhance the efficiency of the ICC's legal process and reduce extensive time commitments. This paper uses the case study methodology, analyzing cases from the ICC and ad hoc tribunals. The analysis concludes that limited state cooperation and the strict standards for proving Genocide are the primary challenges in these stages. Addressing these issues can enhance the ICC's ability to prosecute international crimes effectively.

Keywords: International Criminal Court, legal process, state cooperation, Genocide

1. Introduction

The Pre-Trial and Trial stages are critical parts of the ICC's legal process and are interrelated. Without the confirmation of charges, the case could not go to trial. The evidence used in the Pre-Trial stage will also be used in the Trial stage. However, many problems exist in these two stages, which may lead to the failure of the case. Identifying these obstacles and finding solutions to these problems could help the ICC promote case proceedings, helping to realize international criminal justice more efficiently.

Therefore, this paper raises the research question, "What are the obstacles in the International Criminal Court's Pre-Trial and Trial stages." By asking this question, the paper intends to provide specific qualitative research on the obstacles in the Pre-trial and Trial stages. This paper will first look through scholars' literature targeting particular topics concerning the difficulties in state cooperation, the establishment of Genocide, the use of digital evidence, limited field research, and so on. Then, the paper will give some hypotheses that may possibly answer the question. Besides, the paper will analyze three cases to verify the hypotheses. Finally, based on the correct hypotheses, this paper will give three recommendations and a conclusion.

DOI: 10.54254/2753-7048/2024.24794

2. Thesis and roadmap

The thesis of this paper is that the ICC should undergo reforms due to two significant problems in the Pre-Trial and Trial stages: the lack of state cooperation and challenges in establishing Genocide. To address these issues, the ICC needs to develop improved models of cooperation, refine the implementation of genocide elements and theories, and enhance the use of digital evidence.

3. Literature review

3.1. Previous research: State cooperation, the crime of genocide, digital evidence investigations, and the obstacles in the prosecution

During the ICC's crime investigation, many obstacles exist, and substantial research has been done to identify these obstacles. There are problems regarding state cooperation and the nature of Genocide. Moreover, more novel evidence problems are emerging due to the growing use of digital evidence.

3.2. The problems of state cooperation

When discussing state cooperation within the ICC, it is crucial to first grasp the cooperation framework between the ICC and its member states. Mutyaba [1]. describes the ICC's cooperation framework as a hybrid model blends horizontal and vertical characteristics, as outlined in Article 86 of the Rome Statute, which generally obliges states to comply with the Court's request for assistance. Nevertheless, though such obligations are explicitly expressed in the Rome Statute, in reality, there are still many obstacles to practicing state cooperation.

First, Mutyaba [1] pointed out that there are several reasons for the non-compliance of states, such as competing requests for extradition, prohibited by the state's national law, and so on. Song [2] also maintains that the most important thing to improve the ICC system is the commitment of the state parties. Otherwise, the lack of cooperation will delay the judicial proceedings. Similarly, Sarkin [3] emphasizes that when perceiving the lack of cooperation, there is a need for better outreach and communication to deal with negative perceptions. Muhammad and A. [4] researched the practitioner's view of the ICC system and the obstacles to ICC. And the most significant obstacle was agreed to be the state cooperation issue.

Second, when looking at how to resolve the state cooperation problems, scholars have given many recommendations. Some scholars have expressed the importance of cooperation with other organizations. Mutyaba [1] has pointed out the need to consider alternative mechanisms for enforcing cooperation requests. Micha [5] gave a deep insight into the UN's independent investigative mechanisms, which provide ICC with evidentiary materials. Yang and Tan [6] suggest exploring better cooperation models among the ICC, state parties, and non-state actors. Sarkin [3] called for the implementation of techniques and strategies for better state cooperation, including with domestic and regional institutions. Other scholars, such as Muhammad and A. [4] suggest implementing the Rome Statute by changing it on several fronts and improving its capacity.

3.3. The crime of genocide

The crime of Genocide also brings problems during the prosecution process. On the one hand, Falnery [7] states that the definition of Genocide is too restrictive in its application, and the limited definition will actually prevent some genocide victims from receiving justice. On the other hand,

DOI: 10.54254/2753-7048/2024.24794

Owens [8] contends that the mental requirement for Genocide is too high and the standard should be lower.

Besides, they have both discussed the Mladić case from the ICTY. Owens points out that the actus reus of that case was clearly proved, but the prosecution was unable to demonstrate the mens rea for Genocide. Furthermore, Flanery [7] analyzes what led to the failure to prove mens rea in that case, including the defendant's lack of genocidal intent and the substantiality requirement of the protected group. However, Flanery [7] points out that such a requirement is not explicitly mentioned in the Genocide Convention's definition of Genocide, arguing that such inconsistencies in definitions can lead to significant complications.

3.4. Digital evidence

As a new type of evidence, digital evidence has been increasingly used in the ICC. However, there is no sophisticated standard for gathering and testifying digital evidence, and thus, there are many challenges to using digital evidence. For one, Tejerizo and María de [9] delve into the procedural challenges of using digital evidence against both parties in international criminal proceedings. Tejerizo and María de [9] analyze the particularities of digital evidence and its impacts on international criminal investigations, stating that though digital evidence might be helpful, it can also be unreliable due to problems like inherent biases of open-source evidence.

Besides, Tejerizo and María de [9] explain the challenges digital evidence imposes on both parties, such as challenges in collection, preservation, analysis, admissibility, and assessment. For another, Quilling [10] points out the emerging challenges for the authentication of digital evidence. Quilling [10] listed two relevant ICC cases, the Al-Mahdi and Al-Werfalli cases, to illustrate how the ICC has tried to evaluate digital evidence. Quilling [10] also used the method of comparative study by comparing different views of various scholars; there are critical perspectives regarding scientific evidence.

In order to solve these problems, Tejerizo and María de [9] advocate for strict adherence to disclosure obligations and the reinforcement of quality of arms in analysis, admissibility, and evaluation of digital evidence. Quilling [10] suggests the needs of the implementing a robust digital signature program and calling for a systematic review of the e-Court Protocol.

4. Statement of hypotheses

The first hypothesis is that the nature of the crime investigated determines the difficulties for the investigation, such as Genocide. The war crime of Genocide requires proof of a special intent, which is exemplified in the Elements of Crimes as "the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial, or religious group, as such." This mental requirement sets a high standard, making it challenging to prove the crime of Genocide. Furthermore, in Croatia v. Serbia case, the Court tried to establish a standard of "only reasonable inference." However, this standard is arguable as the intent of Genocide might be able to exist with other intents.

The second hypothesis is that the ICC could not do enough field research due to its own investigative strategy. The ICC had adopted a prosecutorial strategy of "focused investigation," which indicates that the OTP used "small teams of rotating investigators to carry out its investigations." Under this strategy, the ICC investigators were based in Hague and made frequent short-term trips between the fields and Hague. However, this strategy led to limited field research on the OTP in the DRC's situation. In recent years, recognizing this flaw, the Independent Expert

DOI: 10.54254/2753-7048/2024.24794

Review [11] reflected on this problem, and the OTP's 2023-2025 strategic plan [12] has committed to improving field research, which needs to be implemented.

The third hypothesis is that the ICC lacks detailed cooperation models with state parties, non-state parties, and other third parties. The ICC applies a cooperation model in which states generally have obligations to comply with the Court's request for assistance. However, the states may evoke some reasons to refuse to cooperate with the ICC or insist on some claim to stay the trial at the national level. Besides, the ICC prosecutor will also need to cooperate with the non-state parties. Furthermore, as the ICC constantly uses evidence from the intermediaries, the legal status of the intermediaries is not clear under the laws applied by the ICC.

5. Case study analysis

This paper aims to analyze the cases from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC. The first case is the Ratko Mladić case from the ICTY, followed by the Lubanga case from the ICC, and finally, the Al-Bashir case, also from the ICC.

5.1. The ratko mladić case

Mladić was charged with ten counts; among them, counts 1 and 2 were all related to Genocide. Count 1 was charged with "committing those prohibited acts against a part of the Bosnian-Muslim and/or Bosnian-Croat national, ethnical and/or religious groups as such." And Count was charged "with committing those prohibited acts against a part of the Bosnian-Muslim national, ethnical and/or religious group as such." However, count 1 was not successfully established, while count 2 was [13]. The analysis of this case will mainly focus on three aspects: first, what are the criteria of Genocide; second, how to prove the mental element of Genocide; and third, why count 1 failed to be established.

First, under Art.4(2) of the Rome Statute. The actus reus of Genocide includes (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group, and (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The mens rea of Genocide requires a specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group [13]. Additionally, when only a segment of a protected group is targeted, it must be demonstrated that this segment constitutes a substantial part of the entire group, significant enough to affect the group as a whole [14].

To be more specific about the mens rea, the Court pointed out that "the specific intent may be inferred from the surrounding facts and circumstances which may include the commission by physical perpetrators of other culpable acts" [13]. In other words, the mental element can be inferred from the physical element. Then, the Court took two steps to examine the mens rea in count 1, consider factors indicating the physical perpetrators' intention to destroy Bosnian Muslims and Bosnian Croats, and then test whether the part of the group was substantial. However, by analyzing the situation in each municipality, the Chamber finally concluded that the evidence was insufficient to prove there was a specific intention of the physical perpetrators and the "only reasonable inference" standard, which indicates that the inference must be the only reasonable inference based on the evidence [14], and the Chamber concluded that the situation in the Mladić case was not satisfied [13].

Therefore, based on the failure of count 1, hypothesis 1 can be confirmed as correct. The high threshold for the mental element of the Genocide indeed makes it challenging to prove, causing insufficient evidence to establish the mens rea for this crime.

DOI: 10.54254/2753-7048/2024.24794

Furthermore, hypothesis 3 can also be examined in this case, as the lack of state cooperation led to the delayed arrest of Ratko Mladić. After the ICTY issued the international arrest warrant in 1996, he fled away and even publicly lived in Serbia [15], which is actually a state party of the ICTY. Hence, the hypothesis that the ICC lacks a state cooperation model can be traced back to the ICTY period.

5.2. The lubanga case

In this case, in the Judgment Pursuant to Article 74 of the Statute, section VI especially focused on the development of the Prosecution's investigation. The Chamber emphasized two aspects: first, the problems faced by the investigators, and second, the prosecution's dependence on certain intermediaries. To be more specific, the investigators only remained in the field for ten days on average [16]. However, this limited time is caused by various reasons, such as the changing schedules of interviews, the investigators' loss of motivation due to poor conditions of living and support, and security concerns [16]. By contrast, the intermediaries, such as human rights activists, could move more freely. Consequently, this led the prosecution to rely on intermediaries, whose legal status was uncertain at that time [17].

The situation at that time seems to prove that hypothesis 2 is correct. Nevertheless, with the development of ICC, the situation has changed. The lack of field research and the blurred legal status of the intermediaries have been greatly addressed. For one, in the Office of the Prosecutor Strategic Plan (2023-2025) [12], strategic goal 7 has explicitly expressed the willingness to increase the field research of the Office of the Prosecutor, including the number of presented areas, the number of permanently based staff, and the speed of adapting the operation with the requirements [12]. Moreover, the status of the intermediaries has been specified through a series of documents from the ICC, such as the Code of Conduct for Intermediaries (March 2014) and Guidelines Governing the Relations between the Court and Intermediaries (March 2014). Therefore, hypothesis 2 is not an urgent problem for the present ICC evidence-collecting process.

5.3. The Al-bashir case

Al-Bashir was the sitting head of the Republic of Sudan, and he is now charged with ten counts, including three counts of the crime of Genocide. However, he is still at large, and the case is still at the Pre-Trial stage. What should be analyzed in this case is the threshold of proving Genocide intent in the Pre-Trial stage, referring to Article 58(1)(a) of the Rome Statute. On 4 March 2009, the Pre-Trial Chamber issued the first Warrant of Arrest while rejecting the Prosecutor's application regarding Genocide, stating that the specific intent should be the only reasonable conclusion from the Prosecutor's evidence [18]. And because the GoS's special intent "is only one of several reasonable conclusions available on the materials provided by the Prosecution" [18], therefore the standard of proof was not satisfied.

First, the Appeals Chamber reviewed the literal language of Article 58(1)(a), "...the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of the arrest of a person if…(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." Second, the Appeals Chamber pointed out that the "reasonable grounds to believe," shall be differentiated from the "substantial grounds to believe" of Article 61(7), and "beyond reasonable doubt" of Article 66(3) [18]. Then, the Appeals Chamber discussed and decided that the Pre-Trial Chamber's "only reasonable conclusion" standard had amounted to the "beyond reasonable doubt threshold" and was actually an error of law [18]. Consequently, on 12 July 2010,

DOI: 10.54254/2753-7048/2024.24794

the Pre-Trial Chamber issued the second arrest warrant, including the consideration of Genocide. Therefore, this case reinforces hypothesis 1 as the mental element of Genocide will cause problems in the evidence-collecting phase, particularly regarding the standard of proof and the legal interpretation of Article 58(1)(a) of the Rome Statute.

Nevertheless, as mentioned before, Al-Bashir is still at large, even if the ICC has referred the situation to the UNSC and the ASP. In spite of the non-cooperation of South Africa, several ICC state parties also do not cooperate in the name of several reasons, such as the legal controversy around head-of-state immunity [19]. Hence, this case has tested that hypothesis 3 is correct, as the non-cooperation problem still puzzles the ICC since the evidence gathering is stuck and the case cannot be promoted.

6. Recommendations

There are three recommendations for addressing the problems in the Pre-trial and Trial stages.

First, the ICC needs to explore more effective cooperation models among state and non-state parties, which indicates that the ICC might join or organize some investigation teams. An example is the Joint Investigation Team in Ukraine, where the OTP joined some Eurojust member countries to investigate international crimes in Ukraine. From this cooperation, the OTP and the JIT members could establish a set of cooperation models under Article 93 of the Rome Statute through the process of evidence preservation, witness protection, information disclosure, and so on [6]. Though this is not a perfect cooperation model, as it may confront the challenges of impartiality and independence [6], it does provide some provisions of how the OTP can strengthen the bonds with the state parties and reinforce the cooperation requirement.

Second, the ICC shall try to refine the implementation of the Rome Statute and other first-hand resources. As revealed in the case analysis and literature review sections, there are debates around what is the standard of establishing the mental element of Genocide. The current judgment with a high standard of mens rea also brings difficulties in realizing justice [8]. Therefore, one possible solution is to clarify the standards for the mental element in legal documents like Elements of Crimes, for example, whether the "substantial" requirement in the Mladić case is included.

Third, the ICC could exercise and establish the standards of digital evidence. With the development of the internet and technology, there are many digital materials that can be used as evidence in Court. To be more specific, digital evidence comes from various approaches, including open sources, mobile phone telecommunications, flashcards, and so on [9]. This approach can help the ICC investigators to address the problems of non-cooperation, as well as to better collect evidence regarding serious crimes like Genocide. In fact, digital evidence is gradually used by the ICC; for example, in the Al-Werfalli case, the Facebook videos helped to establish the alleged crimes. However, what comes with such convenience is the problems of authentication and verification [10]. And digital evidence has not been formally testified in the ICC's courtroom [10]. Therefore, though digital evidence can help to overcome some obstacles in the prosecution process, further standards and methods to apply such evidence are needed.

7. Conclusion

The ICC has encountered many problems in the Pre-Trial and Trial stages. If the Pre-Trial stage can not be promoted, the subsequent trial can not be opened or succeeded. Therefore, it is extremely important to figure out the obstacles in these two stages and try to raise some recommendations.

DOI: 10.54254/2753-7048/2024.24794

This paper gives three hypotheses that may be relevant to the question's answer. The lack of state cooperation leads to the failure to arrest the suspects and the difficulties in collecting the evidence. Besides, the elements of Genocide make it difficult to prove the establishment of the crime. Furthermore, the lack of field research may affect whether the evidence is sufficient enough for the case to go to the trial stage. By analyzing the cases of Mladić, Lubanga, and Al-Bashir, this paper finds out that the lack of state cooperation does influence the arrest of the suspects, and the high mental element requirement has set up inconsistent standards and dilemmas to prove Genocide and realize the justice in the Trial stage. However, due to the fact that the policy and technology have developed rapidly in the past ten years, the problem of lacking field research has been emphasized and addressed by the ICC. Therefore, this hypothesis is not an urgent problem in the Pre-trial stage.

After confirming the hypotheses, this paper gives three feasible solutions. From both the practical and the theoretical perspectives, this paper suggests the ICC to establish more effective cooperation models with different parties, refine the Rome Statute and other legal documents, and build up the systems to use, authenticate, and verify digital evidence.

References

[1] Mutyaba, Rita. 2012. "An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions. " International Criminal Law Review 12 (5): 937-962. https://doi. org/10. 1163/15718123-01205006b.

[2] Song, Sang-Hyun. 2016. "International Criminal Court-Centred Justice and Its Challenges. " Melb. J. Int'l L. 17: 1. http://www5. austlii. edu. au/au/journals/MelbJIL/2016/1. html.

[3] Jeremy Sarkin. 2020. "Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes, " International Human Rights Law Review 9 (1:) 27-61. https://doi. org/10. 1163/22131035-00901001.

[4] Muhammad, Samaria, Barbora Holá, and Anja Dirkzwager. 2021. "Reimagining the ICC: Exploring practitioners' perspectives on the effectiveness of the International Criminal Court. " International Criminal Law Review 21 (1): 126-153. https://doi. org/10. 1163/15718123-bja10039.

[5] Micha, Eleni. 2022. "Evaluating the Evidence by the UN International Investigative Mechanisms: a New Challenge for the International Criminal Court?. " International Criminal Law Review 23 (2): 352-378. https://doi. org/10. 1163/15718123-bja10140.

[6] Yang, Suhong, and Yudan Tan. 2023. "The Joint Investigation Team in Ukraine: challenges and Opportunities for the International Criminal Court. " European papers: a journal on law and integration 8 (3): 1121-1124. https://doi. org/10. 15166/2499-8249/705.

[7] Brady Flanery. 2020. "The Last ICTY Trial: An Analysis of the Ratko Mladic Trial and the Struggle to Reach a Guilty Verdict for Perpetrators of Genocide, " Indonesian Journal of International & Comparative Law 7 (1): 75-96. https://heinonline. org/HOL/Page?handle=hein. journals/indjicl7&div=9&g_sent=1&casa_token=&collection=journals.

[8] Owens, Nicholas. 2024. "An Issue of Intent: The Struggles of Proving Genocide. " https://scholarship. shu. edu/cgi/viewcontent. cgi?article=2428&context=student_scholarship.

[9] Arcos Tejerizo, María de. 2023. "Digital Evidence and Fair Trial Rights at the International Criminal Court. " Leiden Journal of International Law 36 (3): 749–69. https://doi. org/10. 1017/S0922156523000031.

[10] Quilling, Chelsea. 2022. "The Future of Digital Evidence Authentication at the International Criminal Court. " Journal of Public & International Affairs. https://jpia. princeton. edu/news/future-digital-evidence-authentication-international-criminal-court.

[11] International Criminal Court. Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report. 2020.

[12] Office of the Prosecutor. Strategic Plan 2023-2025. 2023.

[13] The Prosecutor v. Ratko Mladić, IT-09-92-T, 22 November 2017. https://ucr. irmct. org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226. pdf.

[14] The Prosecutor v. Radislav Kristić, IT-98-33-A, 19 April 2004. https://www. icty. org/x/cases/krstic/acjug/en/.

[15] Wallenfeldt, J. . "Ratko Mladić. " Encyclopedia Britannica, August 23, 2024. https://www. britannica. com/biography/Ratko-Mladic.

DOI: 10.54254/2753-7048/2024.24794

[16] The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, 14 March 2012. https://www. icc-cpi. int/court-record/icc-01/04-01/06-2842.
[17] DE VOS, CHRISTIAN M. 2013. “Investigating from Afar: The ICC’s Evidence Problem. ” Leiden Journal of International Law 26 (4): 1009–24. https://doi. org/10. 1017/s0922156513000526.
[18] The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-73, 3 February 2010. https://www. icc-cpi. int/court-record/icc-02/05-01/09-73.
[19] Boehme, Franziska. "Enabling Justice: State Cooperation with the International Criminal Court. " PhD diss. , Syracuse University, 2017. https://surface. syr. edu/etd/687.