Chapter 1
Introduction

Modern day history has registered a steady increase in international criminal trials. Important to mention are the Nuremberg, Singapore and Tokyo trials of 1945 and 1946, which were to foster accountability for the gruesome violations of World War II. The 1990s beheld the establishment of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY),[1] and the Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between 1 January 1994 and 31 December 1994 (ICTR).[2] The formation of *ad hoc* tribunals continued into the subsequent decade with the establishment of the hybrid Special Court for Sierra Leone (SCSL),[3] the Extraordinary Chambers in the Courts of Cambodia (ECCC),[4] and the Special Tribunal for Lebanon (STL).[5] The coming into force of the Statute of the International Criminal Court on 1 July 2002 established the first permanent international criminal institution—the International Criminal Court (ICC). The ICC Statute has 121 ratifications.[6] There is a common effort among all the tribunals and courts, of harmonizing various languages in the course of their work.

The aforesaid events set momentum for what has been referred to as the global spread of international criminal justice. This development has extended to national

[1] See Preamble to the ICTY Statute (adopted by SC Res 827 of 25 May 1993).

[2] See Preamble to the ICTR Statute (adopted by SC Res 955(1994) 8 November 1994).

[3] See Agreement between the UN and the Government of Sierra Leone, SC Res 1315 (2000) 14 August 2000.

[4] See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (promulgated on 6 June 2003).

[5] Established by Agreement between the UN and the Lebanese Republic, SC Res 1757(2007) 30 May 2007.

[6] By August 2012.

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jurisdictions by virtue of the Rome Statute doctrine of complementarity.[7] The Article 1 principle of complementarity presupposes that the jurisdiction of the ICC is merely complementary; competent state authorities have an obligation to address the crimes committed in their respective jurisdictions. The ICC is a court of last resort. In this regard, states parties are enacting ICC implementing legislation to enhance their capacity to address international crimes. This has also led to the formation of special legal entities to adjudicate international crimes such as the International Crimes Division of the High Court of Uganda (ICD).

Further, the development of the doctrine of universal jurisdiction has bolstered the jurisdiction of national courts over international crimes. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[8] Thus, there is an escalating impetus of international trials at both the national and international levels.

The history of international criminal justice is characterised by multilingual courtroom proceedings stimulating debate on the impact of language diversity on fair hearing in the trial process. Language is broadly defined as any organised means of conveying or communicating ideas especially by human speech, written characters or sign language.[9] In a trial situation, aspects such as silence, the courtroom setting, the gender of participants, dress code, the jurisdiction in which the trial takes place, have communicative value. Language is a pervasive and dynamic element that has powerful influences on the legal process.[10] This book focuses on language as communication in the administration of justice. It is intended to illustrate how the conduct of a trial in more than one language affects the proceedings especially the rights of the accused person. A multilingual trial raises multiple complexities relating to cross-lingual and cross-cultural communication. Complexities such as misunderstandings, failures in translation, cultural distance among trial participants affect courtroom communication, the presentation and perception of the evidence, hence challenging the credibility of a trial. The impact of interpretation on proceedings also makes language diversity in criminal proceedings a fair trial concern.

The language debate in international criminal justice dates from the first trials of international crimes at Nuremberg (1945). The Nuremberg trials constituted a global contribution of participants. This phenomenon subsists among contemporary tribunals as (i) a way of expressing global solidarity against crimes that affect humankind as a whole; (ii) ensuring impartiality by engaging international

[7] Article 1 ICC Statute DOC A/CONF 183/9 of 17 July 1998, adopted on 17 July 1998, came into force on 1 July 2002. Art 1 provides that the ICC is complementary to national criminal jurisdictions.

[8] See Principle 1 Princeton Principles on Universal Jurisdiction 28 (2001).

[9] Garner (1999), p. 958.

[10] Levi and Walker (1990), p. 2.

personnel who are considered distanced from the subject of adjudication; (iii) a means of spreading the effects of the accountability process; and (iv) merging a global pool of expertise to address the diverse issues raised by international conflicts. The global pool strategy has propelled the complexities of multilingual proceedings in the administration of international criminal justice.

Scholars such as Combs challenge the fact-finding and evidentiary foundations of international criminal convictions on grounds of language obstacles in the trial process.[11] Karton explains the loss of evidence and distortion of witness testimonies in the process of translation leading to verdicts based on faulty findings of fact.[12] Kelsall explores the adverse effects of cultural distance on communication in an international trial.[13] Floyd (defence counsel) reveals how language barriers affect the right of the accused to effective legal representation.[14] It is sought to affirm the aforementioned observations and challenge the assumption by scholars such as Arzoz that language fair trial rights are not established anywhere, and must be interpreted as ideals and aspirations, and not as enforceable entitlements already recognised by international binding rules.[15] Misrepresentation of the status of language fair trial rights has kept the profile of the subject low in the discourse of international criminal justice. The courts are cognisant of the significance of language to legal process, but the practical effects of the subject are avoided.

This book reveals that language fair trial rights are embedded in the minimum guarantees of fair criminal trial, contained in constitutive statutes of International Criminal Tribunals (ICTs), international instruments, and national constitutions. Thus, fulfilling language fair trial rights is integral to due process.

In a nutshell, international criminal trials are marred by misunderstandings as a result of linguistic and cultural distance among participants, which in turn affect the foundations of trial fairness. The language debate therefore extends beyond translation to include multiculturalism and human rights. While explaining the scope of the debate, Chap. 2 illustrates that the language debate in international criminal justice is characterised by the aforementioned subjects (translation, multiculturalism and human rights). The three subjects constitute the principal themes of the debate. Chapter 4 proves that language fair trial rights are priority rights situated in the minimum guarantees of trial fairness hence clarifying the stance of language rights in international law. The court has an obligation to fully respect these rights in the process of ensuring justice. As elucidated in Chap. 3, this duty is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights. Chapter 3 examines the regime of human rights protection in international criminal justice. Language fair trial rights are human rights. This chapter highlights the opportunities

[11] Combs (2010), p. 167.

[12] Karton (2008), p. 1.

[13] Kelsall (2009), pp. 223–224.

[14] Floyd (2005), p. 143.

[15] Arzoz (2007), p. 1.

and challenges of the court in ensuring fair trial rights that could influence the implementation of language rights. Chapter 5 particularly demonstrates the complexity and shortfalls in translation, a key aid to multilingual proceedings. These inadequacies are confirmed by scholarly translators such as Eades,[16] Garre,[17] Gaiba.[18] The chapter reveals the limitations of translation in aiding communication in court proceedings that could affect trial fairness. Culture extensively influences translation in international criminal trials; thus, Chap. 5 embodies an analysis of the multicultural dynamics of a multilingual trial and how they affect translation. Translation refers to both translation (written communication) and interpretation (oral transmission); each subject is only treated distinctively in relation to peculiarities.

Language is therefore a pertinent subject for consideration in the reform discourse of international criminal justice. A commitment to guarantee trial fairness in international criminal law should entail commitment to address the language question.

Bibliography

Arzoz X (2007) 'The nature of language rights'. JEMIE paper (Issue No 2/2007)
Combs NA (2010) Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions. Cambridge University Press, New York
Eades D (ed) (1995) Language in evidence: issues confronting aboriginal & multicultural Australia. University of New South Wales Press Ltd, Sydney
Floyd JC (2005) International injustice: Rwanda, genocide & cover-up: The United Nations Media Trial. Kabuki Press, Washington DC
Gaiba F (1998) The origins of simultaneous interpretation: The Nuremberg Trial. University of Ottawa Press, Ottawa
Garner BA (ed) (1999) Black's law dictionary, 7th edn. West Group, St. Paul, Minn
Garre M (1999) Human rights in translation: legal concepts in different languages. Copenhagen Business School Press, Copenhagen
Karton J (2008) Lost in translation: International Criminal Tribunals and the legal implications of interpreted testimony. Vanderbilt J Transnatl Law 41:1
Kelsall T (2009) Culture under cross-examination: International Justice and the Special Court for Sierra Leone. Cambridge University Press, Cambridge
Levi JN, Walker AG (eds) (1990) Language in the judicial process. Plenum Press, New York

[16] Eades (1995).
[17] Garre (1999).
[18] Gaiba (1998).

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