Discuss the proliferation of courts and tribunals in international criminal law

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There has not been much concern on the fragmentation of international criminal courts and tribunals and for legitimate reasons though. The proliferation of these courts and tribunals should be seen as an enterprise aimed at bringing perpetrators’ of war crimes, crimes against humanity and genocide to justice. A definitional clarity is necessary because it will facilitate a clear understanding on the linkages between international humanitarian law on crimes against humanity and the law on genocide. In this paper, I will examine the evolution of the theory of proliferation in line with international criminal law. What proliferation means for international peace building and human rights, and the rule of law shall also be discussed. The different international criminal courts and tribunals will also be examined. The conflict and convergence of these International Courts and Tribunals shall be of great importance to portray the effectiveness and weaknesses of proliferation. There will be some general definition of legal terminology for better understanding and some follow up. I will conclude with what others say and personal view on the merits and demerits of proliferation.

1.0 Introduction

Quoting from the judgment of the International Military Tribunal at Nuremberg

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can provision of international law be enforced”

This was the beginning of a new era in international criminal law and responsibility after the failure at the end of World War I in establishing a tribunal to try the Kaiser for supreme offence against international morality, and the sanctity of treaties. Nuremberg was followed by the Tokyo Tribunal but the so called ‘Nuremberg Principle’ adopted by the United Nations setting up a legal jurisprudence was frustrated by the cold war from moving forward. Only after the end of the cold war in 1990 was the Nuremberg principle revisited as a result of the Wars in the Balkans (former Yugoslavia) and the Rwanda Genocide. Here, the United Nations Security Council established ad hoc Tribunals to try perpetrators’ of war crimes, crimes against humanity and genocide. The International Criminal Court for Yugoslavia to be mentioned further as ICTY and the International Tribunal for Rwanda to be mentioned further as ICTR

The Nuremberg Principle also established new grounds in granting international jurisdiction over war crimes committed in non international armed conflict. The re-establishment of the Nuremberg principle also awakened new commitments to the establishment of the International Criminal Court (ICC) whose

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2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
Discuss the proliferation of courts and tribunals in international criminal law

statute were adopted in 1998 and came into force in 2002. The International Criminal Court which will be mentioned further as the ICC has about 100 signatories to the treaty as of 2007 though without controversy due to the absence of the United States of America to be mentioned further as the USA.

2.0 Setting the scene

To begin a discussion on the conflict and convergence with regards to the proliferation of International courts and Tribunals, it will first be of importance first to attempt a definition of some basic terms. For example: Crimes against humanity, Crimes of War (crimes against peace) and Genocide. This is because, they form the legal base under International law on which the different courts and tribunals rely on in handing down judgments. This may be necessary to facilitate a better understanding and importance of these duplicities and what they aim to achieve.

2.1 Crimes against Humanity

Crimes against humanity has been described by M. Cherif Bassiouni to mean “anything atrocious committed on a large scale” However, this term is said to have originated from The Hague Convention preamble of 1907 which codified the customary law of armed conflict. The treaty of Versailles after World War I did established the precedence though faced resistance from the USA terming it as a violation of the law of morality and not positive law. In 1945, the USA and allied developed the agreement for the trial and punishment of major war criminal and the Charter of the International Military Tribunal sitting in Nuremberg could be seen as the stepping stone to this proliferation.

The Nuremberg Military Tribunal defines crimes against humanity in its Article 6(c) as

‘Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal’

This was the first time that crimes against humanity were established in positive international law and the Tribunal for the Far East at Tokyo did follow the Nuremberg Charter. After Nuremberg, there exists no other international convention on crimes against humanity. The category of crimes base on the
Discuss the proliferation of courts and tribunals in international criminal law

Nuremberg definition have been included into the Statutes of the ICC, ICTY and ICTR but with minor disparity as to the definition of the crime itself and its legal element. Crimes against Humanity are deemed to form part of ‘jus cogens’ thus constituting a non derogable rule of International law subject to universal jurisdiction.

2.2 Crimes of war (Crimes against peace)

The Nuremberg Tribunal in 1946 defined Crimes against Peace as

‘The supreme international crimes, differing only from other war crimes in that it contains within itself the accumulated evil of the whole’

Crimes against peace are also known as crime of aggression used against Nazi Germany by the 1945 Charter of the International Military Tribunal at Nuremberg. The Charter defines aggression as;

‘Planning preparation, initiating or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or participation in common plan or conspiracy [to do so]

However, its implementation after World War II has remain controversial because of serious obstacles face in trying to prosecute perpetrators cause by state bureaucracies, the unwillingness of the UN Security Council in handing over jurisdiction to the ICTY after the Balkan wars and the limitation of the ICC Statute which requires state to amend statute to include crime and condition for the exercise of jurisdiction.

2.3 Genocide

It defined by the 1948 Convention for the Prevention and Punishment of Crimes of Genocide to consist of certain acts;

‘Committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’

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16 Ibid.
17 Ibid, page 137.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid, page 360.
Discuss the proliferation of courts and tribunals in international criminal law

This atrocity was committed in Rwanda where was estimated about 500,000 and one million Tutsis and some moderate Hutus who were murdered.\(^{22}\) The Holocaust incidence falls definitely to the above definition although the Nuremberg Military Tribunal’s indictment of the Nazis referred to genocide in a descriptive not legal term.\(^{23}\)

3.0 Analysis in the conflict and convergence of the Jurisprudence of proliferation

According to President Guillaume and Judge Higgins, the judgment of the Appeal Chambers of the International Tribunal for Former Yugoslavia in the Tadic case handed down on 15 July 1999 is a good example of conflict.\(^{24}\) Judge Guillaume said

“In ruling on the merits in the Tadic case, the international criminal tribunal for the former Yugoslavia recently disregarded case-law formulated by the International Court of Justice in the dispute between Nicaragua and the USA. The court had found that the US could not be held responsible for acts committed by the contras in Nicaragua unless it had had ‘effective control’ over them. After criticizing the view taken by the court, the Tribunal adopted a less strict standard for Yugoslavia’s actions in Bosnia and Herzegovina and replaced the notion of ‘effective control’ there by broadening the range of circumstances in which a state’s responsibility may be engaged on account of its actions on foreign territory.”\(^{25}\)

The Appeal chamber said a ‘test of control’ had to be conducted to make the conflict international in line with the terms of article 4 of the Geneva Convention relative to the treatment of Prisoners of War of 12 August 1949.\(^{26}\) Same test used by the International Court of Justice (ICJ) in the Nicaragua judgment of 1986 for determining whether the USA was responsible for violation of humanitarian International Law in relation to control.\(^{27}\) The Appeal Chambers in the Bosnia Herzegovina case found the ‘control test’ used in the Nicaragua case; “Too inappropriate”.\(^{28}\) This critique is in light of “the logic of the law of state responsibility”\(^{29}\) and of it being “at variance with judicial and state practice”.\(^{30}\)

\(^{22}\) Rwanda Genocide by Mark Huband; Crimes of War Ed. By Roy Gutman, David Rieff, and Anthony Dworkin, page 360.
\(^{23}\) United States Holocaust Memorial Museum, [www.ushmm.org](http://www.ushmm.org).
\(^{27}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) Ibid.
\(^{30}\) Ibid.
Discuss the proliferation of courts and tribunals in international criminal law

The International Law Commission quoting from Article 8 of its Article on State Responsibility adopted a test that;

‘The person or group of persons is in fact acting under the instructions of, or under the direction or control of the state in carrying out the conduct’\textsuperscript{31}

The commission said that the requirements ‘instructions’, ‘direction’, and ‘control’ are disjunctive so that the presence of one of them is sufficient but must relate to the conduct which amounts it to an international wrongful act.\textsuperscript{32}

The ICTY may have been of the opinion in the Tadic Case that international Courts and Tribunals were not part of the same system.\textsuperscript{33} Quoting from the ICTY;

“International Law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of Tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the other. In International Law, every Tribunal is a self-contained system (unless otherwise provided)”\textsuperscript{34}

4.0 Criminal Courts and Tribunals

Man’s greedy nature has left the International community with some worrying question as to the new direction in relation to sustaining world peace and security. These worries stem from the increase in war crimes, crimes against humanity and genocide crimes perpetrated by groups, individuals and at times states against mankind.

If the establishment of Nuremberg and Tokyo Tribunals as a result of gruesome violation of International humanitarian law after the first and second World War to administer criminal justice and bring perpetrators to answer for their crimes, then the establishment of the ICTY by UN Resolution 827 of 25 May 1993 as amended by Resolution 1166 of 13 May 199 and Resolution 1329 of 30 November 2000, and the ICTR in 1994 set the base for further proliferation of International Courts and Tribunals.\textsuperscript{35} It would be rightly argued that, the establishment of the ICTY and ICTR set the agenda in the realization and adoption of the statute of the International Criminal Court (ICC) in 1998.\textsuperscript{36} The creation of the ICC

\textsuperscript{31} Ibid, page 600.
\textsuperscript{34} Ibid.
\textsuperscript{36} Ibid.
was not the end of proliferation as seen with the creation of mixed panels by the UN administration in Kosovo, in 2000, the special court for Sierra Leone in 2002, the special panel for serious crimes in East Timor, the Extraordinary Chambers in the Courts for Cambodia in 2003 and the Iraq special Tribunal.

While the ICTY, ICTR and the ICC may be seen to be International in character, established by a UN Resolution of the Security Council under Chapter VII but for the ICC established by the Rome Statute; the panels are said and seen to be multi-dimensional in character established within the premise of a local judiciary but having both National and International judges. A similar situation of a multi facet court is the special court for Sierra Leone established by an agreement between the UN and the government of Sierra Leone pursuant to a UN Security Council Resolution 1315 of 14 August 2000 to prosecute crimes committed during the civil war. This was same for the extra-ordinary chambers in the courts in Cambodia to try members of the Khmer Rouge. We do equally have the special panels for serious crimes in Dili and the Iraqi Special Tribunal.

The co-relationship of these judicial bodies is something of great interest and of some importance for the exercise of International jurisdiction as set out in light of the principle of complementarily under the Rome Statute. The principle reads;

“If a state is unwilling or unable to carry out an investigation or prosecution, the case in question maybe brought by the prosecutor before the ICC”

This principle however, guide only special courts considered to be national courts. Should they be international institutions, then their jurisdiction would not be subject to the principle of complementarily. Since most of these Courts and Tribunals were established for cases related to specific regions, the conflict between them cannot be overstated but for the ICTY which is more expansive in relation to future crimes and whose mandate is unrestricted. This means if crimes of war and crimes against humanity were to be committed in the future in former Yugoslavia, both the ICC and ICTY will claim jurisdiction resulting to a conflict.

Article 103 of the UN Charter may be the solution. It states;

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39 Ibid, page 305.
40 Ibid page 305.
41 Current Developments in International Courts; East Timor-Justice denied by Sylvia de Bertodano.
42 Iraqi Special Tribunal and crimes of Aggression by Claus Krees.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
Discuss the proliferation of courts and tribunals in international criminal law

“In the event of a conflict between the obligations of the members of the United Nations under the present charter and their obligations under any other international agreement, their obligation under the present charter shall prevail.”

5.0 Conclusion

The question is what holds now for the future? Can the issue of concurrent jurisdiction deter the International community from establishing more criminal courts and Tribunals or other panels? The answers here maybe yes to a minimum extend and no to a maximum extend. No because, the establishment of International Criminal Courts and Tribunals is aimed at filling the gaps where national courts are unable to render justice when violations of crimes against humanity and genocide occur in some parts of the world. It may equally serve as a deterrence to others still intending on doing so. It is believed that why the need for unity with International courts and tribunals is necessary, what is of great importance is rendering justice to victims by combating all acts of impunity within the international community.

The development of case law by these International Courts and Tribunals has been at variant not for the ICTY and ICTR because the composition of its Appeal Chamber is identical. An attempt to portray the ICC as some International Court with unique criminal jurisdiction is still premature and its future lies not only on the Rome Statute but on the effective application of the principle of Complimentarily and its relationship with member countries and other Ad Hoc bodies. Also, the International Community ability to bring all actors on board especially the USA who have refused to participate in the court’s activities by not signing to the Rome Statute will be very important given her International status and capabilities across the globe.

Across the globe and for over centuries, the International Community has gotten up each day to encounter a new event that threatens almost its existence. Even before civilization started, we had greater empires like the Roman Empire, the Ottoman Empire whose survival was guaranteed only in destabilizing peace through wars and battles. During this time, there were no international courts for redress. The World was almost torn apart by the French Revolution that was later succeeded by the two World Wars which provoked the establishment of the Nuremberg and Tokyo Tribunals.

To me, the precedence at Nuremberg that has resulted to a multiplicity of International Criminal Courts and Tribunals is more of a good luck in the making. This is because, it sends out a signal to perpetrators

50 Ibid.
51 Ibid.
52 Ibid.
Discuss the proliferation of courts and tribunals in international criminal law

and would be perpetrators of violent crimes that the International Community is resolve and determinate to bring all irrespective of status and authority to book. In so far as duplicity in courts and tribunals meet the standards and deliver which until now is in the positive, then proliferation to me remains a good idea. Through this multiplicity, some of the most powerful like Charles Taylor of Liberia, DuskoTadic of the Former Yugoslavia, Milosevic, and Saddam Hussein et al have gotten their turns. We still have though some unfinished business relating to the Second Intifada and after, death squads sponsored by extremism, and the status of the combatants of war in Afghanistan and Iraq in America’s keeping.

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55 Ibid, The Iraqi Special Tribunal and the Crimes of Aggression by Claus Kress. The Iraqi Special Tribunal; Back to the Nuremberg Paradigm by Danilo Zolo.
Discuss the proliferation of courts and tribunals in international criminal law

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