A CRITICAL ANALYSIS OF CUSTOMS AND GENERAL PRINCIPLES IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

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BEING A RESEARCH DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS OF KAMPALA INTERNATIONAL JNIVERSITY

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DECLARATION

I, DIRI LAWAL ABDULRAHMAN, do solemnly declare, that apart from reference to other peoples' work which has been duly acknowledged, this work is the product of my intellect and academic exercise and has not been presented to any university or other institution of higher learning and where in the world by anyone, either in part or as a whole for the purpose of a certificate, diploma, LLB- Bachelor of Laws degree. I also certify that I prepared by myself specifically for the partial fulfillment for the award of the degree in law at Kampala International University, Uganda.

Dated 24th..... this day of July....., 2018.

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SIGNATURE

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APPROVAL

This is to certify that, this research entitled "A CRITICAL ANALYSIS OF CUSTOMS AND GENERAL PRINCIPLES IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW" has been carefully supervised and approved to meet regulations governing dissertation writing of School of Law, in partial fulfillment of the award requirements for the award of Bachelor of Laws (LLB) Degree from School of Law of Kampala International University, Uganda.

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WINIFRED KABATABAAZI

SUPERVISOR

DATE: 10/10/2018

DEDICATION

This research is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time.

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TABLE OF CONTENTS

ABSTRACT

International criminal law is one of the very broad aspects of international law generally, dealing with the investigation and possible prosecution and punishment of perpetrators of international crimes. In the prosecution of international crimes, international criminal law does contain various principles, norms and customs that have in fact contributed to its development. It is understood that whilst international criminal law is different from international humanitarian law, there is a lot of signifance. Over the years, there has been steady development of international criminal law. This study explains and analyzes comprehensively, the various principles and customs that have contributed to the development of international criminal law, through, basically, the application of international humanitarian law and a little procedural and substantive human rights law applicable in armed conflict situations. The study identifies, however, that there are challenges which tend to hinder the continous development of international criminal law, and through the conduct of the study, to the end, discusses what the challenges entail and how they can be resolved.

CHAPTER ONE

A Critical Analysis of Customs and General Principles in the Development of International Criminal Law

INTRODUCTION

International Criminal Law is a body of public international law designed to prohibit certain categories of conduct commonly viewed as serious atrocities and to make perpetrators of such conduct criminally liable for their perpetration.[1] International Criminal Law cuts through international humanitarian law and international human rights law in the sense that it provides for the prosecution of persons who are in serious or grave breaches of such laws to the extent that it falls within any of the crimes provided for in the Rome Statute. International criminal law, more often than not, deals with the commission of such crimes and the criminal responsibility. The crimes provided for in the Rome Statute include genocide, war crimes, crimes against humanity and more recently, the crime of aggression.[2] International Criminal Law therefore, is to the effect that the purpose of the prosecution of the commission of these crimes is to address violations of human rights and well known humanitarian principles. With regards to responsibility of these crimes, international criminal law provides for what is known as individual criminal responsibility, command responsibility and superior responsibility. There is a difference between all three of them and each of these play a role in the prosecution of particular persons for the commission of the crimes stated above. In relation to the study, there are several principles and customs that have contributed to the development of international criminal law and amongst these principles include, the Complementarity principle, the principle of Individual, superior and command responsibility, etc. The customs that have contributed to the development of international criminal law stem from both customary international humanitarian law (CIHL) and customary international human rights law (CIHRL). In some ways, these customs intermingle with the principles and as such it is complex differentiating the relevance of both in the development of international criminal law. This study however, will look at particular customs and principles both together and differently, to give a wider understanding of the development of international criminal law.

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[1] www.wikipedia.org/wiki/international-criminal-law/; www.peacepalacelibrary.nl/research-guides/international-criminal-law/

[2] Statute of the International Criminal Court, adopted in 1998 at Rome, Italy, Article 5, 6-8 and 8*bis*.

BACKGROUND OF THE STUDY

The development of international criminal law is more or less tied to the development of international humanitarian law and this is as a result of the fact that international criminal law is more of international humanitarian law than international human rights law. As stated earlier, different principles and customs have contributed to the development of international criminal law. The international committee of the red cross (ICRC) came up with a study that comprised of more than one hundred customary norms of international humanitarian law and these norms embody principles that guide the Courts in prosecuting various crimes. The development of international criminal law can be traced back to the period of the Second World War wherein the Nuremberg Tribunal was set up in 1945 to try war crimes and crimes against humanity committed under the Nazi regime. This is where the famous case of United States of America v The Wilhelm List[3] was tried. This case is well-known for establishing the individual responsibility principle vis a vis the superior and command responsibility. The Nuremberg Military Tribunal convicted several Nazi German warlords for the commission of crimes such as mass murder of thousands of civilians, torture, reprisal killings amongst others.

International criminal law has seen development from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The notable similarity between these Tribunals is the prosecution of perpetrators for the crime of genocide. The ICTY was created in 1993 to try persons who had committed various war crimes and crimes against humanity in the Yugoslav wars that was fought from 1991 to 1999.[4] The Tribunal is noted for the prosecution of Dusko Tadic,[5] one of the lead perpetrators, wherein this case established another principle known as the principle of overall control and gave a clear definition of an armed conflict. Relatively, The ICTR was created in 1994 to try perpetrators of war crimes, genocide and crimes against humanity in the Rwandan genocide that occurred in 1994 that left up to 1 million Rwandans, mostly Tutsi, dead.[6] The Tribunal was as well noted for the prosecution of Jean Paul Akayesu for the above crimes.[7]

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[3] US Military Tribunal at Nuremberg, Judgement of 27 October 1948; also known as the Hostages Trial, the High Command Trial and the Southeast Case.

[4] *Transitional Justice in the Former Yugoslavia*, ICJT. International Center for Transitional Justice, 1 January 2009.

[5] *Prosecutor v Dusko Tadic* Case No. IT-94-1.

[6] Organization of African Unity Inquiry into the Rwandan Genocide, Africa Recovery, Vol. 12 1#1 (August 1998), Pg. 4.

[7] *Prosecutor v Jean Paul Akayesu* Case No. ICTR-96-4-T.

In 2002, the Special Court for Sierra Leone was established to prosecute persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in Sierra Leone during the Sierra Leone Civil War. The most notable prosecution was that of Charles Ghankay Taylor[8] who was prosecuted for different crimes. He is serving 50 years in prison.

The International Criminal Court was then created as a permanent Court unlike the former, to try crimes provided for under the Rome Statute.[9] Accordingly, there are different customs, as stated, and principles that have contributed to the development of international law and as explained these customs and principles are more of international humanitarian law than international human rights law. This study therefore examines, analyzes and explains in details what those customs and principles are, how the Court puts them into practice in deciding cases before it, the impact of such customs and principles in the development of international criminal law as well as the adherence of states to these customs and principles.

RESEARCH QUESTIONS

The conduct of this study will answer the following questions;

- What are the roles of international Courts in adjudicting international criminal law?
- What are the differences between international humanitarian law and international human rights law in the context of the development of international criminal law?
- What are the different principles and customs contributing to the development of international criminal law?
- What are the challenges facing the development of international criminal law?
- Are there any development of new principles and customs in line with international criminal law?

STATEMENT OF THE PROBLEM

International Criminal Law is developing through various ways such as through decisions of the Interntional Criminal Court in different cases. However, the development of International Criminal Law with regards to its principles and customs is somewhat stagnant. The problem stems from the failure of certain states to become parties to the International Criminal Court thereby failing to cooperate with the jurisdiction of the International Criminal Court which in effect stagnates the

[8] *Prosecutor v Charles Ghankay Taylor* Case No. SCSL-03-1-T.

[9] Statute of the International Court of Justice, adopted in Rome on 17 July 1998 and entered into force on 1 July 2002.

growth of International Criminal Law. To that effect this study will answer why states have refused to cooperate with the Court.

OBJECTIVES OF THE STUDY

General Aims and Objectives

The general aim of this study is to understand, as already explained, the various customs and principles that have contributed to the development of international criminal law as well as giving a comprehensive analysis of these the practice of these customs as they relate to international humanitarian law as well as international human rights law because international criminal law not only seeks to prosecute perpetrators of violations of international humanitarian law but also seeks to prosecute perpetrators of human rights violations in the context of armed conflicts.

Specific Aims and Objectives

The specific aims and objectives of the study are as follows;

- Giving a comprehensive analysis of the concept of international criminal law and how it is similar to and different from international humanitarian law and international human rights law.
- Giving an understanding of the application of international criminal law with regards to armed conflict and peacetime.
- The study aims at analyzing the different relevant customs and principles that have contributed to the development of international law.
- Giving the roles of the International Criminal Court and the International Court of Justice in the application of the customs and principles.

SCOPE OF THE STUDY

This study will more or less look at the development of international criminal law as a whole beginning from the Nuremberg Trials till date. More so the scope of this study will not be limited to Uganda as the subject of this study says "international" and as such the study will extend to situations in other countries such as Rwanda, former Yugoslavia, Bosnia and Herzegovina, Democratic Republic of Congo, Sudan, amongst others. The study will extend into international humanitarian law and also to international human rights law because particular customs in these laws have influenced the growth of international criminal law. The Rome Statute in relation as well as the Geneva Conventions, their Additional Protocols, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, amongst others.

METHODOLOGY OF THE STUDY

This study will be made using the doctrinal method mostly which will include extracts from various reports, articles and papers on the subject. Libraries will be consulted including the IBML library in Kampala International University, Makerere University Library and other libraries of relevance to the subject. Information gotten from authentic internet sources will be used as well and also reference to different legislations both domestic and international, including case laws from Uganda courts as well as other relevant jurisdictions.

LITERATURE REVIEW

The Literature Review of this study comprises of selected literature, including the Rome Statute of the International Criminal Court, the Geneva Conventions of 1949, the Additional Protocols of 1977 and the ICRC Study on Customary International Humanitarian Law. Use of other relevant literature will be made during the conduct of the study.

Statute of the International Criminal Court

The Rome Statute of the International Criminal Court otherwise called the Rome Statute is a treaty that established the International Criminal Court.[10] There are 123 state parties to the Statute.[11] The history of the International Criminal Court is not really complicated. The challenges of establishing and dissolving ad-hoc criminal tribunals gave rise to the need to create a permanent Court handling matters specifically concerning international crimes with relevance to a combination of international humanitarian law and international human rights law, which is particularly what the Rome Statute came to do. The Statute gives clear stipulation of core international crimes which include genocide, war crimes, crimes against humanity and more recently, the crime of aggression. The Statute contains systematic provisions of what the International Criminal Court is all about, including provisions concerning jurisdiction, admissibility, principles of criminal law,[12] judges and prosecutors, investigation, prosecution and trial, appeal,[13] amongst others. The crimes specifically provided for by the Statute have elements that must be prove to prosecute a person for

[10] Adopted at a diplomatic conference in Rome on 17 July 1998 and entered into force on 1 July 2002.
[11] United Nations Treaty Database entry regarding the Rome Statute of the International Court of Justice. Retrieved 10 March 2010.
[12] Rome Statute, Article 5 – 33.
[13] *Ibid.* Article 34 – 85.

alleged commission of that crime and as such, failure to prove particular elements of the crime will result in acquittal of the accused.

The Rome Statute is comprehensive because most, if not all, of its provisions are focused on international criminal law. The Statute is to the effect that the commission of these crimes is a serious violation of both international humanitarian law and international human rights law which cannot go unpunished. Now with regards to the study, the Rome Statute is significant and important in the conduct of this study as it gives a guide on the different crimes as well as various principles of international criminal law. The Statute embodies customs of international criminal law, although these customs are not well spelled out. The ICRC study on customary international humanitarian law seems to embody most of these customs, however, most of them are with relevance to international humanitarian law and not international criminal law as a whole. Therefore, the conduct of this study is to the effect that it explains the particular customs in details and gives a comprehensive analysis on the contributions of such customs to the development of international criminal law. Whilst the Rome Statute is exhaustive on the principles, this is not the same, as already stated, for the customs. Relatively this study explains a combination of both the particular principles and customs.

Geneva Conventions and their Additional Protocols

The Geneva Conventions[14] and their Additional Protocols[15] are treaties that focus primarily on international humanitarian law. The International Committee of the Red Cross[16] is a body which is mandated to implement the adherence to principles and customs of international humanitarian law. The Conventions and the accompanying Additional Protocols are treaties that "contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting including civilian, medics, aid workers and those who can no longer fight such as the

[14] The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was first adopted in 1864, revised in 1906 and finally in 1949. The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was first adopted in 1949. The Third Geneva Convention relative to the Treatment of Prisoners of War was first adopted in 1929 and revised in 1949. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War was adopted also in 1949.

[15] The Additional Protocols, first, relating to the Protection of Victims of International Armed Conflicts, then relating to the Protection of Victims of Non-International Armed Conflicts and relating to the Adoption of Additional Distinctive Emblem were adopted on 8 June 1977.

[16] The International Committee of the Red Cross and Red Crescent movement was established in 1863 by Henri Dunant, amongst others.

wounded, sick and shipwrecked troops and prisoners of war."[17] The Convention and Additional Protocols are amongst others, particularly noted for provisions concerning their application such as in international and non-international armed conflicts. They therefore, somewhat give a definition of the meaning of international and non-international armed conflicts. Furthermore, the Conventions and Additional Protocols mostly make provisions for the protection of different kinds of persons in situations of war and armed conflicts. Another important aspect of these treaties is that they give a comprehensive distinction between combatants and civilians and what kind of protection they are entitled to. Accordingly, combatants are under the utmost duty to refrain from attacks against civilians and their property as well as cultural or religious objects and including refraining from attacks against the environment. The Conventions and Additional Protocols embody mostly customs of international criminal law because the Rome Statute makes it grave breaches of these treaties a crime and although most part of it is reminiscent of international humanitarian law principles, the same is for international human rights law because prohibiting the killing of civilians is an emphasis of the protection of the right to life. It is therefore imperative to state that the development of these treaties is as well the development of international criminal law in some respect. the difference, however, lies in the absence of principles contributory to the development of international humanitarian law. In fact, the provisions of the treaties are limited to implementation of international humanitarian law customs. Now, it should be understood that there is a difference between guiding principles of international humanitarian law and the same for international criminal law. The guiding principles in international humanitarian law mostly embody CIHL customary rules whilst the latter embody guiding principles in the prosecution of persons for commission of crimes under the Rome Statute. This is one of the significant differences between the treaties and the Rome Statute. As stated earlier, what this study seeks to do is to combine both treaties and other provisions of relevant laws to give a clear analysis of the study.

ICRC Customary International Humanitarian Law Study

The International Committee of the Red Cross was told to embark on a project to make a study of the customs of international humanitarian law after which it came up with a Study on Customary

[17] https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions/

International Humanitarian Law.[18] The study embodies more than a hundred customary rules that must be adhered to in situations of war and armed conflicts.[19] This study primarily focuses on the various customary norms that ought to be adhered to by states before, during and after engaging in war or armed conflict situations whether international or non-international. As already explained, in some cases, different humanitarian principles embody rules of customary international humanitarian law such that they are intertwined. This CIHL study provides for the principle of distinction as one of the most important customary norm. under that study, the principle embodies rules such as prohibition of indiscriminate attacks, proportionality of attacks, distinction between civilians and combatants as well as civilian objects and military objectives. In other words, the customary rules give a guide to both the Court and other interested organizations or individuals to assist in the understanding of what these customary rules entail. This study, in that regards, will give both the principles of international humanitarian law and those of international criminal law because both kinds of principles have contributed greatly, in addition to the customs, to the development of international criminal law.

CHAPTERIZATION OF THE STUDY

This study will have five chapters in the order of chapter 1, chapter 2, chapter 3, chapter 4 and chapter 5. Each chapter will look at different aspects of the study. The composition of these chapters is therefore as follows;

Chapter One

This chapter will basically deal with the introduction, background of the study, statement of the problem, scope of the study, methodology used to conduct the study, the aims and objectives of the study as well as the literature review and the last which is the chaptalization.

Chapter Two

APPLICATION OF INTERNATIONAL CRIMINAL LAW

This chapter will deal with the Application of International Criminal Law to the Development of International Humanitarian Law and International Human Rights Law

[18] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol. 1: Rules, International Committee of the Red Cross, Cambridge University Press, 2005.
[19] Specifically, 161 Rules in 44 Chapters and 6 Parts.

Chapter Three

PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

This chapter will deal with the analysis of the Principles of Legality, Equality, Non-discrimination, Impartiality, Impartiality and Sufficiency of Evidence in the Development of International Criminal Law, amongst others

Chapter Four

CUSTOMS AND NORMS OF INTERNATIONAL CRIMINAL LAW

This chapter will encompass the analysis of the Various Customs of International Criminal Law and these include the customs such as individual and command responsibility, amongst others.

Chapter Five

SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATIONS

This chapter will address the conclusions made based on findings from the study and will thereafter give recommendations to that effect. The recommendations will consist of that which should be done to ensure that the situation is improved to international levels or standards.

CHAPTER TWO

APPLICATION OF INTERNATIONAL CRIMINAL LAW

Introduction

International law is an extensive branch of public international law. Of course, it appears that international criminal law is only applicable in international humanitarian law situations. However, it does apply both in international human rights law as well as international humanitarian law. Whilst it is true that international humanitarian law is applicable in situations of armed conflicts and international human rights law is applicable mostly in peace time and in war also,[20] both of them can be applicable in armed conflicts situations and which is where international criminal law comes in to apply. Literally, international criminal law deals with the prosecution of international crimes such as crimes against humanity, war crimes, and others but in most cases, these crimes are just grave violations of fundamental human rights of a large number of people in a time of armed conflict.

There are different instruments that complement these laws. For instance, international humanitarian law is complemented by the four Geneva Conventions and their Additional Protocols[21] as well as the Hague Conventions,[22] amongst others while international law is complemented by the International Covenant on Civil and Political Rights,[23] International Covenant on Economic, Social and Cultural Rights[24] as well as the Universal Declaration on Human Rights[25] and other regional human rights instruments. Various principles and customs of international criminal law have been codified in these conventions. [26]

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[20] https://www.icrc.og/en/document/what-difference-between -ihl-and-human-rights-law/

[21] The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was first adopted in 1864, revised in 1906 and finally in 1949. The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was first adopted in 1949. The Third Geneva Convention relative to the Treatment of Prisoners of War was first adopted in 1929 and revised in 1949. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War was adopted also in 1949. The Additional Protocols, first, relating to the Protection of Victims of International Armed Conflicts, then relating to the Protection of Victims of Non-International Armed Conflicts and relating to the Adoption of Additional Distinctive Emblem were adopted on 8 June 1977.

[22] Hague Convention of 1899, adopted at the 1st Hague Conference in 24 August 1898 and Hague Convention of 1907

[23] International Covenant on Civil and Political Rights, adopted and opened for signature and ratification by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976.

[24] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature and ratification by the UN General Assembly on 16 December 1966 and entered into force 3 January 1976.

[25] Universal Declaration on Human Rights adopted and ratified by the UN General Assembly on 10 December 1948.

[26] M.C. Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT'L. 768 (1990), Pg. 777.

In the application of international criminal law, various concepts and factors come into play such as the jurisdiction of the International Criminal Court and how such can be invoked, the role of the United Nations Security Council in that regard, the kind of crime that has been committed and others. All these complement the development of certain principles of international criminal law. It is therefore imperative to state that the commission of international crimes has a bearing on the development of various principles of international criminal law.

In this regard, as already stated, this chapter will deal with the Application of International Criminal Law to the Development of International Humanitarian Law and International Human Rights Law with the various conventions, treaties and charters explained comprehensively.

Between International Humanitarian Law and International Human Rights Law

Armed conflict has been defined as the existence of armed violence between either armed forces of two or more states, armed forces of a state and a dissident armed force or between dissident armed forces.[27] In most cases, international humanitarian law is what applies in armed conflict situations.[28] It is important, however, to note that international humanitarian law embodies various human rights guarantees which must be enforced and protected by parties to such conflicts. In armed conflicts, the two different categories of people; combatants and civilians,[29] are protected both under international humanitarian law and international human rights law being applied in such situations.

International humanitarian law basically entails the observance of humanitarian principles in the conduct of war[30] whilst international human rights law entails the protection of fundamental human rights and freedoms at all times.[31] In peacetime, there is no distinction, everyone is entitled to the same kind of rights and is protected accordingly. However, in armed conflict situations, some rights can be deviated from, being applicable to a particular party. For instance, international humanitarian law clearly allows the targeting and killing of a combatant,[32] which is clearly a violation of the right to life but is justified by the surrounding circumstances. Therefore, it can be said that whilst it may be unlawful to infringe a right, the same may still be lawful.

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[27] *Prosecutor v Dusko Tadic* ICTY Case No. IT-94-1-1, 2 October 1995, Para. 70.

[28] https://www.abyssinialaw.com/about-us/item/948/-scope-of-application-of-international-humanitarian-law

[29] Centre for Security Studies (CSS) ETH Zurich, *The Growing Importance of Civilians in Armed Conflict*, Vol. 3. No. 45. December 2008, Pg. 1-2.

[30] *The Humanitarian Charter*, Page 16-19.

[31] *Ibid* Note 1; https://www.un.org/protect-human-rights

[32] Antoine A. Bouvier, *International Humanitarian Law and the Law of Armed Conflict*, Peace Operations Training Institute, 2012, Pg. 25.

As stated already, international criminal law prosecutes crimes which are more or less, grave violations of international human rights law in the context of an armed conflict situation. This is because principles and customs of international humanitarian law and different fundamental human rights and freedoms are intertwined, interconnected and interrelated. It can be stated, however, that the infringement or violation of a fundamental human right may not necessarily mean the violation of an international humanitarian law principle and as such, from an international human rights perspective, international criminal law will not be applicable in peacetime but will apply in times of armed conflict situations.

The applicability of international criminal law in armed conflict situations depend on which rules are to be adhered to by combatants. For instance, combatants must not target or kill a civilian who is not taking part in hostilities.[33] Where such combatant does so, international criminal law will be made applicable to him. The concept of international criminal law therefore seeks to prosecute and punish combatants who do not adhere to already established principles of international humanitarian law as well as international human rights law in an armed conflict situation. It should be understood that those who violate fundamental human rights in peacetime will be subjected to legal action in accordance with provisions of regional human rights treaties. And therefore such person will be required to make reparations to the person or group whose rights have been violated.[34]

The African Commission and Court, the European Court and the Inter-American Court are judicial bodies responsible for the application of international human rights law. In order to seek redress for the violation of a right, in an international Court such as the above, there are also certain requirements which must be fulfilled such as the exhaustion of local remedies, jurisdictional preconditions, amongst others.[35] Who can approach the Court is also another important question to be answered in order to access redress from the Court.[36] Normally, in international human rights law, individuals and NGOs are the ones who bring a case for a violation of a right to the Court. This is of course in addition to state parties and others.

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[33] *Infra* Note 42.

[34] Jared L. Watkins, *The Right to Reparations in International Human Rights law and the Case of Bahrain*, 34 Brook. J. Int'l L. (2009), Pg. 1.

[35] Protocol to the African Charter on Human and Peoples Rights Adopted in adopted on 10 June 1998 and entered into force on 25 January 2004. Article 5.

[36] *Ibid.* Article 34 (6).

Within the domestic legal system of any particular state, the infringement of a right may invite criminal sentences such as in cases of murder, which is a violation of the right to life, theft which is a violation of the right to property and others. However, in international law, criminal sentences are only usually applicable in international criminal law. Large scale violation of a human right can occur in peacetime but is usually when the violation is directed at a large group either intentionally or non-intentionally but either way international law as a whole seeks to protect not only victims of violations in armed conflict situations but also victims of violations in peace time.

International Humanitarian Law

The application of international criminal law is more expressed in international humanitarian law. International humanitarian law, as has already been defined above, deals with different customs, rules, laws, norms and principles which apply and must be adhered to in armed conflicts. International humanitarian law is not a new international law concept. It has a broad history but of course the notable advocate of adherence to international humanitarian law is known as Henri Dunant, a Swiss business man, who after witnessing the events surrounding the Battle of Solferino, idealized, in his write-up; A Memory of Solferino, that international humanitarian law must be codified and enforced to deal with the aftermath of war and conflicts. The effect of this brought about the first Geneva Convention. After a series of war and conflict in the world, three more Geneva Conventions were adopted.

Then in 1977, the Additional Protocols to the Geneva Conventions codifying various principles of international humanitarian law such as the principle of distinction, proportionality, necessity, the principle of humanity and others.[37] Additionally, international humanitarian law forbids the targeting and killing of persons *hors de combat*, that is, persons who are no longer participating in hostilities; those who have been injured or wounded or sick and can no longer fight.[38] Another rule of international humanitarian law which applies in armed conflict is the rule that methods or means of warfare that cause unnecessary or prolonged suffering must not be employed.[39] All these rules and principles is what contributes in the application of international criminal law.

In order to understand the application of international criminal law in international humanitarian law, the application of international humanitarian law must first be understood. It has already been

[37] *Infra* Note 35-42.
[38] *Infra.*
[39] *Infra.*

explained that international humanitarian law applies in armed conflict situations and such has been defined. However, the question is, what kind of armed conflict international humanitarian law apply to. Armed conflicts are generally of two categories; armed conflicts of international nature (IAC) and armed conflicts of non-international nature (NIAC).[40] An international armed conflict has been explained to include different situations. First, an armed conflict is of international nature where it is between two or more states. Secondly, an armed conflict exists where there is total or partial occupation of a state by the military of another state even when the occupation meets no resistance.[41] Thirdly, an armed conflict exists where there is a war of national liberation such as where people are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination.[42] International humanitarian law will, however, not apply to situations of internal disturbances and tensions. In such circumstances, either international or domestic human rights law is what will apply.

International humanitarian law has been explained to be more of *jus in bello* than *jus ad bellum.* But first, what do these phrases mean? *Jus ad bellum* and *jus in bello* are two different Latin terms. *Jus ad bellum* is what regulates the resort to armed force, in other words, it refers to the "principle of engaging in an armed conflict or resorting to war based on a precise cause."[43] *Jus in bello* on the other hand is explained to mean the principles or laws which govern how war should be fought.[44] The stated principles of proportionality and distinction are examples of these laws and principles which must be adhered to by those taking active part in the armed conflict. International humanitarian law, as explained, cares less about why the war is being fought and more of whether the parties to the war are fighting in adherence to set principles, norms, customs and laws.

The rules of international humanitarian law applicable in armed conflicts have mostly been codified in the four Geneva Conventions and their Additional Protocols. However, The Hague Conventions have also codified particular rules relating to the limitations and prohibitions of specific means and methods of warfare. The next sections discuss these two sets of Conventions

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[40] Antoine A. Bouvier, *International Humanitarian Law and the Law of Armed Conflict*, Peace Operations Training Institute, 2012, Pg. 24.

[41] *Ibid.*

[42] *Ibid.*

[43] Jennifer Allison, *Program on International Law and Armed Conflict*, March, 2018, https://guides.library.harvard.edu/

[44] https://www.icrc.org/en/war-and-law/ihl-other-legalregimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello/

in the development of the applicability of international criminal law to international humanitarian law in armed conflicts situations.

The Hague Conventions and Geneva Conventions

It is important to state that in the development of international humanitarian law, the Geneva and The Hague Conventions played fundamental roles. In the line of the history of the development of international humanitarian law, after the Declaration of St. Petersburg in 1868, The Hague Conventions came into existence in 1899. As already explained, the provisions of The Hague Conventions relate to the limitations and prohibitions that have been placed to reduce the effects of specific means and method of warfare. The Geneva Conventions mainly deal with or concern the protection of victims of international and non-international armed conflicts, including combatants and persons *hors de combat*. The Additional Protocols, as more of a mixture or combination of the two sets of Conventions, deal with the rules to be adhered to by combatants as well as the prisoner-of-war status they are given if captured by the opponent and the protection of relief workers as well as the protection of the natural environment from damage. Any deviation from these rules attract prosecution under international criminal law.

Additional Protocols

There are three Additional Protocols to the Geneva Conventions. The first relates to the Protection of Victims of International Armed Conflict, the second relates to the Protection of Victims of Non-International Armed Conflicts whilst the third Protocol relates to the Adoption of an Additional Distinctive Emblem. The first two Protocols are of paramount importance to international humanitarian law. The first Protocol includes most, if not all, of the principles and rules adhered to in an armed conflict. The Protocol makes provision for the protection of wounded, sick and shipwrecked and their entitlement to medical care and humane treatment.[45] It further goes ahead to prohibit physical mutilations, medical or scientific experiment except in accordance with the Protocol.[46] Additionally, the Protocol provides for the respect and protection of medical units including civilian medical units and as such it is prohibited to make them an object of attack.[47] The Protocol goes ahead to provide for the respect and protection of civilian medical and religious

[45] Protocol Additional to the Four Geneva Conventions relating to the Protection of Victims of International Armed Conflicts of 1977, Article 10.
[46] Article 11.
[47] Article 12.

personnel as well as the protection of civilian population and aid societies.[48] Medical aircrafts, ships, vehicles and equipment are also entitled to protection by both parties.[49] The dead are to be buried legally and respectfully.[50]

The next part of the Protocol deals with methods and means of warfare as well as combatants and prisoner-of-war status. The Protocol prohibits the usage of means and method of war which are capable of causing widespread and prolonged suffering as well as weapons which cause widespread, long term and severe damage to the environment.[51] The Protocol goes ahead to prohibit acts of perfidy as defined by it and goes further to prohibit ordering or threatening to order that there be no survivors.[52] Persons *hors de combat* are also entitled to respect, care and protection and shall not be made objects of attacks.[53] The Protocol then defines combatants as members of armed forces who take part in hostilities and provides for the entitlement to prisoner-of-war status if such combatant is captured having adhered to rule as to distinguishing himself as a combatant, from civilians and therefore, such prisoner-of-war will be entitled to protection in accordance with the provisions of the third Geneva Convention.[54]

The next part of the Protocol deals with the civilian (having been defined in accordance with the provisions of the Third Convention and the Protocol) population. Accordingly, the civilian population respected and protected and therefore, acts of violence, terror indiscriminate attacks as well as attacks by way of reprisals upon civilians and civilian objects are prohibited.[55] Additionally, cultural and religious objects must be respected and protected and therefore must not be made objects of attacks and in addition, the natural environment which is of paramount importance to the survival and existence of the civilian must be respected and protected and no attack must be leveled against or directed at it which is meant to cause long term, widespread or severe damage to it.[56] The Protocol then expounds on the principle of taking precautionary measures. It provides that precautionary measures must be taken to ensure and make sure that the civilian population, objects and the environment are cared for and spared.[57] Precaution must

[48] Article15 – 17.
[49] Article 21 – 24.
[50] Article 34.
[51] Article 35 (1) – (3).
[52] Article 37 and 40.
[53] Article 41.
[54] Article 44 and 45.
[55] Article 51.
[56] Article 52 – 55.
[57] Article 57 (1).

therefore be taken as to the choice of means and methods of attack to ensure that injury loss and damage to civilians and civilian object is minimized and in relation, the effects of an attack must be controlled to prevent further injury or loss of civilian life and object.[58] Additionally, non-defended localities and demilitarized zones must be protected and attacks must not be directed at them.[59] The Protocol also provided that civil defense organizations and personnel must also be respected and protected.[60] The Protocol then goes ahead to guarantee the protection of women, children, refugees and stateless persons, relief personnel and journalists.[61]

The second Protocol, as already stated, deals with the protection of victims of non-international armed conflict. The Protocol basically makes provision for the protection of persons not taking part in hostilities in a non-international armed conflict and guarantees humane treatment and prohibits violence to life, health and well-being of persons.[62] Therefore, torture and other cruel inhuman and degrading treatment and punishment are prohibited and additionally, acts of rape, sexual violence, slavery, pillage, terrorism, amongst others, are similarly and particularly prohibited.[63] Special care and protection are to be afforded to children; their rights must be protected and those below the age of eighteen years must not be recruited to participate in hostilities.[64] Persons whose liberty have been restricted are also entitled to care and protection and as such, their rights must be protected and they must be afforded the opportunity to exercise the rights available to them such as the right to humane treatment, right to practice their religion, right to health, and others.[65] Those found to have committed crimes must be afforded the right to fair hearing and the principle of legality must be respected.[66] The wounded, sick and shipwrecked must be cared for and protected as well as well as medical and religious personnel and medical units, equipment and transports must also be respected and protected and in addition, their distinctive

[58] Article 57 (2) – 58.
[59] Article 59 and 60.
[60] Article 62, 63, 64 and 67.
[61] Article 73, 75, 76, 77 and 79.
[62] Protocol Additional to the Four Geneva Conventions on the Protection of Victims of Non-International Armed Conflict, 1997, Article 4.
[63] *Ibid.* Article 4 (2), (a) – (h).
[64] Article 4 (3).
[65] Article 5, (1) (a) – (e).
[66] Article 6, (2) (a) – (d).

emblem must be respected.[67] Civil population and objects must also be protected as well as cultural and religious objects and lastly, civilians must not be displaced.[68]
The last Protocol is concerned with the Adoption of a Distinctive Emblem which must be respected and protected at all times and must not be misused.

Prosecution of Crimes under the Rome Statute

The Rome Statute establishes the International Criminal Court, "having jurisdiction over persons for the most serious crimes of international concern."[69] The International Criminal Court is vested with the jurisdiction to try specifically four crimes provided within the Statute. These crimes are; the crime of genocide, war crimes, crimes against humanity and the crime of aggression.[70] In the realm of international criminal law, as applicable to international humanitarian law, these crimes are prosecuted by the Office of the Prosecutor. As the Statute provides, these are crimes that are grave and of international concern to give the Court jurisdiction to try perpetrators of those crimes. As already explained, international criminal law is applied in such circumstances wherein the commission of these crimes are grave violations of international human rights law altogether. International criminal law therefore seeks to prosecute those who, either individually or by command or superiority, committed the crimes. The Rome Statute highlights various principles of international criminal law which are important in the prosecution of such crimes. These principles include the principle of legality, the principle of command and individual responsibility, the principle of non-retroactivity, amongst others, and are taken into account by the Court when trying a crime provided by the Statute. All the crimes provided for in the Statute have elements or requirements that must be proved by the Prosecutor to secure a conviction of the suspected perpetrator. Some crimes have few elements, others have quite many elements to be proved. And as a result of the rule that the accused is presumed innocent until proved guilty, the Prosecutor must make sure his duty is discharged fully. However, before a case is brought to the Court, there are also certain jurisdictional preconditions that must be met. The Statute provides for the prerequisites. These jurisdictional requirements include that; the crimes must have been committed

[67] Article 7-12.
[68] Part IV, Article 13-17.
[69] Statute of the International Criminal Court, done at Rome, Italy, 17 July 1998, in force I July 1992, Article 1.
[70] *Ibid.* Article 5.

after the entering into force of the Statute, that the State party has accepted the jurisdiction of the Court, that the State of which the person accused of the crime is a national,[71] amongst others.

The Prosecutor in order to initiate a case before the Court, may first initiate investigations on the crime within the jurisdiction of the Court and ought to analyze the seriousness of the information received but of course, where the Prosecutor chooses to initiate an investigation an authorization from the Pre-Trial Chamber of the Court must first be gotten.[72] Issues of admissibility is also taken into account by the Court and the Court has to make a ruling on admissibility of the case and on whether all jurisdictional preconditions have been met before proceeding to the merits of the trial. Where the investigations have been successfully initiated and conducted, the Prosecutor may apply and be issued a warrant of arrest after wh'ch the accused will be brought to Court and the charges confirmed then the trial proceeds. Of course the accused has a right to be represented by a defense counsel and the rights to a fair hearing must be accorded to him.

The crimes provided under the Statute are normally committed during armed conflict situations. Therefore, the genocide include acts such as; killing member, causing serious bodily or mental harm to members, deliberately inflicting conditions of life calculated at bringing physical destruction of members, imposing measures intended to prevent births of members and forcibly transferring children of members, of a national, ethnical, racial or religious group.[73] Crimes against humanity include acts when committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of such attack which includes; murder, extermination, enslavement, deportation or forcible population transfer, imprisonment or severe deprivation of liberty in violation of fundamental rules of international law, torture, rape and different forms of sexual violence provided, enforced disappearance of persons, crime of apartheid and others.[74] war crimes include grave breaches of the Four Geneva Conventions, serious violations of laws and customs applicable in an international armed conflict, serious violations of common Article 3 to the Four Geneva Conventions, both in international and non-international armed conflict and serious violations laws and customs applicable in armed conflicts of non-international character.[75] Lastly, the crime of aggression, which has recently been added, includes

[71] *Ibid.* Article 11-13.
[72] Article 15.
[73] Article 6.
[74] Article 7.
[75] Article 8.

acts provided under the Statute which revolve around military attacks directed at the territory of a State by another State, which constitutes a manifest violation of the United Nations Charter.[76]

The prosecution of these crimes is one of those which have greatly contributed to the development and applicability of international criminal law in the area of international humanitarian law. International criminal law, as already stated, similarly applies to international human rights law as a result of, *inter alia*, violations of fundamental human rights not particularly in peace time but in situations of armed conflicts be it of an international character or of non-international character.

International Human Rights Law

International human rights law is a significant branch of international law that cut across other disciplines of international law such as international humanitarian law, international refugee law, and others. International human rights law can be described as an international wide scale promotion, protection and preservation of fundamental human rights and freedoms of individuals, groups and others. International human rights law, further, deals with the duty and responsibility of state authorities in the protection of the human rights and fundamental freedoms of its citizens as well as duty to protect the rights of persons who are not citizens of that state. International human rights law and international refugee law are related as a result of the fact that refugees have rights guaranteed and afforded to them which must be protected by states. These refugee rights are provided for in the Refugee Convention. This study, however, will not be discussing refugee law as related to international human rights law.

Every person is entitled to the protection of his/her rights and there are various rights which must be protected notwithstanding the fact that there are rights which are absolute and as such cannot be derogated from and there are rights which may be limited, but still, any limitation placed must be done in accordance with the laws put in place. As explained earlier, international human rights law is evident in various international conventions, charters, treaties, declarations and others. These are the legal framework which guarantee and protect these rights. The International Court of Justice has recently been deciding cases of containing both violation of international human rights law and international criminal law,[77] although the Court is not vested with powers to try and convict an accused of international crimes.

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[76] Article 8*bis*.

[77] For example, the *Aerial Incident at Lockerbie Case (Libyan Arab Jamahiriya v USA)* 1992 ICJ Reports 114, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Yugoslavia) Case* 2008 ICJ Reports 118.

The Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights

The International Criminal Court is entitled to apply conventions, treaties, charters, declarations, etc., as sources of law in trying crimes committed under the Statute. These international instruments are the three well-known and important international instruments which provide for and guarantee the fundamental rights and freedoms of individuals. They are known collectively as the international bill of rights. The International Court of Justice has stated that the wrongful deprivation of human beings of their freedom and "subjecting them to physical constraint in condition of hardships is manifestly incompatible with the principles of the UN Charter, as well as the fundamental principles enshrined in the Universal Declaration of Human Rights."[78] Therefore, it is important to state that the provisions of the international instruments on the various rights have attained the status of customary international law and therefore even if there exists states that are not parties to the above international bill of rights, they are bound to respect, protect, preserve and uphold the human rights and fundamental freedoms stipulated and enshrined therein because these obligations are *erga omnes* in nature.[79] In relation, it has been explained that the ICCPR prohibits any derogation from certain rights stipulated therein.[80] They must be protected at all times. The ICESCR does not have any absolute or non-derogable rights under it, however, all of the rights provided therein must be protected. States therefore have the obligation to "ensure the satisfaction of the essential levels of the rights guaranteed thereunder."[81]

The African Court on Human and Peoples' Rights, the European Court of Human Rights as well as the Inter-American Court on Human Rights adjudicate cases based on the provisions of the conventions related to them, in relation to the protection, promotion and preservation of international and regional human rights law. And in so doing, international criminal law is applied.

Conclusion

International criminal law tries to ensure that both humanitarian principles and principles of international human rights law are guaranteed to a large extent. Whilst in some or most cases

[78] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US). Merits*, ICJ Reports, 1986, para. 99-100.
[79] ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain). Judgment of 5th February 1970*, ICJ Reports, 1970, para. 34.
[80] UN HUMAN RIGHTS COMMITTEE, *General Comment No. 29*, UN Doc. CCPR/C/21/Rev. 1/Add. 11, 2001.
[81] United Nations Office of the High Commissioner, *Core Human Rights in the two Covenants*, September 2013, Pg. 1.

international criminal law applies to armed conflict situations, it also applies to the protection of international human rights law. A critical understanding of international humanitarian law discloses that it in fact develops from international human rights law. This is because the various principles that are to be adhered to emanated from the observance of different rights such as the right to life, the right to freedom from torture, the right to a clean and healthy environment, the right to liberty and security of person, the right to fair hearing, the right to freedom slavery, servitude and other fundamental rights. Therefore, it is imperative to state that from this chapter, it is quite clear that international criminal law applies to both laws and additionally, the development of international criminal law is dependent also on the development of international humanitarian law and international human rights law.

CHAPTER THREE

PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

Introduction

International criminal law is comprehensively developed as a result of the development and application of certain principles relevant in the prosecution of international crimes. It should be noted that most of these principles are as well applicable in domestic criminal law. In most cases, these principles have been classified as customary international law because of its binding force, notwithstanding the fact it is not particularly coded in international instruments save the Rome Statute.

These principles have been applied in various international criminal cases having to do with the prosecution of perpetrators of international crimes as provided under the Rome Statute.[82] The preceding chapters to this study has given the historical background of international criminal law. It is understood that international criminal law owes its development to these principles.

The principles discussed in this chapter are more integrated in international criminal law as opposed to just international humanitarian law. These principles basically include the principle of legality, the principle of individual criminal responsibility, command and superior responsibility, the principle of equality, complementarity, impartiality, insufficiency of evidence, among others. It can be said that the principle of legality is one of the most important principles in international criminal law.

The Rome Statute particularly gives quite a comprehensive provision on the principle of legality,[83] otherwise known by the Latin phrase *nullum crimen sine lege* which more or less provides a fundamental defense to a criminal prosecution.[84] The principle of equality of arms and the principle of complementarity have also played fundamental roles in the development of international criminal law.

It is imperative to state that in discussing this chapter, references may be made to customs and norms of international law to give somewhat of a better understanding of these principles. It seems surprising that customs will also be looked at in the study, but that is because most, if not all, of these customs are first general principles before the gain the status of customary international

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[82] *Prosecutor v Thomas Lubanga Dyilo* ICC601/04601/06; *Prosecutor v Bosco Ntaganda* ICC601/04601/06

[83] Rome Statute of the International Criminal Court, Article 22.

[84] Ben Van Schaak, *The Principle of Legality in International Criminal Law* (2011), Santa Clara Law Digital Commons, October 2, 2011, Pg. 101.

criminal law after passing the determining test. The International Committee of the Red Cross has published a document on the various customary "principles" which exist in international humanitarian law. The relevance of this is that some of these customs embody the principles discussed in this chapter and as such reference may be made to it.

The purpose of this chapter, apparently, is to discuss these existing principles and how they have played an important role in the development of international criminal law as well as to discuss the actualities of these principles in the prosecution of international crimes and whether these principles are still relevant in the development of international criminal law.

The Principle of Legality in International Criminal Law

The principle of legality is one of the foremost principles of international criminal law. It originates from the Latin maxim '*nullum crimen sine lege*' which is literally understood to mean "no penalty without law". It explains that an individual cannot be punished for doing something that is not provided by law or that was not a crime at the time it was committed.[85] The understanding of this principle is to the effect that it prohibits ex post facto laws and retroactive application of the law. Additionally, the principle explains that there shall be no penalty for a crime without a written law to that effect. [86] The principle aims at preventing the prosecution and punishment of an individual for acts which he reasonably believed was lawful at the time of their commission.[87]

Furthermore, the principle explains that there can be no penalty without a well-defined law; a code or statute must therefore define the act or conduct which it considers punishable and such penalty for the crime must also be sufficiently definitive, all elements that constitute the crime ought also to be present in the said statute or code. The last part of this principle explains that there can be no penalty for a crime where there is no exact law.[88]

The understanding of this principle as is explained shows that there are four parts of it. As already explained, the comprehension of this principle, of which the retroactivity part of it is one of the most important, has a fundamental and quite solid foundation and stand in comparative criminal law, whilst being recognized fully in international criminal law. It is therefore the duty of the

[85] Rome Statute of the International Criminal Court, Article 22.
[86] *Ibid.*
[87] ICTY, *Celebici* Case.
[88] Boot, M. *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, Pg. 94. ISBN 9789050952163.

Prosecutor to ensure that the principle is followed because it would be a violation to indict a suspect for an offence or crime which was not existent and which has not been provided for by the Rome Statute.

Although, the principle has a strict bearing in international criminal law, there have been cases where the ex post facto part of it has been circumvented which has also been crucial in the development of international criminal law.[89] An example was the Nuremberg Trial,[90] where the Tribunal had prosecuted the accused for, *inter alia*, aggression even when at that time, aggression was not yet an offence codified under the Rome Statute, despite the defense's argument that the prosecution for aggression was a violation of the principle.[91] The United Nations Charter whilst recognizing the importance and essentiality of the principle of sovereignty, territorial integrity and political independence, does provide that it is prohibited for a State to attack another State in a manner which infringes state sovereignty. Of course this, either impliedly or expressly prohibits acts of aggression.

The issue is that at the time this was incorporated in the UN Charter, the intention was to make such a violation of international obligations in what is known as state responsibility. The State responsible for this was only required to pay compensation, not as punishment for committing an international crime but as punishment for violating international principle. This was seen in the DRC v Uganda case.[92] Only just recently was the crime of aggression introduced in the Rome Statute. As such, it would not have been right for Uganda to be prosecuted for aggression when the crime had not been included in the Statute. Uganda was ordered to pay reparations for the violation of DRC's sovereignty.

In generality, the principle tends to explain that a person who commits a crime that has not been provided for in the law cannot be held liable or prosecuted for it. The understanding of the International Criminal Court on this basis is slightly different. The Statute provides in this regard that the recognition of the principle shall not "affect the characterization of any conduct as criminal under international law independently of the provisions of the Statute."[93] This shows that in some

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[89] Mauro Catenacci, *Nullum Crimen Sine Lege, in the International Criminal Court, Comments on the Draft Statute* 159-170 (Flavia Lattanzi, ed., 1998).

[90] United State Military Tribunal at Nuremberg, Germany (*United States of America v the Wilhelm List*)

[91] Kai Ambos, Nuremberg Revisited. *Das Bundesverfassungsgericht, das Volkerstrfrecht und das Ruckwirkuungsverbot*, 17 Strafverteidiger 39-43 (1997).

[92] Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*)

[93] Rome Statute of the International Criminal Court, Article 22 (3).

circumstances, a person can still be held liable for a criminal action or conduct even though it is not provided under the Rome Statute or any other law. The Court can, as a result, only have jurisdiction when the crime is committed after the entering into force of the Statute.

There are additional circumstances where the principle has not been followed. The International Criminal Tribunals for Rwanda and the Former Yugoslavia and their Statutes were created after the crimes had been committed. Of course, in principle, the Tribunals would not have the jurisdiction to try the perpetrators based on the Principle, however they were still prosecuted by the application of already existing laws such as the Geneva Conventions and their Additional Protocols as well as any other relevant law. The varying application of the principle only reveals how broadly it has affected the development of international criminal law stemming from the principles of international humanitarian law as well.

Principle of Individual Criminal Responsibility

The Rome Statute provides for individual responsibility. It states in generality that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with the provisions of the Statute."[94] The principle of individual responsibility has played a fundamental role in the development of international criminal law and this is because of the fact that a person cannot be prosecuted when he/she is not criminally responsible for the crime committed and this is also based on the presumption of innocence; a person can only be liable when it has been proved by the prosecution that he/she is responsible for the crimes committed as provided under the law.

The provisions of the Statute elaborate on the principle of individual criminal responsibility and as such, a person can only be criminally responsible for a crime when he/she actually commits the crime, orders or induces the commission of the crime or aids, abets the facilitation of the commission of the crime and in addition, the responsibility has to come with the intention to commit such crimes.[95] Relatively, it is important to state that this principle is both similar to and different from the command responsibility.

The principle of individual criminal responsibility has been developed over time. The Nuremberg Principles provided, relatively, that a person who commits a crime in international law is

[94] Rome Statute of the International Criminal Court, Article 25 (2).
[95] Article 25 (3) (a)-(d).

responsible and shall be liable to punishment.[96] Similar provisions exist in the Genocide Convention,[97] the Geneva Conventions[98] and the ICTY Statute.[99] The responsibility is on the basis that actions are perpetrated by existing individuals and not abstract entities.

Command responsibility explains that the commander or a similar superior is criminally responsible for the conduct of the troops. In some ways command responsibility has been seen to be part of and included in individual responsibility.[100] The difference here is that the commander is not liable because he ordered the commission of the crime or induced it, he is liable because he is expected to be in control and in charge of whatever move is made by his troops and as such he is presumed to be aware of the troops conduct and actions.

The similarity between this and the principle of individual criminal responsibility is that more often than not, the commander is the one who orders his troops to act or conduct themselves in a manner which is constituent of the commission of a crime provided for within the Rome Statute. In other words, the commander knowingly orders or induces the commission of the crimes by his troops. In this event, the commander will not only be criminally liable under command responsibility but will be individually responsible because his actions fit the requirements of individual criminal responsibility provided under the Statute.

The Statute explains that the responsibility of a person (in other words, individual responsibility) who commits crimes provided under the Statute comes in three ways; as an individual when the crimes are committed personally, as a co-perpetrator when the crime is committed in co-perpetration or cooperation with another person and where the crime is committed through another person.

When these are looked at, responsibility is then attributed to the individual he solicits the commission of the crime, where he conspires to commit the crime or where he attempts to commit the crime, where he incites the commission of a crime such as an incitement of the crime of genocide.[101] Incitement of the crime of genocide was the only incitement meant to be included within the provisions of the Statute, thereby indicating that incitement was not recognized in other

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[96] Principles Recognized by the Charter to the International Military Tribunal at Nuremberg and its Judgment, adopted in 1950, Principle I.

[97] Genocide Convention, adopted in 1948, Article 4.

[98] Geneva Conventions, adopted in 1949, Article 129 GCIII.

[99] Statute of the International Criminal Tribunal at Yugoslavia, adopted in 1994, Article 1.

[100] Kai Ambos, *Individual Criminal Responsibility in International Criminal Law*, in Substantive and Procedural Aspects of International Criminal LAW (G.K. McDonald, O. Swaak Goldman, eds., 1999)

[101] Article 25 (3) (e).

crimes. The incitement of the commission of genocide in Rwanda through the use of mass media is a justification of this.[102] On the contrary however, it will be in line with the purpose if incitement to commit any other offence was also included as a determining factor for the attributability of individual responsibility on a person who commits any crime provided under the stipulations of the Rome Statute.

Additionally, where there is the existence of aiding and abetting the commission of crime, such must be direct and substantial, meaning that there must be significant contribution to the commission of the crime provided under the Statute.[103] The broad application of the principle of individual criminal responsibility for the commission of crimes provided in accordance with the Statute has been particularly fundamental to and important in the development of international criminal law, since it is a determining factor as to whether the person indicted for the commission of a crime is actually responsible for the commission of such crime.

The Principle of Command and Superior Responsibility

The principle of command and superior responsibility is a principle that has played a fundamental role in the development of international criminal law. The Rome Statute effectively provides for this kind of responsibility stating that a military commander or a superior shall be responsible for crimes committed by the troops under his effective command and control where he knew or ought to have known about the commission of the crimes and failed to take necessary steps to prevent its commission.[104] In addition, the superior will be responsible where the crimes concerned were within the effective responsibility and control of the superior.[105]

The responsibility of commanders and superiors emanate from the duty that has been imposed upon them by and in accordance with the provisions of the law. To elaborate more on this, the Additional Protocol 1 to the Geneva Conventions provide that military commanders, with respect to members of the armed forces, have the duty "to prevent and, where necessary, to suppress and

[102] Report to the International Law Commission on the work of its Forty-Eight Session, June 5-Augist 26, 1996. The cases of *Prosecutor v Jean Paul Akayesu* (Case No. ICTR 96-4-T), Judgment, Sept 2, 1998, paras. 672-675 and *Prosecutor v Kambanda* (Case No. ICTR 97=23-S), Judgment and Sentence, Sept 4, 1998, para. 40, discusses the importance of incitement in relation to genocide.

[103] *Prosecutor v Dusko Tadic* (Case No. IT-94-1-T), Opinion and Judgment, May 7, 1997, paras. 674, 688-692. ICTY.

[104] Rome Statute of the International Criminal Court, Article 28 (a) and (b) (i) and (iii).

[105] *Ibid.* Article 28 (b) (ii).

to report to competent authorities breaches and violations of the provisions of the Conventions and of the Protocol,"[106] as well as any other law such as the Rome Statute.

The Protocol then provides in addition that a party to the conflict who violates the provisions of the Conventions or of the Protocol shall be liable to pay compensation and additionally, it shall be responsible for all acts committed by persons forming part of its armed forces.[107]

In some respect this extends the responsibility of commanders to include other members of the armed forces responsible for breaches of the Convention. This results in a contention with regards to the command responsibility of civilians, otherwise known as superiors.[108] Also, it is evident that whilst the Rome Statute differentiated between military commanders and superiors, the Protocol does not particularly make such distinction but rather treats military commanders and superiors equally.

In the discussions preceding the creation of the Rome Statute, it was understood that whilst military commanders are responsible under the recognized standard, for knowledge or negligence, civilian superiors were to only be held responsible or liable for knowledge but not negligence but it was later changed to include "conscious disregard of information indicating that the subordinates were committing or about to commit crimes".[109]

Therefore where a commander or a superior plans the commission of a crime and does not prevent its commission, he/she will be held liable as held by the ICTY wherein *Karadzic* and *Mladic* were deemed responsible for planning to commit the crime of genocide and for their failure to prevent the commission of that and other crimes as commanders.[110] All the cases that have been handled by international criminal tribunals and courts have only prosecuted perpetrators who are either liable under individual criminal responsibility or under command or superior responsibility.

The international instruments and legislations that contribute to the development of international criminal law more or less provide for these responsibilities and without the existence and proof of existence of these in an international criminal prosecution, no conviction and sentencing can be secured. Therefore, it is safe as well as important to state that the development of international

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[106] Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts, adopted in 8 June 1977, Article 87 and 88.

[107] *Ibid.* Article 91.

[108] *Prosecutor v Jean Paul Akayesu*, *supra* note 17, para, 487-91.

[109] Rome Statute of the International Criminal Court, Article 28 (b) (i).

[110] *Prosecutor v Karadzic and Mladic* (Case Nos. IT-95-5-R/IT-95-18-R 61), Review of Indictment Pursuant to Rule 61, July 11, 1996, paras. 84, 94.

criminal law is dependent on command and superior responsibility as well as individual criminal responsibility.

Principle of Complementarity

The principle of complementarity is yet another fundamental principle that has contributed to the development of international criminal law. Both the Preamble and Article 1 of the Rome Statute of the International Criminal Court reflect in their wordings that the International Criminal Court shall be complementary to national criminal jurisdictions.[111] According to Roy S. Lee, the complementarity principle explains that "the Court will complement, but not supersede, national jurisdiction. National courts will continue to have priority in the investigation and the prosecution of crimes committed within their territory and jurisdiction, but the International Criminal Court will act when such national courts are 'unwilling or unable' to investigate and prosecute the perpetrators."[112] This principle therefore explains that States will have priority to handle cases within their jurisdiction before the International Criminal Court.

An individual will not be prosecuted in the International Criminal Court for a crime or an offence that that already been dealt with under the national court system. This is what is known as "*ne bis in idem*" otherwise known as the principle of double jeopardy, that a person shall not be subjected to be punished twice for the same offence.[113] The principle is applicable to both multiple prosecutions and to multiple punishment for the same offence. The complementarity principle has its "basis on both respect for the primary jurisdictional entitlement of a State and on considerations of effectiveness and efficiency as a result of the fact that the states will have more and easier access to evidence, resources and witnesses to carry out the proceedings, reducing cost and improving convenience."[114]

The workings of the principle revolve around Articles 17-19 of the Rome Statute. The basis is that a case may be declared inadmissible before the International Criminal Court and as such will not

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[111] The Preamble states that "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions..." Article 1 states similarly that the Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute and shall be complementary to criminal jurisdictions of national States."

[112] Roy S. Lee, *Introduction, in The International Criminal Court" The Making of the Rome Statute: Issues, Negotiations, Results* 27 (Roy S. Lee ed., Kluwer Law International 2d ed. 2002) (1999).

[113] See the International Covenant on Civil and Political Rights, Article 14 (7), G.A. Res. 2200A (XXI); Rome Statute of the International Criminal Court, Article 20.

[114] Xabier Agirre, Antonio Cassese and Others, *The Principle of Complementarity in Practice*, Informal Expert Paper, ICC-OTP 2003, Page 3.

have the jurisdiction to try the said case again.[115] Prosecuting a case before the Court can only be carried out where the State in question lacks the willingness and ability to try it within its national criminal laws as provided for under the Rome Statute.[116] The identification of unwillingness and inability indicates that there is a guaranteed international and permanent jurisdiction operating effectively, legitimately and efficiently to try the offences or crimes that have been committed.[117] The Court must first assess the relevant national proceedings to be satisfied that the case was successfully handled by the national courts following the required elements such as compliance with principles of due process recognized by international law,[118] review of due diligence carried out,[119] examination and analysis of the independence and impartiality displayed in carrying out the proceedings,[120] among others.

The *ne bis in idem* principle works in three perspectives. Firstly, the International Criminal Court cannot prosecute a person who has been prosecuted in a national court. Secondly, the state cannot prosecute a person within its national courts when that person has already been prosecuted before the International Criminal Court and lastly, the International Criminal Court cannot prosecute a person when that person has already been prosecuted by the International Criminal Court. By these, the Court's ability to try a particular case of a crime committed under the provisions of the Rome Statute will be limited only to those that have not been previously tried. There have been particular cases where the principle has been considered.

In the *Thomas Lubanga Dyilo Case*,[121] the Democratic Republic of the Congo (DRC) had previously initiated proceedings against Lubanga. The court in DRC had issued a warrant of arrest and authorized preventive detention for genocide, crimes against humanity, murder, illegal detention and torture. The proceedings did not go further than that and as such Lubanga could not plead *ne bis in idem*. The Pre-Trial Chamber had viewed the conduct of the charges in DRC

[115] Rome Statute of the International Criminal Court, Article 17 (1) - (3).
[116] *Ibid.*
[117] Michael Reed H., *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach*, Advocats Sans Frontieres, Canada, Page 8.
[118] Rome Statute, Article 17 (2).
[119] *Id.* Article 17 (2) (b).
[120] *Id.* Article 17 (2) (c).
[121] *Prosecutor v Thomas Lubanga Dyilo, supra* note 1, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006.

different from those under the International Criminal Court and because the DRC had referred the case to the ICC itself, there was no need of assessment of similarity of the prosecution.[122]

Another similar case was the *Mathieu Ngudjolo Chui Case*[123] who had been prosecuted in DRC for a charge of murder of an individual in Bunia. When he first appeared before the International Criminal Court he pleaded that he had already been tried and acquitted for the same conduct on the basis of which he was charged before the ICC. The defense was given the option to file a motion challenging admissibility based on *ne bis in idem.* The Pre-Trial Chamber had held that the charge on which he was acquitted was based also on different conduct than that he was charged with before the ICC.

The provisions of the Statutes of the ICTY and the ICTR have a rather restricted application of the principle. The provisions stipulate that generally a person who has been tried before a national court for acts constituting violations of international humanitarian law under the Statute shall not be tried before the tribunal.[124] However, the exception given by the Statute is to the effect that a person who has been tried by a national court may be subsequently tried before the Tribunal if the act committed was characterized as an ordinary crime in addition to the provision that the proceedings before the national courts were not impartial and or independent.[125] The understanding of these Statutes is that a Tribunal would have the jurisdiction to try or prosecute a case even after the adjudication by a national court if such national prosecution was in fact for an ordinary crime such that if a person is prosecuted for murder in the domestic courts, he can be prosecuted under the same circumstances and conduct but instead for the larger international crime of genocide.

International criminal law has developed extensively from the adherence of the principle of complementarity otherwise understood as *ne bis in idem* notwithstanding that it has been given different interpretations and different applications, all depending on the particular facts and circumstances of the case that has been brought before the International Criminal Court for crimes committed as provided in accordance with the Rome Statute of the International Criminal Court.

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[122] Michael A. Newton, *The Complementarity Conundrum: Are we Watching Evolution or Evisceration*? 8 Santa Clara J. Int'l L. 115, 120 (2010), at 155.

[123] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-262, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui 18 (July 6, 2007).

[124] Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res 827 (May 25, 1993, Article 10; Statute of the International Criminal Tribunal fo· the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, etc., Article 9. S.C. Res 955 (Nov. 8, 1994).

[125] *ibid.*

Principle of Equality and Non-discrimination; Impartiality and Independence

The Principles of Equality and Non-Discrimination have been considered and have contributed greatly to the development of international criminal law. The Rome Statute effectively does provide for these principles. According to the Statute, "the application and interpretation of law pursuant to the article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[126]

The understanding of this principle is not complicated. It reaffirms the fundamental human right of equality before the law and freedom from any form of discrimination. Similar provisions such as this is contained in various international criminal tribunal Statutes, including the ICTR, ICTY and the Special Court for Sierra Leone (SCSL).[127] These provisions were similarly reiterated in the ICTY.[128]

The Principles of Independence and Impartially can also be categorized under this heading. The principle of impartiality entails that in making and reviewing decisions, prosecutors and judges should not exercise bias in favor of or against any party or group.[129] Therefore, in making decisions, there should the observance of impartial, in other words , no favoritism should be made in that respect. The principle of independence dictates that prosecutor and judges ought to be independent in making decisions and in performing their functions.[130] In other words, these officers should not take direction from outside persons or entities with regard to selection of defendants and charges and specifically, the judges should not be influenced by any person, group or body shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.[131] This was reaffirmed in the ICTY case of *Prosecutor v Milosevic.*[132]

Principle of Sufficiency of Evidence

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[126] Rome Statute, Article 21 (3).
[127] ICTR Statute, Article 20 (1) and (4); ICTY Statute, Article 21 (1) and (4), SCSL Statute, Article 17 (1) and (4).
[128] *Prosecutor v Delalic et al.*, IT-96-21-A, A. Ch., ICTY, 20 February 2001, para. 611.
[129] Rome Statute, Article 67 (1).
[130] *Ibid.* Article 40 (1).
[131] Article 40 (2).
[132] *Prosecutor v Milosevic*, Case No. IT-02-54, T. Ch., ICTY, 8 November, 2001, para 15.

The Principle of Sufficiency of Evidence entails that the Prosecutor should not bring charges for a crime before the Court unless there is sufficient evidence of guilt. This is with regards to initiation of investigation into and the prosecution of crimes as provided under the Rome Statute.[133] There must therefore be reasonable belief and sufficient evidence to proceed with the prosecution of a case before the International Criminal Court and this principle stems from the rule that the accused is innocent until proven guilty and that 'he who alleges must prove'. Therefore, it is important for the Prosecutor to prove by way of sufficient evidence that the accused committed and is guilty of committing the offence or crimes alleged by the Prosecutor against him, in accordance with the provisions of the Rome Statute.

A particular instance of this is the *Uhuru Kenyatta Case*, where the Prosecutor initiated proceedings against Uhuru Kenyatta, the president of Kenya, and others for the commission of international crimes during the 2007 Post Election Violence in Kenya. The Prosecutor had to terminate the case as a result of the fact that there was not enough evidence to proceed with the prosecution and trial of Uhuru Kenyatta and others.[134] Similar instances have occurred where prosecution has not been conducted for alleged crimes as a result of the fact that there has not been sufficient evidence to bring such case to be tried before the Court.[135]

Conclusion

The principles that have been discussed in this chapter are the principles that particularly play a fundamental and very important role in the development of international criminal law. In summary, these principles include; the principle of legality which explains that a person cannot be punished for an act that did not constitute a crime at the time it was committed, and is divided into four parts that have been explained together with the particular offences that where recently included in the Statute; the principle of individual criminal responsibility entails that the court has jurisdiction only over natural persons and that a person who commits a crime individually or through another person or aids and abets the commission of the crime, etc., will be held individually responsible.

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[133] Rome Statute, Article 53.

[134] *Prosecutor v Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11-2005, Trial Chamber V(b) Decision on the Withdrawal of Charges Against Mr. Kenyatta, 13 March 2015.

[135] For instance, the current ICC Chief Prosecutor, Fatou Bensouda was advised that war crimes were committed on the Mavi Marmara ship in 2010, where 8 unarmed Turks and a Turkish American were killed and several others injured by Israeli commandos, but the Prosecutor, Fatou Bensouda ruled that the case was not serious enough and had no sufficient evidence to merit and International Criminal Court probe.

The principle of command and superior responsibility, having been discussed to be a little part of individual responsibility but somewhat different because a commander or superior is responsible only for the actions of the troops consisting of crimes of which he knew or ought to have known and did not stop its commission; the principle of complementarity which discusses that the Court's jurisdiction to try perpetrators of crimes is complementary to the State to try such crimes under it national criminal law such that the Court will only have jurisdiction where the State is unwilling or unable to try such crimes.

The principle of equality and non-discrimination which explains that prosecutors and judges must perform their duties taking into consideration the principle of equality before the law and non-discrimination of any person; the princ,ple of independence and impartiality which similarly explains that the prosecutors and judges should perform their functions and duties with independence and impartiality and without influence from any person, group, or body; and the principle of sufficiency of evidence which entails that for a case to be tried and prosecuted before the International Criminal Court, there must be reasonable belief and sufficient evidence to proceed with the prosecution. The International Criminal Court has more or less been successful in the administration of justice as a result of adherence to the various principles discussed above, so that it will be possible for new principles to also come into existence so as to contribute to the development of International Criminal Law.

CHAPTER FOUR

CUSTOMS AND NORMS OF INTERNATIONAL CRIMINAL LAW

Introduction

In the development of international criminal law, international humanitarian law has played the biggest role in that major customs of international humanitarian law have been incorporated into international criminal law providing a comprehensive look into the elements of international criminal law. The Rome Statute provided for crimes which are as a result of international humanitarian law. Most international criminal cases were prosecuted because the offenders had committed either genocide, war crimes and crimes against humanity. These crimes are more or less identified as grave violations of principles, customs and norms of international criminal law.[136] There are different customs of international criminal law stemming from international humanitarian law which include the custom of distinction in armed conflicts, specific protection of persons and objects in armed conflicts, treatment of civilians and persons *hors de combat*, as well as the customs concerning universal jurisdiction to prosecute war crimes and crimes against humanity, obligation to prosecute such crimes as well as international cooperation during the prosecution of the crimes. These customs are closely related to particular principles of international criminal law and as already stated, it is the violation of these customs that create international crimes, of which the International Criminal Court has to prosecute to ensure justice is served and to also improve upon the jurisprudence of the Court as well as the development of international criminal law.

The custom concerning distinction in armed conflicts basically explain that in hostilities, at all times combatants must be distinguished from civilians, attacks must never be directed at civilians and civilian objects or properties.[137] Therefore, a combatant conduct his/herself in a manner that is easily distinguished from a civilian. Indiscriminate attacks must not be made,[138] and precautions must be taken in attacks[139] in order to prevent loss of civilian lives and property.

The second custom indicates that there are specific persons and objects that must be protected in armed conflicts. These persons include medical personnel, religious personnel, journalists,

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[136] Rome Statute of the International Criminal Court, Article 8.

[137] Additional Protocol 1, Article 48, 51 (2) as well as 52 (2). Israel, Military Court at Ramallah, *Kassem Case*, Para. 271. The Israeli Military Court in this case recognized the immunity of civilians from direct attacks as one of the basic norms and customs of international humanitarian law.

[138] Additional Protocol 1, Article 51 (4).

[139] Hague Convention (IX), adopted in 1907, Article 2 (3).

humanitarian relief personnel as well as peace keeping personnel. Objects associated with them must be protected and as such, no attack must be leveled against them. Zones such as hospital, safety, demilitarized zones, cultural and religious property as well as the natural environment must be protected.

Thirdly, there is the custom effectively providing for the treatment of civilians and persons *hors de combat.* The conditions in order to be c'assified as a person *hors de combat* must be first fulfilled and when this has been done, such persons must be humanely treated and protected in accordance with the fundamental guarantees afforded to them. Finally, and more importantly, there is the custom of prosecution of international crimes. The custom surrounding the prosecution of crimes include that there is a universal jurisdiction over war crimes, the obligation upon the state to prosecute such crimes and international cooperation in criminal proceedings of the alleged perpetrators of these crimes. The study will therefore discuss these customs in detail and how they have contributed to the development of international criminal law.

Distinction in Armed Conflicts

The custom dealing with distinction in armed conflict is quite comprehensive. It explains simply that in an armed conflict situation, there must at all times be a distinction between combatants and civilians. In other words, at all times, attacks must only be directed at combatants and military objectives and must never be directed at civilians nor civilian objects.[140] Civilians have been defined in by previous international criminal tribunals as "persons who are not, or no longer members of the armed forces."[141] The understanding of this custom is that in any armed conflicts or hostilities, certain attacks which will not be capable of distinguishing between military objectives and civilian objectives are strictly prohibited.[142] The crime of "intentionally directing attacks against a civilian population and individual civilians not directly taking part in hostilities" is particularly provided under the Rome Statute[143] as a codification of the custom in line with the dictates and understanding of international criminal law.

This custom is usually known as a principle of international humanitarian law which is correct. But the workings of this principle has shown is customary status.[144] This custom has been

[140] Rome Statute, Article 8
[141] ICTY, *Prosecutor v Blaskic*, Judgment of 2000, Para. 751.
[142] Infra.
[143] Rome Statute of the International Criminal Court, Article 8 (2) (b) (i).
[144] *Advisory Opinion on the Threat or Use of Nuclear Weapons*, ICJ Reports, Para. 434.

particularly important in the development of international criminal law because it has been the basis for the conventional formulation of most international crimes provided under the Rome Statute.[145] The custom is applicable in both international and non-international armed conflicts.[146] The principle of distinction is apparent in different situations and circumstances. These are particularly provided for under the recent Additional Protocols, The Hague Conventions, the Rome Statute, amongst others. [147]

The study particularly concentrates on the Statute as well as the Additional Protocols but references in other to expound on the contribution to the development of international criminal law, will be made to other applicable international instrument. The principle/custom of distinction was first clearly stipulated that "the only legitimate object States should endeavor to accomplish during an armed conflict is to weaken the military forces of the enemy."[148] The explanation of this is to the effect that in an armed conflict situation, armed attacks should only be leveled at the enemy in order to defeat its military force but not to destroy both combatant and civilians.

Additionally, the development of this custom intimates that in an armed conflict situation,[149] precautions must be taken by the parties to the conflict to ascertain that before launching an attack, the parties should know the status of the number of civilians and must take precaution not to launch any attack that will be destructive to civilians. Also, the parties to the conflict must take all feasible precaution to protect civilian population and civilian objects under their control against side-effects of an attack.[150] It has been long understood that places which are not defended and are particularly inhabited by civilians such as towns and villages must never be attacked.[151] More so, the custom prohibits acts or threats of violence which are aimed at spreading terror upon civilian population. Previous tribunals that existed before the International Criminal Court have particularly prosecuted perpetrators of such attacks, showing the intensity and importance of this prohibition.[152]

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[145] Rome Statute of the International Criminal Court, Article 8 (2) (b).
[146] *Ibid.* Note 7.
[147] Including Protocol II to the Convention on Certain Convention Weapons, Article 3 (2) as well as the Ottawa Convention banning Anti-Personnel Landmines, Preamble.
[148] St. Petersburg Declaration, Preamble.
[149] ICTY, *Prosecutor v Kupreskic,* Judgment.
[150] Additional Protocol I, Article 58 (c).
[151] Hague Regulations, Article 25.
[152] ICTY, *Prosecutor v Stanislav Galic,* Case No. IT-98-29-T, Judgment and Opinion, 5 December 2003. Here, the Trial Chamber found the accused guilty of acts of violence the primary purpose of which was to spread terror among the civilian population. It was found to be a violation of the laws and customs of war under Article 3 of the Statute of the ICTY.

In accordance with this principle of distinction, civilians may only be subjected to attacks when they participate in hostilities. As such, they will lose their protection against attack when and for such time as they directly participate in hostilities.[153] The prohibition on directing attacks against civilians and civilian objects have been codified. It is in fact a war crime under the Rome Statute to direct attacks against civilian objects that are apparently not military objectives.[154] Where there is a doubt as to whether an object is civilian or military in nature, the presumption shall be that it is civilian in nature.[155] Civilian objects may only therefore be attacked where they are being used as military objectives. As such, objects which are specifically civilian in nature will lose their protection where they are being used as military purposes or for military action. Military objectives include "objectives which by their nature, location, purpose or use make an effective contribution to the military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at that time, offers a definite military advantage."[156] Such is a cardinal custom and principle of international humanitarian law which must not be violated.[157]

Another important aspect of this custom/principle which has been mentioned previously is the prohibition of indiscriminate attacks. International criminal law, stemming international humanitarian law, stipulates (as provided under the Additional Protocols) that indiscriminate attacks are "such attacks which are not directed at a specific military objective; which employ a means or method of combat not directed at a specific military objective; which also employ a means/method of combat effects of which cannot be limited; and as a result, are of a nature to attack both military objectives and civilian objects without any distinction."[158]

The principle of proportionality is another principle/custom which is closely related to the principles of distinction and proportionality. As a norm and custom of international humanitarian and criminal law,[159] the principle explains that it is prohibited to launch an attack which will result in incidental loss of lives and property, which would be excessive as compared to the direct military advantage anticipated and expected.[160] Any such conduct is a violation of international

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[153] Additional Protocol 1, Article 51 (3); *Case Concerning the Events at La Tablada*, IACHR Case 11.137; Additional Protocol II, Article 13 (3).
[154] Rome Statute, Article 8 (2) (b) (ii).
[155] Additional Protocol I, Article 52 (3).
[156] Additional Protocol I, Article 52 (2).
[157] *Ibid. Nuclear Weapons Case.*
[158] Additional Protocol I, Article 51 (4); See also; *Prosecutor v Martic,* Review of Indictment, 1996.
[159] Argentina, National Appeals Court, *Military Junta Case*, of 1985; ICTY, *Prosecutor v Martic,* Review of Indictment; ICTY, *Prosecutor v Kupreskic,* Judgment.
[160] Additional Protocol I, Article 51 (5) (b).

humanitarian law and international criminal law, of which the Rome Statute codifies as a war crime.[161] The military advantage is understood to mean the advantage anticipated from a military attack as a whole and not isolated or particular aspects of attacks.

All these different principles are what categorically and wholly make up the principle of distinction in all armed conflict situations. These are manifestly customs of international criminal law which have been and continue to be relevant in the development of international criminal law before the International Criminal Court.

Specifically Protected Persons and Objects in Armed Conflicts

In the development of international criminal law, it is understood that various laws, customs and norms of warfare and international humanitarian law are important and fundamental. It is a basic custom of this international humanitarian law manifest in international criminal law that there are particular, specific persons and objects, aside from ordinary civilian population and objects, which must be protected in armed conflicts. Attacks must at no time be levelled at and against them. These include medical and religious personnel and objects, humanitarian relief personnel and objects as well as journalists, cultural property and the likes. The custom evident is that in all armed conflict, whether of international or non-international character, these specific persons are entitled to special protection from attack.

The first category of protected persons and objects are medical and religious personnel and objects. The understanding is that medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances, except where they commit acts which are harmful to the enemy, in which case they will lose their protection. Similarly, religious personnel are actively assigned to religious duties must be respected and protected at all times and will lose their protection in a similar way as medical personnel.[162] It is therefore a war crime, under the Rome Statute to intentionally attack such persons.[163] The definition of such medical personnel has been stipulated under the Additional Protocol to the Geneva Convention.[164] The definition of religious personnel has also been expounded by the Protocol.[165] Medical personnel may include both from the military/armed forces or from the civilians as is with religious personnel.

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[161] Rome Statute, Article 8 (2) (b) (iv).
[162] Geneva Convention II, Article 36.
[163] Rome Statute, Article 8 (2) (b) (xxiv); Article 8 (2) (e) (ii); Additional Protocol II, Article 9 (1).
[164] Additional Protocol I, Article 8 (c).
[165] *Ibid.* Article 8 (d).

Medical personnel from NGOs such as Medecins Sans Frontiers (MSF) are also entitled to special protection as long as they are assigned and perform medical duties in relation to the conflict at hand and they must never take part in hostilities. They are additionally entitled to carry light weapons for defense and protection, in so far as it does not deprive them of their protected status.[166] Religious personnel are similarly allowed to do the same. The custom goes ahead to explain that medical units such as hospitals and places where the wounded and sick are collected and cared for, which have been assigned for particular medical purposes must be respected and protected,[167] of which such medical units may be military or civilian in nature and classification as explained under the Protocol to the Geneva Convention.[168] Attacks against medical units as well as medical transport (including medical aircrafts, ambulances, medical ships, etc.,) therefore constitute a war crime under the provisions of the Rome Statute.[169]

The next category of persons and objects protected under the custom/ principle are humanitarian relief personnel and objects, they must all times and circumstances be respected and protected.[170] Special protection has been afforded to specific humanitarian personnel and their objects.[171] Therefore, as a rule of customary international law, attacks must in no means be levelled against them both in international and non-international armed conflict situations. As is understood, protection afforded humanitarian relief personnel is to both civilian and military humanitarian personnel. Mistreatment, violence, torture harassment and other human right violations are prohibited. Objects such as vehicles, units, installations and others belonging to such personnel are protected as well as respected and must not be attacked.

It is additionally prohibited to attack other personnel and objects involved in peacekeeping missions because they are entitled to the protection afforded to civilian and civilian objects under international humanitarian law. Violations of these give rise to international crime as provided under the Rome Statute.[172] Taking hostage persons belonging to peacekeeping missions have been decided as a violations which have been prosecuted.[173] This protection is similarly afforded to

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[166] Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols*, ICRC, Geneva, 1987.
[167] 1899 and 1907 Hague Regulations, Article 27.
[168] Additional Protocol I, Article 12.
[169] Rome Statute, Article 8 (2) (b) (ix).
[170] Additional Protocol I, Article 71 (2).
[171] Convention on the Safety of United Nations Personnel, Article 7 (2).
[172] Rome Statute, Article 8 (2) (b) (iii) and (e) (iii).
[173] ICTY, *Prosecutor v Karadzic and Mladic*, First Indictment.

journalist and as such when engaging in professional missions in areas of armed conflict, they must be respected and protected. Objects such as those dedicated to culture are afforded protection as a rule and norm of customary international humanitarian law manifest in international criminal law[174] and therefore, it is a crime to seize and cause destruction of such objects.[175] More importantly, the natural environment is entitled to protection and as such no part of the natural environment must be attacked except it is a military objective and also destruction of the natural environment is prohibited.[176] There is therefore an obligation to take all feasible precautions to avoid or minimize damage to the environment in order to protect and sustain its existence.[177]

Treatment of Civilians and Persons *hors de combat* in Armed Conflict Situations

Treatment of civilians and persons *hors de combat*[178] is a very fundamental custom in international humanitarian and criminal law. The custom stipulates that in armed conflict situations, civilians must be treated with respect and must be protected at all times. Civilians and persons *hors de combat* must be treated humanely.[179] This requirement is similarly protected in international human rights law as well and as such in international law, every person deprived of liberty must be treated with dignity and humanity and other rights applicable to them at all times.[180] It is therefore prohibited to impose adverse distinction, connoting discrimination, in the application of international humanitarian law based on race, color, sex, religion, etc. No distinction should at any time be made among the wounded, shipwrecked, injured on any grounds. They must be protected against any form of violation of their human rights. Outrages on personal dignity and other inhumane practices have been considered grave breaches.[181] Murdering(including willful killing and violence to life and person) civilians, persons *hors de combat* as well as prisoners of war is

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[174] Hague Convention for the Protection of Cultural Property, Article 4 and 19; ICTY, *Prosecutor v Tadic,* Interlocutory Appeal.

[175] France, Permanent Military Tribunal at Metz, *Lingenfelder Case*, Judgment of 1947; United States, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) Case*, Judgment of 1948.

[176] Guideline on the Protection of the Environment in Times of Armed Conflict, Paras. 8-9; ICJ, *Advisory Opinion on the Threat or Use of Nuclear Weapons,* ICJ Reports, 1996.

[177] World Charter for Nature, Principle 20; ICJ, *Nuclear Tests Case (Request for an Examination of the Situation)*, Order, 1995

[178] Persons *hors de combat* is understood to mean those who are no longer participating in hostilities because of sickness, injury and others.

[179] Additional Protocol I, Article 75 (1), Additional Protocol II, Article 4 (1); Geneva Conventions, Common Article 3; Hague Regulations, Article 4, Second Paragraph.

[180] UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights).

[181] Additional Protocol I, Article 85 (4) (c).

also prohibited.[182] This is evident in international human rights law as it prohibits arbitrary deprivation of the right to life of any person.[183] This goes with the prohibition of all indiscriminate attacks, attacks against civilian population and any other attack which is intended to and actually causes death to the civilian population or individual civilians.

Additionally, all forms of torture and other cruel, inhuman or degrading treatment of civilians and persons *hors de combat* is prohibited.[184] Also, corporal punishment which is a form of torture is prohibited as a fundamental guarantee for civilians and persons *hors de combat.*[185] As a contribution to the development of international criminal law, the custom encompasses the prohibition of mutilation, medical or scientific experiments or any other medical procedure which is not consistent with generally accepted medical standards and this is because of the fact that these experiments expose the victim and severely endangers the physical, medical, psychological health as well as integrity of such person concerned and as a result, this can be interpreted to be a form of exposure to torture and other cruel, inhuman or degrading treatment and punishment.

Civilians and persons *hors de combat* are entitled to special protection from rape and other forms of sexual violence.[186] They are also protected from all forms of slavery and the slave trade. These acts are prohibited in international criminal law manifested in provisions of the Rome Statute and other international humanitarian law instruments[187] including the prohibition of other acts of forced labour. The protection of civilians and persons *hors de combat*, as a custom of international criminal law, is extended to the prohibition of taking hostages.[188] Enforced disappearance of civilians or persons *hors de combat* is prohibited as is arbitrary deprivation of liberty of such protected persons. The protection of such persons is also guaranteed under international human rights law.[189] Civilians and prisoners of war as well as persons *hors de combat* are entitled to the

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[182] Additional Protocol I, Article 75 (2); ICTY, *Prosecutor v Dusko Tadic,* Interlocutory Appeal Second Amended Indictment and Judgment; ICTY, *Prosecutor v Delalic*, Judgment; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA),* Merits, Judgment of 1986.

[183] International Covenant on Civil and Political Rights, Article 6 (1).

[184] Rome Statute, Article 8 (2) (c) (i); ICTY, *Prosecutor v Mrksic,* Initial Judgment, ICTY, *Prosecutor v Tadic,* Second Amended Indictment and Judgment; see also, Military Tribunal at Nuremberg, *Wilhelm List (Hostages Trial) Case,* Case No. 47 (1948) 11 TWC 757.

[185] European Court of Human Rights, *A. v United Kingdom*, (1998) 2 F.L.R. 959 (ECHR), 23 September 1998.

[186] Rome Statute of the International Criminal Court, Article 8 (2) (b) (xxii) and (e) (vi).

[187] Rome Statute of the International Criminal Court, Article 7 (1) (c); Additional Protocol II, Article 4 (2) (f).

[188] ICTY, *Prosecutor v Blaskic,* Judgment of 2000; ICTY, *Prosecutor v Kordic and Cerkez,* Judgment of 2001.

[189] International Covenant on Civil and Political Rights, Article 9 (1); Convention on the Rights of the Child, Article 37 (b); American Convention on Human Rights, Article 7 (3); African Charter on Human and Peoples' Rights, Article 6.

right to a fair trial and must be accorded all stipulated judicial guarantees[190] before an independent and impartial Court or tribunal. Additionally, the right to religion of civilians must be respected and protected. Their religions and religious practices and convictions are respected under international humanitarian as well as international human rights law.[191] Forcing persons to act against their religious belief is therefore prohibited.[192] Civilians and all persons *hors de combat* must therefore be protected, treated with respect and dignity at all times, as a norm and important custom of international humanitarian law and international criminal law.

Prosecution of War Crimes including Universal Jurisdiction, Obligation to Prosecute and International Cooperation in Criminal Proceedings

The parties to any armed conflict situation have the utmost duty to comply with and adhere to principles, rules, norms and customs of international humanitarian law and must respect similar customs associated with the development of international criminal law.[193] The obligation to respect IHL as well as IHRL and ICL by States is part of the general duty and responsibility imposed upon States to respect and adhere to overall international law. Both the armed forces of a State party and other dissident armed groups are required to respect IHL. They must be advised on the relevant rules and principles of international humanitarian and criminal law to at least, encourage respect and adherence to it. Such humanitarian rules, customs and norms ought also to be taught within the educational system of a State party to promote awareness of what international criminal law in the aspect of war crimes, crimes against humanity, genocide, etc., entails.

The prohibition of encouragement of violation of international law also lies as a responsibility of States in any armed conflict situations. The relevant international instruments must therefore be respected and adhered to, as well as protected by the parties to the conflicts.[194] As such, where State parties violate customs of international humanitarian law evident in international criminal

[190] Additional Protocol I, Article 85 (4) (e); Rome Statute, Article 8 (2) (a) (vi) and (c) (iv).
[191] Hague Regulations, Article 46; Additional Protocol, Article 75 (1); Additional Protocol II, Article 4 (1).
[192] Knut Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, Commentary on Article 8 (2) (b) (xxi) of the ICC Statute, Page 315.
[193] Additional Protocol I, Article 1 (1).
[194] Geneva Conventions, Common Article 1; Additional Protocol 1, Article 1 (1) and Article 89. Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, Page 18. See also ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, Merits, Judgment of 1986. See also, ICTY, *Prosecutor v Anto Furundzija*, Judgment of 1998 and *Prosecutor v Zoran Kupreskic*, Judgment of 2000, where it was explained that the norms and customs of international humanitarian law are *erga omnes* and therefore all States had a legal interest in their observance and consequently a legal entitlement to demand their respect.

law, they will be held responsible[195] and will be required as a norm of international law to pay reparations to the victims of such violations.[196] Such reparations may include restitution, compensation, satisfaction, among others.

As has been discussed in the previous chapter of this study, concerning principles that contributed to the development of international criminal law, the principle of individual and command/superior responsibility was discussed. It is imperative to note that this principle is also a custom and norm of international criminal law[197] which is deeply rooted and similarly important in the prosecution of perpetrators of violations of other norms and customs of international law, both in international armed conflicts and non-international armed conflict situations. International criminal law comes in to ensure that perpetrators are held individually criminally responsible and punished for serious violations of customs and norms of international humanitarian law in what is stipulated as war crimes, crimes against humanity and others. The prosecution of such perpetrators have seen an increase in the development of international criminal law. In the prosecution of these crimes, the customs of international criminal law are that States have the right to vest universal jurisdiction in their national courts over such crimes because of the fact that these crimes are of universal concern. They have the mandate to investigate war crimes allegedly committed by members of their armed forces and where possible, prosecute the perpetrators.[198]

It is therefore required under international criminal law that States must make every effort to cooperate, to the extent possible, with each other in order to facilitate investigation of international crimes and prosecution of the suspects. Internationally, it is known that the United Nations Security Council has been active in pleading with States to cooperate with the international criminal court on the prosecution of suspects of international crimes as is provided under the Rome Statute. However, it has been alleged that the UNSC's mandate of state cooperation with the ICC is mostly with regards to African leaders and situations of armed conflicts in Africa and that the ICC seems only to be targeting such leaders[199] and this has caused some tension between Africa

[195] International Law Commission, *Articles on State Responsibility,* adopted in 2001, Article 4.

[196] PCIJ, *Chorzow Factory Case,* Merits, Judgment of 1928, where the Court explained that it is a principle of international law that any breach of an engagement involves an obligation to make reparations to the victims.

[197] Additional Protocol I, Article 85; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Article 4 as well as Rome Statute of the International Criminal Court, Article 5 and 25.

[198] See the Preamble to the Rome Statute of the International Criminal Court.

[199] Mehari Taddele Maru, *The International Criminal Court and African Leaders: Deterrence and Generational Shift of Attitude,* ISPI Analysis No. 247, May 2014.

and the ICC, with African countries threatening to leave the Court. The cooperation with the ICC as a widely established custom of international criminal law cannot be overstressed which is why it is important for not only African countries but for countries that are not parties to the Court such as the United States to cooperate with the Court.

Conclusion

The chapter has given a comprehensive discussion and explanation about the various important customs that have contributed to the development of international criminal law. From the chapter, it is understood that international criminal law is mostly as a result of international humanitarian law. Any violation of rules of international law will result in an international crime stipulated. The chapter discussed particular customs such as distinction, protection of special persons and objects, treatment of civilians and persons *hors de combat* as well as the prosecution of perpetrators of the crimes. The understanding of this chapter is that even the prosecution of international crimes is in itself a custom that has contributed to the development of international criminal law. These customs coupled with the various principles continue to improve the status and applicability of international criminal law. Every subject of international law therefore has the responsibility to protect, respect and adhere to the customs of international criminal law. More so, there must be State cooperation with relevant Court because where there is no cooperation, there would be difficulties in prosecuting persons who have committed grave breaches of international humanitarian law. The adherence to the various customs of international law is what improves the development of international criminal law.

CHAPTER FIVE

SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATIONS

Summary of the Study

The study has particularly focused on giving an analysis of the customs and general principles applicable in the development of international criminal law. The study has particular talked about the application of these principles and customs in both international humanitarian law and international human rights law. The study has then gone ahead to discuss the different principles of international criminal law including the principles of legality, individual, command and superior responsibility, equality, non-discrimination, impartiality, among others. These principles are very fundamental to the development of international criminal law because they are tied to the prosecution of international crimes provided under the Rome Statute. These principles have helped various Courts, both international and domestic to adjudicate cases in a manner that justice is not only done but seen to be done as well.

This study is important because the difference between principles and customs need to be understood but together, where applicable, and different as well and has also given the close relationship that is existent between international humanitarian law and international human rights law. The next chapter then discussed the customs and norms applicable, though mostly in international humanitarian law, but as well in international criminal law giving an analysis of the different kinds of protection and respect afforded to different categories of persons including civilians, civilian objects, relief personnel and objects, peacekeeping personnel and object, among others. The custom/principle of distinction applicable in armed conflict situations was also discussed as well as the treatment of special persons and prosecution of crimes in international criminal law.

The understanding apparent in this study is that although principles and customs are really similar in nature, aspects of applicability are different. The study has stressed that most principles that have been discussed are only applicable in the main prosecution of international crimes whilst the customs and norms are applicable to what takes place in armed conflict situations. This means that the adherence of most customs come before the adherence of the principles and also that principles such as individual, command or superior responsibility are applicable concurrently. This shows the different points in time that the development of international criminal law has taken place.

And lastly, the study has tried to discuss the development of international criminal law, not only using the jurisprudence of the international criminal court but the jurisprudence of the international criminal tribunal for the former Yugoslavia, the international criminal tribunal for Rwanda and the Nuremberg tribunal as well because these various judicial bodies have jurisprudence relevant to the development of international criminal law.

Findings of the Study

The conduct of the study has revealed particular findings which are of relevance to the current activities surrounding international criminal law. They include the following below;

- There are more customs than principles applicable in international criminal law

It has been found that the principles of international criminal law are limited mostly to the prosecution and trial of international crimes but the customs are applicable in all circumstances of international criminal law, making it visible and apparent that there are more customs applicable, and even when the applicable instruments are analyzed, it reveals the same.

- There is a wide and developed jurisprudence on most of the principles and relevant customs

The conduct of the study found out that the occurrence of armed conflict situations both of international or non-international character have led to a number of prosecutions which has in turn resulted in a lot of decisions on various principles and customs which has widened the development of jurisprudence of the relevant principles and customs.

- The Courts and tribunals have played a very fundamental role in the interpretation and application of international criminal law

It is revealed that the Courts, such as the ICC and criminal tribunals such as the ICTY and ICTR have played a very important role in the interpretation and application of principles and customs of international law. For instance, the ICTY gave the popular case of *Prosecutor v Dusko Tadic* which expounded on the meaning and application of what amounts to armed conflict and overall control. The ICTR gave the case of *Prosecutor v Jean Paul Akayesu* that touched on the different aspects concerning genocide, individual and command responsibility, among others. The ICC is famous for cases such as *Prosecutor v Bosco Ntaganda* and *Prosecutor v Bemba* which expounded on other customs and principles of international criminal law. The Nuremburg Tribunal developed the Nuremburg principles, a huge development in international criminal law.

- Most international instruments concerned with international humanitarian and criminal law are basically codified customary practices

It was found that the principles and customary practices were developed through the various occurrences in international humanitarian and criminal law which have mostly been codified under international instruments such as the Additional Protocols, the Rome Statute and other applicable conventions.

- Customs and principles of international criminal law are mostly applicable and more developed in international armed conflict situations than in non-international armed conflict situations

It was lastly found that more of the customs and principles that contributed to the development of international criminal law apply to international armed conflicts, looking at the way the Additional Protocols were drafted and taking into consideration that international armed conflicts are somewhat broader than non-international armed conflicts.

General Conclusion

The general conclusion of this study is that the various principles and customs of international criminal law are fundamental to the administration of justice for the conduct of international crimes. The study has explained the customs and principles both visible conventionally and applicable in practice to give a comprehensive explanation of its implementation, application and enforcement. There continues to be development with regards to international criminal law even as the jurisprudence of these principles and customs continue to improve. The various principles, norms and customs should therefore be adhered to and respected by the parties to it fully and continuously to on the commission of international crimes such as the crime of genocide, war crimes and crimes against humanity as well as aggression. There should be commitment to the respect of the various principles and customs to reduce on the adverse effects of armed conflict situations and to improve on global peace and security.

Specific Recommendations

Specific recommendations have been outlined below which should be taken into consideration and implemented;

- Improved development of principles and customs of international criminal law to non-international armed conflict situations

There is need to improve on the development of principles and customs of international criminal law to apply in non-international armed conflict in a more significant way as a result of the current increase in non-international armed conflict situations.

- Improved cooperation between African heads of state and the ICC, through dialogue basis

In order to reduce the tensions between African heads of state and the International Criminal Court, there needs to be a dialogue between the two sides in order to improve relations and cause the African states to cooperate. There is need to resolve allegations that the ICC is targeting Africa and the UN Security Council should not interfere.

- Countries such as the United States should ratify the Rome Statute and become party to the Court

The United States was chiefly involved in the prosecution of German war criminals at the Nuremburg Military tribunal, which developed the Nuremberg principles. But it has refused to become a party to the ICC, considerably as a result of the fact that it has been involved in violations of international humanitarian law. One of the allegations is that the US, being a permanent member of the UNSC has targeted African leaders as well. In order to promote the respect and adherence of international humanitarian law, the US and other allies need to become parties to the Court also.

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