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A Reconsideration of the Sources of the Law of Crimes Against Humanity

Amade Roberts Amana, PhD,
Associate Professor of Law, Faculty of Education and Legal Studies,
Kampala International University in Tanzania, Dar es Salaam, Tanzania
Email: a.amana@kiut.ac.tz

Abstract:
The Rome Statute describes 'crime against humanity' as certain enumerated acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Any crime against humanity constitutes a violation of the human rights of the victim. The jurisprudence of crimes against humanity was substantially developed by international criminal tribunals. This article examines the sources of the law of crimes against humanity from the perspectives of treaties, customs; general principles of law, judicial decisions and expert literature. A stylized application of the provision is necessary to adapt it to international criminal law.

Keywords: Crimes against humanity, international law, sources, Statute of the International Criminal Court,

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1. INTRODUCTION

Penalties are imposed by international law only for crimes identified by its formal sources. A formal source of law is law-creating.[1] Sources of international law are thought of, as the materials and processes from where the precepts of international law come. However, Roscoe Pound points out the ambiguity in the phrase "sources of law" citing multiple interpretations: (i) the sovereign as the fountain of law; (ii) the authoritative texts which serve as the basis of the juristic and doctrinal evolution of a legal system, for example, authoritative reports in the common law system; (iii) the raw materials, including statutes, from which judges derive grounds for deciding disputes before them; (iv) the formulating agencies through which regulations take form in a way that legislation and the decisions of judges may give them the force of law; and (v) the literary symbols by which law is expressed.[2]

Formal sources are those supported by the rule of recognition within the legal system, that is, the criteria for ascertaining what the law is.[3] Formal sources of law are often contrasted with material sources which only identify where the law is to be found.[4] Gealfow has said that material sources explain the rationale for enacting law a specific subject, while formal sources express the normative rules, for example, legislation, treaties, and legal custom.[5] On the other hand, Malcom Shaw posits that exponents of the distinction between formal and material sources of law believe that formal sources confer upon rules their bindingness, while material sources consist of the actual content of the rules.[6]

According to Brownlie, formal sources are those methods for the creation of rules of general application which are legally binding, while material sources provide evidence of the existence of rules which, when established, are binding and of general application. However, Brownlie cautions that as no machinery exists for the creation of international law, the term 'formal source' is misleading in international relations. In consequence, 'formal sources' hardly exist in international law.[7] The distinction between formal and material sources, and the constituents of each class is debatable.

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1 M Dixon, *Textbook on International Law*, (6th edn, Oxford University Press, 2005) p.25.
2 Roscoe Pound (1946), Sources and Forms of Law. Vol. 21. No. 4. Notre Dame Law Review, p. 248.
3 R K Gardiner, *International Law*, (Pearson Longman, 2003) p.25.
4 R M M Wallace, *International Law* (5th edn, London: Sweet and Maxwell, 2005) p.8.
5 John A. Gealfow (2018) Case Law and its Binding Effect in the System of Formal Sources of Law. Juridiskā zinātne / Law, No. 11, 39-40.
6 Malcom N. Shaw (2008), International law, 6th edition, Cambridge University Press, p. 71.
7 James Crawford and Ian Brownlie (2019), *Brownlie's principles of public international law*. Oxford University Press, USA.

Forms of law also appear in the literature. As stated by E. H. Ketcham, attempts in the realm of law to objectively define and clarify relationships between individuals, individuals and things, and between the governed and those in authority are done through forms of law.[8] Many terms have been used to describe the division of law into legal specialties. Forms of law correspond to fields of law, types of law or branches of law such as criminal law, administrative law, international humanitarian law, international human rights law, and so on. The sources of law for these branches may be analyzed in the context of formal or material sources of law. As already pointed out, one worrying thing about classifications in the sources of law, or forms of law is the notorious lack of consistency. Despite this, it is essential to analyze the sources of international law, and specifically crimes against humanity, so that attention would not be directed at the wrong sources of law of crimes against humanity.

Or as Parry eloquently counseled some decades ago: 'if attention be directed to the wrong sources, it is impossible to discover what international law is, or what is perhaps more important, what is not international law'.[9] It is important to know the procedural and substantive constituents of law, especially where they impinge on validity. During the 20th century, new branches of international law, like International Human Rights Law, and International Criminal Law, emerged which do not sit easily on the orthodox state-centric view of international law. Unlike international law's traditional narrative, these emerging departments deal with the rights and duties of individuals or non-State actors.[10] Oji is of the view that 'international law lays down principles, rules and standards that govern nations and other participants in international affairs in their relations with one another'.[11]

It is wrong to assume that the Statute of the International Criminal Court (ICC) is the only source of International Criminal Law, because the rules of the Statute are applicable to only the ICC.[12] Every criminal tribunal must apply the rules defined by its Charter. Article 38 of the Statute of the International Court of Justice (ICJ) is taken as articulating the general sources of international law:

1. The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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8 E. H. Ketcham (1930). Sources and Forms of Law. *The International Journal of Ethics*, *40*(3), 363-371.

9 C Parry, *The Sources and Evidences of International Law*, (Manchester University Press, 1965) p.7.

10 C. Schreuer (2000), 'Sources of International Law: Scope and Application' No. 28. Emirates Centre for Strategic Studies and Research. < http://www.univie.ac.at/int law / .../59_ sources.pd... > accessed 3 December 2023.

11 Oji, E. A. 'Application of Customary International Law in Nigerian Courts' [2011] *Nigerian Institute of Advanced Legal Studies Journal of Law and Development*, (1) (1): 151

12 A Cassese, International Criminal Law (2nd edn, Oxford University Press 2008) p.14.

(a) International Conventions whether general or particular, establishing rules expressly recognized by the contesting states;
(b) International custom, as evidence of a general practice accepted as law;
(c) The general principles of law recognized by civilized nations;
(d) Subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.

A stylized application of Article 38 is necessary for crimes because the ICJ does not exercise criminal jurisdiction. Thormundsson has pointed out that there is a good deal of reason to assume that the sources purporting to constitute international law according to the introductory provision of Article 38 also apply, though not directly, to criminal cases as minimum standards required for international criminal liability.[13] The exhaustiveness of Article 38 of the ICJ Statute as a formal source of international law has not gone unchallenged. On one side of the divide are those who assert that Article 38 does not allow the consideration of other potential law-creating processes such as natural law, moral postulates or the doctrines of international law.[14]

The opposite view, states that they are not all-inclusive.[15] Sir Jennings for instance, questioned the exhaustiveness of Article 38 as a sufficient guide to the content of modern international law, and proposed other sources like the results of treaty negotiation conferences, and the decisions and recommendations of international organizations.[16] Furthermore, the normative characterization of *jus cogens, obligatio erga omnes,* and soft-law principles, describe a minimum standard of acceptable behavior from which no State may derogate.[17] The sources of law in Article 38 are not listed in a hierarchy but represent the order which the court may observe. A treaty opposed to customary law or *jus cogens* would be void, and a treaty may be interpreted with reference to general principles of law.[18] Paragraphs (a)-(c) are regarded as the more authoritative sources of international law, while paragraph (d) identifies some of the law determining agencies. These sources of law are treated one after the other.

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13 J Thormundsson, J. 'The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law' Stockholm Institute for Scandinavian Law' (1957) <http://www.scandinavian law.se/pdf/39-17.pdf> accessed 4 December 2022

14 M T Ladan, *Materials and Cases on Public International Law* (Ahmadu Bello University Press Ltd, 2007) p.11.

15 U O Umozurike, *Introduction to International Law* (3rd edn, Spectrum Books Limited, 2005) p.15.

16 Jennings, R. Y. 'What is International Law and How Do We Tell It When We See It?' [1981] *Schweitzerisches Jahebuch fur Internationales Recht*, 59.

17 Hollis, D. B. 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law' [2005] (23) (1) *Berkeley Journal of International Law*; 142.

18 I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003) p. 5.

2. TREATIES

A treaty is an all-purpose term for all agreements binding at international law, concluded between international entities, notwithstanding their formal appellation. Of course, Article 38 (1) (a) does not mention the term treaty, but refers to international conventions. Article 2 (1) (a) of the 1969 Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. A treaty may supplement, modify or override obligations derived from customary law. As such, where a treaty and a custom converge upon the same subject matter, the latter is tributary to the former.

In the *Wimbledon Case,* the PCIJ held that Article 380 of the Peace Treaty of Versailles 1919, which obliged Germany to keep the Kiel Canal open to vessels belonging to States at peace with her, superseded her neutral right under customary law to prevent the transportation of ammunitions to Poland, then at war with Russia.[19] Unlike international customary law, treaties are inflexible since they were legislated to regulate specific matters of concern to the parties.[20] Only States that ratify treaties are bound by them.[21] The principles of treaty law are now largely codified in the Vienna Convention on the Law of Treaties 1969.

The Statutes of international criminal tribunals set out the substantive crimes within their jurisdiction, and their procedural rules as well. In this regard, the London Agreement of 8th August 1945, establishing the International Military Tribunal Nuremberg and the crimes within its jurisdiction; and the 1998 Statute of the ICC laying down the set of crimes which it may try and some general principles of International Criminal Law (ICL) are particularly significant.[22] The London Agreement was adopted by the governments of the USA, France, UK, and the Union of Soviet Socialist Republics, for the prosecution and punishment of the major war criminals from Axis Europe. The Charter of the IMT Nuremberg was annexed to the London Agreement.[23] Both the London Agreement and the IMT Charter were later ratified by other Allied states. Article 6 of the Charter defined three categories of crimes: crimes against peace, war crimes and

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19 1923 PCIJ, Series A, No. 1. Under Article 380 of the Treaty of Versailles, 28 June 1919: 'The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality'.

20 Swart, M. 'Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and Adventurous Interpretation' [2010] (70) *ZaoRV*, 462.

21 J Elsea, 'U.S Policy Regarding the International Criminal Court' [2002] Report for Congress, Order Code RL31495.

22 Cassese (n12) 15-16.

23 Article 2 of the London Agreement provides that 'the constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement.

crimes against humanity. Furthermore, the Charter established general principles of ICL, like individual criminal responsibility.[24]

Only four 'core' international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression fall within the jurisdiction of the International Criminal Court (ICC).[25] The Statute of Rome was adopted by 120 states at a diplomatic conference on 17 July 1998 and entered into force on 1 July 2002 after ratification by 60 countries. The Statute of the ICC being an agreement between the state parties is a 'treaty of a particular type' as well as the 'grundnorm' of the court. Also of significance are the constitutive instruments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The United Nations Security Council established the ICTR for Rwanda in November 1994 by Resolution 955 to try serious violations of International Humanitarian Law in the country. The Statute of the ICTR confers jurisdiction over genocide,[26] crimes against humanity,[27] and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II.[28]

The constitutive instrument of the ICC has expressed which law the court should apply. By Article 21 titled 'applicable law,' the ICC is required to apply (1): (a) in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) failing that, general principles of law derived by the court from national laws of legal systems of the world including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards; (2) the court may apply principles and rules of law as interpreted in its previous decisions; and the caveat, that (3) the application and interpretation of law must be consistent with internationally recognized human rights norms. This provision authorizes the ICC to apply its own proper law or primary system of law, and other laws external to it.

The proposition that the Statute of the ICC is also a criminal code of a kind is convincing as it defines the crimes within the jurisdiction of the court.[29] A criminal code is a compilation of criminal laws, usually defining and categorizing offences and setting

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24 Article 7 of the Charter.

25 Article 5 of the Statute of the ICC: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

26 Article 2, Statute of the International Criminal Tribunal for Rwanda (ICTR), S.C. Res. 955, U.N. Doc. S/Res/955 (1994).

27 Article 3 Statute of the ICTR.

28 Article 4 Statute of the ICTR.

29 Articles 6, 7 and 8 of the Statute of the ICC.

out their respective punishments.[30] The statute is also a code of procedure containing systems of investigation, prosecution, penalties, enforcement and appeal.[31] Furthermore, Article 51 of the Statute of the ICC provides for the Rules of Procedure and Evidence for the court. These rules adopted by a two-thirds majority of the Assembly of State Parties indicate a supplementary source of law. However, in the event of a conflict between the Statute of the ICC and the Rules of Procedure, the former prevails.[32] Under Article 7 of the Statute of the ICC, crimes against humanity are constituted by: (a) the enumerated acts (b) committed as part of a widespread or systematic (c) attack directed against a civilian population, (d) with knowledge of the attack and (e) pursuant to or in furtherance of a State or organizational policy to commit such attack. The *actus reus* of a crime against humanity consists of an attack that is inhumane in nature and character, causing great suffering, or serious injury to body or mental or physical health, committed on a widespread basis against a civilian population.[33]

Article 7 of the ICC Statute states as follows: "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Under its Statute, the Special Court for Sierra Leone (SCSL), established by an Agreement between the United Nations and the Government of Sierra through Security Council Resolution 1315 (2000) of 14 August 2000 can try the following crimes: crimes against humanity,[34] violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II;[35] other serious violations of International Humanitarian Law;[36]

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30 B. A. Garner, *Black's Law Dictionary:* (9th edn, Thomson Reuters, 2009), 1247.
31 See for instance, Articles. 15, 16, 54, 55, 57, 58, 60, 62, 63, 77, 81 and 83 of the Statute of the ICC.
32 Article 51 (5), Statute of the ICC.
33 Proulx, V.'Rethinking the Jurisdiction of the International Criminal Court in Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?' [2004] (19) (5) *American University International Law Review:* 1059-1060.
34 Article 2, Statute of the Special Court for Sierra Leone, 16 January 2002.
35 Article 3, Statute of the SCSL.
36 Article 4, Statute of the SCSL.

and crimes under Sierra Leonean law.[37] It bears mentioning that the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and a host of other hybrid tribunals were established by the UN Security Council exercising its powers concerning 'actions with respect to threats to the peace, breaches of the peace and acts of aggression' under Chapter VII of the Charter of the United Nations. The decisions of the Security Council are binding on all members of the UN.[38]

At the regional setting, the African Union in 2014 adopted a protocol extending the jurisdiction of the African Court of Justice and Human and Peoples' Rights to crimes against humanity among several others. The definition, characterization and descriptive contextualization of the crime are contained in the protocol.[39] Several treaties create international crimes and confer jurisdiction on domestic courts to try and punish offenders. The key difference between these treaties – creating crimes, and the constitutive instruments of the international criminal tribunals is that whereas, the later established crimes, and no system of law courts, the former constituted both crimes and corresponding judicatures. The Genocide Convention of 1948 defines the crime of genocide,[40] and penalizes it.[41]

Before the adoption of the Genocide Convention of 1948, genocide was not regarded as an international crime in its own right, but as a sub-class of crimes against humanity, which could be committed only during an armed conflict.[42] During the Control Council Law No. 10 trials, the judgment in the *Justice Case* described genocide as 'the prime illustration of a crime against humanity'.[43] Of significance too is the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights.[44] The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is also relevant to crimes against humanity.[45]

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37 Article 5, Statute of the SCSL.

38 Article 25, Charter of the United Nations, 26 June 1945.

39 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, adopted on 27 June 2014, Article 28 C.

40 Genocide Convention 1948 Article II: Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: *(a)* Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group; *(e)* Forcibly transferring children of the group to another group.

41 Genocide Convention 1948, Article III.

42 Y Aydin, 'The Distinction between Crimes against Humanity and Genocide Focusing Most Particularly On the Crime of Persecution' [2014] Judge ogeneral Directorate of EU Ministry of Justice of Turkey.

43 *United States of America* v *Josef Alstotter et al.* (The Justice Case) (1948) 3 T.W.C 1; (1948) 6 L.R.TW.C 1; (1948) 14 Ann. Dig. 278.

44 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights, adopted on 27 June 2014, Article 28A.

45 Articles 3 and 5.

Other crime-creating treaties include: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;[46] the International Convention against the Taking of Hostages of 1979; [47] the International Convention for the Suppression of Terrorist Bombings;[48] the International Convention for the Suppression of the Financing of Terrorism;[49] the O. A. U Convention on the Prevention and Combating of Terrorism; [50] the International Convention for the Protection of All Persons from Enforced Disappearance;[51] the Draft Comprehensive Convention against International Terrorism;[52] and the Draft International Convention on the Prevention and Punishment of Crimes against Humanity. [53] The Draft Convention on Crimes against Humanity confers jurisdiction on national courts or the ICC to try alleged perpetrators of its crimes.[54] The draft conventions if adopted would facilitate measures on the prosecution of their subject crimes. The offences committed by the violation of these treaties can amount to crimes against humanity.

2.1 International Humanitarian Law (IHL)

The two forms of law: international humanitarian law and human rights law have a significant influence on the sources of law for the ICC. It is a widely acknowledged fact that International Criminal Law draws upon IHL, domestic criminal law, and transitional justice; a triad in which transitional justice focuses on the human rights violations committed by the *ancien régime*.[55] Umozurike has aptly stated that humanitarian law derives from the basic principle that the individual is entitled to certain minimum rights in peace or in war.[56] Article 8 of the Rome Statute directly refers to 'grave breaches of the Geneva Conventions of 12th August 1949'; 'other serious violations of the laws and customs of war applicable in international armed conflict'; and 'serious violations of Article 3 common to the four Geneva Conventions'. Some of the breaches may also

46 Articles II and III.
47 Article 1.
48 Article 2.
49 Article 2.
50 Articles 1 and 3.
51 Articles 4, 5, 6 and 7.
52 Articles 2, 3,4,5,6, and 7.
53 Articles 1 and 3.
54 Article 10: (1) Persons alleged to be responsible for crimes against humanity shall be tried by a criminal court of the State Party, or by the International Criminal Court, or by an international tribunal having jurisdiction over crimes against humanity.
55 Danner, A.M and Martinez, J. S. 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' [2005] (93) *California Law Review*; 75.
56 U O Umozurike, 'Introduction to International Law,' (3rd Edition, Spectrum Books Limited, 2005) p. 212.

constitute crimes against humanity committed during an armed conflict. Indeed, IHL is the *fons et origo* of many of the crimes in ICL.[57]

The International Committee of the Red Cross has defined IHL as a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not, or are no longer participating in hostilities and restricts the means and methods of warfare.[58] IHL applies only in the context of an armed conflict.[59] IHL is composed of the Law of The Hague and the Law of the Geneva. The Hague Conventions of 1899 and 1907 were the first multilateral treaties on warfare, and were substantially derived from the Lieber Code of 1863, which is recognized as the first modern codification of the laws and customs of war.[60] The Law of The Hague consists of the Hague Conventions of 1899; revised in 1907; and in the 1977 Protocols Additional to the Geneva Conventions as well as the treaties regulating the use of weaponry[61] Three main treaties adopted in the First Hague Peace conference in 1899 make up the Hague Law.[62]

The second Hague Peace Conference of 1907 adopted 13 conventions and one declaration.[63] The Hague law determines the rights and duties of belligerents in the conduct of hostilities and limits the means of inflicting damage upon the enemy.[64] The Hague law and regulations primarily regulate the conduct of hostilities. Most of the substantive provisions of the Law of The Hague are considered to embody rules of customary international law. The Hague Conventions of 1907 are still part of international

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57 Danner and Martinez (n55).

58 International Committee of the Red Cross Advisory Service on International Humanitarian Law. What is International Humanitarian Law? < https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf > accessed 14th January 2022.

59 Common Articles 2 and 3 of the Geneva Conventions of 1949.

60 (Lieber Code) General Orders No. 100, Instructions for the Government of Armies of the United States in
the Field, 24 April 1863.

61 E A Oji, *Responsibility for Crimes under International Law*' (Lagos: Odade Publishers, 2013) pp. 78-79.
See also (I) the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare of 1925; (II) the 1972 Biological Weapons Convention; and (III) the 1993 Chemical Weapons Convention.

62 (I) The Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration; (II) the Convention with Respect to the Laws and Customs of War on Land, dealing the treatment of Prisoners of War, wounded combatants, prohibition of poison and killing of combatants who had surrendered, collective punishments, looting of a town, attack on undefended places, etc; and (III) the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22nd August 1864. The third treaty dealt with the protection of marked hospital ships, and wounded and shipwrecked sailors of all belligerent parties.

63 These include: (I) the Convention Respecting the Limitation of Force for Recovery of Contract Debts; (II) the Convention Relative to the Opening of Hostilities, which sets out the procedure for the declaration of war; (III) Convention Respecting the Laws and Customs of War on Land; (IV) Convention Relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities; and (V) the Convention Relative to the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

64 M T Ladan, *Materials and Cases on Public International Law* (Ahmadu Bello University Press Ltd, 2007) p. 201.

law and are often referred to. For illustration, the United Nations Security Council Resolution 1483 called upon States to observe their obligations under the four Geneva Conventions of 1949 and the Hague Regulations of 1907.[65] As an additive, resort to the use of force as an instrument of national policy was prohibited by the Kellogg-Briand Pact of 1928;[66] and presently, the United Nations Charter 1945.[67]

On the other hand, the Law of Geneva, which developed from 1864 to 1949 provides for humanitarian treatment in the event of armed conflict. It represents the *ius in bello*. The Geneva Conventions of 1949 updated the terms of the first three Geneva Conventions of 1864, 1906, and 1929 and added a fourth treaty. [68] The Geneva Conventions provide for the protection of civilians, prisoners of war, the wounded, and sick and those rendered *hors de combat*.[69] Grave breaches of the Geneva Conventions involving the following acts committed against persons or protected property: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, may amount to war crimes.[70]

2.2 International Human Rights Law

Like IHL, human rights are inspired by considerations of humanity. [71] Notwithstanding the fact that they have different historical launch pads, IHL is increasingly perceived as part of human rights law applicable in armed conflict situations. [72] Article 21 (3) of the ICC Statute provides that the interpretation and

65 Paragraph 5, Resolution 1483 (2003), adopted by the Security Council at its 4761st meeting, on 22 May 2003. S/RES/1483 (2003).

66 Articles I and II.

67 Article 2 (4).

68 (I) The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1949 (updated the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the 1906 and 1929 versions); (II) the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949 (revised and updated the 1906 version); (III) the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (revised and replaced the 1929 version); and (IV) the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949. The Geneva Conventions have been modified by three protocols: (I) Protocol I (1977) Relating to the Protection of Victims of International Armed Conflicts; (II) Protocol II (1977) Relating to the Protection of Victims of Non-International Armed Conflicts; and (III) Protocol III (2005) Relating to the Adoption of an Additional Distinctive Emblem.

69 C C Wigwe, *International Humanitarian Law* (Readwide Publishers, 2010) p. 2.

70 Article 50, First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1949.

71 Oji *Responsibility for Crimes under International Law* (n61)55.

72 Doswald-Beck, L. and Vite, S. 'International Humanitarian Law and Human Rights Law' [1993] (293) *International Review of the Red Cross*.

application of law by the ICC must be consistent with internationally recognized human rights. The classic description of International Human Rights Law (IHRL) alludes to its overarching mission of protecting the essential and universal features of what it means to be a human, being from the arbitrary exercise of sovereign power.[73] In a study conducted by the Austrian Development Cooperation, human rights was defined as 'certain minimum standards and rules of procedure to which those in power should or must adhere in their treatment of people.

This primarily concerns state authorities such as governments, police or armed forces, but increasingly also those wielding non-governmental power, such as international organizations, business enterprises and, or the private sector in general as well as religious communities or individuals that exert power over other people. On the one hand, human rights set limits to the power exercised by government and nongovernmental entities and on the other they oblige these within their purview to lay the foundation for enabling people to actually exercise and enjoy their rights through affirmative measures.'[74]

Human rights describe certain minimum standards and rules of procedure to which those in power should adhere in their treatment of people. This basically concerns state authorities such as governments, police or armed forces, but increasingly also those wielding non-governmental power, who exert control over people. Human rights norms set limits to the power exercised by government and non-governmental entities, and oblige them to lay the foundation to enable people to affirm these rights. The idea of an international Bill of Rights had been conceived at the framing of the UN Charter, but a compromise-declaration: the Universal Declaration of Human Rights of 1948 was adopted in its stead.[75] The UDHR is regarded as part of international customary law or general international law.[76]

After the UDHR, the United Nations General Assembly adopted two other human rights treaties in 1966, that is, the International Covenant on Civil and Political Rights (ICCPR),[77] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[78] These instruments, particularly, the UDHR, provided the basis for later

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73 Macklem, P. 'What is International Human Rights Law? Three Fingers of a Distributive Account'[2007] (52) *McGill Law Journal*; 577.

74 F. Walter, and others, *Human Rights Manual: Guidelines for Implementing a Human Rights Based Approach in ADC* (Austrian Development Agency, 2010), p.6 < https://www.entwicklung.at/fileadmin/user_upload/Manual_Human_Rights.pdf > accessed 3rd January 2024.

75 K C Joshi, *International Law and Human Rights* (2nd edition, Eastern Book Company, 2012) p.439.

76 Joshi (n75) 444.

77 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

78 Adopted and opened for signature, ratification and accession by General Assembly resolution

human rights treaty systems, including the 1981 African Charter on Human and Peoples' Rights (The Banjul Charter).[79] The Banjul Charter combined all three generations of human rights into one legally binding instrument. The collectivity: UDHR, ICCPR and ICESCR, is known as the International Bill of Rights.[80] Broadly speaking, these treaties guarantee the basic rights to life, equality, dignity, privacy, liberty; freedom from slavery, torture, discrimination, arbitrary arrest or detention, and retroactive criminal punishments.[81]

An international crime would be committed where the consequences of the breach of human rights satisfy the elements of the crime.[82] In certain circumstances, the breach of human rights norms of liberty, life, discrimination, and dignity of the person, would constitute crimes against humanity.[83] Such obnoxious practices would have also violated provisions of the Genocide Convention of 1948;[84] the Convention on the Elimination of All Forms of Racial Discrimination of 1965;[85] and the 1926 Slavery Convention amongst others.[86] Some of the guarantees in the Statute of Rome derive their validity from human rights law, like the *nullum crimne, nulla poena sine praevai lege poenali* (no crime and no punishment without a pre-existing penal legislation) principle.[87] Articles 7 (2) of the Banjul Charter, and 15 (1) of the ICCPR prohibit *ex post facto* criminal legislations, treaties, and penalties. Individuals prosecuted and tried for international crimes are assured a fair degree of fundamental human rights guarantees. The Statute of Rome provides for an accused person, the rights of fair hearing; [88] freedom from self-incrimination, duress, torture, cruel or degrading treatment or punishment; [89] the presumption of innocence;[90] and choice of counsel.[91]

3. CUSTOMARY INTERNATIONAL LAW

Article 38 (1) (b) directs the ICJ to apply 'international custom, as evidence of a general practice accepted as law'. Ironically, it is 'general practice accepted as law' that is

2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

79 Adopted on 27 June 1981, entered into force on 21 October 1986.

80 O V C Ikpeze, *Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment* (Folmech Printing and Pub. Co. Ltd, 2009) p. 21.

81 Universal Declaration of Human Rights 1948, Articles 1, 2, 3, 4, 5, 7, 9 and 11.

82 Oji *Responsibility for Crimes under International Law* **(**n61) 59.

83 Article 7, Statute of the ICC.

84 Articles I, II, III, IV, IV, V and VI.

85 Articles 1, 2, 3, 4 and 5.

86 Articles 1 and 2.

87 Articles 22 and 23, Statute of the ICC.

88 Article 41, Statute of the ICC.

89 Article 55, Statute of the ICC.

90 Article 66, Statute of the ICC.

91 Article 67, Statute of the ICC.

evidence of international custom. In the *Asylum case*, the ICJ described custom as a 'constant and uniform usage accepted as law'.[92] However, Kirsch and Oehmichen have cautioned that there is an academic debate on which of the two elements - *opinio juris* or state practice, is the dominant one for establishing customary international law.[93] Ohlin has asserted that 'any analysis of customary international law must begin with state practice'.[94] State practice and the opinio juris must co-exist to establish an international custom. Therefore, 'not only must the acts concerned amount to a settled practice, but they must also be accompanied by the *opinio juris sive necessitatis*, a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[95]

Or as the ICJ held in the *North Sea Continental Shelf Cases*: they are impelled by legal obligation and not habitual action.[96] Even more elaborately, the elements of international customary law include (I) the existence of State practice, as established by evidence of actual State activity, statements whether made in the abstract or not, diplomatic correspondence, UN General Assembly resolutions and so forth; (b) consistency of practice (constant and uniform); (c) generality of practice, common to a significant number of States, and (d) Opinio juris, i.e. States must recognize the practice as binding upon them as law. In the *Advisory Opinion on the Legality of Nuclear Weapons,* the ICJ found that a large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The laws and customs of war as they were traditionally called were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874.[97]

Brownlie has drawn up a non-comprehensive catalogue of material sources of international custom: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the ILC, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practices of international organs, and resolutions relating to legal questions in the United Nations General Assembly.[98]

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92 Asylum Case (Colombia V. Peru), ICJ Reports 1950, p. 266.

93 Kirsch, S. and Oehmichen, A. 'Judges Gone Astray- The Fabrication of Terrorism as an International
Crime by the Special Tribunal for Lebanon' [2011] (1) *Durham Law Review Online*; 8.

94 Ohlin, J. D. 'Applying the Death Penalty to Crimes of Genocide' [2005] (99) *The American Journal of International Law*; 751.

95 Military and Paramilitary Activities in and against Nicaragua (The Republic of Nicaragua V. The United States of America), 1986 I.C.J. 14; 108-109.

96 North Sea Continental Shelf, Judgment, I.C.J Reports 1969, p. 3.

97 Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 8 July 1996. ICJ Reports, para. 75.

98 Brownlie (n18)5.

Particularly, Security Council and General Assembly resolutions, establishing international criminal tribunals, may evidence state practice and aid the development of the customary law of international crimes. When customary law is applied today, the methods used to determine its content are increasingly relaxed, especially in relation to the proof of state practice. The contemporary approach to customary law relies largely on loosely defined *opinio juris* and, or inference from the widespread ratification of treaties or support for resolutions and other soft law instruments, therefore, rendering it more flexible and open to the relatively rapid acceptance of new norms.[99] Once a rule of customary international law has emerged, the current understanding is that it binds all states except those that clearly and persistently objected to the rule prior to the time of its crystallization or ripening into a rule of law.[100]

In the *Tadic Interlocutory Appeal Decision*, opinions expressed in the writings and findings of the International Committee of the Red Cross (ICRC) were regarded as evidence of international practice in the establishment of custom.[101] International custom is perhaps, the oldest and the original source, of international as well as of law in general. Umozurike wrote that customs were the most important source of international law until their recent displacement by the extensive framework of law-giving multilateral treaties.[102] Nevertheless, customs remain a dynamic source of law in the light of the nature of the international system and its lack of centralized government organs.[103]

In international criminal law, resort is often had to customary law or general principles of law in order to clarify treaty or fill in lacunae in law.[104] However, as already observed in respect of conventional law, a criminal tribunal can enforce only customary rules defining crimes within its jurisdiction. Customs as a source of international criminal law present some vexed issues. Firstly, they suffer from a lack of specificity. The doctrine of specificity requires criminal rules to be as detailed as possible so as to clearly indicate to their addresses the prohibited conduct.[105] Secondly, the jurist's legal pedigree may affect his attitude towards judicial law. There are two major legal systems in the Western world: the common law and the civil law. Judges trained in common law may task themselves to apply criminal law evolved from case law, crystallizing overtime into

99 Meron, T. 'Revival of Customary Humanitarian Law' [2005] (99) (4) *American Journal of International Law*; 817.
100 Bradley, C. A. and Gulati, M. 'Withdrawing from International Custom' [2010] (120) (2) *The Yale Law Journal*; 211.
101 Prosecutor v Dusko Tadic. Decision on Defence Motion for Interlocutory Appeal on Jurisdiction. 2 October 1995, paras. 73, 109.
102 Umozurike (n10)17.
103 Shaw (n6) p.69.
104 Cassese (n12) 17.
105 Cassese (n12) 41.

custom. Whereas, in legal analysis; their civil law counterparts will place more emphasis upon a code of crimes, possibly leading to different decisions.[106]

References to case law as evidence of customary rules abound. In the *Furundzija case,* an ICTY Trial Chamber held that the prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law; it has gradually crystallized out of the express prohibition of rape in Article 44 of the 1863 Lieber Code and the general provisions contained in Article 46 of the Regulations annexed to Hague Convention IV, read in conjunction with the 'Marten's Clause' laid down in the preamble to the Convention.[107] Likewise, in The *Scotia*, the US Supreme Court held that the extensive acceptance of British regulations for preventing collision at sea had made them rules of customary law.[108]

In the *Tadic* case, the ICTY Appeals Chamber held that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.[109] Human rights instruments recognize that customary international law can safely found criminal convictions without violating the legality principle. So much of the spirit and letter of this proposition is affirmed by Article 15 (1) of the ICCPR 1966 which provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. It is worthy to mention that many of the international conventions in force today, like the Geneva Conventions, are rooted in customary law. M Cherif Bassiouni has stated that international law experts point to historic legal precedents from 1923 to date, including prosecutions before international and national tribunals, as evidence of customary international law.[110]

4. GENERAL PRINCIPLES OF LAW

By Article 38 (1) (c) of the Statute of the ICJ, general principles of law recognized by civilized nations make up the third source of international law. General principles describe the inexhaustible reservoir of legal principles from which international tribunals can enrich and develop international law.[111] Resort to general principles will prevent international tribunals from declaring judgments *non liquet*. Conversely, if there is in existence, an applicable treaty or custom, general principles will

106 Cassese (n12) 18.
107 Prosecutor v Anto Furundzija (ICTY Trial Chamber), 10 December 1998, para. 137.
108 The Scotia, 81. US. 14 Wallace 170 (1871).
109 Prosecutor v Dusko Tadic (ICTY Appeals Chamber), 15 July 1999, para. 283, 292, 305.
110 M C Bassiouni, M. C. 'Crimes Against Humanity: The Case for a Specialized Convention' [2010] (9) (4) *Washington University Global Studies Law Review*; 582.
111 McNair, L. 'The General Principles of Law Recognized by Civilized Nations' [1957] (33) *British Yearbook of International* Law; 1.

not apply. There are two views about the content of paragraph 1 (c) of article 38. While one view regards them as analogies drawn from domestic jurisprudence adapted to international judicial reasoning, the opposite view is that they are the product of natural law as developed from Judeo-Christian beliefs.[112]

Ideas derived from local law and international law are considered to fall within the catchment area of Article 38 (1) (c).[113] Carter, Trimble and Bradley posited that the most fertile field for the implementation of municipal law analogies have been those of procedure, evidence and the machinery of the judicial process.[114] In the *Chorzow Factory* (Indemnity) *case,* the PCIJ stated that it is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law.[115] Another fundamental general principle is that of good faith. In the *Nuclear Test cases*, the ICJ held that one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[116]

Obviously, some general principles of international law are applicable to criminal cases. These are principles developed from treaty law or customs. General principles of ICL emerged in the same way. It is in the face of a normative gap in these sources, that the criminal tribunal may apply the general principles of the criminal jurisprudence of states. This class of principles inheres in national legal systems, and is of relevance to international criminal law, for instance, non-retroactivity of penal law and the territoriality of crimes. Others were transposed from national legal systems, and have overtime, firmly infused themselves in ICL.

In the *Furundzija* case, the ICTY Trial Chamber outlined the criteria for the application of national laws by international criminal courts. Thus, whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common law or that of civil law states. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since international trials exhibit a number of features that differentiate them from criminal proceedings, account must be taken of the specificity of international criminal proceedings when utilizing national law

112 Kapoor, S. K. *International Law and Human Rights* (18th edn, Central Law Agency, 2011), p. 70.
113 Shaw (n6) p. 94.
114 B E Carter *et al*, *International Law* (4th edn, Aspen Publishers, 2003) p.151.
115 Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).
116 Nuclear Tests Case (Australia v France): ICJ Rep. 253, 20 Dec 1974.

notions. In this way, a mechanical importation or transposition from national law into international criminal is avoided, as well as the attendant distortions of the unique traits of such proceedings.[117]

The view has also been expressed that the relationship between public international law and domestic criminal law has greatly contributed to the development of international criminal law.[118] A tribunal's analysis of general principles must be broad; including the study of the key legal systems; common law, civil law, Islamic law, and the legal systems of Asia and Africa. In *Erdemovic*, the trial chamber of the ICTY found that there is a general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present.[119] Antonio Cassese identified the general principles of ICL to include: legality, specificity, presumption of innocence, and equality of arms.[120]

5. JUDGMENTS OF TRIBUNALS AND SCHOLARLY OPINIONS

Judicial decisions are only persuasive authorities. The doctrine of precedent as it is known in the common law tradition does not apply to court decisions in the international judicial system.[121] The decisions of international tribunals and the opinions of learned scholars are law-determining agents, and not formal sources of law. Judicial decisions are subsidiary means of determination of rules of law.[122] International tribunals are not even bound by their own precedents. Article 21 (2) of the Statute of the ICC provides that the court may apply principles and rules of law as interpreted in its previous decisions.

Nevertheless, Cassese has advised that judicial decisions in ICL cannot be cursorily dismissed as they may prove to be of crucial importance not only for ascertaining whether a customary rule has evolved, but also as a means to establish the most appropriate interpretation to be placed on a treaty rule.[123] For instance, the decisions of the IMT Nuremberg set down significant principles on the crime of aggression and crimes against humanity. Although the views of legal writers may help in espousing the law; they lack normative force.

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117 Prosecutor V. Anto Furundzija (ICTY Trial Chamber), 10 December 1998, para. 178.
118 Thormundsson (n8).
119 The Prosecutor v Drazen Erdemovic, (ICTY Trial Chamber), 29 November 1996, para. 31.
120 Cassese (n12) 20-21.
121 Shaw (n6) p. 103.
122 Article 38 (1) (d), Statute of the ICJ.
123 Cassese (n12) 26-27.

6. CONCLUSION

It is important to determine the source of a particular law, or to know where it can be found, so that attention is not directed at the wrong place. This informed the perspective adopted by this paper. Thus, the article has reflected upon the sources of the law of crimes against humanity, drawing analogies with the traditional sources of international law. The discussion examined treaties, customary international law, general principles of law, judicial decisions and academic scholarship, as sources of law of crimes against humanity. However, it was noted that a stylized application of the ICJ provision is necessary to render it useful for international criminal justice. The constitutive act of each criminal tribunal stipulates its source of law.

This trend was followed by the IMT Nuremberg, the ICTY, ICTR, mixed courts or panels, up to the ICC. Article 21 of the Statute of Rome clearly states which law the court should apply: (a) in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) failing that, general principles of law derived by the court from national laws of legal systems of the world including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards; (2) the court may apply principles and rules of law as interpreted in its previous decisions; and the caveat, that (3) the application and interpretation of law must be consistent with internationally recognized human rights norms.