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A CRITICAL EXAMINATION OF THE ROLE OF CUSTOM AND GENERAL PRINCIPLE IN DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

International law, also known as public international law is a body of rules, norms; standard that is applied among sovereign states. International Criminal Law is a branch of public international law, which seeks to establish criminal responsibility upon those individuals and community for committing crimes is seen to be heinous in nature and thus include war crimes, genocide, crimes against humanity and crime of aggression, which will be discussed in this article. It places responsibility on individual persons not states or organizations and proscribes and punishes acts defined as crimes by international law.ICL aims to hold those individuals or communities responsible for instigating such heinous crimes that threaten society's peace. This article will focus upon two sources of law, i.e. customs and general principles. The focus will be upon provisions of Rome Statute which deal with general principles.

KEY WORDS - *International Law, Development of Criminal Law, Custom & General Principles*

INTRODUCTION

International Criminal Law (ICL) is a comparatively new concept and is still developing. ICL is a part of Public International Law, and thus, the sources of ICL can be found in international law. International Criminal Law is a body of public international law that establishes individual criminal responsibility for international crimes, such as war crimes, crimes against humanity, genocide, and aggression.[1] Public international law is a set of rules and regulations that binds the states together and governs how they interact with each other and with individuals. International Criminal Law is a small but essential part of the same concerns only with individuals. It places responsibility on individual persons not states or organizations and proscribes and punishes acts defined as crimes by international law.[2] It is challenging to define ICL as it has been a widely debated topic. Still, one can understand it as a law legislated to entail criminal responsibility upon

[1] International Criminal Law (July 2017), https://www.rulac.org/legal-framework/international-criminal-law (last visited 28th Feb 2021)

[2]International Criminal Law & Practice Training Material, https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-2-what-is-intl-law2.pdf (last visited 28th Feb 2021)

those individuals or groups, who violate the community's fundamental interests. International criminal law deals with individuals' criminal responsibility for the most serious human rights and international humanitarian law violations.[3] ICL recognizes four types of international crimes: war crimes, genocide, crimes against humanity, and aggression crimes. ICL aim to hold those individuals or communities responsible for instigating such heinous crimes that threaten society's peace.

International Criminal Law (ICL) deals with individuals' criminal responsibility for the most severe human rights and international humanitarian law violations.[4] ICL is of utmost importance in the global domain to hold those involved in serious crimes accountable for their acts. ICL provides for punishments that apply to all criminals. The law does not limit itself to holding only the criminals liable but also holds accountable who assist in the planning and authorization of the crime.

Unlike national laws, there is no authority for making an international law that would be accepted globally and will have a universal application. The chaotic nature of International Law makes it difficult to put legislations into place.

The basis of International law is treaties, conventions, and general principles of law, judicial precedents and well recognized customs.[5] The sources of International Law have been mentioned in Article 38(1) of International Court of Justice statute. The section reads as: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

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;*

[3] International Criminal Law, https://www.diakonia.se/en/IHL/The-Law/International-Criminal-Law1/ (last visited 28th Feb 2021)

[4] https://www.diakonia.se/en/IHL/The-Law/International-Criminal-Law1/#:~:text=International%20criminal%20law%20deals%20with,and%20the%20crime%20of%20aggression. (last visited 28th Feb 2021)

[5] United States of America v. Josef Altstoetter et al, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. III, pp. 974–975

d. *Subject to the provisions 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 rules of law.*"

Article 38(1) does not contain an exhaustive list of sources; neither there is any particular hierarchy that is to be followed, except for the single reference to subsidiary means in item (d).[6]

This article will focus upon two sources, i.e. customs and general principles and analyse how they have played a role in the development of International Criminal Law.

CATEGORIES OF CRIMES

International criminal law does not deal with trivial crimes. ICL deals with heinous crimes, crimes that disturb the country's internal peace, have a more significant impact and pose a larger population threat. The main categories of crime include war crimes, genocide, crimes against humanity and crime of aggression.[7]

Crimes, as mentioned above, include the massacre of civilians, rape, torture, murder, enslavement, sexual slavery, trafficking of children, bodily or mental harm to people of a specific group, persecution against any identifiable group, among many others as mentioned under Article 6-8 and 8bis of Rome Statute of International Criminal Court.[8] These crimes are an attack upon the basic principles of humanity, morality and dignity. The international community has ascertained the importance of restoring these basic principles and making individuals liable for the acts.

Genocide

Genocide is an attack upon human diversity. It is often referred to as "crime of crimes".[9] The most infamous genocide attacks that have happened till fate include that on Rwanda, Serbrenica, attacks

[6]J. Thormundsson , The Sources of International Criminal Law with Reference to the Human Rights Principles of Domestic Criminal Law, available at http://www.scandinavianlaw.se/pdf/39-17.pdf, 14.01.2012
[7]https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf (last visited 28th Feb. 2021)
[8] Ibid
[9]W. A. Schabas, Genocide in International Law: The Crime of Crimes (Cambridge: Cambridge University Press, 2009)

against Yezidi community in Iraq.[10] As mentioned under Rome Statute it is "*any act 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."[11]

In other words, genocide can be termed as an act of hatred, hatred for a particular group or nation. The act of genocide aims to deliberately kill many people belonging to a specific group to destroy it. It can be committed against a differentiated group based on its national, racial, ethical or religious character.

Crimes against Humanity

Crimes against humanity comprise acts that violate human rights when done as a part of a pre-planned and systematic attack upon a certain population. It comprises some features of genocide, but differs in how genocide focuses upon killing people who belong to a certain national, ethical or religious group. Simultaneously, crimes against humanity tend to punish the collective nature of the commission of the crime.[12] Article 7(1) mentions a long list of crimes that are termed as crimes against humanity. The list includes but is not limited to:

- Murder,
- Extortion,
- Torture,
- Rape, sexual slavery, enforced prostitution, forced pregnancy,
- Crime of apartheid,

[10]D. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 International Criminal Law Review 93, 132.
[11] Article 6 Rome Statute of International Criminal Court
[12]J. D. Ohlin, 'Organizational Criminality', in E. van Sliedregt and S. Vasiliev, Pluralism in International Criminal Law (Oxford: Oxford University Press, 2014), 118

- Imprisonment,
- Deportation or forcible transfer of population,
- Extermination,
- Enslavement
- Persecution against an identifiable group
- Enforced disappearance of people
- Other inhumane acts of similar nature.

Crimes against humanity are attack on civilians who are without their knowledge part of a targeted population. The international community tends to protect individual legal interests such as liberty, autonomy and human dignity.[13] Such crimes are prohibited as the target is not only humans but humanity and specific qualities that we all share.[14]

War Crimes

War crime is the oldest category of atrocity crimes and serious violation of international humanitarian law. It is a violation of international boundaries and treaties of maintaining peace and not starting a war against a state without. War crimes have been explained in detail under Article 8(2) includes wilful killing, torture, serious bodily injury, destruction of property, denying a prisoner of war a fair trial, bombarding villages and towns, making improper use of a flag of truce among a long list of other crimes.[15] They can be committed only at times of armed conflict, either international or domestic. Though the presence of armed conflict is not sufficient to establish a war crime, it is also necessary to establish the link bet6ween the armed conflict and the offence. They prohibited acts of war crime include:

- Murder,
- Mutilation, cruel treatment and torture,
- Taking hostages,
- Intentionally directing attacks against civilian population,

[13] Ambos, Treatise on International Criminal Law, Vol. II, 48

[14]M. Osiel, Mass Atrocity, Collective Memory and the Law (New Brunswick, NJ: Transaction Publishers, 1997), 22–23, 293

[15] Article 8 Rome Statute of International Criminal Court

- Intentionally directing attacks against buildings dedicated to religion, education, art or science,
- Pillaging,
- Rape, sexual slavery, forced pregnancy,
- Conscripting children below 15 years of age into armed forces

Crime of Aggression

It is one of the most controversial crimes under international law. Article 8bis explains crimes of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"[16].

Clause (2) of Article 8b, is defines an act of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, per United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression". Crimes of Aggression can be categorized into three types:

- Crime against state
- Crime against peace and security
- Crime against collective and individual rights[17]

CUSTOMS AS A SOURCE

Prior to the legislation of treaties among the states, the burden of reference in International law fell upon customary rules. Customs are certain practices that have been followed by a community for a long period of time and raise the expectations of similar behaviour for the generations to come. It is the oldest source of international law. There are certain conditions that need to be fulfilled for

[16] Article 8bis Rome Statute of International Criminal Court

[17] F. Mégret, 'What is the Specific Evil of Aggression?', in Kreß and Barriga, The Crime of Aggression, 1398

a custom to be treated as a source of law. It is not necessary that the custom needs to be followed by every state, but should be followed and practiced fairly.[18]Developing of a custom is a long and time consuming process. Customary International law comes into play in international criminal proceedings when either there is no statute available on that particular matter or the court refers to them. In situations where customary international law is not referred to, customs can prove to be relevant in defining the elements of crime.[19]

The support for customs in the international criminal law has been stated in the report of United Nations Secretary-General on the International Criminal Tribunal for the former Yugoslavia Statute (ICTY): "*34. (...) the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal persecuting persons responsible for serious violations of international humanitarian law*"[20].

In the case of **The Prosecutor v. Dražen Erdemović**[21], ICTY considered the issue whether customary international law allowed for the defence of duress to changes of crimes against humanity and war crimes involving killings.

Article 31(3)(c) of Vienna Convention on Law of Treaties makes customs relevant for the interpretation of International Criminal Court Statute, there are certain other sections that give special relevance to customary international law. Clause 3 reads as:

"*There shall be taken into account, together with the context:*

a. *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
b. *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

[18]Vide: Military and Paramilitary Activities in and against Nicaragua, 1986, I.C.J. 14., United Kingdom v. Norway, 1951 I.C.J. 116
[19]Judgment, Tadic (IT-94-1-A), AJ, 15th July 1999, § 194
[20]Report of the Secretary-General Pursuan to Paragraph 2 of Security Council Resolution 808 (1993), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf, 12.01.2012
[21]IT-96-22-T

c. *Any relevant rules of international law applicable in the relations between the parties*."

Article 31(3) of ICC Statute states that "*At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."* In other words, the article allows grounds for excluding criminal responsibility other than those provided for in Article 21. It means that if customary international rules were to extend a defence beyond its scope under the Statute, the Court would be entitled to apply the broader defence and not the definition in the Statute.[22]

Customary International law is an unwritten law, derived from the practices of communities and states and opiniojuris. Although customary law is in its essence unwritten, it is usual for tribunals to utilize treaties and other written documents (such as UN resolutions) as evidence of customary international law.[23] The creation of custom can be slow and its content uncertain, and it has been replaced to a large extent by multilateral treaties, but custom nonetheless continues to contribute significantly to international law.[24]

To establish the principles of Customary International Law, a major role has been played by judicial decisions. The most influential of them all being the **North Sea Continental Shelf Case**.[25] The case focused upon two elements of customs, i.e. practice and mental element of the state. The judgment explains both the elements of customs. "For in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opiniojurissive necessitate

[22] Antonio Cassese, The Oxford Companion to International Criminal Justice, https://www.ejiltalk.org/wp-content/uploads/2018/12/AkandeSourcesofIntCrimLaw.pdf (last visited 28th Feb. 2021)
[23] Military and Para-Military Activities in and Against Nicaragua, (Nicaragua v. USÁ.), ICJ Reports (1986), 14, at §§ 175 et seq.
[24] Gillian Triggs, International Law: Contemporary Principles and Practices (LexisNexis, 2nd ed, 2011
[25]International Court of Justice, North Sea Continental Shelf cases (Federal Republic of -Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment, 20 -February 1969, 1969 General List Nos. 51 and 52

is. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[26]

In the case of **Nicaragua v. United States[27],** ICJ stated that opinion juris must be backed by a state practice to establish it as a rule of international criminal law. The proof of state practice and opinion juris can be seen in state conferences like Geneva Conference.

In the case of ***West Rand Central Gold Mining Co. v. The King*[28],** the UK Court stated that to prove that a rule is customary rule of law, it must possess the following:

"1) there must be objective evidence of state practice and,

2) The international community must believe that such practice is required as a matter of law - this subjective element is known as opiniojuris."

In ***Prosecutor v. Tadic*[29],** the Nigerian court imposed capital punishment upon soldiers who killed numerous civilians in the war between Nigeria and Biafra in late 1960s. it was seen as an attack upon international humanitarian law in non-international armed conflict and recognise individual criminal responsibility in case of (serious) violations.[30] The Appeals Chamber did not distinguish between opinion juris and uses, combining together; it fulfils the purpose of customary international law.

GENERAL PRINCIPLES AS A SOURCE

When the customary rules of international criminal law and treaty law were considered insufficient, the International Criminal Tribunal for former Yugoslavia (ICTY) considered general principles for maintaining peace and standard uniform laws for regulating crime in international domain. General principles encompass all the rules that are included in the general particle these

[26] Case concerning North Sea Continental Shelf (Germany v. Denmark and the Netherlands) (Application for Intervention) [1969] ICJ Rep 3
[27]1986 I.C.J. 14
[28][1905] 2 KB 391)
[29]Case No. IT-94-1-AR72
[30]icty, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the -Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 106

general principles have played an essential role in shaping the jurisprudential perspective of international criminal law as well as courts and tribunals.

Rome Statute of International Criminal Court holds the utmost importance when discussing international criminal law sources and principles. General principles come into play only if overarching sources are unable to address the issue at hand.

Derived from domestic legislation, general principles have played a significant role in framing international criminal law. These general principles are composed by examining the national laws of various states and deducing a common approach. A common practice makes it easier for the International Criminal Court (ICC) to apply the rules. Article 20-24 of the Rome Statute lays down the general principles of International criminal law.

The general principles analysis begins with Article 21, which states the laws applied by the court.

"*The Court shall apply:*

(a) In the first place, this 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, as appropriate, the national laws of States that would generally 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"[31]

The article suggests that ICC can apply general principles if the rules of conventional or customary law are such that they cannot be used. General principles as mentioned under Rome Statute are:

- Ne bis in idem (Article 20)
- Applicable Law (Article 21)
- Nullumcrimen sine lege (Article 22)
- Nullapoena sine lege (Article 23)

[31] Article 21(1) Rome Statute of International Criminal Court

- Non-retroactivity ratione personae (Article 24)
- Individual criminal responsibility (Article 25)
- Exclusion of jurisdiction over persons under eighteen (Article 26)
- Irrelevance of official capacity (Article 27)
- Responsibility of commanders and other superiors (Article 28)

Ne bis in idem (Article 20)

When translated literally the maxim means "not twice about the same". The Latin maxim and Article 20(1) of the Rome Statute state that no person shall be tried and punished for the same offence twice. Clause 2 mentions that no person shall be tried by another court for the crimes mentioned under Article 5, i.e. genocide, crimes against humanity, war crimes and crimes of aggression, if he has been convicted once for the same. Clause 3 reads as follows:

"*No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The Latin maxim is derived from Roman law maxim "nemobisvexari pro unaeteadamcausa", meaning a person shall not be twice vexed for the same cause. The article ensures fairness even towards prisoners of such heinous crimes. The protection against double jeopardy ensures that the decision pronounced once is final and protects against arbitrary, malicious and fraudulent prosecution both at domestic and international level.

Article 20(3) states that a national court may prosecute the same accused for an offence but just not the same offence for which the ICC has convicted him. For example, a national court may convict an accused for crime against humanity but not for genocide if he has been convicted for the same by ICC.

In ***United States v Blockburger***[32]**,** the US Supreme Court held that multiple convictions can be imposed on a single person if it can be proved that each conviction is made under different statutory provisions and each provision requires certain facts to be proved which other provisions do not require. The test as used in this case, the Block burger test was later applied in ***Rutledge v United States***[33].

Applicable Law (Article 21)

The Rome Statute under Clause 1 states that:

"The Court shall apply:

a. In the first place, this 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, as 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."

Article 21 is similar to Article 38 of ICJ, apart from the fact that Article 21 provides for a hierarchy to be followed while applying the law. Under the Rome Statute the highest preference is given to Rules of Procedure followed by treaties and rules of international law and lastly where the above sources cannot be applied, the court applies general principles as mentioned in the Rome Statute.

Nullumcrimen / Nullapoena sine lege (Article 22 & 23)

Also known as the principle of legality, the concept is mentioned under Article 22 & 23. The principle states that no person can be convicted or punished for an act or omission that did not violate a penal law in existence when it was committed. In other words, to ascertain that an act is a crime and a punishable offence, the same must be mentioned in the state's penal law, and a

[32] 284 US 299 (1932)
[33] 517 US 292 (1996)

penalty for the same must also be mentioned. The purpose of both principles is to ensure that the legislation is specific and mentions a list of the acts that are termed as offence and individuals can foresee the consequences of their actions.

Article 23 states that "*A person convicted by the Court may be punished only in accordance with this Statute*".

The principle of legality is closely associated with the principle of non-retroactivity, the principle of specificity, and the prohibition of analogy. The articles prevent the retroactive effect of the application of any law, the definition of the act be precise, and the definitions be strictly construed.

Art 22 states the above-mentioned principles as:

"*1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

Non-retroactivity ratione personae (Article 24)

The article reads as:

"1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply"

The principle means that rules and treaties and national laws that are made a part of international criminal law, which constitute acts to be criminal, should not be applied to acts which were committed before the treaties came into force.

Individual criminal responsibility (Article 25)

The rule as laid down under Article 25 is a fundamental principle of the modern day world. Article 25 of the ICC Statute explicitly allows only individual criminal responsibility of natural persons in various forms of complicity. The article gives jurisdiction to ICC over natural persons.

Exclusion of jurisdiction over persons under eighteen (Article 26)

ICC has no power to prosecute any person who is below the age of 18 years at the time when the crime was committed.

Irrelevance of official capacity (Article 27)

Article 27 reads:

"*1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

There are certain immunities that one may be subject to under national and international laws. Article 27 mentions the persons in whose respect such immunities cannot be applied, and thus, they may be executed for crimes committed any may not be up for any reduction of the sentence.

Responsibility of commanders and other superiors (Article 28)

This article would establish criminal responsibility of military commanders or civilian superiors for the commission of crimes under international law by their subordinates if an individual commander or superior knew or should have known that his or her subordinates were committing or about to commit such crimes and failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

CONCLUSION

International criminal law is a still a growing area of law, with no absolute laws put in place for governance. It is difficult in to bring states agree upon a common law, especially when their interests are varied. There are times when states cannot agree upon the all the laws codified and enacted and hence it gives rise and leverage to countries to enter into treaties that would benefit them. Such treaties become the basis of governance between the two or more states. But not every state enters into treaties or even if they do enter, laws on every subject are not available to be adhered to. Some states just follow the long prevailing customs. Customs have become an important source of law, be it international or domestic law. When the International fraternity does not have any rule of law to be followed or referred to, customs come into play.

Customs are practices that have been or are being performed by individuals belonging to a particular community for a long period of time, and thus have become a part of that community. On the other hand, general principles of law are the basic laws or rules that are applicable universally. General principles come into play when no provision for the same is available in any treaty and customs. They are the "gap fillers" in law. The general principles for international criminal law are mentioned in the Rome Statute from Article 20 – 28.

International criminal law, gives priority to treaties while allowing customs and general principles to clear the gap that might be present in the existing law. The international courts have from time to time showed their inclination towards referring to the opinion juris, customs and general rules for deciding case laws. International Criminal Court (ICC), on the other hand is opposed to applying general principles and customs. ICC emphasizes, the states to apply codified laws and case laws, because it is the strongest anchor that they have in a quagmire of law and politics.