Between Lex Lata and Lex Ferenda?
Customary International (Criminal) Law and the Principle of Legality

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1. Introduction

International courts serve an important function in finding and interpreting existing law, but as noted already forty years ago the focal problem of international courts is that: “the borderlines between interpretation of existing law and the making of new law are inevitably fluid.” Particularly in interpreting customary international law the courts face situations which call for innovative methods in determining the definition and the scope of the law. International criminal law has only recently grown more coherently codified, but still bears much on customary law elements, unlike some other fields of public international law, in which rules have been quite thoroughly codified. Additionally, in criminal law issues such as foreseeability, and non-retroactivity, to mention a few, ought to be given a high credence, or the reason that it is the liberty of an individual that is at stake. In discovering and applying customary international law, international criminal courts are confronted with the balancing exercise between following positivist approach – attaching itself to law as it is, as enacted or adopted by an authority, and may lead to an undesired, even unjust outcome in criminal trials – and natural law approach – arising from inherent rights and duties regardless of their formal recognition, and may risk the violation of the principle of legality. Principle of legality determines the

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1 W. Friedmann, The North Sea Continental Shelf Cases – A Critique, 64 American Journal of International Law (1970) 229, 235. See also D. Terris, C. P. R. Romano and L. Swigart, The International Judge: An Introduction to the Men and Women who Decide the World’s Cases (Brandeis University, London 2007): “as the number of courts increases and as those courts produce an impressive volume of decisions, the claim that international judges do not make international law is increasingly anachronistic”, at 104.
limits of the law-making process and encompasses norms that legal rules must adhere to, such as clarity, promulgation and non-retroactivity.\(^2\)

The question arises, how can the courts preserve the principle of legality, and especially the prohibition of retroactive effect of law, in interpreting – and in formulating – customary international law in a progressive manner. Should the principle of legality be applied liberally in order to bring perpetrators to justice, or is strict application necessary in criminal courts, even at the cost of some impunity? This paper analyses how these two aspects should be balanced and reconciled against one another in discovering, interpreting, and applying customary international law, with reflections on theories of H.L.A. Hart and Lon Fuller – the two influential proponents of modern positivist and natural legal thought, respectively – and recent case-law of international courts in fields of international criminal law and human rights law.\(^3\) Also, Hart’s primary and secondary rules, and rule of recognition are considered in the determination of what may count as customary international law.

First, I consider the principle of legality and its importance in the formation of law – with emphasis on customary international law, followed analysis of its link to morality and the concepts of *lex lata* and *lex ferenda*. I have included a brief discussion on the application of primary and secondary rules and rule of recognition in the formation of (customary) international law. Finally, I analyse selected recent court decisions which deal with international crimes and the principle of legality, with the aim of reflecting on the above issues.

2. Strict Legality and Inner Morality –
Which Way for International Criminal Law?

Customary international law is often uncodified and imprecise, leaving the judge with wide discretion to determine the specific substance of law to be


\(^3\) Main emphasis is on the case-law of the International Criminal Tribunal for former Yugoslavia on one hand, and the European Court of Human Rights on the other. It has been argued that”[...] contrary to inter-state adjudication the focus of ICL is on the responsibility of individuals and not of states; thus these tribunals may be less deferentual to state sovereignty. At the same time, contrary to most modern systems of criminal law, its focus is more on the rights violated (i.e. those of the victims) than on the procedural rights of the defendants.” S. Zappala, ‘Judicial Activism v. Judicial Restraint in International Criminal Justice’, at 222, in A. Cassese and others (eds.), The Oxford Companion to International Criminal Justice (Oxford University Press, 2009).