

## ARTICLE

# Non-Retroactivity as a General Principle of Law

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This article examines the principle of non-retroactive application of law, which prohibits the application of law to events that took place before the law was introduced. The application of this principle has become particularly controversial as states adopt stricter regulations to tackle climate change with retroactive effect, and investors challenge such regulations before international courts and tribunals. In the context of criminal law, the principle is widespread and has become a binding norm of international law. However, a survey of domestic jurisdictions and decisions of international courts and tribunals shows that there is no general principle of international law which forbids the retroactive application of administrative law. Despite pronouncements of some international courts and tribunals to the contrary, states can conclude treaties and adopt administrative regulations with retroactive effect to pursue legitimate public policy objectives.

**Keywords:** international law; legal certainty; *ex post facto* laws; retroactivity; retroactive laws; environmental law; dispute resolution

## 1. Introduction

Although international courts and tribunals often refer to the principle of non-retroactive application of law as general principle of law, they rarely explain what precisely this principle entails.<sup>1</sup> While laws normally apply to the future (prospectively), they may also apply to the past (retroactively), impacting actions or situations occurring before the law was enacted.<sup>2</sup> Retroactive laws pose a challenge to the fundamental principles of equality, certainty and predictability underlying the rule of law.

The Article shows that although the principle of non-retroactivity is widely accepted in criminal law, it does not receive equal recognition in other areas of domestic law. Despite pronouncements of some international courts and tribunals,<sup>3</sup> there also appears to be no universally recognised customary rule of international law or general principle against retroactivity.

The principle of non-retroactive application of law first emerged in Roman law, where it took the form of a rule against punishing an individual in the absence of a specific rule prohibiting certain conduct when committed.<sup>4</sup> Its application has become particularly controversial as states adopt stricter environmental regulations to tackle climate change.<sup>5</sup> The retroactive effect of these and other regulations has been challenged in

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<sup>1</sup> See, e.g., *Conocophillips Gulf of Paria B.V. v Corporación Venezolana de Petróleo, S.A., Petróleos de Venezuela, S.A.*, ICC Case No. 22527/ASM/JPA Award [29 July 2019] 378; *Perenco Ecuador Limited v Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6 Interim Decision on the Environmental Counterclaim [11 August 2015] 357; *Hissein Habre v Republic of Senegal*, ECW/CCJ/JUD/06/10 Judgment [18 November 2010].

<sup>2</sup> In various jurisdictions, the terms retroactive, retrospective, *ex post facto* laws are often used interchangeably.

<sup>3</sup> See, e.g., *Al Albani v Secretary-General of the United Nations*, Judgment No. 2016-UNAT-663 [2016] [25]–[27] (United Nations Appeal Tribunal) (ruling that the principle of non-retroactivity precluded the application of the revised rules on dependency benefits to a period prior to their entry into force and that the outcome was supported by '[p]rinciples of security and certainty of law'); *Hunt-Matthes v Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444/Corr.2 [2014] [26]: (noting 'the general principle of law against retrospective effect/application of laws'); *RREEF Infrastructure (G.P) Ltd and RREEF Pan-European Infrastructure Two Lux Sarl v Kingdom of Spain*, ICSID Case No. ARB/13/30 Decision on Responsibility and the Principles of Quantum [30 November 2018] [474] (ruling that retroactively applicable legislation was contrary to a well-established general principle of law).

<sup>4</sup> G. Broggin, 'Retroactivity of Laws in the Roman Perspective' (1996) 1 Irish Jurist 151, 168.

<sup>5</sup> See Chapter 5 of this Article.

international courts and tribunals. However, outside the context of criminal law, the principle of non-retroactivity has received little attention in comparative and international law literature. Its poor understanding leads to statements about its universal nature and confusing it with other legal concepts such as legality, legal certainty, fair and equitable retreatment and *res judicata*, and has resulted in an increasing number of disputes.

The constitutions of states from various parts of the world with different legal traditions include the principle of non-retroactivity.<sup>6</sup> It also forms a part of the broader European Union law principle of legal certainty,<sup>7</sup> which closely correlates with the notion of legitimate expectations.<sup>8</sup> The principle is also reflected as a presumption in treaty interpretation<sup>9</sup> and has been raised in challenges to legislation on the basis that individual rights have been infringed.<sup>10</sup> However, it is not uncommon for states to adopt legislation with retroactive effect.<sup>11</sup>

Recently, the most litigated form of administrative regulations related to retroactive measures either imposing liability for environmentally harmful effects that have already occurred, or retroactively removing subsidies or related economic incentives.<sup>12</sup> On the one hand, states are under pressure to comply with their climate change commitments. On the other, they have to live up to the expectations of investors, protected by domestic law and international investment agreements, many of which include the fair and equitable treatment standard. As the Article demonstrates, investors increasingly rely on the principle of non-retroactivity of law when claiming a breach of fair and equitable treatment provisions. In the context of international law particular focus will be paid to investor-state arbitration, viewed as a species of global administrative law.<sup>13</sup> Essentially, investor-state tribunals review administrative legislation and practices of states.

The aim of the Article is not to espouse a theory of retroactivity, but to determine whether the non-retroactivity of law is one of ‘the general principles of law recognized by civilized nations.’<sup>14</sup> General principles of international law have traditionally been conceived of as a reflection of legal rules which are common across domestic legal systems. To identify an internationally applicable general principle of law, a two-step analysis is required: first, establishing that the principle is common to the majority of national legal systems, and then to determine whether this principle is applicable in the international legal system.<sup>15</sup>

<sup>6</sup> Ibid pp 231–302; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch 11 (U.K.), ¶ 11(g); Constitution of the Republic of The Gambia, art. 24(5); Constitution of the Republic of Azerbaijan, art. 71(VIII); art. 8 of the Republic of Lithuania Code of Administrative Offences Regeringsformen [Constitution], art. 10 (Sweden); The Constitution of the People’s Democratic Republic of Algeria, art. 46; Constitution of the Republic of Madagascar, art. 13; Constitución Española, art. 25(1); Constitution of the Islamic Republic of Pakistan, art. 12; Constitution of Botswana, art. 10(8); Constitution of Zambia, art. 18(8); Article 9 of the 2001 Constitution of Senegal; 2008 Constitution of Ecuador, Article 76(3); Daehanminguk Hyonbop [Constitution], art. 13(2) (Republic of Korea); U.S. Constitution art. I § 9; Arts 54 and 57 Constitution of the Russian Federation.

<sup>7</sup> A. Portuese, O. Gough and J. Tanega, ‘The Principle of Legal Certainty as a Principle of Economic Efficiency’ (2017) 44 European Journal of Law and Economics 131, 131–133.

<sup>8</sup> Case C-99/78, *Weingut Gustav Decker K.G. v Hauptzollamt Landau*, ECR 101 [1979] [59].

<sup>9</sup> Vienna Convention on the Law of Treaties, *opened for signature* (23 May 1969) 115 U.N.T.S. 331, art. 28 [hereinafter VCLT].

<sup>10</sup> *R v HMRC ex p Huitson* [2010] EWHC 97, appealed in *R (Huitson) v HMRC*, [2011] EWCA 893; Constitutional Court of Hungary, Decision no. 184/2010. (X.28.) AB [26 October 2010], §§ 5.2–5.3.

<sup>11</sup> Nazis and Nazi Collaborators (Punishment) Law (Israel), 5710–1950, 4 *LSI 154 (1949– 1950)*; War Crimes Act, 1991, c.13 (U.K.); Finance Act, 2006, c. 25 § 94 (U.K.); Law No. 2019-759 of 24 July 2019, Journal Officiel de la République Française [J.O.] [Official Gazette of France], <[https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=FC20F9BF0BBDEBED3705CC6814B4685A.tplgfr37s\\_3?cidTexte=JORFTEXT000038811588&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000038811585](https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=FC20F9BF0BBDEBED3705CC6814B4685A.tplgfr37s_3?cidTexte=JORFTEXT000038811588&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000038811585)> The Taxation (Unpaid Company Tax) Assessment Act, 1982, c. 119 (Austl.); Cathya Djanogly, ‘Retrospective tax legislation: a clash of two moral imperatives’ (2012) Thomson Reuters Practical Law <[https://uk.practicallaw.thomsonreuters.com/0-518-8006?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-518-8006?contextData=(sc.Default)&transitionType=Default&firstPage=true)> accessed 5 February 2021.

<sup>12</sup> See Section 4 of this Article.

<sup>13</sup> G. van Harten and M. Loughlin, ‘Investment treaty arbitration as a species of global administrative law.’ (2006) 17(1) European Journal of International Law 121.

<sup>14</sup> Article 38(1)(c) of the Statute of International Court of Justice; ILC *Second Report on General Principles of Law* UN Doc A/CN.4/741 53–54, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement>> accessed 5 February 2021. O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991); F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, (Martinus Nijhoff 2008); J. Ellis ‘General Principles and Comparative Law’ (2011) 22(4) European Journal of International Law 949, 953–959.

<sup>15</sup> ILC *First Report on General Principles of Law*, A/CN.4/732, (5 April 2019) 8, 30–52 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/100/93/PDF/N1910093.pdf>> accessed 5 February 2021.

This Article follows this two-step analysis. It sets the scene with the history and the rationale of the principle non-retroactive application of law in domestic legal systems from around the world. Then it examines approaches in criminal and administrative law and pays particular attention to environmental law as a species of administrative law. In addition to domestic law, it analyses the case law of international courts and tribunals, as their pronouncements may serve as evidence of the existence of a general principle of law.<sup>16</sup>

The Article concludes that in the context of criminal law, non-retroactivity has become a binding general principle of international law. Outside the criminal law context, however, states can conclude treaties and adopt administrative regulations with retroactive effect to pursue legitimate public policy objectives. The Article calls on international courts and tribunals to be cautious about making pronouncements on the invalidity of laws with retroactive effect under general international law in the absence of explicit treaty provisions or promises to that effect.

## 2. The history and the rationale behind the principle

The principle of non-retroactivity was first clearly articulated in Roman law, where already by the end of the second century B.C. it applied in both criminal and civil law to protect the existing legal order and economic interests.<sup>17</sup> The Roman statesman Cicero explained the importance of the principle of non-retroactivity. According to him, individuals should be able to rely on laws in the expectation that the state will not afterwards interfere with individuals' rights.<sup>18</sup> This expectation helped to ensure equality of all before the law guarding predictability and legal certainty.<sup>19</sup>

Roman law made a distinction between natural or unwritten law (called *ius*) and laws adopted by the legislator (called *lex*). Unlike *lex*, *ius* existed long before the foundation of Rome with its roots in antiquity.<sup>20</sup> Cicero explained the limits of non-retroactivity, such as in situations when the grievous nature of committed actions resulted in an assumed positive duty not to commit them, even in the absence of positive law expressed in a statute. *Ius* came from fundamental moral values and the law of nature which are not necessarily expressed in *lex*. Rather than creating a new law and applying it retroactively the judge was considered to facilitate concrete determination of legal rules.<sup>21</sup> Therefore, the principle of non-retroactivity did not affect *ius*, which usually covered only serious crimes or offences.<sup>22</sup>

It is important to distinguish the principle of non-retroactivity from *res judicata*, which literally means 'a matter that has been adjudicated.' New judgements cannot invade on procedurally 'concluded' acts, and final judgments preclude completely or create legal barriers to relitigation between the same parties in respect of the same object and within the same jurisdiction.<sup>23</sup> In Roman law, the *res judicata* principle served as a 'supreme guarantor of the social order,' protecting from invasions of the past by a new judgment.<sup>24</sup> The

<sup>16</sup> The decisions of international courts and tribunals are considered to be a subsidiary means for the determination of general principles of law. See Article 38(1)(d) of the Statute of International Court of Justice; *supra* note 40; ILC *Second Report on General Principles of Law* UN Doc A/CN.4/741 53–54, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement>> accessed 5 February 2021. O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991); F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008); J. Ellis 'General Principles and Comparative Law' (2011) 22(4) *European Journal of International Law* 949, 953–959.

<sup>17</sup> Broggin (n 4) 168.

<sup>18</sup> *Ibid* 167.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* 151.

<sup>21</sup> *Ibid* 168. For example, the Emperor Justinian's Novel 143 by means of authentic interpretation changed an inheritance rule. The Enactments of Justinian. The Novels. Concerning A Woman Who Suffers Herself to Be Carried Away. S. P. Scott, *The Civil Law*, XVII, Cincinnati, 1932, <[https://droitromain.univ-grenoble-alpes.fr/Anglica/N143\\_Scott.htm](https://droitromain.univ-grenoble-alpes.fr/Anglica/N143_Scott.htm)> ('We order that the present interpretation shall apply, not only to all future cases, but also to those which have passed; just as if this Our law had, in the beginning, with its construction, been communicated.')

<sup>22</sup> In the Middle Ages, Francisco Suarez introduced a similar distinction between the *lex declarativa* and the *lex constructiva*. F. Suárez, *De Legibus*, ac deo Legislatore, Book VII, Chapters IX–XIII (1612), edited and translated in J. Scott, *The Classics of International Law* (1944). France adopted it following the French Revolution. *Lex declarativa* interprets the already-existing laws by removing ambiguities. This is different from *lex constitutiva*, which widens the scope of the law or increases the penalty or introduces a new penal law. Whilst *lex constitutiva* was subject to the principle of non-retroactivity, *lex declarativa* was not. M. B. Crowe, 'The Morality of Retrospective Legislation' (1965) 32 *Irish Theological Quarterly* 338, 346.

<sup>23</sup> Y. Sinai, 'Reconsidering Res Judicata: A Comparative Perspective' (2010) 21 *Duke Journal of Comparative & International Law* 353.

<sup>24</sup> Broggin (n 4) 161.

principles of *res judicata* and non-retroactive application of law both aim at ensuring legal certainty. While *res judicata* concerns court judgements, non-retroactivity applies to legislation.

### 3. Retroactivity in criminal law

#### 3.1. Domestic law

Most, if not all, domestic jurisdictions explicitly recognise the principle of non-retroactivity in the context of criminal law.<sup>25</sup> Prohibition of retroactivity in criminal law means that criminal penalties may not be applied to acts which took place before the relevant rule entered into force. For example, Canada's Constitution enshrines this principle in relation to criminal law.<sup>26</sup> The Gambia, Azerbaijan and Sweden have similarly worded provisions in their constitutions.<sup>27</sup>

Some states do not have written constitutions or have constitutions that do not contain an explicit provision prohibiting the retroactive application of criminal law. Nevertheless, rules that have a similar effect can often be found in case law or domestic statutes. The People's Republic of China's constitution does not contain any provisions on non-retroactivity, but there are a number of statutes recognising the principle.<sup>28</sup> The UK does not have a written constitution but recognises the principle in its Human Rights Act (which incorporates the European Convention of Human Rights into domestic law) as well as earlier case law.<sup>29</sup> Similarly, New Zealand recognises the principle in its Bill of Rights.<sup>30</sup> France has adopted provisions requiring the publication of a legal text before criminal liability can be established.<sup>31</sup> In Bhutan, the principle is found in the national penal code.<sup>32</sup>

Some jurisdictions apply criminal laws retroactively on the basis that certain offences had already existed in international law, which is consistent with the International Covenant on Civil and Political Rights.<sup>33</sup> For example, one Israeli statute applies retroactively to 'crimes against the Jewish people on the basis that the crimes contained therein already existed in customary international law.'<sup>34</sup> In Canada it is possible to prosecute a defendant for an act which, although not criminal in domestic law at the time, was recognized as criminal by general principles of law.<sup>35</sup> The legislation of the United Kingdom gives domestic courts *ex post facto* jurisdiction over war crimes committed during the Second World War.<sup>36</sup> These examples do not show a departure from the principle of non-retroactivity in criminal law as such, because the offences already existed in international law at the time they were committed.

Some domestic legal systems allow retroactive application of criminal law in specific situations. The most controversial examples include allowing the retroactive criminalization of crimes which are political in nature,<sup>37</sup>

<sup>25</sup> K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010), 231–302 and Annex C.

<sup>26</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, (1982) being Schedule B to the Canada Act 1982, ch 11 (U.K.), 11(g).

<sup>27</sup> Examples include Constitution of the Republic of The Gambia, art. 24(5); Constitution of the Republic of Azerbaijan, art. 71(VIII); Regeringsformen [Constitution], art.10 (Sweden).

<sup>28</sup> People's Republic of China Criminal Law arts 3 and 12; People's Republic of China Legislation Law, ch. 2 National Law, ¶1 Scope of Lawmaking Authority, art 9; People's Republic of China Legislation Law, ch. 5 Scope of Application and Filing, art. 84.

<sup>29</sup> United Kingdom Human Rights Act 1998, sched. 1, pt. 1, art. 7; *Knüller (Publishing, Printing and Promotions) Ltd. v DPP*, [1973] AC 435.

<sup>30</sup> New Zealand Bill of Rights Act 1990 arts 25 and 26.

<sup>31</sup> Declaration of the Rights of Man and of the Citizen, art. 8 (approved by the National Assembly of France Aug. 26, 1789). See also The Constitution of the People's Democratic Republic of Algeria, art. 46; Constitution of the Republic of Madagascar, art. 13; Constitución Española, art. 25(1).

<sup>32</sup> Bhutan Penal Code art 6.

<sup>33</sup> Art 15 of International Covenant on Civil and Political Rights ('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.')

<sup>34</sup> *Nazis and Nazi Collaborators (Punishment) Law (Israel)*, 5710–1950, 4 *LSI* 154 (1949–1950).

<sup>35</sup> *R v Finta*, 1 S.C.R. 701 [1994].

<sup>36</sup> War Crimes Act, [1991] c.13 (U.K.). See also, a discussion of the international law exception to the principle of non-retroactivity in criminal law in V. Spiga, 'Non-retroactivity of criminal law: a new chapter in the Hissene Habré Saga' (2011) 9(1) *Journal of International Criminal Justice* 5, 11–12.

<sup>37</sup> Constitution of the Islamic Republic of Pakistan, art. 12 ([1] 'No law shall authorize the punishment of a person (a) for an act or omission that was not punishable by law at the time of the act or omission; or (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed [2] Nothing in clause [1] of in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time [...] an offence.')

or the retroactive punishment of an individual in contempt.<sup>38</sup> Arguably, these examples violate the principle of non-retroactivity and are likely unlawful as a matter of international law as discussed in more detail below.<sup>39</sup>

To sum up, most if not all states support the principle of non-retroactive application of law as fundamental in domestic criminal law.

### 3.2. International Law

Domestic law may serve as an important source of international law as it can lead to the recognition of a general principle if there is consistent recognition across a representative number of jurisdictions.<sup>40</sup> Moreover, a number of international human rights instruments explicitly provide for the principle of non-retroactive application of law.

The position that public international law takes on retroactivity is important because of the three roles it can play. First, the principle of non-retroactivity may be relevant to regulate relations between states and other subjects of international law. Second, it informs or disciplines national law on the issue of retroactivity. Finally, in the absence of clear domestic law provisions, it can play a subsidiary role interpreting laws. Although there is no common terminology as to what 'retroactive application' is or when it is permissible,<sup>41</sup> it is possible to identify certain patterns in international law on retroactivity.

The Universal Declaration of Human Rights prohibits criminal convictions for any conduct which did not constitute a crime, under national or international law, at the time when it was committed.<sup>42</sup> In addition, it bans imposing a penalty heavier than the one that was applicable at the time the crime was committed.<sup>43</sup> The European Convention of Human Rights also provides that no one can be guilty of a criminal offence on the basis of any act or omission which did not constitute an offence at the time.<sup>44</sup> The International Covenant for Civil and Political Rights contains similar provisions.<sup>45</sup> Many states adopted domestic laws on retroactivity heavily influenced by the wording in such international treaties.<sup>46</sup>

International courts and tribunals have consistently recognised and applied the principle in the context of criminal law. For example, in one case the European Court of Human Rights (ECtHR) found a violation of the principle of non-retroactivity when the domestic court sentenced the applicants under legislation that had not existed at the time of the act.<sup>47</sup> In its judgment the Court rejected arguments that the principle of retroactivity embodied in Article 7 did not apply in the case of war crimes.<sup>48</sup>

<sup>38</sup> Constitution of Botswana, art. 10(8) ('No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law: Provided that nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed'; Constitution of Zambia, art. 18(8) ('No person shall be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law: Provided that nothing in this clause shall prevent a court from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in written law and the penalty therefore is not so prescribed.').

<sup>39</sup> See the relevant provisions of international law in Chapter 3.2.

<sup>40</sup> Statute of the International Court of Justice, (18 April 1946), art. 38(1), 33 U.N.T.S. 993 [hereinafter ICJ Statute] ('The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... the general principles of law recognized by civilized nations.'). For an explanation of how general principles can be difficult to identify in practice, see C. Redgwell, 'General Principles of International Law' in S. Vogenauer and S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Bloomsbury Publishing 2017); N. Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 *Harvard International Law Journal* 111; F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, (Martinus Nijhoff 2008);

<sup>41</sup> One ICSID tribunal discussed this in detail: *Tradex Hellas S.A. (Greece) v Republic of Albania*, ICSID Case No. ARB/94/2 Decision on Jurisdiction [24 December 1996] [186].

<sup>42</sup> Universal Declaration of Human Rights, (12 December 1948) G.A. Res. 217A, art. 11(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 ('No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.').

<sup>43</sup> *Id.*

<sup>44</sup> European Convention on Human Rights, art 7.

<sup>45</sup> International Covenant on Civil and Political Rights, (16 December 1966) art. 15(1), S. Exec. Rep. 102–23 999 U.N.T.S. 171 ('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.').

<sup>46</sup> Examples include Criminal Law of the People's Republic of China, (adopted by the Fifth National People's Congress on 1 July 1979) art. 12; Grondwet van Nederland [Constitution] art. 16 (The Netherlands); Constitution of Argentina, art. 18.

<sup>47</sup> *Maktouf and Damjanovic v Bosnia and Herzegovina*, 2013-IV Eur. Ct. H.R. 1 (2013).

<sup>48</sup> *Ibid* [43].

In other cases, the ECtHR found breaches of Article 7 as the domestic courts which failed to apply the law as it stood at the time of the relevant acts.<sup>49</sup> In *Kononov v Latvia* the Court described the principle as 'an essential element of the rule of law' which 'occupies a prominent place in the Convention.'<sup>50</sup> Similarly, the Inter-American Court of Human Rights has held that the state could not try an individual for criminal offences which, although in existence in domestic law, did not apply to the individual at the time of committing the offence.<sup>51</sup>

To conclude, broad consensus exists in support of a general principle of the non-retroactivity in criminal law. International and domestic law norms provide that no one should be convicted for any criminal offence for conduct which did not constitute a crime, under national or international law at the time of its commission.

## 4. Retroactivity in administrative law

### 4.1. Domestic law

Although it appears that a consensus has formed on the international level regarding non-retroactivity in criminal law, in administrative law the situation is more complex. While criminal law deals with the most serious offences, administrative law establishes rules governing how the administration is authorised to work and the remedies in case of breach of administrative regulations.<sup>52</sup> Imprisonment is not a penalty for administrative or regulatory infractions, but heavy fines, injunctions and performance orders may have a significant adverse effect on the liberty of a person or company. Many will wish to know the rules in advance and adapt their behaviour to avoid such sanctions.<sup>53</sup> In administrative law, like in criminal law, the rules are imposed by the state rather than agreed by the parties. Therefore, the logic which explains the application of the rule against retroactivity in the criminal law may also apply in administrative law.

National constitutions may provide that the principle of non-retroactivity applies equally in the administrative and the criminal law context.<sup>54</sup> But only a handful of jurisdictions do so. For example, the Constitution of Ecuador establishes the general principle of non-retroactivity applied to 'criminal, administrative or other offense[s].'<sup>55</sup> The Constitution of the Republic of Korea protects from deprivation of property rights by means of retroactive legislation.<sup>56</sup> The Constitution of the United States bars government from enacting *ex post facto* laws, or, in other words, retroactively making illegal conduct that was not illegal when performed without identifying any specific area of law.<sup>57</sup> Despite the broad wording of the prohibition, courts have effectively limited the prohibition to criminal laws.<sup>58</sup>

Most countries do not have explicit provisions related to non-retroactivity outside criminal law in their constitutions. Moreover, domestic administrative regulations may explicitly provide for retroactive effect. Taxation is an area of administrative law where retroactive application of law is common.<sup>59</sup> For example, in the 1980s, the Australian government passed a number of tax laws aimed at tackling tax avoidance allowing for retroactive recovery of tax.<sup>60</sup> Similarly in France the *Conseil Constitutionnel* upheld the validity of retroactive tax legislation which was considered to be in the general interest.<sup>61</sup> More recently, France enacted the

<sup>49</sup> *Korbely v Hungary*, ECtHR App no 9174/02 [2008]; *Vasiliauskas v Lithuania*, ECtHR App no 35343/05 [2015].

<sup>50</sup> *Kononov v Latvia*, ECtHR App no 36376/04 [2010].

<sup>51</sup> *Likat Ali Alibux v Suriname*, Case 12.608, Inter-Am. Ct. H.R., Report No. 101/11, OEA/Ser.L./V/II.142, doc. 32 Written Final Observations, 2–3 [2011].

<sup>52</sup> J. Bell 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds.) *The Oxford Handbook of Comparative Law* (Oxford University Press 2012).

<sup>53</sup> J. Harris Aiken, 'Ex Post Facto in the Civil Context: Unbridled Punishment' (1992) 81 *Kentucky Law Journal* 323, 323–325.

<sup>54</sup> *E.g.*, in Lithuania, art. 8 of the Republic of Lithuania Code of Administrative Offences prohibits retroactive administrative penalties. *See also* Constitution of the Russian Federation, art. 54, 57.

<sup>55</sup> 2008 Constitution of Ecuador, Article 76(3) ('No one shall be judged or punished for a deed or omission which, at the time of its perpetration, is not legally classified by law as a criminal, administrative or other offense; nor shall a punishment not provided for by the Constitution or law be applied. A person can only be judged by a competent judge or authority and in keeping with the procedures corresponding to each proceeding').

<sup>56</sup> Daehanminguk Hyonbop [Constitution], art. 13(2) (Republic of Korea).

<sup>57</sup> U.S. Const. art. I § 9.

<sup>58</sup> For an overview *see* S. Selinger, 'The Case Against Civil Ex Post Facto Laws' (1995) 15 *Cato Journal* 191. For the history of this principle in the US law, *see* W.W. Crosskey, 'The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws' (1947) 14 *University of Chicago Law Review* 539.

<sup>59</sup> *See, e.g.*, C. Djanogly, 'Retrospective tax legislation: A clash of two moral imperatives' (2012) Thomson Reuters Practical Law <[https://uk.practicallaw.thomsonreuters.com/0-518-8006?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-518-8006?contextData=(sc.Default)&transitionType=Default&firstPage=true)> accessed 5 February 2021.

<sup>60</sup> The Taxation (Unpaid Company Tax) Assessment Act, 1982, c. 119 (Austl.) allowed for retroactive recovery of tax.

<sup>61</sup> *See, e.g.*, CC decision no. 99-425DC, [29 December 1999] [8].

Digital Services Act retroactively introducing a three percent digital services tax.<sup>62</sup> In the United Kingdom, the government has introduced a number of tax regulations with retroactive effect.<sup>63</sup> As discussed in more detail below, these measures have been challenged in the domestic courts on the basis of incompatibility with the European Convention on Human Rights.<sup>64</sup> However the courts have held that the government was justified in introducing such legislation.<sup>65</sup>

It is helpful to look at the reasoning of domestic courts facing challenges to retroactive application of administrative law. The reasoning of the English court in a case concerning retroactive provisions in the Finance Act 2008,<sup>66</sup> closely resembled that of an earlier ECtHR case on a similar matter.<sup>67</sup> The courts in both cases relied on three factors to decide on the lawfulness of the retroactive application of law. Firstly, that the public interest pointed towards preventing a small number of citizens from avoiding tax. Secondly, that the complainant in both cases had been explicitly warned that their intended scheme was contrary to the purpose of the tax measures in force at the time. Thirdly, that the complainants had been aggressively undermining the intention of the legislature. However, the decisions leave open the possibility that retroactive legislation may be deemed impermissible where these factors are not present.

Growing concerns regarding violation of labour, environmental and safety standards, particularly in resource-rich developing countries, have resulted in introduction of stabilization clauses which contain carve outs relating to retroactive changes in these areas. For example, the Senegalese Petroleum Code allows stabilization clauses in petroleum contracts against future legal, economic and fiscal changes, but such clauses cannot be invoked if changes relate to the protection of the safety of a person, the environment, the control of oil operations or labour law, unless the modification violates 'international practices' or applies in a discriminatory manner.<sup>68</sup>

The United States courts recognize a presumption against the retroactive application of criminal statutes, but have ruled that imposing liability for acts committed before the effective date of the statute as such does not violate due process.<sup>69</sup> As long as there is legitimate legislative purpose, retroactive application of legislation is justified.<sup>70</sup> Historically, United States courts tended to apply the principle to legislation that is considered to have a punitive motive.<sup>71</sup> One federal court dealing with this question reasoned that 'the infliction of punishment, either legislatively or retrospectively, is a *sine qua non* of legislation that runs afoul of these constitutional prohibitions.'<sup>72</sup>

Another example showing a similar approach the Hungarian Constitutional Court ruling that the retroactive nature of a 98% tax on severance payments was clearly exaggerated and of a confiscatory nature, and therefore disproportionate and unjustified.<sup>73</sup> These cases suggest that proportionate retroactive administrative measures are usually valid. Conversely, if such measures are of confiscatory and punitive measure, they are likely to be struck down.

To conclude, outside of the area of criminal law, domestic legal systems differ when it comes to retroactive application of law – from a general ban to a more nuanced approach specifying certain areas of law or consequences where retroactivity is permissible. This suggests that in the area of administrative law, the general principle of law on non-retroactivity has not formed. States balance the need to for non-retroactivity against other public policy considerations.

<sup>62</sup> On 24 July 2019, the French President signed into law a three percent digital services tax, which applies retroactively to income generated after 1 January 2019: Law No. 2019-759 of 24 July 2019, Journal Officiel de la République Française [J.O.] [Official Gazette of France].

<sup>63</sup> Finance Act 2006 on notional payments, c. 25 § 94 (U.K.); the Finance Act 2008 on double taxation, *ibid* at c. 9 § 58; Finance Act 2010 on repo rules, *Id.* at c. 13 § 45.

<sup>64</sup> [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 November 1950, (ETS No. 5), 213 U.N.T.S. 222 [hereinafter the ECHR]. The challenges concerned protection of property under Protocol 1 to the ECHR, *entered into force* 18 May 1954, (ETS No. 9), 213 U.N.T.S. 262, art. 1.

<sup>65</sup> See *infra* notes 64 & 65.

<sup>66</sup> *R v HMRC ex p Huitson* [2010] EWHC 97 [76]–[97], appealed in *R (Huitson) v HMRC*, [2011] EWCA 893 [47]–[73].

<sup>67</sup> *The National and Provincial Building Society v The UK* (197) S.T.C. 1466.

<sup>68</sup> Article 72 of the 2019 Petroleum Code of Senegal. For more information on stabilization clauses and human rights standards see A. Shemberg, *Stabilization Clauses and Human Rights*. OECD (2008), <<http://www.oecd.org/investment/globalforum/40314647.pdf>; *Stabilization Clauses and Human Rights*>.

<sup>69</sup> See *United States v Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 [1982]; *United States v Northeastern Pharmaceutical & Chemical Co Inc.*, 810 F.2d 726 [1983].

<sup>70</sup> See, e.g., *Pension Benefit Guaranty Corp. v R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 [1984]; *United States v Northeastern Pharmaceutical & Chemical Co Inc.*, 810 F.2d 726 [1983].

<sup>71</sup> See, e.g., *Burgess v Salmon*, 97 US (7 Otto) 381 [1878] and *Cummings v Missouri*, 71 US (4) 277 [1866].

<sup>72</sup> *United States v Monsanto*, 858 F. 2d 160 [1988].

<sup>73</sup> Constitutional Court of Hungary, Decision no. 184/2010. (X.28.) AB [26 October 2010] [§§5.2–5.3].

## 4.2. International law

The Vienna Convention on the Law of Treaties (much of which is regarded as a codification of customary international law)<sup>74</sup> provides that, in the absence of a contrary intention, international treaties do not apply to situations which occurred before the treaty entered into effect:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.<sup>75</sup>

The Vienna Convention sets out the principle as a presumption, subject to the contrary intention of states. A number of courts and tribunals have referred to the principle when discussing whether a specific situation is covered by the relevant treaty.<sup>76</sup>

According to Hersch Lauterpacht, 'it is a general principle of law that legislation, unless it specially provides to the contrary or unless irresistible considerations of justice so require, is not retroactive.'<sup>77</sup> It is clear from this quote that states can depart from this principle based on their own considerations of justice.

Various international courts and tribunals have applied the principle of non-retroactivity to areas outside of criminal law. For example, the Inter-American Court of Human Rights stated that the principle of non-retroactivity applies with equal force to administrative and criminal sanctions.<sup>78</sup> The court reasoned that administrative sanctions are also an expression of the state's punitive power and can result in an alteration or deprivation of individual rights as much as criminal sanctions can.<sup>79</sup>

Some states have taken the view that their regulatory autonomy is more important than the certainty provided for by the rule of non-retroactivity and have drafted treaties which explicitly carve-out areas where retroactive measures are permitted. For example, the Sweden-Russia bilateral investment treaty allows the state parties to retroactively apply exceptions to the national treatment obligations when this would be for the purpose of maintaining defence, protecting national security and public order, the environment, morality and public health.<sup>80</sup>

European Union law also allows departure from the principle of non-retroactive application 'where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.'<sup>81</sup> The EU's highest court has engaged in a cost-benefit analysis to determine whether the benefits of the 'general interest' outweigh the costs of retroactive administrative regulations.<sup>82</sup> Therefore, in situations where the retroactive effect brought only benefits and no costs for those affected, the general principle of non-retroactive application of law did not apply.<sup>83</sup>

Another exception in EU Law concerns situations in which it was reasonable to foresee retroactive application of law. For example, in the context of anti-dumping law, the European Court of Justice concluded that the retroactive effects of anti-dumping duties did not constitute a breach of the principle of legitimate expectations because the effects were reasonably foreseeable, even though there were no transitional measures to mitigate the effect of retroactive application of law.<sup>84</sup>

The practice of international tribunals is not uniform and arguably tribunals occasionally pronounce the existence of the general principle of non-retroactivity without a solid justification. For example, in a number

<sup>74</sup> *E.g.*, in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, I.C.J. Reports 1997, p 7 [46]: '[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law.'

<sup>75</sup> Vienna Convention on the Law of Treaties, *opened for signature* (23 May 1969) 115 U.N.T.S. 331, art. 28 [hereinafter VCLT].

<sup>76</sup> *Blečić v Croatia*, App No 59532/00, 2006-III Eur. Ct. H. R. [2006] [70] (referred to the principle of non-retroactivity in deciding whether the ECHR bound the state in relation to acts which took place before Croatia was a party to the treaty); *Paushok v Mongolia*, UNCITRAL Case Award on Jurisdiction and Liability [28 April 2011] [434]; *Société Générale v The Dominican Republic*, LCIA Case No. UN 7927 Award on Preliminary Objections [19 September 2008] [78].

<sup>77</sup> H. Lauterpacht, 'The Nationality of Denationalized Persons' (1948) 1 *Jewish Yearbook of International Law* 164, 168.

<sup>78</sup> *Baena-Ricardo and Others v Panama, Inter-Am. Ct. H.R., I.A.C.H.R. (ser. C) No 722 [2001] [107]*.

<sup>79</sup> *Ibid.*

<sup>80</sup> Russian Federation – Sweden BIT [Bilateral Investment Treaty], (4 April 1995) art. 3(3).

<sup>81</sup> C-98/78, *Racke v Hauptzollamt Mainz*, E.C.R. 69 [1979] [20].

<sup>82</sup> *See, e.g.*, Case C-108/81, *Amylym v Council*, E.C.R. 3107 [1982] [6–8]; Case C-4/73, *Nold v Commission*, E.C.R. 491 [1974].

<sup>83</sup> *See, e.g.*, Case C-90/95 *de Compte v Parliament*, E.C.R. 1999 [1997]; Case C-15/85, *Consorzio Cooperativo d'Abruzzo v Commission*, E.C.R. 1005 [1987]; Case C-78/77, *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, E.C.R. 169 [1978]; Case T-7/99, *Medici Grimm v Council*, E.C.R. II-2671 [2000].

<sup>84</sup> Case C-246/87, *Continente Produkten-Gesellschaft Erhardt-Renken GmbH & Co. v Hauptzollamt Munchen-West*, E.C.R. 1151 [1989]. See the same exception in Case C-258/80, *Metallurgica Rumi v Commission*, E.C.R. 251 [1981] [11]–[12].



of cases international administrative tribunals<sup>85</sup> have relied on what they labelled the 'well-known general principle' of non-retroactivity in the context of disputes concerning employment rights. In each case, however, the existence of the principle is merely asserted, and no effort is made to survey rules of domestic or international law.<sup>86</sup> The same criticism can be made of other tribunals. One example is the International Centre for the Settlement of Investment Disputes (ICSID) award in *RREEF Infrastructure v Spain*. The tribunal found that the imposition of retroactive measures violated 'a well-established general principle of law.'<sup>87</sup>

A 2020 award of the Permanent Court of Arbitration in *Cairn Energy v India* have taken a more nuanced and arguably more appropriate approach to retroactivity in administrative law.<sup>88</sup> In that case, an investor argued that the state had breached the fair and equitable treatment standard by adopting retroactive taxation regulations. The tribunal concluded that outside of criminal law the retroactive imposition of duties or limitation of rights was permissible if in the public interest and proportionate. Consequently, the tribunal reasoned that a balancing exercise had to be carried out in order to determine whether there had been a breach of the fair and equitable treatment standard. Other tribunals have rejected the general applicability of the principle of non-retroactivity in environmental law as explained in more detail in the next section of this Article.

The discussion of both domestic and international law above shows that although administrative law usually applies prospectively, international law allows to derogate from the non-retroactivity principle in administrative regulations by explicit provisions of treaties or legislation. The analysis of this principle in the context of environmental law, a species of administrative law, below also supports this conclusion.

## 5. Retroactivity in environmental law

### 5.1. Domestic law

As states and regional authorities introduce regulations to meet greenhouse gas emissions targets, some of these administrative regulations have retroactive effect which causes an increasing number of disputes. The understanding is growing that renewable energy sources will play a vital role in the future to attain a range of Sustainable Development Goals,<sup>89</sup> including sustainable energy for all, sustainable economic growth and mitigating the consequences of climate change.<sup>90</sup> The International Chamber of Commerce set up a Task Force to consider the role of arbitration in resolving climate change related disputes. Its recent report concluded that 'climate change related disputes will increase exponentially.'<sup>91</sup> Issues already arise in arbitration where tribunals are confronted with attempts to apply laws retroactively and more cases related to environmental issues are likely to arise in the near future.<sup>92</sup>

A growing number of disputes relate to the domestic law implementation of the EU policies to combat climate change. Initially, EU legislation promoted the development of clean energy in Europe, in particular investment renewables by encouraging generous subsidies to support renewable energy sources.<sup>93</sup> However, as discussed in more detail below, subsequent altering tariff schedules and qualifying technical criteria with retroactive effect in EU Member States reduced such subsidies with an almost punitive effect on existing

<sup>85</sup> This tribunal resolves disputes between international civil servants and their employers (intergovernmental organisations contributing to the development of international administrative law. See Y. Kryvoi, 'The Law Applied by International Administrative Tribunals: from Autonomy to Hierarchy' (2015) 47 *George Washington International Law Review* 267.

<sup>86</sup> *Al Albani v Secretary-General of the United Nations*, Judgment No. 2016-UNAT-663 [2016] [24]–[27]; *Hunt-Matthes v Secretary-General of the United Nations*, Judgment No. 2014-UNAT-444/Corr.2 [2014] [26]–[30]; *Mrs S. N. v World Intellectual Property Organization* (WIPO), Judgment No. 3185 [6 February 2013].

<sup>87</sup> *RREEF Infrastructure (G.P.) Ltd and RREEF Pan-European Infrastructure Two Lux Sarl v Kingdom of Spain*, ICSID Case No. ARB/13/30 Decision on Responsibility and the Principles of Quantum [30 November 2018] [326], [474].

<sup>88</sup> *Cairn Energy PLC and Cairn UK Holdings Ltd. v Republic of India*, PCA Case No. 2016-7, Award [21 December 2020] [1734] – [1789].

<sup>89</sup> Sustainable Development Goals, G.A. Res. 70/1, at 14, U.N. Doc.A/RES/70/1 (25 September 2015), <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>> While Sustainable Development Goals are not binding, a number of international agreements have been concluded to achieve such goals. See, e.g., the 2016 Paris Agreement on Climate Change which is a legally binding international treaty on climate change within the UN Framework Convention on Climate Change.

<sup>90</sup> C. Verburg and J. Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology: The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' (2019) 2(1) *Brill Open Law* 101–139.

<sup>91</sup> International Chamber of Commerce Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes Through Arbitration and ADR* 16 (2019), <[www.iccwbo.org/climate-change-disputes-report](http://www.iccwbo.org/climate-change-disputes-report)> accessed 5 February 2021.

<sup>92</sup> See, e.g., *Conocophillips Gulf of Paria B.V. v Corporación Venezolana de Petróleo, S.A., Petróleos de Venezuela, S.A.*, ICC Case No. 22527/ASM/JPA Award (29 July 2019) [378] (the tribunal concluded that a nationalisation Decree 'did not and could not apply retroactively so as to strip the Claimant of rights that had vested prior to the dispossession' of the investment).

<sup>93</sup> See section 4.2; Renewable Energy Directive (2009/28/EC); European Commission, *Delivering the internal electricity market and making the most of public intervention*, C(2013) 7243 final (5 November 2015) <[https://ec.europa.eu/energy/sites/ener/files/documents/com\\_2013\\_public\\_intervention\\_en\\_0.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/com_2013_public_intervention_en_0.pdf)> accessed 5 February 2021.

investments in renewables. Investors asserted claims against EU Member States arguing that retroactive application of law is one way a state can breach an investor's legitimate expectations or even indirectly expropriate the investments.<sup>94</sup> As will be seen below, these claims have had mixed success.

Intergovernmental organizations such as the Energy Charter Secretariat recommend avoiding retroactive application of changes to existing regulations in domestic law to minimize conflicts with foreign investors.<sup>95</sup> However, governments in various parts of the world introduced retroactive taxation policies to encourage the development of certain energy sources in circumstances where such projects would be economically unattractive without tax benefits and subsidies.<sup>96</sup> For example, in the Czech Republic, the parliament changed the renewable energy regime retroactively, increasing the profits tax rate payable to stimulate introduction of solar batteries.<sup>97</sup> The Czech Republic Constitutional Court ruled that such retroactive changes were permissible in limited scenarios, if justified on the grounds of public order.<sup>98</sup>

In Italy, statutes dealing with environmental and energy concerns included retroactive provisions.<sup>99</sup> Similarly, Spain retroactively reduced generous renewable energy subsidies.<sup>100</sup> That prompted various domestic and international claims, including some submitted to the Constitutional Court and the Supreme Court. The courts were asked to examine the legality of retroactive application of law in the light of the Spanish Constitution, which guarantees 'the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights.'<sup>101</sup>

The Spanish Constitutional Court and the Supreme Court eventually concluded that the reduction of renewable incentives was consistent with the constitutional principles of legitimate expectations, legal certainty, and the prohibition of retroactivity.<sup>102</sup> According to the courts' logic, the legislator duly justified the cuts as a part of a coherent policy of stimulating the growth of renewable energies technology and competition in this sector and therefore the measures were not an arbitrary use of public power.<sup>103</sup>

Soil use and pollution is another area where retroactive application of law may be permissible. For example, although as a general rule, retroactivity is prohibited in Kazakhstan,<sup>104</sup> the Sub-Soil Use Code allows retroactive application of law in a range of cases such as terms and procedure of delimitation of a subsurface plot, conservation of subsurface plot, obligations to supply hydrocarbons to the domestic market or procedures for conducting exploration and liquidation of consequences of subsurface use operations.<sup>105</sup>

In the United States, the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorized the government to force responsible parties to clean up inactive or abandoned hazardous substance sites.<sup>106</sup> CERCLA retroactively applies 'to control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'<sup>107</sup>

Although the language of CERCLA is not explicit, federal courts found that, in light of the legislative history and general purpose of the statute, it should be interpreted as imposing liability for recovery and response costs for incidents which occurred before the passage of the Act.<sup>108</sup> According to US courts, under

<sup>94</sup> M. Alessi, J. Núñez Ferrer and C. Egenhofer, 'Suspended in Legal Limbo: Protecting Investment in Renewable Energy in the EU', CEPS, (23 January 2018) 5 <<https://www.ceps.eu/ceps-publications/suspended-legal-limbo-protecting-investment-renewable-energy-eu/>> accessed 5 February 2021

<sup>95</sup> Best Practices in Regulatory Reform: Minimising Potential Conflicts with Foreign Investors, Decision of the Energy Charter Conference, CCDEC 2017 4 INV, Brussels (11 October 2017).

<sup>96</sup> C.J. Sarasa-Maestro, R. Dufo-López and J.L. Bernal-Agustín, 'Photovoltaic Remuneration Policies in the European Union' (2013) 55 Energy Policy 317, 326.

<sup>97</sup> Ibid.

<sup>98</sup> *Photovoltaic Power Plants*, Czech Republic Constitutional Court Case No. Pl. ÚS 17/11 15.05.2012 Judgment [2012] [52]–[53].

<sup>99</sup> Article 23 of law 91/2014 allows retroactive changes to the feed-in tariff rates for large-scale photovoltaic solar producers.

<sup>100</sup> Law RDL 2/2013 implied the retroactive elimination of the generous incentives established in 2004. Subsequent Law 24/2013 on the electricity sector confirmed the situation. Series, I. A. (2016); C. Otero García-Castrillón, 'Spain and Investment Arbitration: The Renewable Energy Explosion' in Armand de Mestral (ed.), *Second Thoughts: Investor State Arbitration between Developed Democracies* (McGill-Queen's University Press 2017).

<sup>101</sup> Art 9(3) Constitution of Spain.

<sup>102</sup> For an overview of this and other decisions in various jurisdictions Otero García-Castrillón (n 101).

<sup>103</sup> Ibid.

<sup>104</sup> Articles 42–43 of the 2016 Law on Legal Acts of the Republic of Kazakhstan.

<sup>105</sup> Article 277 of the 2017 Code on Subsoil and Subsoil Use of the Republic of Kazakhstan.

<sup>106</sup> Comprehensive Environmental Response, Compensation, and Liability Act § 106, 42 U.S.C. Sec. 9606.

<sup>107</sup> See H.R. Rep. No. 96-1016 (1980). For analysis of CERCLA's legislative history see D. Farber, 'How Legal Systems Deal with Issues of Responsibility for Past Harmful Behaviour' in L. H. Meyer and P. Sanklecha (eds.) *Climate Justice and Historical Emissions* (2017) 88–89.

<sup>108</sup> *United States v Shell Oil Co* 22 Env't Rep. Cas. (BNA) 1473 (D. Colo) [1985].

CERCLA, 'the restitution of clean-up costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.'<sup>109</sup> Therefore, as long as the statute has no punitive character, the principle of non-retroactivity does not apply.<sup>110</sup>

The Republic of Korea enacted a statute modelled on the CERCLA approach.<sup>111</sup> However, Korea's Constitutional Court subsequently held that its retroactive imposition of liability violated 'the principle of legitimate expectations protection' rooted in due process rights contained in the Korean Constitution, which provides that, 'no person shall be deprived of property rights by means of retroactive legislation.'<sup>112</sup> The court ruled that 'retroactive legislation' can be 'genuine' retroactive legislation applying to facts or laws already finalized or 'non-genuine' applying to pending facts or laws. The 'non-genuine retroactive legislation' is permissible, provided that the legislature balances the public interests requiring retroactivity and legitimate expectations. To ensure stability of the law and public confidence, 'genuine retroactive legislation' was not permissible under the Constitution in the absence of exceptional circumstances. Subsequently, the Korean parliament introduced new defences to clean-up liabilities, and a right to reimbursement for parties initially responsible for cleaning up as well as adopted special measures to reduce the risk of unconstitutional of retroactive liability.<sup>113</sup>

This overview of jurisdictions with different legal traditions demonstrates that states increasingly adopt administrative regulations with retroactive effect in environmental laws, leaving courts to determine the legality of these provisions, usually as a matter of domestic law. As a practical matter, courts do not conclude that retroactive laws as such are illegal. Instead, they aim to ensure that retroactive application of law takes into account the public interests requiring retroactivity and legitimate expectations of other parties.

## 5.2. International law

International environmental treaties are usually silent on retroactive application of law, and there is little relevant court or tribunal practice. One notable exception is the 1997 Kyoto Protocol, which allows for its retroactive application so that parties apply decisions on human induced activities affecting the climate from its 'first commitment period.'<sup>114</sup> As a result of this provision, states may modify and implement their climate policy support schemes with retroactive effect.<sup>115</sup> Notably, the Paris Agreement on Climate Change does not contain any similar language, and does not make any mention of states imposing liability on private actors for past acts or emissions. It therefore seems likely that the Paris Agreement will be interpreted in line with the general approach under the Vienna Convention on the Law of Treaties discussed above.

Because of the lack of clear guidance on permissibility of retroactive application of domestic and international law, investor-state tribunals face an increasing number of disputes. Retroactive changes to the EU regulatory regime on renewable energy led to multiple claims of investors against states and even a backlash against investment arbitration.<sup>116</sup> These claims typically involved the investor claiming that it had a legitimate expectation that the host state would not retroactively change its domestic law, and that the decision to do so led to a breach of the fair and equitable treatment standard.<sup>117</sup>

For example, in *Eiser and Energía Solar v Spain*, the ICSID tribunal held that the retroactive nature of energy sector regulations was one reason for finding a breach of the fair and equitable treatment standard.<sup>118</sup> Spain replaced a tariff regime applicable at the moment of the investment with a new regime. As

<sup>109</sup> Ibid at 174–5.

<sup>110</sup> Ibid.

<sup>111</sup> Y. Yoon, 'The Impacts and Implications of CERCLA on the Soil Environmental Conservation Act of the Republic of Korea' (2017) 6 *Transnational Environmental Law* 11, 11–12.

<sup>112</sup> Constitutional Court of the Republic of Korea, Decision 2010 Hunba 28, (23 August 2012); Constitutional Court of the Republic of Korea, Decision 2010 Hunba 167 (23 August 2012).

<sup>113</sup> Ibid.  
Yoon (n 112) 11.

<sup>114</sup> Art. 3(4) Kyoto Protocol to the United Nations Framework Convention on Climate Change [hereinafter FCCC], FCCC Conference of the Parties, 3d Sess., UN Doc. FCCC/CP/1997/L.7/Add.1 (10 December 1997).

<sup>115</sup> See, e.g., J. Delbeke, G. Klaassen & S. Vergote, 'Climate-related Energy Policies' in J. Delbeke and P. Vis (eds.) *EU Climate Policy Explained* (Routledge 2015) 56 ('Member States were generally slow to adapt their support schemes, and this created situations of overly generous subsidies. This undermined the credibility of the policy, which coincided with the budgetary crisis that spread over Europe. As a result, the support schemes were modified and sometimes even subject to retroactive revisions').

<sup>116</sup> A.M. López-Rodríguez, 'The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU' (2019) 8 *Transnational Environmental Law* 279, 301.

<sup>117</sup> The fair and equitable treatment standard is usually conceived of as encompassing a number of doctrines, including the protection of legitimate expectations – see C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2<sup>nd</sup> ed 2017), 314–322.

<sup>118</sup> *Eiser and Energía Solar v Spain*, ICSID Case No. ARB/13/36 Final Award [4 May 2017] [400].

a result, the investor received a much lower than projected rate of remuneration. The tribunal noted that the investor had a legitimate expectation that the regulatory environment would have a fundamental stability under the fair and equitable treatment clause in the Energy Charter Treaty. Although the tribunal recognised the importance of maintaining the host state's regulatory autonomy and rejected the argument that the fair and equitable treatment clause protects investors against all changes in host state regulation,<sup>119</sup> it concluded that the retroactive measures constituted a radical and impermissible change.<sup>120</sup>

Investor-state tribunals have had to balance the principle of non-retroactivity against the regulatory autonomy of the host states. For instance, in the Energy Charter Treaty case of *Eiser and Energía Solar v Spain* outlined above, the tribunal determined that the investor's interest in a stable regulatory environment outweighed the interest of the state in being able to adapt its domestic law to stay up to date with scientific and environmental knowledge.<sup>121</sup> However, in another dispute, the tribunal concluded that the renewable incentives regime could not be regarded as a specific commitment to the investors because it had a general character and applied to all market participants.<sup>122</sup> The tribunal in that case considered the regulation was not specific enough to be a 'representation' upon which the investor could rely.

In *Perenco Ecuador Limited v Ecuador*, the tribunal examined an apparent conflict between Ecuadorean domestic law imposing retroactively strict environmental liability and legitimate expectations of investors under the Ecuador-France BIT.<sup>123</sup> Having examined attempts to impose strict tortious liability after the fact, the tribunal concluded that an investor can in general be held only to the legal standards that applied to its conduct at the time of the conduct. The tribunal acknowledged the constitutional principle of non-retroactivity and the 'public order' exception to this principle, but held that the exception was not present in Ecuadorean legal practice.<sup>124</sup> It ruled that 'basic legal standards against which [the investor] was to conduct itself cannot later be changed and applied retroactively to impose liability where none existed under the then-applicable standard.'<sup>125</sup> In this particular case, the tribunal applied domestic law to determine the respondent state's liability under international law.

As this review of cases suggests, states often adopt explicit legislation or treaty provisions with retroactive effect in environmental law, and are generally allowed to do so under international law. Some investor-state tribunals have held that retroactive changes to the law are permissible in the absence of specific treaty language prohibiting it and if such measures are proportionate and pursue a genuine environmental objective. However, other tribunals have decided that it is not permissible to apply stricter environmental laws retroactively as this violates fair and equitable treatment of investors. When it comes to the principle of non-retroactivity as an element of fair and equitable treatment, the tribunals usually focus on whether the state made any specific promises not to change the laws with retroactive effect rather than whether the retroactive effect is unlawful as a matter of general international law.<sup>126</sup>

## 6. Conclusion

This Article adopted a two-step analysis to determine the existence of an internationally applicable general principle of law of non-retroactivity. First, it established that the principle of non-retroactivity in criminal law is common to the majority of national legal systems and then determined that this principle was applicable in the international legal system. However, in the area of administrative law, this principle has not shaped into a binding general principle of law.

Most examined jurisdictions agree that retroactivity with punitive effect may conflict with the respect of legitimate expectations of those affected. When deciding on non-retroactivity as a part of fair and equitable

<sup>119</sup> Ibid [362]–[363].

<sup>120</sup> Ibid [382] and [414] (The Tribunal ruled that it was unlawful to introduce a new remuneration methodology retroactively prescribed design standards for facilities built many years prior to that and significantly reduced the value of the investment).

<sup>121</sup> See n. 80 above.

<sup>122</sup> *Charanne and Construction Investments v Spain*, SCC Case No. V 062/2012 Award [21 January 2016] [490]–[493].

<sup>123</sup> *Perenco Ecuador Limited v Republic of Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6 Interim Decision on the Environmental Counterclaim [11 August 2015] [357].

<sup>124</sup> Ibid [356].

<sup>125</sup> Ibid.

<sup>126</sup> See e.g., other cases resulting from Spain's changes of its law related to renewables: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.a.R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36 Award [4 May 2017]; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg)*, *SICAR v The Kingdom of Spain*, SCC Case No. 2015/063 Award [15 February 2018]; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1 Award [16 May 2018]; and *Antin Energía Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31 Award [15 June 2018].

treatment, the tribunals focus on the existence of any specific promises not to change laws rather than on unlawfulness of retroactive administrative regulations as such.

In practice international courts and tribunals have to balance the principle of non-retroactive application of administrative law and the right of states to regulate to achieve legitimate policy goals. Courts and tribunals are right to engage in a cost-benefit analysis. If the retroactive effect brings only benefits and not costs for those affected, in which case the principle should not apply.

This Article suggests that courts and tribunals would be wrong to automatically assume that international law always forbids retroactive application of administrative regulations but need to examine closely the applicable international and domestic law. Despite pronouncements of some international courts and tribunals to the contrary, states can conclude treaties and adopt administrative regulations with retroactive effect to pursue legitimate public policy objectives.

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## Competing Interests

The authors have no competing interests to declare.

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