PROCEDURAL LEGALITY IN INTERNATIONAL HUMAN RIGHTS LAW

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INTRODUCTION

Suppose the law criminalizes an act but does not lay the procedure for prosecuting such an act. Is the Principle of Legality implicated under international human rights law if the legislature subsequently passes a retroactive procedural law to prosecute the action? Human rights scholarship does not appear to answer this question with specificity. In *Justice Kabineh Ja'neh v. Liberia*,[1] the Economic Community of Western African States ("ECOWAS") Community Court of Justice (ECCJ) faced this question. In the absence of precedent and international human rights legal scholarship to guide the ECCJ on this question, the ECCJ adopted conflicting views.[2] This Article argues that (with the exception of the American Declaration of the Rights and Duties of Man) under the Principle of Legality in international human rights instruments, what is safeguarded is the foreseeability and non-retroactivity of substantive law prohibiting conduct and prescribing a punishment. It should be noted that this protection is non-derogable.[3]

This Article refers to this as "Substantive Legality." It further argues that the rationale for the Principle of Substantive Legality—prohibition of surprise, partiality, and unpredictability of what constitutes a crime and its punishment—may not be implicated by a retroactive procedural rule. If it is, States have a legitimate interest in punishing offenders aware of the consequences of their action, or inaction, even when they do not know the procedural rules to be used for their prosecution.

However, human rights advocates might find the foregoing discomforting because unfair and stringent retroactive procedural rules can affect substantive rights.[4] Such practices can impact Substantive Legality guaranteed under international human rights law, which is

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1. *Counselor Muhammad Kabine Ja'neh v. The Republic of Liberia & 1 Anor.*, ECW/CCJ/JUD/28/20, Economic Community of West African States (ECOWAS): Community Court of Justice, 10 November 2020, https://caselaw.ihrda.org/en/entity/h74ihrb4ph [hereinafter *Ja'neh* ECCJ].

2. *Cf. id.* paras. 142, 149.

3. Jessica Lynn Corsi, *An Argument for Strict Legality in International Criminal Law*, 49 GEO. J. INT'L L. 1321, 1348 (2018).

4. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010).

non-derogable.[5] United States House of Representatives member John Dingell once stated: "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[6] Just like the legitimate interest of the State, offenders have a legitimate right of protection from retroactive procedural rules that seek to tacitly "take away" their Substantive Legality right.[7] Human rights law should not allow this violation under the guise that the Principle of Legality in the international human rights instruments seems to protect only against retroactive substantive law.

This Article aims to balance the State's legitimate interest and the offender's non-derogable Principle of Substantive Legality right that may be unfairly prejudiced by retroactive procedural rules. It introduces the concept of "Procedural Legality"—prospective or retroactive procedural laws consistent with the fourteen components of the Principles of Fair Trial[8]—and argues that a retroactive procedural rule should be tested under Procedural Legality rather than the Substantive Legality. This Article contends that procedural rules could substantially impact the offender's overall trial. Substantive Legality seeks to protect the foreseeability of crimes and their punishments, whereas Procedural Legality affects the stages of the trial.

This Article argues that if the retroactive procedural rule is considered part of and tested under the Principle of Substantive Legality, the trial will be impaired by violating a non-derogable right. Yet, States might find this interpretation offensive to their legitimate interest in punishing offenders if offenders could foresee the consequence of their (in)action by substantive law. But suppose the retroactive procedural rule is considered part of and tested under Procedural Legality. This ensures a balance: courts can determine whether the retroactive procedural rule implicates the components of Procedural Legality, and thus, substantially affects the trial. If it does not, there is no policy reason for vitiating the trial.

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5. Corsi, *supra* note 3.

6. Main, *supra* note 4, at 821.

7. Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

8. *See generally* AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW (2021).

I. SUBSTANTIVE VS. PROCEDURAL LEGALITY

The Principle of Substantive Legality encompasses different concepts,[9] but under international human rights law, it primarily entails foreseeability[10] and the non-retroactivity or retrospectivity[11] of crimes and punishments. Foreseeability requires individuals to be aware of the

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9. The Principle of Legality is hereinafter also referred to as the "Principle." The various components of the Principle are discussed later in this article. *See infra* Part II. The Principle should not be confused with the equation of the general principle of "rule of law" to "principle of legality" described in a 2005 lecture by James Spigelman, the former Chief Justice of New South Wales, as "rebuttable presumptions." James Spigelman, CJ New South Wales, Opening Address to the New South Wales Bar Association Conference: The Principle of Legality and the Clear Statement Principle, *in* 79 AUSTL. L.J. 769 (2005). To Spigelman,

> [T]he principle of legality is a unifying concept, which should be used to encompass a range of more specific interpretive principles that have been developed over many centuries . . . Amongst the *rebuttable presumptions* which it may now be convenient to consider under the rubric of the principle of legality are the presumptions that Parliament did not intend: to invade fundamental rights, freedoms and immunities; to restrict access to the courts; to abrogate the protection of legal professional privilege; to exclude the rights to claims of self-incrimination; to permit a court to extend the scope of a penal statute; to deny procedural fairness to persons affected by the exercise of public power; to give immunities for governmental bodies a wide application; to interfere with vested property rights; to alienate property without compensation; to interfere with equality of religion.

Id. at 17-18. This lecture was later published in the Australian Law Journal. *See id*. See generally Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYDNEY L. REV. 413 (2014) for a consideration of Spigelman's paper.

10. *See* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 359 (2009) (stating that "[f]oreseeability is a critical element of any theory of legality meant to apply to most or all current legal systems"). However, the importance of "foreseeability" is sometimes downplayed. *See, e.g*., Kokkinakis v. Greece, App. No.14307/88, 260-A Eur. Ct. H.R. (ser. A) 18, ¶ 52 (1993).

11. While retroactivity and retrospectivity can mean different things, they are sometimes used interchangeably in scholarship. *See, e.g*., Yarik Kryvoi & Shaun Matos, *Non-Retroactivity as a General Principle of Law*, 17 UTRECHT L. REV. 46, 46 (2021). See Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 868 (2009) for a different usage that uses the terms interchangeably.

liability of (in)action under the language of law or legislation.[12] Non-retroactivity prohibits a person from facing punishment for an act before it was prohibited by law or legislation.[13] In criminal law, both components are of parallel importance: "if foreseeability is paramount, then retrospective changes to the criminal law . . . are permissible, so long as they could reasonably be predicted . . . [but] if non-retrospectivity is the guiding principle, then no amount of foreseeability could save retroactive criminalization."[14]

Traceable to the seventeenth century,[15] if not earlier,[16] the Principle has been described as a sign of good law.[17] Today, it is safeguarded under many national legal systems,[18] including Islamic criminal law,[19] customary international law,[20] and is arguably a rule of *jus cogens*.[21]

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12. Daniel Grădinaru, *The Principle of Legality,* 11 RSCH. ASS'N INTERDISC. STUD. 289, 289 (2018).

13. See Peter K. Westen, *Two Rules of Legality in Criminal Law,* 26 L. & PHIL. 229, 232 (2007) for the distinction between "law" and "legislation" in the Principle's discourse.

14. Cian C. Murphy, *The Principle of Legality in Criminal Law under the ECHR*, 2 EUR. HUM. RTS. L. REV. 192, 204 (2010).

15. Grădinaru, *supra* note 12.

16. Gerardo Broggini, *Retroactivity of Laws in the Roman Perspective*, 1 IR. JURIST 151, 151 (1966).

17. LON FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (stating that the eight ways to fail in creating a system of law are as follows: failure to form any rules whatsoever; failure to publicize rules; *formation of retroactive legislation*; failure to make rules understandable; formation of contradictory rules; rules requiring the impossible; frequently changing rules; conflict of the rules as announced and their actual administration).

18. Beth Van Schaack, *The Principle of Legality in International Criminal Law,* 103 AM. SOC. INT'L L. 101, 101 (2009); *see also* GALLANT, *supra* note 10, at 243 (listing all the constitutions implementing non-retroactivity of crimes and non-retroactivity of punishments, stating that "[m]ore than four-fifths of United Nations members (162 of 192, or about 84 percent) recognize non-retroactivity of criminal definitions (*nullum crimen*) in their constitutions").

19. *See generally* Muhammad Munir, *The Principle of Legality in Islamic Criminal Justice System*, 7 HAZARA ISLAMICUS 107 (2018).

20. GALLANT, *supra* note 10, at 352 (stating that "[t]he central aspects of the principle of legality in criminal law, especially the non-retroactivity of crimes and punishments, are now rules of customary international law").

21. THEODORE MERON, WAR CRIMES LAW COMES OF AGE 244 (1998); Corsi, *supra* note 3 (stating that "[l]egality is not only a principle of criminal law, but also a fundamental human rights principle and likely a *jus cogens* principle").

Under international human rights law, per the leading international human rights instruments and documents, derogation from the Principle is not permitted.[22] Whereas, under international criminal law, the Principle may not be applied only in certain circumstances.[23] Literature on the Principle has proliferated under domestic criminal law[24] and international law in the last century.[25] Though, scholarship remains minimal under international human rights law.[26] Further, international courts and tribunals have not sufficiently espoused the ambit of the Principle under international law.[27]

This Article argues that the scope of the Principle of Legality under current international human rights law only covers what is described as "Substantive Legality." "Substantive" means that the Principle is concerned with the foreseeability and non-retroactivity of "substantive law," that is, laws that create or define criminal (in)action.[28] The Principle is not inclusive of "procedural law," that is, laws that regulate

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22. *See generally* Noora Arajärvi, *Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality*, 15 TILBURG L. REV. 163 (2011). See *infra* Part II.B for further discussion.

23. *See* Marko Milanovic, *Aggression and Legality: Custom in Kampala,* 10 J. INT'L CRIM. JUST. 165, 173 (2012) ("the Court might acquire jurisdiction over individuals *ex post facto*, i.e. after they have committed the alleged crime: pursuant to a UN Security Council referral under Article 13(b) of the Statute, and pursuant to a non-state party acceptance of jurisdiction under Article 12(3) of the Statute").

24. *See generally* Paul Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005); Douglas Husak & Craig Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principles of Legality*, 1994 WIS. L. REV. 29 (1994).

25. *See generally* Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657 (1997); Leslie C. Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962).

26. Murphy, *supra* note 14, at 193 (stating that with respect to the clause that safeguards the Principle under ECHR, "[t]he leading textbooks on the Convention, including those by Janis, Kay & Bradley, and Jacobs & White, each only devote a handful of pages to the clause").

27. Kryvoi & Matos, *supra* note 11 (stating that "[a]lthough 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").

28. Albert Kocourek, *Substance and Procedure,* 10 FORDHAM L. REV. 157, 158 (1941) (quoting THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 90 (13th ed. 1924)).

the manner and the means of determining the culpability of individuals in criminal proceedings.[29] Although there is no defined line between substantive and procedural law under international law,[30] a clear distinction is necessary for determining whether the Principle of Legality has been violated by States under international human rights law.

Suppose a law criminalizes an act but does not provide the procedure for prosecuting the act. Is the Principle of Legality, under international human rights law, implicated if the legislature passes a retroactive procedural law to prosecute previously non-criminalized acts? Human rights scholarship does not appear to have answered this question with specificity.[31] This Article argues that currently, the scope of the Principle of Legality under international human rights law is not implicated by the subsequent enactment of retroactive procedural rules that stipulate the means of prosecuting an individual.

A. The Meaning of Procedural Legality

This Article introduces the concept of "Procedural Legality"—laws consistent with the fourteen components of the Principle of Fair Trial[32]—to cushion the effect of unfair retroactive procedural rules. The Article argues that while the Principle of Legality under international human rights law does not cover procedural laws, whether such procedural laws are passed before or after the commission of a crime, they must be consistent with Procedural Legality.[33] The Article further argues that Procedural Legality has some element of substantive rights, even though it is not included in the Principle of Legality.[34] The reasons

29. Andrew I. Haddad, *Cruel Timing: Retroactive Application of State Criminal Procedural Rules to Direct Appeals*, 116 COLUM. L. REV. 1259, 1264 (2016).

30. SHABTAI ROSENNE, THE LAW AND THE PRACTICE OF INTERNATIONAL COURT, 1920–2005, 1021 (2006).

31. *See* Arajärvi, *supra* note 22, at 173 (stating that "[t]he principle of legality is relevant in both procedural and substantive aspects of the law, but here the emphasis lies in the way substantive law corresponds to the principle of legality, mainly in international criminal law"). Arajärvi does not discuss the relevance of procedural rules to the Principle. *Id*.

32. *See infra* Part IV.

33. *Id*.

34. *See infra* Part III.

and importance of divesting Procedural Legality from the Principle of Legality ("Substantive Legality") are discussed below.[35]

B. Procedural Legality in Practice: Justice Kabineh Ja'neh v. Liberia[36]

In *Ja'neh v. Liberia*, the Economic Community of West African States' Community Court of Justice ("ECCJ")[37] struggled to fit the non-retroactivity of procedural rules into the Principle of Legality contained within the African Charter on Human and Peoples' Rights,[38] which only allowed for Substantive Legality. The ECCJ's reasoning could have been tidier had it considered the lack of procedural rules, before the commission of an (in)action as an issue of Procedural Legality rather than Principle of Legality.

Here, Justice Kabineh Ja'neh, an Associate Justice of the Supreme Court of Liberia, was accused of "misconduct, abuse of public office, wanton abuse of judicial discretion, fraud, misuse of power and corruption."[39] The Liberian Legislature—consisting of the House of

35. *See infra* Part II.C.

36. *Ja'neh* ECCJ, *supra* note 1. There was an application for the reconsideration of this judgment by the Respondent State but it was dismissed by the ECOWAS Community Court of Justice. *See Counselor Kabineh Muhummand Ja'neh v. Liberia & Anor*, ECW/CCJ/JUD/13/21, Economic Community of West African States (ECOWAS): Community Court of Justice, 4 June 2021, http://www.courtecowas.org/wp-content/uploads/2021/08/JUD-ECW-CCJ-JUD-13-21-Counsellor-Kabineh-Muhammad-JaNeh-vs.-REP.-OF-LIB-04_06_21.pdf.

37. The Economic Community of West African States Community Court of Justice acquired jurisdiction over human rights complaints in 2005. *See* Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The Ecowas Community Court of Justice,* 107 AM. J. INT'L L. 737, 737 (2013).

38. The African Charter on Human and Peoples' Rights, June 7, 1981, 21 I.L.M 58 [hereinafter African Charter], is the principal African regional human right instrument. *See* Mujib Jimoh, *Investigating the Responses of the African Commission on Human and Peoples' Rights to the Criticisms of the African Charter*, 4 RUTGERS INT'L L. & HUM. RTS J. 1 (2023); *see also* Moussa Samb, *Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union*, 15 ANN. SURV. INT'L & COMP. L. 61, 62 (2009).

39. *Kabineh M. Ja'neh v. The House of Representatives of the National Legislature*, Petition for a Writ of Prohibition, at 1 (2018), http://judiciary.gov.lr/wp-content/uploads/2018/12/JUSTICE-JANEH-PROHIBITION.pdf [hereinafter *Ja'neh* SC].

Representatives and the Senate—has the constitutional power to impeach a Justice of the Supreme Court.[40] Justice Ja'neh was accused by two members of the Liberian House of Representatives, who, on July 17, 2018, initiated an impeachment process for his removal from the Supreme Court.[41] But there was a challenge: according to Article 43 of the Liberian Constitution, the Legislature, including both the House of Representatives and the Senate, were required to prescribe the procedure for impeachment.[42] At the time Justice Ja'neh's impeachment proceedings were initiated, the Legislature had no such procedure.[43]

Upon receipt of the Petition of Impeachment, the House of Representatives set up the Special Ad-hoc Committee ("SAC") to examine the petition.[44] On August 27, 2018, the SAC prepared its own Rules of Impeachment, which the House's Plenary adopted to guide the House's version of the impeachment process.[45] The SAC then submitted its report to the full House recommending impeachment.[46] The Bill of Impeachment was later forwarded to the Liberian Senate. Recognizing that it also did not have a rule to govern impeachment proceedings, the Senate delivered the Bill of Impeachment to its Judicial Committee,[47] where the committee amended the Senate Standing Rules 63 to cover Justice Ja'neh's impeachment trial.[48]

At the domestic level, Justice Ja'neh challenged the impeachment process on many grounds, including the retroactive application of the Senate Rules.[49] The Liberian Supreme Court dismissed his motion to quash the impeachment proceedings, paving the way for his subsequent impeachment on March 29, 2019.[50] Justice Ja'neh then filed a case at

40. 1986 Constitution of the Republic of Liberia, art. 43.
41. *Ja'neh* SC, *supra* note 39, at 7.
42. *Ja'neh* ECCJ, *supra* note 1, para. 19.
43. *Id*. at para. 21.
44. *Ja'neh* SC, *supra* note 39, at 8.
45. *Ja'neh* ECCJ, *supra* note 1, para. 16.
46. *Id*.
47. *Id*. para. 19.
48. *Id*.
49. *Ja'neh* SC, *supra* note 39, at 14.
50. *Ja'neh* ECCJ, *supra* note 1, para. 23.

the ECCJ alleging violations of his rights in the African Charter and the Universal Declaration of Human Rights.[51]

The contention in his first relief was that "he was subjected to impeachment proceedings *without* prescribed Rules of Procedure."[52] However, it is not clear from the Judgment of the ECCJ whether his contention was that (1) the separate rules adopted by the House and Senate *amounted to no rules at all*, since Article 43 of the Liberian Constitution requires the *Legislature* collectively to make the rules for impeachment, not separately as was done in his case[53] or (2) he was subjected to rules of procedure made after the commencement of his impeachment proceedings. In its judgment, the ECCJ did not distinguish procedural rules from the Principle of Legality. At the same time, the ECCJ was not emphatic about procedural rules being part of the Principle of Legality. This makes it difficult to reconcile the ECCJ's pronouncements.

On the one hand, the ECCJ seemed to suggest that retroactive procedural laws offend the Principle of Legality. Contrarily, the wording of Article 7 of the African Charter containing the Principle of Legality does not seem to include procedural law.[54] The ECCJ held that:

> Generally, it is envisaged under Article 7 of the African Charter that procedural laws and rules governing any criminal trial must not only be clear but also certain and known to the general public, and particularly to the accused *before* his trial.[55]
>
> For the law to be said to comply with the procedure laid down in an Act, it must be foreseeable, contrary to what pertains to the instant case where the whole proceedings were deprived of the appearance of having been conducted on the basis of prescribed rules and

51. *Id*. at para. 33. See African Charter, *supra* note 38, arts. 1, 2, 5, 7, 15, and 26; Universal Declaration of Human Rights arts. 3, 8, 10, 11(1)-(2), 21(1)-(2), 23(1), -(3), G.A. Res. 217A, U.N. GAOR 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR] for articles alleged to be violated.

52. *Ja'neh* ECCJ, *supra* note 1, para. 35(a).

53. *Id*. para. 89.

54. African Charter, *supra* note 38, art. 7(2) (providing that "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender"). *See infra* Part II.B for discussion.

55. *Ja'neh* ECCJ, *supra* note 1, para. 142.

> procedures. If there were proper rules of procedure the Senate would have been under obligation to abide by those rules and procedures to legitimize the process. The lack of clarity in the rules afforded the Senate unfettered rights to resort to some unorthodox means in the trial of the Applicant which materially impaired the overall fairness of the trial.[56]

On the other hand, the ECCJ appeared to downplay the importance of non-retroactivity of procedural law, suggesting that what is important is the overall fairness of the procedural rules even if made post-commission of a crime:

> Though, certainty of law and procedural rules require that, before any person is charged for criminal offence, the law and the procedures as well as bodies mandated to investigate and try the case must be sufficiently known to the accused . . . .What is important is whether the Applicant's guilt or innocence was determined by a competent tribunal or court of law in accordance with the evidence properly obtained and presented and that the process leading to the Applicant's indictment was neither arbitrary, capricious nor political to such an extent that the fairness of his trial was prejudiced.[57]
>
> It is necessary to examine whether the operation of the amended Senate Standing Rules in the Applicant's case had a *compensatory effect* in practical terms, rendering the entire proceedings fair.[58]

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Part II of this Article discusses the meaning of the Principle of Legality by examining the main provisions in international human rights instruments and documents. These provisions do not contain requirements for the non-retroactivity of procedural law and do not need to be safeguarded by the Principle. Retroactive procedural rules that comply with Procedural Legality do not implicate the three main policy reasons behind the Principle of Legality.[59] These policy reasons are knowledge, foreseeability, and predictability.[60] First, a retroactive procedural rule compatible with Procedural Legality is knowable and foreseeable.

56. *Id*. para. 148.
57. *Id*. para. 95.
58. *Id*. para. 149 (emphasis added).
59. *See infra* Part II.C.
60. *Id*.

Criminals should be able to foresee the safeguard of a fair trial by prospective or retroactive procedural rules since a fair trial is now considered a rule of *jus cogens*.[61] But if a fair trial is not safeguarded by a retroactive procedural rule, such a trial should be vitiated. Second, retroactive procedural rules do not affect the predictability of offense and punishment arm of the Principle of Legality.[62] This is because procedural rules do not define the offense or prescribe punishment; rather, they describe the means for prosecuting. As such, individuals should be able to predict the offense and punishment for their actions.[63] Therefore, retroactive procedural rules do not prejudice the individual if they comply with Procedural Legality.[64]

Part II also discusses the importance of separating Procedural Legality from the Principle of Legality, which is to maintain a balance in protecting the State's interest in prosecuting criminals and individuals' rights to fair trial. Where a retroactive procedural rule does not prejudice a defendant, the trial should not be vitiated solely because a retroactive procedural rule was adopted during trial. This is the thesis of this Article. Notwithstanding, this thesis falls short of Fuller's "inner morality" thesis[65] because it accepts that a trial should be invalidated when retroactive procedural rules violate Procedural Legality. However, the thesis protects individuals from the potential wrongs of unguarded enactment of retroactive procedural rules. The thesis requires courts to consider the compatibility of retroactive procedural rules with the components of Procedural Legality to determine if the retroactive procedural rules safeguard fair trial.

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61. CLOONEY & WEBB, *supra* note 8, at 10 (stating that "[t]here is evidence that the right to a fair trial is not only a customary norm, but one that has achieved the status of a *jus cogens* norm, meaning that it is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .").

62. *See* Kryvoi & Matos, *supra* note 11.

63. *Cf*. Dana, *supra* note 11, at 857 (stating that "[o]nly the innocent deserve the benefits of the principle of legality").

64. Here, the procedural rule must, however, not increase the sentence. *See* Corsi, *supra* note 3 (arguing for the inclusion of sentencing guidelines as part of the Principle of Legality).

65. *See* Arajärvi, *supra* note 22, at 167 ("By inner morality it is understood, as Fuller explains it, that by prosecuting those who have committed destruction of the morality of the law, even if that entails breaching the principle of legality, the outcome is likely to be morally acceptable.").

Part III argues that, even though it is not part of the Principle of Legality, Procedural Legality has a substantive element. Part IV outlines the components of Procedural Legality that dictate the compliance of both prospective and retrospective procedural rules.

II. THE PRINCIPLE OF LEGALITY

A study of the scholarship on the Principle of Legality affirms one thing, "while commentators are entirely in agreement about the hallowed value of legality . . . they differ regarding its scope."[66] There is division among international law scholars as to the number of necessary components of the Principle of Legality.[67] In all, Professor

66. Westen, *supra* note 13, at 231.

67. International law scholar, Professor Meron, prefers one component. *See* Theodor Meron, *Remarks by Judge Theodor Meron*, 103 AM. SOC'Y INT'L L. 107, 107 (2009) [hereinafter Meron Remarks]. Note he acknowledged that there could be other components. *Id*. Professor Dana argues the Principle has two components, though one of the two has four attributes. *See* Dana, *supra* note 11, at 861, 864 (stating that "*nulla poena sine lege* and its counterpart, *nullum crimen sine lege*, serve as the bedrock of the principle of legality . . . . The extent of protection accorded to these interests depends in part upon the degree of adherence to four attributes of *nulla poena sine lege*"). Professor Westen accepts the Principle has two components, but deviates from the conventional attributes given by other scholars. *See* Westen, *supra* note 13, at 229 ("I believe that both approaches are misguided. There is no such thing as a single 'principle of legality;' yet, the four aforementioned rules are not unrelated to each other. The so-called 'principle of legality' consists of two distinct norms . . . 'No person shall be punished in the absence of a bad mind,' and the principle that underlies the maxim, 'Every person is presumed innocent until proven guilty'"). Professor Munir says the Principle has three components. *See* Munir, *supra* note 19, at 107 ("[t]his principle has two postulates: 1) no crime without law; and 2) no punishment without law. The natural outcome of these two principles is another principle, that is, 'no retroactive application of criminal law.'"). Judge Claus Kreß opines that the Principle has four components, but in sum, they may be reduced to one: "an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached." *See* Claus Kreß, *Nulla Poena Nullum Crimen Sine Lege* [No Crime Without Law], MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. 1 (2010), https://www.legal-tools.org/doc/f9b453/pdf/. Corsi agrees that the Principle has four components but sought to add a fifth. *See* Corsi, *supra* note 3, at 1326 ("The four prongs of legality promoted here are 1) *nullum crimen sine lege*, 2) *lex praevia*, 3) *lex certa*, and 4) *lex stricta*."), 1321 ("Additionally, it concludes by arguing for a codified international criminal code that includes sentencing guidelines, thereby creating a fifth prong of *lex scripta*.").

Westen states, "loosely speaking, [the Principle] has something to do with each of these purported requirements but strictly speaking, it consists neither of any of them alone nor of all of them together."[68]

The Principle is a substantive right.[69] Throughout history, the Principle has been justified by notable jurists and partially formed one of the most interesting debates in legal jurisprudence—the Hart–Fuller debate.[70] The most popular rationale for the Principle is the elimination of surprise, partiality, and unpredictability in criminal adjudication.[71] First, a law that violates the Principle comes "as a greater surprise."[72] Such law becomes unfair "because it does not afford the affected individual notice about the rule that will be applied."[73] The Principle aims to give notice and fair warning of the consequences of one's (in)actions.[74] Second, a law that violates the Principle "expose[s] the lawgiver to greater temptation to partiality and corruption."[75] Such a law is an enticing opportunity to resort to "unorthodox means" to punish individuals.[76]

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68. Westen, *supra* note 13, at 233.

69. *See* GALLANT, *supra* note 10, at 226 (stating that "[t]here is a general trend through treaty systems setting up international organizations to make it possible for the individual to raise a claim that a prosecution or sentence violates the principle of legality").

70. *See* Herbert L. A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 593 (1958); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630 (1958).

71. Kryvoi & Matos, *supra* note 11 (stating that "[r]etroactive laws pose a challenge to the fundamental principles of equality, certainty and predictability underlying the rule of law").

72. Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity,* 12 AM. BAR FOUND. RSCH. J. 379, 439-40 (1987).

73. Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1341 (2000).

74. Westen, *supra* note 13, at 229. *See also* Corsi, *supra* note 3, at 1339 (stating that "[t]hese purposes include giving prior and clear warning regarding behaviour that society both condemns and punishes, thereby potentially allowing individuals to avoid both the behavior and attendant consequences").

75. Troy, *supra* note 73, at 1342.

76. *See* Charles Wyzanski, *Nuremberg – Fair Trial?*, ATLANTIC (Apr. 1946), https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/ (stating that ''[t]he antagonism to *ex post facto laws* is not based on a lawyer's prejudice encased in a Latin maxim. It rests on the political truth that if a law can be created after an offense, then power is to that extent absolute and arbitrary").

Third, a law that violates this Principle erodes predictability—that is, at the time of the (in)action, the individual could not foresee that their (in)action would be deemed criminal. Perhaps Attorney Daniel Troy's practical rationale sums up the purpose of the Principle:

> This perception rests on our everyday experience. From early on, we learn not to change the rules in the middle of the game. We protest if our parents punish us without warning. We quickly come to dread unwelcome surprises. We expect warnings before dramatic events upset our expectations. And we mold our conduct based on the laws as we know and understand them.[77]

This Part first will examine the Principle under domestic and international criminal law. Secondly, this Part will analyze the Principle under international human rights law. The last section will address how retroactive procedural rules compliant with Procedural Legality may not violate the Principle of Legality.

A. The Principle of Legality Under Domestic and International Criminal Law

Domestic and international criminal law regimes have extensively considered the Principle of Legality. Before the Nuremberg trials, the Principle featured prominently under domestic law[78] and had a seemingly consistent scope. However, under international criminal law, the Principle's scope was initially unclear. During the Nuremberg trials, the Principle was considered "flexible" and allowed the Judges to "balance considerations of fairness towards an accused against other objectives: the condemnation of brutal acts, ensuring individual accountability, victim satisfaction and rehabilitation, the preservation of world order, and deterrence."[79] These controversies amongst international jurists led to the taking up of the Principle by "the international human rights movement."[80]

Today, the understanding of the Principle has changed. The non-retroactivity of punishment, a component of the Principle, is now

77. Troy, *supra* note 73, at 1340.
78. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L. J. 165, 165 (1937).
79. Schaack, *supra* note 18, at 102.
80. GALLANT, *supra* note 10, at 155.

considered a customary international law rule and a rule of *jus cogens*.[81] According to Professor Meron, under international criminal law, two questions must be answered when determining whether the Principle has been complied with.[82] First, it must be ascertained whether criminal defendants understood what constituted the offenses at the time the offenses were committed.[83] Second, it must be determined if the tribunals convicted the defendants for "actions that were excessively removed from the crimes of which they were found guilty."[84]

The following are some of the components of the Principle under criminal law. The first is *nullum crimen sine lege*, meaning "no crime without law" ("Component 1").[85] This means that the law should define a crime.[86] This aspect covers criminal conduct and postulates that conduct cannot be punished retrospectively. Thus, it deals with the "punishability of the conduct in question."[87] The second is *nulla poena sine lege*, meaning "no punishment without law" ("Component 2").[88] Component 2 postulates that the punishment or sanction for an (in)action cannot be retrospective.[89]

It should be noted that Component 2 differs from Component 1 because Component 2 incorporates the possibility that an earlier law labeled specific conduct as criminal but failed to prescribe the punishment.[90] Alternatively, it may well be that a tribunal enforced a prescribed punishment that a new law seeks to change retroactively. Component 2 seeks to prevent those types of situations. Component 2 has been described as the "poor cousin" of Component 1 because it is

81. *Compare* Corsi, *supra* note 3 ("[l]egality is not only a principle of criminal law, it is also a fundamental human rights principle and likely a *jus cogens* principle"), *with* Kryvoi & Matos, *supra* note 11 (stating that "despite pronouncements of some international courts and tribunals, there also appears to be no universally recognised customary rule of international law or general principle against retroactivity").

82. Meron, *supra* note 67.

83. *Id*.

84. *Id*.

85. Grădinaru, *supra* note 12.

86. *Id*.

87. Dana, *supra* note 11, at 859. *See generally* Kreß, *supra* note 67.

88. Dana, *supra* note 11, at 858.

89. *Id*. at 858-59.

90. *Id*.

far less discussed than Component 1.[91] As prominent legal scholar Jerome Hall observed, Component 2 is far less discussed because it "affects only proven criminals."[92] In contrast, Component 1 "protects the mass of respectable citizens."[93] Both Components 1 and 2 relate to non-retroactivity. The Principle's other components and attributes that have appeared in scholarship are *lege stricta* (the prohibition against analogy), *lege certa* (the principle of certainty), *lege praevia* (the prohibition against retroactive application), and *lex scripta* (punishment must be based on written law).[94] However, these components and attributes are outside the scope of this Article.[95]

B. The Principle of Legality Under International Human Rights Law

Under customary international human rights law, the Principle of Legality is now a rule.[96] It also has a feature of *jus cogens*. Corsi advances three main reasons for describing the Principle as a *jus cogens* rule.[97] First, the Principle is so important that no legal system can exist without it.[98] Second, the main international human rights instruments make it a non-derogable right.[99] Third, the Principle itself protects other rights, including the right to life and individual freedom.[100] Therefore, the Principle has been "integrated into the concept of fundamental human rights in criminal justice."[101]

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91. *Id*. at 858.
92. *Id*. at 859.
93. *Id*.
94. *See generally* Grădinaru, *supra* note 12; Corsi, *supra* note 3.
95. See *supra* note 67 for discussion on other components and attributes of the Principle which have appeared in other scholarship.
96. *See* Corsi, *supra* note 3.
97. *Id*. Although Corsi advances four reasons, her second and third reasons are essentially the same. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. Dana, *supra* note 11, at 867 (citation omitted).

The two main sources of international law are customary international law and treaties.[102] Both sources confirm the integration of the Principle in international human rights law.[103] The Principle should be classified as a part of customary international human rights law because State practice and *opinio juris*[104] support such classification.[105] Additionally, other sources of international law such as general principles, judicial decisions, and the writings of publicists confirm the importance of the Principle in international human rights law.[106]

Furthermore, all the main international human rights instruments and documents safeguard the Principle.[107] Not including the American Declaration of the Rights and Duties of Man ("American Declaration"),[108] the other main international human rights instruments have nearly similar provisions on the Principle. However, note that the American Declaration appears to be the only international human rights instrument that prohibits non-retroactive procedural rules rather than prohibiting Substantive Legality.[109] This prohibition stems from its provision on non-retroactivity which refers to "courts previously established."[110] The American Declaration provides that "every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by *courts previously established in accordance with pre-existing laws*, and not to receive cruel, infamous or unusual

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102. John Mukum Mbaku, *The Role of International Human Rights Law in the Adjudication of Economic, Social, and Cultural Rights in Africa*, 8 PENN ST. J. L. & INT'L AFFS. 579, 582 (2020).

103. GALLANT, *supra* note 10.

104. *See* Mujib Jimoh, *The Status of New Rights before the African Human Rights Commission and Court*, 25 OR. REV. INT'L L. (forthcoming 2024) (on file with author).

105. *See* GALLANT, *supra* note 10.

106. *Id*. at 352-53.

107. *Id*.

108. American Declaration of the Rights and Duties of Man, O.A.S Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Col., Mar. 30-May 2, 1948 [hereinafter American Declaration]. The American Declaration is one of the first international human rights documents. *See* Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man,* 30 U. PA. J. INT'L L. 1211, 1211 (2009).

109. *See* American Declaration, *supra* note 108, art. XXVI.

110. *Id*.

punishment."[111] From textual analysis, Article XXVI does not expressly safeguard Substantive Legality—that is, laws that create or define criminal (in)action—but only prohibits the creation of courts that may try previously committed offenses.

The Universal Declaration of Human Rights ("UDHR"), adopted one year after the American Declaration, sharply contrasts with the American Declaration's provision on the Principle. It provides that:

> 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.[112]

Although a declaration is technically not binding under international law, some,[113] if not all,[114] of its provisions are now incorporated into customary international law. Thus, while the American Declaration expressly forbids the retroactive creation of courts to try past offenses—and is therefore silent on whether the offense itself should not be retroactive—the UDHR expressly safeguards Components 1 and 2 of the Principle that prohibit the retroactive criminalization and punishment.[115]

The International Covenant on Civil and Political Rights ("ICCPR")—which, together with the UDHR and the International Covenant on Economic Social and Cultural Rights, is described as the

111. *Id*. It appears to this author that the exclusion of "and" in between "previously established" and "in accordance with" means that "pre-exiting laws" relates to "courts previously established." *See id*. The inclusion of "and" in between "previously established" and "in accordance with" could have meant that the American Declaration prohibits both non-retroactivity of procedure and substance. *See id*. It would mean that it safeguards trial by "courts *previously* established" *and* trial "in accordance with *pre-existing* laws." *See id* (emphasis added).

112. UDHR, *supra* note 51, art. 11(2).

113. David Forsythe, *1949 and 1999: Making the Geneva Conventions Relevant After the Cold War*, 81 INT'L REV. RED CROSS 265, 265-66 (1999).

114. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 98 (1989).

115. *See supra* Part II, section A.

International Bill of Human Rights[116]—is similarly worded as the UDHR save for the inclusion of "if subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."[117] Other international human rights instruments are similarly worded as the UDHR.[118] All these instruments, that is, the UDHR, ICCPR, European Convention on Human Rights ("ECHR"), American Convention on Human Rights ("ACHR") and the African Charter, make the Principle a non-derogable provision.[119] Article 4(2) of the ICCPR includes Article 15, safeguarding the Principle, as part of the non-derogable provisions.[120] Article 15(2) of the ECHR includes Article 7, guaranteeing the Principle, as non-derogable.[121] Similarly, Article 27(2) of the ACHR includes Article 9, which describes the Principle as non-derogable.[122] The Principle's non-derogability places it in a "higher status."[123]

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116. CHRISTOPHER N. J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS 2–3 (2014).

117. International Covenant on Civil and Political Rights art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

118. Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. No. 221 ("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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.") [hereinafter ECHR]; Organization of American States, American Convention on Human Rights art. 9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.") [hereinafter ACHR]; African Charter, *supra,* note 38 ("No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.").

119. *See infra* notes 120-22.

120. ICCPR, *supra* note 117, art. 4(3).

121. ECHR, *supra* note 118, art. 15(2).

122. ACHR, *supra* note 118, art. 27(2).

123. Murphy, *supra* note 14, at 192.

Although it appears that only the ICCPR, ECHR, and the ACHR safeguard the Principle's non-derogability, the Principle is also non-derogable under both the UDHR and the African Charter.[124] The UDHR does not permit derogation from its rights, except for some permissible "accommodation[s]."[125] However, the provision on the Principle of Legality does not permit such accommodation.[126] Similarly, the African Charter does not contain a derogation clause.[127] Rather, it contains only one limitation clause[128] and several claw-back clauses which attempt to "take back" the guaranteed rights.[129] However, the Article safeguarding the Principle contains no such claw-back clause.[130]

C. International Human Rights Instruments and Non-Retroactive Procedural Rules

In *Ja'neh*, the ECCJ ruled that:

> [W]here the procedural laws were not well defined for the Applicant to know what constituted the procedure to be followed in his trial, it was difficult, if not impossible for an objective observer to decipher when the trial was crossing the strictures of due process of law, and equally difficult and almost impossible to foresee the consequences.[131]

It is submitted that if a retroactive procedural rule complies with Procedural Legality—specifically, with the components of a fair trial—and

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124. *See* Corsi, *supra* note 3, at 1349 ("The ICCPR, the ECHR, the IACHR, and the ACHPR all contain articles articulating legality. Additionally, the first three conventions affirm the non-derogability of the principle of legality").

125. ROSALYN HIGGINS, THEMES & THEORIES 457 (2009).

126. *See, e.g.*, UDHR, *supra* note 51, art. 13 (the right to freedom of movement is confined to "within the borders of each State"). *See also id*. art. 14(2) (the right to seek asylum may not be "invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations").

127. Jimoh, *supra* note 38, at 5.

128. *Media Rights Agenda v. Nigeria*, Communication 105/93, African Commission on Human and Peoples' Rights, [Afr. Comm'n H.P.R.], ¶ 68 (Oct. 31, 1998); African Charter, *supra* note 38, art. 27(2).

129. *See* African Charter, *supra* note 38, arts. 6, 8, 9(2), 10(1), 11, 12(1), 12(2), 13, & 14; Jimoh, *supra* note 38.

130. African Charter, *supra* note 38, art. 7.

131. *Ja'neh* ECCJ, *supra* note 1, para. 103.

does not lead to the extension of the maximum punishment provided in the substantive law ("Twin Consideration"),[132] there is no consequence the defendant cannot foresee. Additionally, with the Twin Consideration in place, there is no policy consideration against applying retroactive procedural law under international human rights law.

i. The Texts of the International Human Rights Instruments

Nothing in the main international human rights instruments' texts prohibits the retroactive application of procedural rules that comply with the Twin Consideration. The texts of the instruments speak to the prohibition against applying *substantive laws* that create offenses and prescribe retroactive punishments. Since procedural rules ordinarily create the *means* for prosecuting an offense and not the offense *itself*, the texts are silent on the retroactivity of procedural rules.[133] The *travaux préparatoires*[134] of the UDHR may confirm this contention.[135] The *travaux* states that the UDHR creates "the customary international law rule of non-retroactivity of crimes and punishments."[136] Since procedural rules generally do not create crimes or punishments, failing to apply retroactive procedural rules that comply with Procedural Legality is challenging to justify.[137] Moreover, many opine that customary international law does not prohibit the retrospective creation of jurisdictions from hearing cases.[138] Gallant states, "[C]ustomary international law does not prohibit the establishment of new courts, either national, international, or mixed, to hear cases concerning crimes

132. GALLANT, *supra* note 10, at 368 (stating that "sentencing procedures are needed to ensure that sentences do not exceed the maximum that could have been given for the crime as to which the accused has notice (*nulla poena sine lege*)").

133. *See* Lester B. Orfield, *What Constitutes Fair Criminal Procedure under Municipal and International Law*, 12 U. PITT. L. REV. 35, 44 (1950) ("Article 11(2) of the UDHR relates to "substantive criminal law").

134. *Travaux préparatoires* refers to the preparatory documents of an instrument. Such documents may include proceedings, negotiations and debates held preparatory to the drafting of an instrument. *See* Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT'L L. 780 (2013).

135. GALLANT, *supra* note 10, at 230.

136. *Id*.

137. *See infra* Part IV.

138. GALLANT, *supra* note 10, at 394.

that have already been committed so long as the acts were prohibited by some applicable criminal law at the time committed."[139]

ii. The Rationale for the Principle of Legality Considering Retroactive Procedural Rules

Eliminating surprise, partiality, and unpredictability in criminal adjudication are usually cited rationales behind the Principle of Legality.[140] However, "surprise" and "unpredictability" relate to the knowledge about what act constitutes an offense and what the punishment is, as a consequence of the act.[141] The requirements of the Principle are satisfied if the wording of a criminal provision is clear to an individual, or with the courts' interpretation of such a provision, what acts and omissions will make an individual criminally liable.[142] If "the actor is able to recognize the criminality of the act," this fulfills the Principle's core requirement.[143] Seemingly, procedural rules that merely describe the means of prosecution do not impair the actor's recognition of his liability and punishment.

The third rationale—"partiality"—might be implicated by retroactive procedural rules that are unfair and stringent, thereby asphyxiating the defendant's fair trial rights. Where, however, the retroactive procedural rules comply with the Twin Consideration, the partiality fear is eliminated. Therefore, it is necessary to test the retroactive procedural rules against the Twin Consideration when balancing the State's interest in punishing offenders with the Procedural Legality right of the defendants. From the preceding submission, it would seem that the timing of the procedural rules does not matter as long as it does not implicate the Twin Consideration.

III THE SUBSTANTIVE ELEMENT IN PROCEDURAL LEGALITY

The previous section determined that international human rights law instruments likely do not prohibit retroactive procedural rules, but the query does not end there. If it were the end, States could use

139. *Id*. (arguing that this also covers the expansion of jurisdiction).
140. *See supra* notes 71-77.
141. Corsi, *supra* note 3, at 1339.
142. Grădinaru, *supra* note 12, at 289.
143. Corsi, *supra* note 3, at 1332 (citing GALLANT, *supra* note 10, at 132).

retroactive procedural rules to violate the Principle of Substantive Legality and leave individuals with little protection. Such reasoning would negate the "power" of procedural rules, which "can, in a very practical sense … undermine substantive rights."[144] As such, retroactive procedural rules need to pass some other tests—Procedural Legality and non-extension of crime and punishment. Such a requirement should alleviate the concerns of human rights advocates.

It might seem unlikely, but Procedural Legality—the creation of procedural laws that are consistent with the components of a Principle fair trial—has substantive elements present in it.[145] Prominent jurists have engaged in a debate about the nature of "substance" and "procedure."[146] One of the most brilliant exhibitions of the debate is the work of Professor Albert Kocourek.[147] Professor Kocourek divided the differing views into three—Betham, Salmond and Chamberlayne:

> First, there is the orthodox view that "substance" and "procedure" can be clearly and sharply separated (Bentham). There is the view that this separation "is sharply drawn in theory" but that in practical operation many procedural rules are "wholly or substantially equivalent to rules of substantive law" (Salmond). Next, there is the view, that there is no distinction between "substance" and "procedure" (Chamberlayne). Chamberlayne said, "[T]he distinction between substantive and procedural law is one not only of but little consequence; . . . it is one which is principally based . . . on a mere difference in form of statement."[148]

In the end, Professor Kocourek submitted that "there is a clear logical distinction between substance and procedure."[149] The distinction between the two becomes essential because the Principle of

144. Main, *supra* note 4, at 802.

145. *See infra* Part IV.

146. D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 UCLA L. REV. 189, 189 (1982); Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 617 (1932). *See generally* Anthony J. Colangelo, *Jurisdiction, Immunity, Legality, and Jus Cogens*, 14 CHI. J. INT'L L. 53 (2013).

147. *See* Kocourek, *supra* note 28.

148. *Id*. at 160-61.

149. *Id*. at 186.

Legality only protects Substantive Legality.[150] In other words, the international human rights instruments safeguard against non-retroactive *substantive* laws but not *procedural* rules. This safeguard is similar to what the Principle of Legality's scope covers under a domestic legal system.[151] Notwithstanding, procedural rules do have a substantive effect and could substantially impact a defendant's overall trial.[152] Although, if it has any such effect, it is on the trial itself, and not the foreseeability of crimes and punishments. This impact explains why retroactive procedural rules should be tested under Procedural Legality rather than under the Principle of Substantive Legality. Suppose the retroactive procedural rule is considered part of and tested under the Principle of Legality. In that case, the trial will be vitiated because it violates a non-derogable right.[153] Yet, this interpretation might offend some States' legitimate interest to punish offenders if offenders could foresee the consequence of their (in)action under substantive law.[154] However, if the retroactive procedural rule gets incorporated into Procedural Legality, courts can determine whether the retroactive procedural rule has substantial effect on the trial.[155] If it does not impact the trial, then there is no policy reason for vitiating the trial.

However, here, the procedural rules' actual role in the administration of justice must also be mentioned. Procedural rules provide the framework for the application of substantive law.[156] It can change the contours of substantive law by weakening or denying it

150. *But see* Corsi, *supra* note 321, at 1332 (stating that "[t]his articulation of legality is at once substantive and procedural. It addresses the element of crimes; the basis for criminal procedures such as arrest, investigation, detention, and prosecution; and concepts such as fair trial rights that join procedural process and substantive rights").

151. See Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INT. L. REV. 87, 87-90, 94 (1995) for a discussion on Scalia's opinion in Rivers v. Roadway Express, Inc. and Landgraf v. USI Film Product, noting that "a statute establishing a new rule of evidence, however, regulates the conduct of trials; it would therefore be considered retroactive only if applied to evidence previously admitted or excluded from a trial." *See also* Main, *supra* note 4, at 821 ("procedural laws can be applied retroactively").

152. *See generally* Main, *supra* note 4.

153. *See supra* Part II.B.

154. *See supra* Part II.C.ii.

155. *Ja'neh* ECCJ, *supra* note 1, at 55, ¶ 134.

156. GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 7 (2008).

accountability and transparency.[157] As Representative John Dingell reportedly said, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[158]

Amongst scholars, there is no consensus on whether the right to a fair trial, which Procedural Legality can safeguard, should be described as a substantive right or a procedural right.[159] Whether one is convinced by Professor Larry Alexander's contention that "procedural rights are just substantive rights, albeit substantive rights of a special (but quite numerous) kind,"[160] it is clear the components of Procedural Legality could severely damage the Principle of (Substantive) Legality if retroactive procedural rules do not guarantee the fourteen components of a fair trial.

IV. THE COMPONENTS OF PROCEDURAL LEGALITY

Procedural Legality entails the compliance of procedural rules—whether prospective or retroactive—with fair trial principles. International human rights instruments widely safeguard the right to a fair trial.[161] This right is fundamental to the jurisprudence of human rights law, which is evident in the many cases considered on this right by international human rights courts.[162] The end goal of a fair trial is to ensure justice prevails.[163] Any society that does not safeguard fair trials

157. Weinstein, *supra* note 7, at 1906.

158. Main, *supra* note 4, at 821.

159. *Cf*. Arajärvi, *supra* note 22, at 173 (stating that "[a]dmittedly in human rights law, the same rules that are called procedural in criminal trials can have an essentially substantive character. For instance, the right to fair trial is a substantive norm included in human rights treaties, and imposes on states the responsibility to respect it, and failing that, individual (in some human rights regimes) can enforce it against the state, thus in that case the right to fair trial is of substantive importance"), *and* Anthony J. Colangelo, *Procedural Jus Cogens*, 60 COLUM. J. TRANSNAT'L L. 377, 416 (2022) (stating that "*jus cogens* that guarantee things like notice, a hearing, and an impartial and independent decisionmaker fall on the procedural side of both").

160. Larry Alexander, *Are Procedural Rights Derivative of Substantive Rights*, 17 L. & PHIL. 19, 19 (1998).

161. *See supra* Part II.B.

162. *See generally* DAVID HARRIS ET AL., HARRIS, O'BOYLE & WARWICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (3d ed. 2014).

163. See Allen N. Sultan, *Judicial Autonomy under International Law*, 21 U. DAYTON L. REV. 585, 587 (1996) for a discussion on fair trial and justice.

lacks justice.[164] This right is non-derogable. Except for the UDHR and the African Charter, the texts of other human rights instruments protect fair trial in both civil and criminal proceedings.[165]

To maintain a balance between the State's legitimate interest of punishing offenders and individuals' right to fair trial, retroactive procedural rules should not lead to a summary dismissal of trials.[166] A *summarily* dismissed trial on the basis that the procedural rules are retroactive may impair a State's legitimate interest. A procedural rule that does not define the crime and punishment, but merely states the means of prosecution, may apply retroactively. Many scholars have written about the nature of customary international human rights law regarding the Principle of Legality requiring the *foreseeability of an act as criminal* at the time of commission.[167] Retroactive procedural rules do not seem to implicate this.

At the same time, a defendant's Principle of Legality right could be compromised and eroded by unfair procedure if the court summarily decides retroactive procedural rules do not offend the Principle of Legality. As the ECCJ noted in *Ja'neh*, "it is . . . not in doubt that the absence of prescribed rules of impeachment *substantially affected the fairness of the impeachment proceedings* at the House."[168] To maintain this balance, the court should test the retroactive procedural rules considering the components of Procedural Legality. Where the retroactive procedural rules comply with the components of Procedural Legality, seemingly no harm is done to the defendant by applying such retroactive procedural rules.

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164. Noel Dias & Roger Gamble, *Fair Trial Protections Under International Law: Too Narrow a Canvas?*, 18 SRI LANKA J. INT'L L. 241, 241 (2006).

165. *See id*. at 245-46; ICCPR, *supra* note, 117, art. 14; ACHR, *supra* note 118, art. 8; ECHR, *supra* note 118, art. 6.

166. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1067 (1997) (arguing for the invalidation of a retroactive law only if it violates "a stable equilibrium").

167. GALLANT, *supra* note 10, at 352.

168. *Ja'neh* ECCJ, *supra* note 1, at 41, ¶ 103 (emphasis added).

Under international human rights law, a fair trial has fourteen components.[169] These are also the components of Procedural Legality which prospective or retroactive procedural rules must comply with to be valid. These are:

(1) Right to a Competent, Independent, and Impartial Tribunal Established by Law
(2) Right to a Public Trial
(3) Right to be Presumed Innocent
(4) Right to Prepare a Defense
(5) Right to Counsel
(6) Right to be Tried without Undue Delay[170]
(7) Right to be Present During Trial
(8) Right to Examine Witnesses
(9) Right to an Interpreter
(10) Right to Silence
(11) Right to Appeal
(12) Right to Equality
(13) Right Not to be Subject to Double Jeopardy
(14) Right to Effective Remedies[171]

Arguably, these components are now a part of customary international law.[172] In fact, at least three of these components are described as "procedural *jus cogens*."[173] For instance, "189 States provide notice to the accused, 196 States provide for the right to a hearing, and 196 States provide for an impartial and independent decisionmaker."[174] On this basis, it can be concluded these components satisfy the International Law Commission's *jus cogens* criteria.[175] Thus,

169. CLOONEY & WEBB, *supra* note 8, at 3, 7, 35.

170. *See* Agnes Czine, *Fair Trial Under Scrutiny*, 7 HUNGARIAN Y.B. INT'L L. & EUR. L. 419, 425 (2019) (preferring right to "adjudicate" within a reasonable period).

171. *See generally* Orfield, *supra* note 133, at 41-42 (providing a list of many more safeguards).

172. David P. Stewart, *The Right to a Fair Trial in International Law*. *By Amal Clooney and Philippa Webb*, 116 AM. J. INT'L L. 664, 665 (2022).

173. Dias & Gamble, *supra* note 164 (arguing that some of the components of a fair trial is now a rule of *jus cogens*).

174. Colangelo, *supra* note 159, at 378.

175. *Id*. at 377-78.

international human rights law detests any trial devoid of these components.[176] Where procedural rules comply with these components, they may apply retroactively.

CONCLUSION

Two questions need to be answered in underscoring the thesis of this Article. First, can a retroactive procedural rule comply with the fourteen components of a fair trial? This is answered in the affirmative. Rules of procedure guide the *manner* of a trial (or pre-trial).[177] When retroactive procedural rules are made during trial, they should be tested considering the fourteen components to determine their validity.

Second, if a substantive law clearly criminalizes certain conduct and prescribes punishment, and a retroactive procedural rule complies with the fourteen components, is there any further basis to vitiate the trial? This is answered in the negative. The requirement is such that retroactive procedural law should not impose any obstacle to the defendant by violating Procedural Legality. As Professor Orfield observed seventy-three years ago, what is important is that the retroactive procedural law "must not alter the legal rules of procedure or evidence in existence at the time of the crime to the *substantial disadvantage* of criminal defendants."[178]

James Madison proclaimed, "Justice is the end of government. It is the end of civil society."[179] The idea of justice demands respecting the State's interest to punish offenders. However, justice also demands the State not subject defendants to unfair laws. To achieve this two-pronged

176. Ali Adnan Alfeel, *Iraqi Special Tribunal Under International Humanitarian Law*, 2 J. E. ASIA & INT'L L. 11, 35 (2009).

177. *See* CLOONEY & WEBB, *supra* note 8, at 17. Of the fourteen components, the right to be presumed innocent; the right to prepare a defense; the right to counsel; the right to be tried without undue delay; the right to an interpreter; and the right to silence are important during pre-trial. *See generally* Colangelo, *supra* note 159. Pre-trial rights are as much as important as trial rights since they are part of fair trial. *Id*. As for these pre-trial rights, the court should consider the extent to which they were violated and the overall impact of the absence of procedural rules before the enactment of the retroactive procedural rules taking over. *Id*.

178. Orfield, *supra* note 133, at 35 (emphasis added).

179. *See* Sultan, *supra* note 163, at 586 (explaining that though there is a dispute about the author of this quote between James Madison and Alexander Hamilton, recent texts seemed to attribute it to Madison).

justice, courts must find a balance. To achieve this balance, courts must test retroactive procedural rules under Procedural Legality rather than Substantive Legality. With this, a court will not summarily vitiate a trial because it finds that while a substantive law criminalizes conduct and prescribes a punishment, the procedural rule for prosecuting the defendant is retroactive. The court must test whether the retroactive procedural rule violates Procedural Legality. If it does, the court should vitiate the trial as such a trial would be unfair. Otherwise, the defendant will not be prejudiced by a procedural rule compliant with Procedural Legality, even if it is retroactive.