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Production: *The Journal is printed by Thomas Reuters Core Publishing Solutions, 610 Opperman Drive, Eagan, MN 55123. The Journal invites the submission of articles and book reviews. Citations should conform to the most recent edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, published by The Harvard Law Review Association.*

Postmaster: *Send address changes to Connecticut Journal of International Law, 65 Elizabeth Street, Hartford, CT 06105-2290.*

Web Address: *The Journal's home page is located at <http://www.cjil.org>.*

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Vol. 37, No.2 of 2

Cite as CONN. J. INT'L L.

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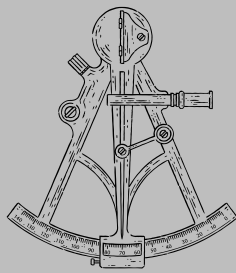


A PATH TOWARDS SYRIAN JUSTICE:
IDENTIFYING AND CIRCUMVENTING THE BARRIERS OF TRADITIONAL
JUSTICE MECHANISMS

*Luke Reynolds**

Abstract

The situation in Syria poses an existential challenge to the international commitment to justice and accountability; in order to salvage any notions of justice, the global world must innovate. As many as half a million people have died in Syria and 83% of the living population resides in poverty during the largest exodus since WWII. As well-documented war crimes and crimes against humanity continue to result in rising death and migration tolls, the political world stands idly by, stalled by geopolitical stalemates. This paper explores how traditional international justice mechanisms fall short of holding perpetrators accountable where there is political meddling, escalating security risks, a noncooperative nation-state, and a lack of financial support for justice. In order to ensure justice in an ongoing conflict where there is no clear victor, the international community must venture into uncharted legal terrain. Evidence collection and universal jurisdiction have kept the prospects of justice alive. However, a much greater international response, such as the establishment of an ad hoc tribunal without UNSC approval, is critical for transitional justice in a post-conflict Syria. While observers have noted the failure of international justice mechanisms, this paper identifies the obstacles to justice and provides possible mechanisms to circumvent them. The future of accountability in the Syrian context relies on the ability of international justice mechanisms to transcend geopolitical interests and meet the urgency and constraints of the moment.



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I. INTRODUCTION

As Syria enters its eleventh year of civil war, the numbers of dead and displaced only continue to rise. Deaths have neared half a million¹ and the largest exodus since WWII is occurring with over 6 million Syrian refugees and another 6 million internally displaced.² Every day in Syria, people are detained without cause, tortured, raped, and killed.³ Syrians fear attacks on their homes, hospitals, schools, and public spaces.⁴ For those that remain in Syria, 83% are thought to be impoverished and famished.⁵ At this point, the war has no victor, only victims.⁶ Thus far, no international justice mechanism has held perpetrators of crimes in Syria accountable – marking the abject failure of the international community. As the conflict prolongs, the victims and the world are left to wonder: why has nothing been done, and where can we turn for justice? As this paper will outline, a series of obstacles block traditional mechanisms designed to hold those accountable for mass atrocities from coming to fruition. It is clear that the unhinged power of the corrupt Syrian government coupled with a sharp divide in the Security Council is to blame. However, there are also basic preconditions necessary – like jurisdictional constraints – for the International Criminal Court (“ICC”), hybrid courts, domestic trials, and ad hoc tribunals that are currently not present in Syria.

Short of regime change, it is unlikely that a traditional international tribunal of the kind from the last thirty years will be established with Assad still in power. This paper suggests that nontraditional mechanisms, like universal jurisdiction and collective action outside of the United Nations Security Council (“UNSC”), are necessary to keep the prospects of justice alive and international pressure on the Assad regime to take responsibility for the atrocities committed. By installing a myriad of different

¹ Syrian Observatory for Human Rights, *Nearly 585,000 people have been killed since the beginning of the Syrian Revolution*, SYRIAN OBSERVATORY FOR HUM. RTS. (Jan. 4, 2020), <https://www.syriaohr.com/en/152189/>. Other estimates remain below 500,000.

² *Syria Emergency*, UN REFUGEE AGENCY, U.N. High Comm’r for Refugees [UNHCR], <https://www.unhcr.org/en-us/syria-emergency.html> (last visited Feb. 25, 2022).

³ Faten Ghosn & Joanna Jandali, *The Price of Prosecution: The Reality for Syrian Transitional Justice*, 8 PENN ST. J.L. & INT’L AFF. 1, 2 (2020).

⁴ “*Afraid to go to class*”: Ten years since the start of the Syria crisis, children and teachers describe the lasting horror of attacks on schools, Islamic Relief, RELIEFWEB (Mar. 15, 2021), <https://reliefweb.int/report/syrian-arab-republic/afraid-go-class-ten-years-start-syria-crisis-children-and-teachers>.

⁵ *FAST FACTS SYRIA CRISIS*, at 2, UNICEF (Mar. 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/SYR-FastFacts-March2019.pdf_0.pdf.

⁶ While Assad is likely to enter his fourth decade of power, power does not mean victory. In the last ten years the country has lost nearly half a trillion in GDP, 75% of the population relies on humanitarian aid for survival, 40% of schools were destroyed, 90% of medical needs are unmet, living wages are not available. This is on top of the mass death and displacement. See Lisa Schlien, *Humanitarian Crisis Worsens in Syria After Decade of War*, VOA (Mar. 4, 2021), <https://www.voanews.com/middle-east/humanitarian-crisis-worsens-syria-after-decade-war>; *9 Years Of Schools On The Front Line: The Impact of Airstrikes on Syria’s Schools*, Syria Relief, RELIEFWEB (Mar. 15, 2020), <https://reliefweb.int/report/syrian-arab-republic/9-years-schools-front-line-impact-airstrikes-syria-s-schools>; Jeremy Bowen, *Syria War: Assad Under Pressure As Economic Crisis Spirals*, BBC (June 15, 2020), <https://www.bbc.com/news/world-middle-east-53020105>.

mechanisms, the international community may be able to gradually and incrementally deliver justice in Syria.

II. OBSTACLES TO ACCOUNTABILITY

Mass atrocities in Syria began in March 2011, when peaceful school children protesting the Assad-regime were arrested and tortured in what the government considered acts of sedition.⁷ The government's repression, in line with other Arab Spring uprisings, led to the rise of armed opposition groups that eventually controlled territory and turned the situation into "non-international armed conflicts."⁸ But even after there were armed rebels to fight, the government continued to bombard civilians who were believed to support the rebellions. After a chemical weapons attack in August 2013 in Ghouta, Syria, that cost the lives of about 1,300 men, women, and children, UNSC Resolution 2118 expressed the "strong conviction" that the responsible individuals "should be held accountable."⁹ In 2014, the French Ambassador to the United Nations ("U.N.") formally proposed an ICC referral resolution, and while it received thirteen affirmative votes – including the United States – it was rejected with vetoes from Russia and China.¹⁰

Despite U.N. Secretary-General Ban Ki-Moon stating that the Council has an "inescapable responsibility" to pursue accountability for mass atrocity crimes in Syria,¹¹ the international community has been obstructed by geopolitical interests. Russia has displayed unwavering support for Assad, who is one of their closest allies in the region and allows Russia to exert military influence throughout the Middle East. Since Russia has an airbase of growing importance in Latakia¹² and a significant naval base and commerce port in Tartus, Russia is sure to keep revolutionary factions, influenced by western nations, out of power.¹³ Russia has provided significant military and financial support to the Assad government.¹⁴ Likewise, Iran has a strategic partnership with the Assad government that influences power in the Middle East and allows Iran to support Hezbollah.¹⁵ On the other side, the U.S., European countries, and Turkey have financially and militarily supported the opposition to the Assad-led

⁷ Joe Sterling, *Daraa: The Spark that Lit the Syrian Flame*, CNN (Mar. 1, 2012), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>.

⁸ Stephen J. Rapp, *Overcoming the Challenges to Achieving Justice for Syria*, 30 EMORY INT'L L. REV. 155, 155 (2015).

⁹ *Id.* at 157; S.C. Res. 2118, ¶ 15 (Sept. 27, 2013).

¹⁰ *Russia and China Veto UN Move to Refer Syria to ICC*, BBC NEWS (May 22, 2014), <https://www.bbc.com/news/world-middle-east-27514256>.

¹¹ *Id.*; *Russia, China block Security Council referral of Syria to International Criminal Court*, U.N. (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>.

¹² Over the last year, Russia has been expanding the airbase to accommodate larger aircraft with heavier cargo loads, including aircraft with nuclear capabilities, to reach more targets in the Middle East more quickly. See, *Russia equipping Syria air base to receive nuclear bombers*, MEMO (Feb. 12, 2021), <https://www.middleeastmonitor.com/20210212-russia-equipping-syria-air-base-to-receive-nuclear-bombers/>.

¹³ Roy Allison, *Russia and Syria: Explaining Alignment with A Regime in Crisis*, 89 INT'L AFF. 795, 796 (2013).

¹⁴ *Id.* at 809.

¹⁵ *Id.* at 808-11.

government.¹⁶ As a result, Syria has turned into a proxy battleground to secure political power in the Middle East.

This proxy war matters to transitional justice, because with large hegemonic powers at odds, the Security Council is unlikely to agree to a tribunal that would threaten political interests. Furthermore, with no peaceful end to fighting in sight, the region is too unstable to implement a tribunal. The lack of safety, international contributions to support a trial, and overall international intervention further diminishes the hope of justice and accountability in Syria. Above all else, the greatest obstacle to justice lies in the Assad regime's unwillingness to cooperate with, or accept, any tribunal that investigates the wrongdoings of the government. As will be discussed in the following sections, until the international community determines a way to eliminate or circumvent these obstacles, Syrian supported accountability will be feeble at best.

III. EVIDENTIARY VALUE: PROSECUTORS WITHOUT A TRIAL

Since the beginning of the war, international justice has failed to deliver for victims or, at the very least, end the injustices. Even after the Obama administration finally agreed to refer the Syrian crisis to the ICC, Russia vetoed any Security Council referral – providing an untethered life rope to Assad.¹⁷ Syria has declined to hold domestic trials, which is probably for the best considering there is no indication of impartiality or independence.¹⁸ Bordering nations are likely to decline to host a trial in fear of their national security and geopolitical relationships being tarnished by unconventional attacks and half-hearted political assurances. However, the international community has yet to block evidence gathering by U.N. backed organizations. While evidence and documentation are not accountability mechanisms themselves, they are essential tools for any successful transitional justice process.

The first documentation mechanism, the Commission for International Justice and Accountability (“CIJA”), was created by the U.N. Human Rights Council in 2013 and uses on-the-ground Syrian investigators to collect evidence of international crimes committed by the Assad regime as well as the Islamic State.¹⁹ Veering off the course from the traditional path of setting up a tribunal and then conducting investigations, the CIJA collects evidence without any identifiable judicial goals. The CIJA has smuggled more than 600,000 government documents out of Syria which link the Assad regime to war crimes and crimes against humanity.²⁰ The CIJA recently published a four-hundred-page legal brief, known as the Assad Files, which links the Assad

¹⁶ *Syria crisis: Where Key Countries Stand*, BBC (Oct. 30, 2015), <https://www.bbc.com/news/world-middle-east-23849587>.

¹⁷ Jessica Doumit, *Accountability in A Time of War: Universal Jurisdiction and the Strive for Justice in Syria*, 52 GEO. J. INT'L L. 263, 269 (2020).

¹⁸ *See Id.* at 272.

¹⁹ *Commission for International Justice and Accountability*, CIJA (last visited Mar. 6, 2022), <https://cijaonline.org/>.

²⁰ Seema Kassab, *Justice in Syria: Individual Criminal Liability for Highest Officials in the Assad Regime*, 39 MICH. J. INT'L L. 283, 288 (2018) (citing Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (2012)).

government to the systematic torture and murder of hundreds of thousands of Syrians.²¹ Stephen Rapp, who led the prosecutions at the international criminal tribunals in Rwanda and Sierra Leone, claimed that CIJA's documentation is "much richer than anything I've seen, and anything I've prosecuted in this area."²²

The second initiative established by the General Assembly – bypassing the rifting Security Council – is the International Impartial and Independent Mechanism ("IIIM") for Syria.²³ The IIIM gathers, collates, and preserves evidence of atrocities in Syria.²⁴ However, unlike the CIJA, the IIIM's mandate is focused on preparing the groundwork for prosecutions in national, regional, and international courts.²⁵ According to one set of commentators, "[t]he Mechanism is an important addition to the international justice landscape" which may "provide a bridge between the contemporaneous collection of evidence and its use in trials that may take place years or even decades later."²⁶ Essentially, the IIIM acts as a prosecutor without a court or trial.

Forward-looking, the evidence collection that is emerging could potentially serve as leverage toward establishing legal mechanisms to pursue acknowledgement and criminal accountability. Backward-looking, the information gathered on mass crimes makes the inaction of the international community abhorrent as it clearly identifies mass human rights abuses. Nonetheless, the evidence is ready for the day when Syrians and the international community come together to achieve justice for the victims and survivors of mass atrocities. The following section outlines why no traditional international justice mechanism has capitalized on the evidence and how accountability remains in the hands of state actors under the principle of universal jurisdiction.

IV. ASSESSMENT OF TRADITIONAL JUSTICE & ACCOUNTABILITY MECHANISMS

Despite mounting evidence in Syria, none of the traditional international models of justice²⁷ designed to deal with atrocities like those in Syria are feasible at this moment, with the exception of national trials. In order to deliver justice to the widest range of victims, and to hold those accountable for crimes, it is important to analyze the shortcomings and potential benefits each mechanism may have for Syria. In examining the models of accountability, two principles become clear. First, an

²¹ *Id.* at 287.

²² Ben Taub, *The Assad Files*, THE NEW YORKER (Apr. 18, 2016), <https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed> (summarizing the files).

²³ Homepage, INT'L, IMPARTIAL AND INDEP. MECHANISM, <https://iiim.un.org/> (last visited May 11, 2021).

²⁴ *Id.*

²⁵ *Mandate*, INT'L, IMPARTIAL & INDEP. MECHANISM, <https://iiim.un.org/mandate/> (last visited May 11, 2021).

²⁶ Beti Hohler & Elizabeth Pederson, *The Syria Mechanism: Bridge to Prosecutions Or Evidentiary Limbo?*, E-INT'L REL. (May 26, 2017), <http://www.e-ir.info/2017/05/26/the-syria-mechanism-bridge-to-prosecutions-or-evidentiary-limbo/>.

²⁷ See generally Tove Rosen, *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Jan. 24, 2022).

international tribunal, likely an ad hoc or hybrid court, is critical to holding those in the highest levels of power accountable in a post-conflict setting. Second, efforts to deliver justice and accountability in the interim – through ongoing evidence collection and national trials – are essential to keep the prospects of justice alive and to prevent the mountain of evidence from eroding with time.

A. The International Criminal Court

The ICC's purpose is to prosecute the types of international crimes (war crimes, crimes against humanity, and genocide) that the Assad regime, and others, are allegedly committing in Syria.²⁸ The ICC has a massive operating budget and the personnel to prosecute the crimes being committed by the Assad government.²⁹ However, Syria is not a party to the ICC and therefore the jurisdictional tribulations begin. The ICC has three means by which it can exercise jurisdiction over a particular crime – none of which are currently applicable in Syria. However, there is the possibility of a new fourth option which, condition-permitting and still limited, might be the best path for ICC jurisdiction.

The ICC can exercise jurisdiction under Article 13(a) of the Rome Statute through a state party referral.³⁰ However, Syria, although it is a signatory of the Rome Statute, has yet to ratify it – thus it is not a member.³¹ It is unlikely that Assad would allow ratification of the Statute and open himself and top leaders to removal and penal punishments by the ICC. Therefore, Article 13(a) is likely a non-starter.

The second option lies under Article 13(b) of the Rome Statute, which empowers the U.N. Security Council to refer states to the ICC under Chapter VII of the U.N. Charter, irrespective of whether the referred state is a Rome Statute signatory.³² This would appear like the normal approach that the international community would take to ensure crimes in Syria do not go unpunished. In May 2014, the Security Council voted on a resolution to refer Syria to the ICC for investigation. However, entangled in a complex political web, Russia acted in accordance with its own interests and vetoed the resolution.³³ China followed.³⁴ Russia called it a “publicity stunt” that would hinder political talks, while China vetoed it on the basis of state sovereignty and called on Council members to allow the Syrian Government and Syrian opposition forces to negotiate a solution.³⁵ Over the past decade, Russia and China have vetoed U.N. Security Council resolutions to deter international crimes in Syria at least fifteen

²⁸ Rome Statute of the International Criminal Court Part II, July 17, 1998, 2187 U.N.T.S. 38544, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

²⁹ Reuters Staff, *Factbox: What is the International Criminal Court?*, REUTERS (Mar. 3, 2021), <https://www.reuters.com/article/us-warcrimes-icc-palestinians-background-idCAKBN2AV24Z> (citing a budget of approx. \$180M/year).

³⁰ *Supra* note 28, at Art. 13(a).

³¹ *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.iccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited May 11, 2021).

³² *Supra* note 28, at Art. 13(b).

³³ Rapp, *supra* note 8, at 158; *Russia and China Veto UN Move to Refer Syria to ICC*, BBC NEWS (May 22, 2014), <https://www.bbc.com/news/world-middle-east-27514256>.

³⁴ *Id.*

³⁵ *Id.*

times.³⁶ Unless the political circumstances change, it is unlikely that the UNSC will approve of ICC jurisdiction.

The third option is for the Office of the Prosecutor (“OTP”) to open a *proprio motu* investigation under Article 15 of the Rome Statute.³⁷ The ICC Prosecutor may choose to investigate alleged crimes that either occurred on the territory, or by a national, of a State Party or a non-State Party that has consented to ICC jurisdiction.³⁸ The Prosecutor must demonstrate that (i) there is a reasonable basis to believe that a crime within the jurisdiction of the court has been committed (jurisdiction *ratione materiae* and *ratione temporis*); (ii) a precondition to the exercise of jurisdiction exists; (iii) the admissibility requirements of gravity and complementarity have been fulfilled; and (iv) there are no substantial reasons to believe that an investigation would not serve the interests of justice.³⁹ This approach can be delayed by the UNSC, but not forever. An OTP investigation is in the realm of possibility, but it faces significant challenges considering that the Assad regime would never consent or cooperate with foreign prosecution, something needed if the ICC was ever to establish jurisdiction in Syria.

A new path for ICC jurisdiction was recently created. Following a Pre-Trial Chamber (“PTC”) decision, recently coined the “Myanmar precedent,” the ICC established jurisdiction over Myanmar (a non-party state), by setting up a tribunal in Bangladesh (a party state) to deal with charges of deportation and forcible transfer.⁴⁰ Since the decision in 2018, lawyers have requested the ICC to investigate alleged border crimes, notably deportation, by the Assad regime.⁴¹ Under Article 12(2)(a), the PTC could extend the Myanmar precedent to Syria and allow the ICC to establish jurisdiction in Jordan, a state party to the ICC.⁴² There is an indication that this is possible; since April 2020, there were over 650,000 Syrian registered refugees in Jordan, and over one million Syrians are estimated to have been displaced to Jordan since 2011.⁴³ In 2018, approximately 85% of the Syrian refugees in Jordan were living below the poverty line.⁴⁴ In regard to showing complementarity, Syria has shown itself

³⁶ *Ten Years on Justice for Syrians More Important Than Ever*, AMNESTY INT’L. (Mar. 12, 2021), <https://www.amnesty.org/en/latest/news/2021/03/ten-years-on-justice-for-syrians-more-important-than-ever/#:~:text=Over%20the%20past%20decade%2C%20Russia,they%20have%20completely%20failed%20them.>

³⁷ *Supra* note 28, at Art. 15.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *The State of Justice: Syria 2020*, SYRIA JUST. & ACCOUNTABILITY CTR., at 15 (Mar. 2020), https://syriaaccountability.org/wp-content/uploads/02.28_SJS-ENG_pdf_compressed-1.pdf.

⁴¹ Reuters Staff, *Lawyers Hope Refugees’ Case Against Damascus Will be Breakthrough*, REUTERS (Mar. 7, 2019), <https://www.reuters.com/article/us-mideast-crisis-refugees-icct/lawyers-hope-refugees-case-against-damascus-will-be-breakthrough-idUSKCN1QO1HD>.

⁴² *Supra* note 28, at Art. 12(2)(a).

⁴³ *Syrian Regional Refugee Response: Jordan*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <https://data2.unhcr.org/en/situations/syria/location/36> (last updated Jan. 31, 2022).

⁴⁴ *Jordan Factsheet - October 2018*, UNHCR, (Oct. 30, 2018), <https://reliefweb.int/report/jordan/unhcr-jordan-factsheet-october-2018#:~:text=83%25%20of%20Syrian%20refugees%20in,USD%2096%20per%20individual%20monthly.>

to be unwilling or unable to genuinely investigate or prosecute the alleged crimes – opening the gate for the ICC.⁴⁵ Nonetheless, this approach faces major hurdles.

Even if the OTP could open an investigation in Jordan, it may be difficult to prove that Syrian refugees were displaced or deported to Jordan as a result of intentional and coercive directed attacks by the Assad regime. Unlike in Myanmar, there is not a direct government sponsored campaign of forcible transfer. There are also recent reports of the Jordanian government deporting refugees back to Syria – weakening the claim of forced deportation when refugees are allowed to return.⁴⁶ The Jordanian Government's general unwillingness to support or request an investigation further challenges the OTP's ability to prove forcible transfer or deportation. However, even if Jordan could be brought on board, the Prosecutor would still have to positively establish that the proposed investigation is in the interests of justice. The OTP has faced an uphill battle attempting to establish jurisdiction in Afghanistan. The PTC shot down a *proprio motu* investigation but was later reversed on appeal, with the appeals chamber holding that the prosecutor determines if it is in the interests of justice, not the court.⁴⁷ While the court has opened a door, it is unclear if the OTP is daring enough to walk through it for Syria, a more tumultuous political battleground than Afghanistan. It is likely that the hegemonic actors will argue that any investigation will escalate tensions and further upset the proxy battles in the region. The PTC may also determine that the noncooperation of the Assad regime will weaken investigatory credibility and the true perpetrators of international crimes will not be brought to justice. Therefore, it remains possible for the Myanmar precedent to have roots in Syria, but the chances of it blossoming in full bloom are unlikely as the risk of justice being pervaded remains high.

Syria exposes the holes in the ICC on three fronts. First, the ICC's reliance on the nation being investigated to cooperate with investigations and detain alleged criminals renders it nonfunctional in Syria, a state that will not cooperate (Jordan notably also does not seem eager to cooperate).⁴⁸ Second, any time there is massive political tension it is unlikely that the ICC will receive the international financial and rhetorical support needed. Finally, the effectiveness seems marginal if the top leaders of the Assad regime will not be turned over to the ICC. This arguably might be worse for Syrians who demand that their leaders be held accountable, even if that means waiting.

⁴⁵ Mark Lattimer et al., *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, 12, CEASEFIRE CENTRE FOR CIVILIAN RIGHTS (2015), <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf>.

⁴⁶ Bill Frelick, "I Have No Idea Why They Sent Us Back" *Jordanian Deportations and Expulsions of Syrian Refugees*, HUM. RTS. WATCH (Oct. 2, 2017), <https://www.hrw.org/report/2017/10/02/i-have-no-idea-why-they-sent-us-back/jordanian-deportations-and-expulsions-syrian>; see also *supra* note 17.

⁴⁷ Jennifer Trahan, *The Significance of the ICC Appeals Chamber's Ruling in the Afghanistan Situation*, OPINIOJURIS (Oct. 3, 2020), <http://opiniojuris.org/2020/03/10/the-significance-of-the-icc-appeals-chambers-ruling-in-the-afghanistan-situation/>.

⁴⁸ See *supra* note 17; *supra* note 46; Marc Perelman, *Western Policy on Syria has Been a Failure, Jordan's FM Tells FRANCE 24*, THE INTERVIEW (Dec. 11, 2021), <https://www.france24.com/en/tv-shows/the-interview/20211112-western-policy-on-syria-has-been-a-failure-jordan-s-fm-tells-france-24> (Jordan's Deputy Prime Minister calls for a political solution and is open to Assad and Syria returning to the Arab league – signaling further delays in post-conflict accountability).

Adding to the struggle for justice, the ICC is not a quick-moving body, which means that even if there is jurisdiction, victim harm will not be redressed for some time. Thus, the ICC appears to act best when winners and losers have already been picked by the international community. While the ICC remains a nonviable option now, it is capable of holding Assad and other top leaders accountable when the political and social structures are accommodating.

B. Syrian Domestic Trials

Domestic trials, when well-supported, can best secure justice and national healing. In Guatemala, nearly a decade after a brokered peace agreement, domestic courts finally achieved the independence and guidance from Guatemalan Attorney Generals to prosecute crimes committed decades earlier.⁴⁹ The domestic courts were strengthened by the U.N.-sponsored International Commission Against Impunity in Guatemala (“CICIG”), which trained judges on international law, provided witness protection, and helped investigate crimes.⁵⁰ The domestic courts relaxed their evidentiary rules to allow all testimony from victims and would discount it as the court saw fit.⁵¹ This model was central to establishing national justice for victims and led the way toward acknowledgment and reparations.⁵²

However, no proponent of international justice could suggest domestic trials as a possible option in Syria at this moment. The 1973 Syrian Constitution provides for an independent judicial system, but in practice, the judiciary is far from independent and is compromised by Assad’s wishes.⁵³ There is documented history of the Syrian court not providing due process to individuals on terrorism charges, and torture of detainees is all too common.⁵⁴ In light of such facts, it would be inappropriate to believe that fair trials are written into the fabric of Syrian domestic courts. The courts lack the impartiality, independence, due process, and capacity to prosecute and deliver fair trials for international crimes.⁵⁵ While it would be ideal for a domestic court to prosecute international crimes locally and on behalf of the Syrian people, the possibility of this happening in Syria is unlikely to exist within the current judicial landscape.

Before attempting domestic trials, Syria should learn from Iraq, whose efforts to domestically prosecute international crimes were compromised by judicial bias and weak due process. The Iraqi High Tribunal (“IHT”) was not established by the UNSC,

⁴⁹ Jo-Marie Burt, *Gender Justice in Post-Conflict Guatemala: The Sepur Zarco Sexual Violence and Sexual Slavery Trial*, 2019 SOC. SCI. RSCH. NETWORK 63, 75.

⁵⁰ Miguel Zamora, *Institutional Inoculation: The International Commission Against Impunity in Guatemala (CICIG), International Rule of Law Mechanisms, and Creating Institutional Legitimacy in Post-Conflict Societies*, 57 COLUM. J. TRANSNAT’L L. 535, 570 (2019).

⁵¹ Burt, *supra* note 49, at 71-72.

⁵² Zamora, *supra* note 50.

⁵³ See ILAC RULE OF LAW ASSESSMENT REPORT: SYRIA 2017, INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM 41 (Mikael Ekman ed. 2017), <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf>.

⁵⁴ See Ghosn, *supra* note 3, at 5-11. Referring to a UN Commission’s interviews of detainees in Syria who were tortured or witnessed arbitrary killings.

⁵⁵ *Id.* at 23 (referencing Syrian courts as a pseudo-court systems rampant with corruption).

a treaty, or a U.N. administration.⁵⁶ Rather, the U.S.-appointed Iraqi Governing Council approved a tribunal which was later revoked and replaced by the Transitional National Assembly of Iraq.⁵⁷ The IHT had primacy over all other Iraqi courts and consisted of national judges and prosecutors.⁵⁸ The IHT was the closest the Middle East has come to domestic prosecution of international crimes. However, the IHT lacked judicial independence, provided weak guarantees of a fair trial, was procedurally mismanaged, and failed to reach out to the public.⁵⁹ For instance, the Tribunal, which tried Saddam Hussein, declared and executed death by hanging before Hussein could be tried for the commission of genocide linked to the Anfal campaign, in which hundreds of thousands of Kurds were murdered.⁶⁰ If domestic trials become tenable, Syrians must account for how rushed verdicts, death sentences, and political biases created a highly politicized environment in Iraq and tainted the legacy and legitimacy of its Tribunal.

C. Ad Hoc Tribunals / Hybrid Tribunals

The establishment of ad hoc and hybrid international criminal tribunals has trended within the international community as a way to combine national and international elements. Ad hoc courts, like the ICTY and ICTR, have exported domestic violations of international law to a court comprised of international judges and attorneys, as well as procedural law set in advance of trials and investigations. Ad hoc tribunals can fill in the gaps and hold bigger named officials accountable where universal jurisdiction leaves off. In a more flexible manner, hybrid tribunals typically apply international criminal law and due process standards in conjunction with the domestic laws of the state, and include both international and local judges.⁶¹ Unfortunately, for the situation in Syria, the ad hoc and international nature of these courts imply a reliance on the United Nations to create and fund the appropriate vehicle to carry out these prosecutions. With the exception of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and Special Tribunal of Lebanon – which were established in domestic agreement – all these courts have been procured from a U.N. Security Council resolution.⁶² I analyze past ad hoc court structures in turn while recognizing that in order for any of these traditional models to work in Syria, state and UNSC approval is necessary. Although it is an unlikely scenario in Syria, this does not mean the value of international tribunals should be discounted or ruled out in a post-conflict setting when political and social appetites may shift.

⁵⁶ R. Cryer Et Al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 193 (4th ed. 2019).

⁵⁷ *Iraqi High Tribunal*, HYBRID JUST., <https://hybridjustice.com/iraqi-high-tribunal/> (last visited May 11, 2021).

⁵⁸ *Id.* The tribunal did, however, let international advisors observe and help support with funding, training, and security

⁵⁹ Cryer et al., *supra* note 56, at 194.

⁶⁰ Hybrid Justice, *supra* note 57; Jonathan Steele, *Saddam trial 'fundamentally unfair'*, THE GUARDIAN (Nov. 20, 2006, 11:33 AM), <https://www.theguardian.com/world/2006/nov/20/iraq.jonathansteele1>.

⁶¹ Lattimer et al., *supra* note 45, at 13.

⁶² See Ghosn, *supra* note 3, at 15.

i. Analyzing the ICTY & ICTR

The United Nations Security Council, under its Chapter VII powers, created tribunals for the former Yugoslavia and for Rwanda.⁶³ Notably, these tribunals were created against the wishes of the former Yugoslavia and Rwanda and were located outside of these two countries, at the Hague and Tanzania, respectively.⁶⁴ The tribunals dealt with a series of violence and abuses that spanned across many years and incidents. The size and authority of the tribunals effectively allowed for 161 people to be indicted by the ICTY and 93 people by the ICTR.⁶⁵ Both the ICTY and the ICTR shared the same rule on evidence: “[a] Chamber may admit any relevant evidence which it deems to have probative value.”⁶⁶ The broad evidence rule allowed for experienced judges to evaluate and discount evidence, rather than lawyers having to argue its admissibility. While purely retributive in function, the ICTY and ICTR helped pave the way for reconciliation, rehabilitation, and reparations.⁶⁷

Such a tribunal in Syria would be effective in theory because there is evidence of dozens of international criminal actors (on all sides), an unstable national judiciary, and domestic financial woes. It would also send a strong global and regional message that the world remains committed to international justice – even in the Middle East. In 2013, a group of jurists, including former chief prosecutors of international tribunals, drafted the “Chautauqua Blueprint,” which was intended for a Syrian Extraordinary Tribunal ‘to prosecute those most responsible for atrocity crimes committed in Syria by all sides of the conflict.’⁶⁸ However, the document acknowledged that the tribunal could only operate within Syria “when the political situation permits, presumably following a change in government.”⁶⁹ The draft has not been addressed by the UNSC.

The biggest challenge behind the establishment of an ad hoc or hybrid tribunal is garnering consent from the nation state or a UNSC resolution. While a tribunal or court could be set up in a buffer zone or a neighboring state, it is unlikely as most of Syria’s neighbors are hesitant to host and there are high costs involved in running such a tribunal.⁷⁰ In addition to a general lack of political will, there are substantiated security concerns for victims, witnesses, and staff. Thus, the option remains of limited utility today.

⁶³ Beth Van Schaack, *Deconstructing Syria's Would-Be International Criminal Court Referral: The Politics of International Justice*, 56 STAN. J. INT’L L. 1, 4 (2020); S.C. Res. 827, ¶ 2 (May 25, 1993). Both tribunals were preceded by Security Council-mandated commissions of inquiry (COI).

⁶⁴ Ghosn, *supra* note 3, at 34.

⁶⁵ Cryer et al., *supra* note 56, at 134 (discussing the ICTY indictments); Ghosn, *supra* note 3, at 34 (illustrating indictments in a chart).

⁶⁶ Int’l Crim. Trib. for the Former Yugoslavia, Rules of Proc. & Evidence, U.N. Doc. IT/32/Rev.50 at 91 (Jul. 8, 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf.

⁶⁷ See Goshen, *supra* note 3, at 27; Rachael Andrew, *Hybrid Models of Justice and Rwanda's Post-Genocide Response*, TRADITIONAL JUST. CTR., U. OF WESTERN ONTARIO (2014), <https://tjcentre.uwo.ca/documents/Rachael%20Andrew.pdf>.

⁶⁸ Lattimer, *supra* note 45 at 13.

⁶⁹ *Id.*

⁷⁰ In addition to hundreds of millions in operating costs, there are security and political costs to factor in. *Id.* at 5, 13.

ii. Analyzing Hybrid Courts

A hybrid tribunal may be able to prosecute crimes of a wider range than the cases the ICC manages or an ad hoc is prepared to try, while giving Syrians ownership throughout the process. A main advantage of hybrid tribunals is the ability to design statutes that guide the harms that the community and victims are seeking redress for.⁷¹ Instead of just prosecuting top officials, mid or lower-level combatants can be investigated and brought to justice. In addition to international law, Syrian law can be used to prosecute those who did not commit international crimes but did cause extreme harm in violation of penal law. Typically, but not always, hybrid tribunals are hosted in the conflicted state or within close proximity.⁷² Past examples of hybrid tribunals include the Special Court for Sierra Leone (“SCSL”) and the Special Tribunal for Lebanon (“STL”), both of which were established with the active consent of the state concerned, following an agreement with the United Nations.⁷³

The SCSL is a prime example of an international court that operated within the domestic sphere. It was established by a treaty between Sierra Leone and the U.N. after a request from the Sierra Leone President.⁷⁴ Just two years after the end of the civil war, the court was established with a mixed jurisdiction and composition.⁷⁵ International judges (the majority on the court) were appointed by the U.N. Secretary General and the rest of the judges were appointed by the government of Sierra Leone.⁷⁶ Likewise, the U.N. appointed the prosecutor to prosecute persons “who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”⁷⁷ The hybrid court became a national symbol of peace and stability in Sierra Leone.⁷⁸ Because of the mixed jurisdiction, the SCSL did not bar prosecutions of those with domestic amnesties.⁷⁹ The success of the court is in part due to the cooperation of Sierra Leone and the vast support, financially and otherwise, from the international community to secure justice.

On the other hand, the Special Tribunal for Lebanon (“STL”) is an example of a hybrid tribunal that Syria should try to avoid. The STL was created over a decade ago and was limited in its scope to investigate a terrorist crime — the murder of former Lebanese Prime Minister Rafiq Hariri — and other connected crimes.⁸⁰ It is funded 51% by voluntary contributions from member states in the U.N., and the remaining 49% by the people of Lebanon through taxes.⁸¹ Since its creation, there have been just

⁷¹ See *Id.* at 13.

⁷² *Id.* at 13-15.

⁷³ *Id.* at 14-15.

⁷⁴ Van Schaack, *supra* note 63, at 4; Cryer et al., *supra* note 56, at 176.

⁷⁵ Milena Sterio, *Sequencing Peace and Justice in Syria*, 24 ILSA J. INT'L & COMP. L. 345, 348-49 (2018).

⁷⁶ Cryer et al., *supra* note 56, at 177.

⁷⁷ *Id.*

⁷⁸ *Id.* at 178-79.

⁷⁹ *Id.* at 177.

⁸⁰ Reem Salahi & Bachar El-Halabi, *The Limits of The Special Tribunal for Lebanon and What Syrians Can Learn*, ATL. COUNS. (Sep. 16, 2020), <https://www.atlanticcouncil.org/blogs/menasource/the-limits-of-the-special-tribunal-for-lebanon-and-what-syrians-can-learn/>

⁸¹ Cryer et al., *supra* note 56, at 185.

five indictments and one guilty charge.⁸² In February 2021, the STL was extended for another two years⁸³ – nearly a billion dollars later.⁸⁴ The STL and the United Nations have faced a plethora of problems, including a lack of cooperation by the Lebanese security agencies, who were dominated by the Assad regime at the time, and the political parties of the March 8th coalition, dominated by Lebanese militant group Hezbollah.⁸⁵ Trials endure ongoing judicial obstruction and the U.N. lacks the political will to issue indictments. Secretary-General Kofi Annan aptly displayed such hesitancy when he warned the Prosecutor that “he did not want another trouble spot.”⁸⁶ The STL has attempted to secure justice, but political pressures mounted and the investment from Lebanese people has yielded little benefit. The STL is a stark reminder, and indicator to Syria, that international courts come with many limitations and that accountability in highly politicized contexts requires a multifaceted approach including support from civil society, political reforms, social reforms, and an insulated judiciary. Without a multifaceted approach, any tribunal in Syria could end up being an ineffective institution.

While not structurally conducive at the moment, hope should not be lost for a hybrid tribunal dedicated to investigating and bringing justice to the atrocities in Syria. A group of U.S. Senators recently introduced a bipartisan bill, the Syrian War Crimes Accountability Act, aimed at investigating war crimes, crimes against humanity, and genocide in Syria.⁸⁷ The bill calls on the Secretary of State to assist in creating a hybrid tribunal.⁸⁸ Such an approach may be possible if the tribunal could be set up in a secure location and funded appropriately. If the backdrop permits an SCSL modeled court, it is likely a lucrative investment for the Syrian people and the international community.

D. National Trials Empowered by Universal Jurisdiction

With the traditional options for Syrian accountability seemingly exhausted, the international community has begun relying on national trials and the doctrine of universal jurisdiction to keep the hope of justice alive in Syria.⁸⁹ Universal jurisdiction grants national domestic courts the jurisdiction to prosecute and investigate international criminal crimes committed in Syria in the absence of an international tribunal. There are two key rationales behind using universal jurisdiction: (1) state actors waive their sovereignty over these kinds of crimes when they commit them or permit their commission; and (2) all states have an interest in prosecuting these cases

⁸² Press Release, U.N. Secretary General, Secretary-General Extends Mandate of Special Tribunal for Lebanon, To Last Until It Completes Pending Cases or Exhausts Funding, U.N. Press Release SG/SM/20600 (Feb. 25, 2021).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Salahi & El-Halabi, *supra* note 80.

⁸⁶ *Id.*

⁸⁷ *US Senators Call for ‘Hybrid Tribunal’ for Syrian War Crimes*, RUSSIA TODAY (Apr. 8, 2017), <https://www.rt.com/usa/384024-hybrid-tribunal-syria-bill/>.

⁸⁸ *Id.*

⁸⁹ Alexandra Lily Kather, “Water Finds Its Way”? *Universal Jurisdiction as an Avenue For Justice in Syria*, LIEBER INSTITUTE, WEST POINT (Jul. 28, 2021), <https://lieber.westpoint.edu/water-finds-way-universal-jurisdiction-justice-syria/>.

because these specific egregious crimes affect humanity as a whole.⁹⁰ Universal jurisdiction requires less resources than an international tribunal largely because trials take place in domestic courts that are already established.

Opponents contend that universal jurisdiction violates state sovereignty and that the state where the crime was committed should have control.⁹¹ National trials are also limited in that the resources expended on the case largely depend on what the domestic state is willing to supply. For this reason, opponents argue that the outcome of one case may differ from a factually identical case taking place in another state.⁹² Therefore, rulings on matters of international law may be inconsistent and damaging to international jurisprudence.⁹³ A final and well-noted criticism is that universal jurisdiction has historically politicized acts of nonwestern states without actually being able to hold the sovereign accountable.⁹⁴ Bassam al-Ahmed, executive director and founder of Syrians for Truth and Justice, stated that there is a problem of false hope because some have exaggerated the impact of these cases.⁹⁵ Nonetheless, without inflating the capacity of national tribunals, they are still a valid source of international justice in some contexts. The question really becomes, is universal jurisdiction better than nothing?

If presented as a first step towards accountability, criminal prosecutions in foreign national courts can have a positive impact on Syrian justice. Universal jurisdiction helps build the international case for a greater tribunal, as is being seen in Germany and France where cases keep revealing new perpetrators.⁹⁶ Each national trial builds a body of evidence vital to future or concurrent tribunals and preserves evidence that may otherwise erode over time.⁹⁷ National trials send a message to the world that accountability for egregious crimes is not lost. For some victims, these cases are also important because they prevent alleged perpetrators of heinous crimes from seeking safe haven in countries that have universal jurisdiction. Beyond the small victories for victims, universal jurisdiction presents an operative message to those in the Assad regime that something needs to change if they desire to travel elsewhere besides Moscow and Tehran.

In recent years, European nations, including Germany, France, Sweden, and the Netherlands have exercised universal jurisdiction to hold perpetrators accountable and redress harm to victims who resettled in their countries.⁹⁸ These cases, and especially

⁹⁰ Doumit, *supra* note 17, at 273.

⁹¹ *Id.*

⁹² Máximo Langer, *The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes*, THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS 204, 218 (Martha Minow, Cora True-Frost & Alex Whiting eds., The Univ. of Mich. Press 2015).

⁹³ *Id.* Although it is worth noting that other international tribunals often have inconsistent ruling across different chambers, such as the ICC.

⁹⁴ *Id.* at 223.

⁹⁵ Doumit, *supra* note 17, at 282.

⁹⁶ Priyanka Boghani, *How Syrian War Crimes Are Being Investigated — in Europe*, FRONTLINE (Nov. 21, 2019), <https://www.pbs.org/wgbh/frontline/article/how-syrian-war-crimes-are-being-investigated-in-europe/>.

⁹⁷ Doumit, *supra* note 17, at 267.

⁹⁸ Anwar El Bunni, *Breaking New Ground: Transitional Justice in Syria*, BROOKINGS (Nov. 24, 2020), <https://www.brookings.edu/opinions/breaking-new-ground-transitional-justice-in-syria/>.

the two most recent cases in Germany, illuminate progress and put pressure on the international community.

i. European Cases:

Germany provides a prime example of how universal jurisdiction draws national attention to international crimes and pokes holes in the political shield that has protected perpetrators of crimes against humanity. Under the universal jurisdiction doctrine, two high-ranking Syrian officials and military officers have been sentenced for committing crimes against humanity. In January of 2022, a German court issued a landmark ruling sentencing Anwar Raslan to life in prison for crimes against humanity.⁹⁹ Raslan, a former Syrian Colonel and head of domestic intelligence, was convicted of crimes against humanity related to the torture¹⁰⁰ of more than 4,000 detainees and deaths of at least fifty-eight people at a Syrian prison.¹⁰¹ This came at the heels of Raslan's subordinate, Eyad Al-Gharib, being sentenced to four-and-a-half-years for aiding and abetting crimes against humanity.¹⁰² The trials held in Germany marked the first international trials that focused on the widespread use of torture by Assad's regime.¹⁰³ With no intentions of abandoning universal jurisdiction, the German court is preparing to try a Syrian Doctor accused of crimes against humanity in January 2022. These cases establish three important legal precedents of universal jurisdiction: (1) deny perpetrators of international crimes a safe haven; (2) provide some measure of justice to victims; and (3) offer a retributive punishment for grave violations of international law.

Anwar al-Bunni, a Syrian lawyer in the European cases, said holding high-level officials accountable is critical and that "it is not possible for Syria to stabilize unless these criminals are held accountable."¹⁰⁴ Al-Bunni furthered that "the goal ... is to block any attempt to rehabilitate war criminals and people who've committed crimes against humanity."¹⁰⁵ Leila Sadat said that these trials are "less satisfactory than a more systematic and comprehensive solution, but the cases so far suggest that the national prosecutions brought outside Syria may deliver a modicum of justice."¹⁰⁶

⁹⁹ *German court sentences former Syrian colonel to life in prison*, AL JAZEERA (Jan. 13, 2022), <https://www.aljazeera.com/news/2022/1/13/hold-german-court-sentences-former-syrian-colonel-to-life-in>.

¹⁰⁰ Mia Swart, *Why Do States Allow Impunity for Torture*, AL JAZEERA (June 26, 2019), <https://www.aljazeera.com/news/2019/06/26/why-do-states-allow-impunity-for-torture/>. (Torture is considered one of the most widely acknowledged international crimes and can be prosecuted as either a war crime or a crime against humanity.)

¹⁰¹ *Id.*; see also *The State of Justice: Syria 2020*, SYRIA JUST. & ACCOUNTABILITY CTR., 14-15 (Mar. 2020), https://syriaaccountability.org/wp-content/uploads/02.28_SJS-ENG_pdf_compressed-1.pdf.

¹⁰² Bunni, *supra* note 98; *Syrian Agent Convicted in Germany in First Trial of State-Sponsored Torture in Syria*, RFI (Feb. 24, 2021, 10:35 AM), <https://www.rfi.fr/en/international/20210224-syrian-agent-convicted-in-germany-in-first-trial-of-state-sponsored-torture-in-syria>.

¹⁰³ Mia Swart, *National courts lead the way in prosecuting Syrian War Crimes*, AL JAZEERA (Mar. 15, 2021), <https://www.aljazeera.com/news/2021/3/15/national-courts-lead-the-way-in-prosecuting-syrian-war-crimes>.

¹⁰⁴ Maryam Saleh, *Syrian Refugees Use Precedent Set in Rohingya Case To Try To Bring Government Officials Before The International Criminal Court*, THE INTERCEPT (Mar. 16, 2019, 7:57 AM), <https://theintercept.com/2019/03/16/syria-conflict-international-criminal-court/>.

¹⁰⁵ Swart, *supra* note 103.

¹⁰⁶ *Id.*

Germany is not alone in exercising universal jurisdiction. Sweden was the first state to convict a member of the Syrian Military for war crimes.¹⁰⁷ In total, three individuals have been convicted of crimes committed in Syria's war after they left the country and traveled to Sweden.¹⁰⁸ This past February, a complaint was opened in Sweden to investigate crimes against humanity committed by senior officials in the Assad regime.¹⁰⁹

In France, where universal jurisdiction is limited to victims who are French citizens or perpetrators who are French nationals or on French territory, cases are making headway.¹¹⁰ In 2018, French judges issued international arrest warrants for three high-ranking Syrian officials after two France nationals teaching outside Damascus were brutally tortured and murdered.¹¹¹ In March of 2021, another action was filed in French courts by survivors of chemical weapons attacks outside Damascus alleging that Syrian government officials committed war crimes and crimes against humanity.¹¹² As a result, arrest warrants have been issued for the head of the Syrian National Security Bureau, the head of the Syrian Air Force Intelligence Directorate, and the head of the Air Force Intelligence Directorate's investigative branch.¹¹³ Such warrants are already creating tensions on the political front that may push the UNSC to take some form of action beyond a stance of complicity.¹¹⁴

Therefore, national trials, while not perfect in any regard, are appearing to hold some criminal actors accountable whilst preserving evidence for broader transitional justice efforts, such as truth commissions and historical records.¹¹⁵ More importantly, it sends a global message that absent an international criminal tribunal, perpetrators of crimes against humanity will not completely evade justice. While the efforts are incremental under universal jurisdiction, slow justice is better than no justice. As long as future ad hoc and military tribunals are not hampered, the onslaught of cases in Europe is good for the future prospects of justice in Syria. Prosecutor Stephen Rapp opined that "the slow-moving wheels of justice eventually caught up with Chile's

¹⁰⁷ "These are the Crimes we are Fleeing," *Justice for Syria in Swedish and German Courts*, HUMAN RIGHTS WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts#>.

¹⁰⁸ *Id.*

¹⁰⁹ Swart, *supra* note 103.

¹¹⁰ *Id.*; *Groups Ask France to Probe 2013 Syria Chemical Attacks*, AP (Mar. 2, 2021), <https://apnews.com/article/europe-france-damascus-germany-war-crimes-c8964445b445365e053fe9691fe8d621>.

¹¹¹ *France Seeks Arrest of Three Syrian Intelligence Officials*, FRANCE 24 (May 11, 2018), <https://www.france24.com/en/20181105-france-seeks-arrest-three-syrian-intelligence-officials>; *Q&A on the Dabbagh Case: French judges issue 3 international arrest warrants against top Syrian officials*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (May 11, 2018), <https://www.fidh.org/en/issues/litigation/q-a-on-the-dabbagh-case-french-judges-issue-3-international-arrest>.

¹¹² *Groups Ask France to Probe 2013 Syria Chemical Attacks*, AP (Mar. 2, 2021), <https://apnews.com/article/europe-france-damascus-germany-war-crimes-c8964445b445365e053fe9691fe8d621>.

¹¹³ The high-ranking government officials include Major General Ali Mamlouk, Special Advisor to the President on Security Affairs; Major General Jamil Hassan, Director of Air Force Intelligence; and Major General Abdel Salam Faraj Mahmoud - Director of Investigation at the Air Force Intelligence Branch in Damascus. *See France Seeks Arrest of Three Syrian Intelligence Officials*, FRANCE 24 (May 11, 2018), <https://www.france24.com/en/20181105-france-seeks-arrest-three-syrian-intelligence-officials>.

¹¹⁴ *See* Van Schaack, *supra* note 63.

¹¹⁵ Doumit, *supra* note 17, at 267.

Augusto Pinochet and Slobodan Milosevic of the former Yugoslavia.”¹¹⁶ The same is true here, as universal jurisdiction remains one of the only functioning mechanisms to keep the wheels moving, even if Assad is not on trial, yet.

V. PRECONDITIONS FOR INTERNATIONAL TRANSITIONAL JUSTICE

The Syrian Civil War and the Assad regime are exposing the holes in the international justice system and are testing the length of its reach. As frustrating as this is for victims and those who seek justice, the holes also reveal where the international justice system can improve.

Syria uncloaks a telling truth: political will is everything. International transitional justice is not possible without political support (or indifference) domestically or among the permanent members of the Security Council. It is possible to have an international court without domestic support (as was the case with the ICTY), and you can theoretically have a domestic trial of an international crime without the UNSC support (like the Extraordinary Chambers in the Courts of Cambodia). However, in Syria, neither the state-run government nor the Security Council support intervention. As a result, the prospects for ICC investigations, ad hoc tribunals, hybrid courts, or domestic trials are virtually nonexistent. Such a dynamic also exemplifies the significant power that five states wield over transitional justice. But even if there was Syrian Government or UNSC support, there are still other obstacles that blockade international justice in Syria.

Political meddling makes the prospects of an international tribunal limited. Syrian courts lack insulation from the Assad government, the military, and the international community. A necessary precondition to transitional justice is an impartial judicial system. Without one, Syrian courts lack the independence necessary to achieve transitional justice for Syrians.

On a logistical level, Syria lacks a secure location to host a tribunal. Currently, humanitarian aid is at serious risk of safely making it in Syria to those in need.¹¹⁷ This is further complicated by the government’s recent insistence that all humanitarian aid is funneled through Damascus.¹¹⁸ It is hard to imagine witness protection and international judges being free from threats in a place that has failed to protect its own citizens. The option of a tribunal in a neighboring state is limited as security is fragile and the problem of protection for Syrian witnesses still persists. Thus, for a successful trial, there must be support for witness protection and the security of an unfettered and potentially lengthy judicial process.

Finally, the Syrian situation also shows how without funding, no international tribunal will be established. The scale of crimes indicated by the evidence suggests that a tribunal will require funding on the level of the ICTY, ICTR, or annual budget of the ICC. While it is not impossible to operate on a more limited budget, the

¹¹⁶ James Reinl, *Could Syria’s ‘Prosecutor Without a Tribunal’ Work?*, AL JAZEERA (May 31, 2017), <http://www.aljazeera.com/indepth/features/2017/05/syria-prosecutor-tribunal-work-170529110910869.html>.

¹¹⁷ Human Rights Council, *supra* note 20, at 285.

¹¹⁸ Jack Detsch & Christina Lu, *Assad Regime Continues Stonewalling U.S. Aid to Syria*, FOREIGN POLICY (Apr. 23, 2021), <https://foreignpolicy.com/2021/04/13/syria-us-assad-humanitarian-aid/>.

noncommittal of funding and the reliance on private donations run the risk of the entire effort falling apart. This was nearly the case with the SCSL, and in that scenario the U.S. and Sierra Leone barely kept the court afloat.¹¹⁹ Right now any Syrian tribunal lacks firm funding commitments (which no group besides a few U.S. Senators have committed to), and it is unlikely to succeed until financial commitments are made.

Although not the case in Syria, it should be noted that the ability to collect evidence and present it in an unbiased and nonpartisan way is crucial to transition justice. The valiant efforts of the CIJA and IIIM have already satisfied this precondition in Syria. However, without evidence collection, international transitional justice risks being delegitimized or prosecuted without hope of convictions.

In sum, the traditional mechanism of international transitional justice requires political will, independence from political meddling, security of the judicial process, funding, and evidence collection.

VI. RECOMMENDATIONS: NONTRADITIONAL APPROACHES THAT CIRCUMVENT PRECONDITIONS

The use of traditional and nontraditional to describe transitional justice mechanisms is ironic considering it has been less than a hundred years since Nuremberg broke the doors open to holding criminal leaders internationally accountable. In that sense, every mechanism of transitional justice is nontraditional. As regimes and criminal leaders circumvent existing modes of justice, so must the international community prepare for the flanks by criminal actors. The crimes taking place in Syria are arguably the gravest atrocities of this century, and the political friction is so tense that any heat might enflame hegemonic powers into a heightened conflict, far beyond that of a proxy war.

Two innovative approaches could be taken by the international community to circumvent the political unwillingness, security concerns, and funding issues present in the Syrian conflict. The first involves invoking a 1950's United Nations General Assembly Resolution called Uniting for Peace. The second, likely more politically appealing option, involves creating an international tribunal for states with universal jurisdiction. While these options do not carry the teeth exemplified in past ad hoc tribunals, they do present a viable response to what seems to be rogue actions and consistent violations of humanitarian law.

The first approach to achieve justice and accountability in Syria lies in U.N. Resolution 377A(v), the Uniting for Peace Resolution. The General Assembly passed the Uniting for Peace Resolution in 1950 in response to a fractured Security Council on matters in Korea.¹²⁰ Part A states that if there is a lack of unanimity of Security Council permanent members, "the General Assembly will exercise its primary responsibility to maintain international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression."¹²¹ The

¹¹⁹ Cryer et al., *supra* note 56, at 178.

¹²⁰ Grace Melling & Anne Dennett, *The Security Council Veto and Syria: Responding to Mass Atrocities Through The "Uniting for Peace" Resolution*. *INDIAN J. INT'L L.* 57, 298 (2017).

¹²¹ G.A. Res. 377A(V), ¶ 1 (Nov. 3, 1950).

General Assembly may make recommendations for collective measures including the use of armed force when necessary to restore international peace.¹²² It would then require a two-thirds majority by the General Assembly.¹²³ Under this resolution, the General Assembly could establish a tribunal similar to that of the ICTY and ICTR in the absence of the Security Council.¹²⁴ This would send the U.N. into uncharted waters considering no international criminal tribunal has been sanctioned by the U.N. without UNSC approval.

This approach has not been used to establish an international court, but has received endorsement from international leaders. Samantha Power, the former U.S. Ambassador to the U.N., stated in support of the Resolution, “it’s a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere.”¹²⁵ If the General Assembly uses such resolution to approve a tribunal, regardless of actually creating one, it might send a strong message to the UNSC that it is time to act. The use of the Uniting for Peace Resolution could provide a constitutional response to an incapacitated Security Council, whilst keeping the United Nations involved. Such an action would, at the very least, signal international condemnation of acts in Syria and turn the wheels of justice a little quicker.

The second approach, in the absence of a compliant host state in the region, involves concerned states reverting back to the Nuremberg model and creating among themselves a joint universal jurisdiction tribunal outside of the United Nations. The greatest impact would be achieved if several of the European states, already exercising universal jurisdiction, worked in coordination while also making public efforts to connect Syrians with the process. A European tribunal for crimes committed in Syria may capitalize on much of the progress being made in Germany, Sweden, and France. In April 2021, delegates of the European Union signaled support for such approach, stating “our countries are committed to ensuring that war criminals and torturers will not go unpunished.”¹²⁶ They furthered to say that they will demand “accountability” from Assad’s regime, as well as extremist and other armed groups, over the alleged war crimes committed since the 2011 uprising.¹²⁷ By pooling resources, a universal jurisdiction tribunal could jointly investigate, install judges with more specialization, and appoint a prosecuting team working on a range of different actions. Concerns about creating a precedent that could be employed in other contexts may be hindering progress on this front. That is why such a tribunal should seek the support and endorsements of an organization like NATO, OSCE or the Arab League.¹²⁸ Doing so would deter certain states from adjudicating future violations of international law without support from a larger coalition well established on the international stage.

¹²² Melling, *supra* note 120, at 299.

¹²³ *Uniting for Peace Resolution*, *supra* note 121, at part A.

¹²⁴ *Id.*

¹²⁵ Melling, *supra* note 120, at 297.

¹²⁶ *EU Ministers Vow Syria ‘War Criminals’ Won’t Go Unpunished*, THE NEWS INT’L (Apr. 1, 2021), <https://www.thenews.com.pk/print/812930-eu-ministers-vow-syria-war-criminals-won-t-go-unpunished>.

¹²⁷ *Id.*

¹²⁸ This would essentially sidestep the UN and ICC in a manner modeled after the proposed criminal chamber of the African Court of Justice & Human Rights. Such a step would require political pioneering.

VII. CONCLUSION

Syria provides an unfortunate but helpful case study to the international community on how justice in the face of extreme politicization requires a multifaceted approach. While traditional justice mechanisms seem unlikely in the moment, an international ad hoc tribunal with the capacity and support to hold the highest-level perpetrators accountable for atrocities in Syria is vital to the international rule of law. When political will (especially among the Security Council members), domestic cooperation, security for victims and the judicial process, and funding all bear fruit, an ad hoc tribunal stands a chance. Nonetheless, getting to that point may be an arduous road that may not reach its end with Assad still in power. In the interim, the international community must not lose hope for justice and must continue to seek international justice on a national level. If the international community decides to fold, millions of Syrians suffer at the behest of geopolitical stagnation, and the global world reverts back to individualism principles and complicity in crimes against humanity. In order to be the global society where “never again” rings true from the courthouse doors in Nuremberg to the Presidential Palace in Damascus, the global world must innovate.

Therefore, in addition to national trials, the international community must explore seeking international justice without the Security Council’s blessing. While resolution 377(a)(v) is a dramatic step towards globalism, it is not so dramatic that it would crack the foundations of international order. Furthermore, when the political will of certain nation states exists to deliver justice for global citizens, international organizations should step up and support those state actors willing to carry the torch. In order to turn the wheels of justice forward, a universal jurisdiction tribunal should be established in Europe to focus on the crimes committed in Syria.



THE LIMITLESS NATURE OF THE CONSTITUENT POWER
AND ITS RELATION TO CONSTITUTIONALISM*

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* This Paper was presented at the 7th Constitutional Law Scholars Forum organized by Barry University School of Law and Texas A&M University School of Law in Orlando, Florida.

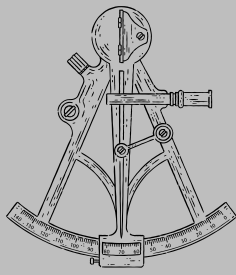
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ABSTRACT

Much has been written about the limitless nature of the exercise of the constituent power. This means that constitutional framers, supposing they are duly authorized by the sovereign to exercise this power to its fullest potential, are not bound by any legal constraint with regard to how they can exercise the constituent power. In other words, when it comes to the constituent power, all options are on the table. Will the new constitutional order allow free speech or not? Will it have three branches of government or six? Will it prohibit torture or require it?

The limitless nature of the constituent power, and the fact that there are no legal constraints that can be imposed on it, create an understandable concern for constitutional jurists. How can something that is meant to produce an instrument that, in turn, is supposed to control and limit power not be, itself, subject to any control or limit? This has led many constitutional jurists to attempt to identify *internal* limits to that power. Such endeavors, like concluding that a constitution can be *unconstitutional*, are and should be, futile.

But the exercise of the constituent power does not operate in a vacuum. There are *external* factors that—while they cannot limit the constituent power properly—can exert sufficient pressure so as to become a *de facto* limitation. One of those factors is *constitutionalism*. In other words, while a constitution can never be unconstitutional, it can be *un-constitutionalist*. This article explores that possibility, specifically, that while principles associated with constitutionalism cannot actually limit the exercise of the constituent power, they can be used to raise moral objections with regards to a particular exercise of that power, and deny the constitutionalist label to its product.



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INTRODUCTION

Conceptually, the constituent power, as a concrete manifestation of popular sovereignty, is and must be, *limitless*. Save for considerations that emanate from the laws of the physical or natural world, the power to create a new legal order has no *internal* limitation with regard to positive law, morality, or politics. As a result, a constitutional creator is theoretically free to design any legal order she wishes, unconstrained with regards to structure, policy, or rights; Nothing is off the table.

However, the limitless nature of the constituent power should not be confused with our ability to insert moral, political, and even constitutionalist *objections* with regard to a specific *use* of that power. In other words, the unconstrained nature of the constituent power does not mean that there are instances where its exercise can transcend the frontiers of the basic core requirements of constitutionalism. When this happens, the exercise of the constituent power, while it can still proceed as a practical and conceptual matter, can be subject to substantive condemnation or impeachment from the outside. Although exclusively external in their nature, they can still exert considerable influence over constitution makers who are as interested in what they *can* do as well as in what they *should* do. External limitations can be as powerful as internal ones.

Under these circumstances, a particular product of the use of the constituent power may be morally indictable and, more importantly, denied the characterization of being ‘*constitutionalist*.’ This denial can pressure constitution makers to engage in self-restraint and limit themselves in order to avoid external condemnation that can be politically damaging.

But this is conceptually separate from the existence of any real or actual inherent limit to the constituent power itself. As a result, what we are left with are legitimate and powerful objections to the use of the constituent power that may, for example, deprive it of the coveted “constitutionalist” label. Yet, it still does not comprise a conceptual or normative limitation on the constituent power as such.

Constituent power derives from sovereignty, and it functions as the ultimate legal rule of recognition. It thus operates as its own primary source, and, as a result, and from a purely conceptual point of view, answers to no one. It is neither right nor wrong; it simply is. In that sense, the constituent power acts as a legal Genesis, where there is nothing above or before it that can forcibly bind it. On the contrary, its power to create is boundless, for it writes on a completely “legal blank slate.”

But just because the constituent power is inherently limitless does not mean its use is immune to effective external moral attack. What is done as a consequence of the exercise of the constituent power is subject to value judgments. In other words, limitless power does not equate with endless or unquestionable political legitimacy. In modern times, the quest for political legitimacy can be as important as the ability to exercise raw legal power.

This article explores the possible uses of *constitutionalism* as an *external* element to judge the political and moral nature and correctness of a specific use of the constituent power in a particular historical moment. But while this exercise does not constitute a limit to this power per se, it does represent a source of objection that can deny a constitution the ultimate coveted moral prize: being characterized as *constitutionalist*.

In that sense, while no constitution can truly ever be *unconstitutional*, it can be characterized as being *unconstitutionalist*. If successful, these objections can produce self-restraint on the part of the constitution-makers or weaken their product to such an extent that it would probably be replaced shortly after.

This can prove to be an easier—and conceptually much more viable—route to constrain constitution-makers, thus avoiding the fruitless attempt to identify internal limitations to the constituent power itself, which simply do not exist. Calling a constitution *unconstitutional* is a legal device and, when it comes to an exercise of the full extent of the constituent power, it is conceptually unavailable. But calling a constitution *unconstitutionalist* is a powerful moral objection that can have the same desired effect: to pressure constitutional makers entrusted with the full constituent power to limit *themselves* or create the conditions for its abandonment in the future, paving the way for a voluntary exercise of the constituent power that conforms to the political and moral requirements of constitutionalism.

I. The Constituent Power

Because “[t]he theory of constituent power is a central concern of modern constitutional theory,”¹ there is abundant literature regarding the *constituent power*.² Simply put, it refers to the primary or original power to *create* a legal order.³ The constituent power can be used to produce a new constitution that, once adopted, becomes the ultimate and sole source of legal authority in the community that enacts it.⁴ Thus, the constituent power is the ability to design a new legal order from the top down, including its highest source. As a result, the constituent power resides at the very top of any legal system.

This power emanates from the proposal that “in every society there must be a legally unlimited constitution maker – someone who can create constitutions at will.”⁵ In other words, once we trace back a legal norm to its ultimate source, something must explain how that ultimate source came to be. In modern times, that source is the constitution. And because the constitution has no legal superior, it can say anything. This means that constitution-makers, if they are given the full breadth of the constituent power, are

¹ Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 131 (2014); See also Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1384 (2021) (“[C]onstituent power has –and should have– an immense prominence to modern constitutionalism”).

² See, e.g., Joel Colón-Ríos, *Of Omnipotent Things*, 52 CONN. L. REV. 1335 (2021); Oran Doyle, *Populist Constitutionalism and Constituent Power* 20 GERMAN L. J. 161 (2019); Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715 (2011).

³ See Kay, *Constituent Authority*, *supra* note 2, at 717. Kay also points out that the constituent power is “something undefined.” *Id.* at 719. This makes it more difficult to establish conceptual hard borders.

⁴ William Partlett, *The Elite Threat to Constitutional Transitions*, 56 VA. J. INT'L L. 407, 420 (2016) (stating that the main architect of the concept of the constituent power or *pouvoir constituant*, Emmanuel Sieyès, believed that it allowed for the repudiation of “all existing legality and establish a new system of constituted powers”).

⁵ Colón-Ríos, *Constituent Power*, *supra* note 1, at 132.

necessarily unbound and unrestrained in their architectural roles when writing the constitution.

Oran Doyle proposes that the existence of the constituent power helps explain, for example, “how a new constitution can unlawfully replace a pre-existing constitution yet come to have a lawful authority itself.”⁶ Many authors have rightly linked the effects of the constituent power with the famous “rule of recognition” and the existence of an ultimate source of authority,⁷ which, in turn, explains how a given community accepts a legal rule as valid. Once fully activated, the constituent power becomes, quite literally, the power of legal creation.

Therefore, the constituent power must be absolutely original, in that it answers to no superior, much less pre-existing, legal norm.⁸ It acts as a sort of legal Big Bang or Genesis. Because it is the ultimate power to create, *it has no other creator*. It simply exists and its sole function is to create. It is the legal equivalent of pure original energy. The main question then becomes who or what can wield it and under what circumstances.

As a result, the constituent power is normally characterized as being legally *limitless*, since it does not answer to any previously existing or superior legal requirement, structure, or norm. The power to create implies the ability to ignore any previously existing legal rule and to design any new legal system with absolute creativity. Put simply, “[c]onstituent powers are not created by law and cannot be limited by law.”⁹ The reason is simple: the power to create is the power to destroy, and the power to create a legal order must mean that all legal rules must flow from the original source, in this case, the exercise of the constituent power itself. Therefore, the original source cannot be subject to the rules it is called to create.¹⁰ The power to generate something from nothing is the ultimate creative blank check.

To be sure, when we say *limitless*, we refer exclusively to the power to *create* a legal order. For example, the ability to decide how many branches of government there will be; whether there will be a thousand rights, two rights, or none; whether the death penalty will be abolished, permitted, or required; and so on. It is the constitutional equivalent of an artist drawing on a blank piece of paper. Constitutional creators are potentially omnipotent legal designers. Since law is, in the end, a social fiction, the only limits on creation are the drafters’ imaginations.¹¹

⁶ Doyle, *supra* note 2, at 162. He further states that “[t]he theory of constituent power provides a conceptual account of how a constitution can be created without any prior legal authorization.”

⁷ See Kay, *Constituent Authority*, *supra* note 2, at 721; Partlett, *supra* note 4, at 416; Mikolaj Barczentewicz, *Constituent Power and Constituent Authority*, 52 CONN. L. REV. 1313, 1322 (2021).

⁸ See Barczentewicz, *supra* note 7, at 1319 (“[M]ust be a power that cannot b[e] conferred by a pre-existing constitutional . . . rule”).

⁹ Barczentewicz, *supra* note 7, at 1320. See also Roznai, *supra* note 1, at 1386 (“[C]onstituent power is a power external to the constitutional order and therefore considered to be free and independent from any formal bands of positive law”); Richard S. Kay, *Response to the Contributors*, 52 CONN. L. REV. 1719, 1723 (2021) (describing the constituent power as “antecedent to positive law and, therefore, as something that cannot be controlled or limited by such positive law”).

¹⁰ These rules, as well as the other institutions, structures, and legal norms that follow, are considered to be *constituted* powers, in that they are created by the legal system, and not the other way around.

¹¹ In democratic societies, the People still must accept the *product* of those who exercised the constituent power. The People are always free to reject their proposal. But this does not affect the limitless nature of the constituent power. Refusing to accept a specific product of the use of that power is separate from the ability to generate it in the first place.

This limitless nature of the constituent power is one of its constantly repeated and emphasized features. As Richard S. Kay puts it, the constituent power is “unconstrained by anything but the facts of nature and its own will.”¹² In other words, it allows its wielders to design and establish a legal order in any way they see fit. In terms of the legal order, it implies the categorical power to create at will.

Many other jurists agree with the limitless nature of this power.¹³ If the constitution decides to recognize a right to free speech, it is because a particular exercise the constituent power chose to do so. There is no inherent requirement one way or another. Nor is there a pre-established rule book that commands what a constitution must include or exclude.¹⁴

This brings us to the all-important distinction between *constituent power* and *constituent authority*.¹⁵ As we saw, the former deals with the scope of what *can* be done, which is anything in terms of designing a legal order.¹⁶ This power exists independently, even if there is no one that is able to wield it. The latter addresses the *ability* of a person or body to actually use that power in a particular historical moment. As Richard Kay explains, constituent authority “refers to the one thing that a given people in a given time and place understand as competent to make a binding constitution.”¹⁷ Specifically, it is “the observed quality in a person or persons that enables them to produce an effective positive law constitution.”¹⁸

The constituent power is a limitless *source*; constituent authority is the means that establishes how much can be tapped and under which circumstances by a specific constitutional creator. It follows then that one of the most effective ways to curtail a constitutional creator is by limiting its constituent authority, and therefore, its access to the full constituent power.

More specifically, constituent authority deals with the actual *exercise* of the constituent power, including any limits, conditions, or requirements imposed on the person or body that has been allowed or commissioned to use it. In other words, constituent authority focuses on the *wielder* of the constituent power, not on the power itself. Thus, constituent authority does not limit or curtail the constituent power directly. It does so indirectly by constraining the entity that is called upon to use it in a particular situation.¹⁹

¹² Kay, *Constituent Authority*, *supra* note 2, at 719. *See also*, Colón-Ríos, *Constituent Power*, *supra* note 1, at 134, 142 (describing the constituent power as “an unlimited power” and emphasizing “there are no means of enforcing any legal or moral limits on a misguided constituent subject”).

¹³ *See* Joel Colón-Ríos, *Of Omnipotent Things*, *supra* note 2, at 1340 (characterizing the constituent power as “the unlimited, unpredictable, and unorganized (and unorganizable) force that creates a constitution”); Doyle, *supra* note 2, at 162 (describing the constituent power as “unfettered by any legal or moral constraint”).

¹⁴ As we will see in Part III, there are basic core requirements for a constitution to be considered *constitutionalist*.

¹⁵ *See* Kay, *Constituent Authority*, *supra* note 2, at 720 (explaining that constituent authority “is different, or perhaps additional to, the constituent power”).

¹⁶ Although, it does not always mean everything, since, as we will see in Part IIA, the laws of the physical world can impede materially impossible outcomes.

¹⁷ Kay, *Constituent Authority*, *supra* note 2, at 716.

¹⁸ *Id.* at 720 (explaining that “practical authority, the kind that actually does produce a constitution that is regarded as binding for an extended period in the population governed by the legal system that the constitution purports to control”).

¹⁹ *Id.* at 735 (explaining that “a true constituent authority must act within the comfort of legal authorization”).

By placing limits or conditions on the wielder, we can indirectly limit the uses of constituent power. For example, through constituent authority, a sovereign can commission an entity to create a new legal order, but require that it include the right of free speech. In contrast, an entity given absolute constituent authority would be able to access the full scope of the constituent power. In that scenario, the entity would not be required to recognize a right to free speech, since they would have absolute discretion to design the content of the new constitution. But if the entity is given *limited* constituent authority, it is unable to tap the constituent power. In this case, it is denied the ability to omit the right of free speech. The effect of this technique is palpable: by limiting or conditioning constituent authority, the constituent power will be indirectly affected.

As a result, Doyle explains, constituent power acts more “as a capacity rather than an entity.”²⁰ In that sense, constituent authority establishes *how much* constituent power an actual entity—be it a person or a body—may exercise. Constituent authority acts as a legal dial or valve that regulates access to the constituent power.

But this is an indirect path. It still does not speak to the boundaries of the constituent power itself.²¹ The constituent power remains limitless, yet through constituent authority we can curtail the quantity that can be tapped in a particular historical moment. We should think of the constituent power as a nuclear reactor, while constituent authority acts as the control panel. Sometimes it is easier to control power by placing limits on whoever wields it, instead of trying to control the power itself.²² But we should never confuse the limits we can impose on constituent authority—and, thus, on the ability to tap the full potential of the constituent power—with an actual limitation of that power per se.

Constituent power must be conceptually and normatively unlimited because it derives from sovereignty,²³ which, in turn, is also legally unlimited and inherently supreme.²⁴ In modern democratic societies, both sovereignty and the constituent power rest with the People.²⁵ This reinforces the strong conceptual link between the constituent power and “popular sovereignty.”²⁶

In a democratic society, popular sovereignty is also linked with constituent authority since the People are its ultimate titleholders.²⁷ Whether through formal delegation or the deployment of a legal fiction by which the constitution-making body and process somehow

²⁰ Doyle, *supra* note 2, at 169.

²¹ Colón-Ríos, *Of Omnipotent Things*, *supra* note 2, at 1340.

²² *Id.* (stating that “an entity whose constituent authority is recognized by society can, at the same time, be subject to different kinds of substantive limits.”). See also *id.* at 1340–41 (explaining that “[t]his does not mean that the exercise of constituent authority is bound by established legal forms, but that a condition of having ‘constituent authority’ may be the realization that one is acting on a commission from the ‘true sovereign’ and therefore bound to obtain the limits attached to it.”).

²³ Kay, *Constituent Authority*, *supra* note 2, at 719.

²⁴ See Colón-Ríos, *Of Omnipotent Things*, *supra* note 21, at 1339.

²⁵ Colón-Ríos, *Constituent Power*, *supra* note 1, at 132 (stating that “[i]n a democracy, that power always remains with the People”).

²⁶ Doyle, *supra* note 2, at 162–63 (suggesting that “the people is the constituent power”).

²⁷ Richard S. Kay, *Response to the Contributors*, 52 CONN. L. REV. 1719, 1725 (2021) (writing that “[t]he need for ultimate popular acquiescence in the source of constitutional rules has led many observers to conclude that only a democratic process can generate” constituent authority); Partlett, *supra* note 4, at 422.

become the People,²⁸ constituent authority is the mechanism that allows the constituent power to be transferred and used.

While there is still an unresolved debate regarding *who* exactly is the People,²⁹ the notion of a sovereign, self-governing community is hardly a controversial idea. Kay characterizes this as a “self-evident starting point.”³⁰ In the end, the “[c]onstituent as expressing the people’s power to establish their constitutional order is considered as some kind of natural right.”³¹

The possible existence of some sort of binding superior source that can place a restriction on the sovereignty of the People begs the question: who or what established that source? By definition, it would need to be an entity that possesses a superior form of sovereignty. If such an entity exists, then *it* becomes the holder of absolute sovereignty and, as a result, the constituent power. This simply brings us back to the same place. It would only be a matter of agreeing as to how many turtles are, in fact, holding up the world. The end result is the same: there is an omnipotent legal source that answers to no one.³²

In democratic societies, ultimate sovereignty must reside exclusively with the People, in its varying manifestations and articulations. Any alternative would simply transfer power from the many to the few.³³ Even if the few are benign and only seek to limit the democratic excesses of the majority, they would still be acting as rulers. It is better to deposit such immense power on the People and, through political and moral discourse, appeal to our better angels.

II. The Search for Limits to the Constituent Power

While most scholars recognize the baseline proposition that the constituent power is conceptually unlimited, they also seem uneasy with this realization.³⁴ It would seem that the possible existence of legally limitless power is an understandably frightening thought to many, myself included. This situation, in turn, has generated several attempts to identify possible internal, or, at least, external, limitations to the constituent power.³⁵

²⁸ See Jorge M. Farinacci-Fernós, *Post Liberal Constitutionalism*, 54 TULSA L. REV. 1, 45 (2018); Kay, *Constituent Authority*, *supra* note 2, at 739.

²⁹ Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, 14 LAW & ETHICS HUM. RTS. 19, 30 (2020); Kay, *Constituent Authority*, *supra* note 2, at 738, 740–741; Colón-Ríos, *Constituent Power*, *supra* note 1, at 137.

³⁰ Kay, *Constituent Authority*, *supra* note 2, at 735.

³¹ Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1390 (2021).

³² More likely, someone would claim to speak in the name of that source, transferring ultimate sovereignty from the People to that privileged conduit. From a democratic perspective, it is a bridge too far.

³³ Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. OF TRANSNAT'L L. 97, 113 (2013).

³⁴ See, e.g., Julian Scholtes, *The Complacency of Legality: Constitutionalist Vulnerabilities to Populist Constituent Power*, 20 GER. L.J. 351, 358 (2019).

³⁵ Mikolaj Barczeniewicz, *Constituent Power and Constituent Authority*, 52 CONN. L. REV. 1313, 1328 (2021). (“By any view of constituent power, at least some exercises of constituent power *can be unlawful*.”) (emphasis added); see also Roznai, *supra* note 31, at 1391 (“[T]he traditional conception according to which constituent power is unlimited is simply a misunderstanding of its nature.”).

A. The laws of the physical world

Sir Thomas More famously questioned if Parliament could enact a law that denied the existence of God.³⁶ In theological, philosophical, or logical discussions, it is common to encounter the scenario regarding whether God could create a rock so heavy he or she could never be able to pick up.³⁷ With regards to the constituent power, this refers to the fact that its exercise cannot be contrary to the laws of nature and the physical world.³⁸ Neither the sovereign nor the constituent power can violate the laws of physics; they are not magical concepts but useful social fictions that, in order to function in the real world, must abide by these laws.

For example, a constitution maker cannot adopt a constitutional rule that states that a president will serve a two-hundred-year term, that the parliament will consist of 10.1 billion human beings, or that the sessions of the Supreme Court shall be held in Jupiter.

Such things are simply materially impossible at the moment. No use of the constituent power can overcome these physical obstacles.

But this is not really an *internal* limit on the constituent power itself. It's just how the constituent power plays out in the physical universe. There is nothing inherently unlawful or prohibited in this regard. It is not a legal or normative stance. As such, it does not constitute an actual conceptual limit on the constituent power.

The constituent power is a concept that exists in the universe of law and society. It is not a material ability. Its impact on the physical world is incidental and subject to its parameters. In that sense, the existence of physical limitations simply reminds us that constituent power is a social fiction like all matters related to the law. Thus, it must abide by the requirements of the physical world, nothing more.³⁹

B. The power to create is not the ability to rule

The limitless nature of the constituent power refers to the power to *create* a legal order. It does not inherently include the power to *actually rule* through the entities, structures, and institutions it creates. In order for a constitutional creator to wield the power to actually engage in governance, it requires direct access to a separate source of power:

³⁶ Roy Stone de Montpensier, *The British Doctrine of Parliamentary Sovereignty: a Critical Inquiry*, 26 LA. L. REV. 753, 770 n. 49 (1965).

³⁷ Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 469 n. 154 (1994).

³⁸ Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 719 (2011). This is separate from claims that reference some sort of superior natural law as a limit on the constituent power. See Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 134 (2014); see also Yaniv Roznai, *Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1390-91 (2021).

³⁹ This is conceptually different from those who propose the existence of limitations to the constituent power based on so-called *natural law* considerations (emphasis added). See Colón-Ríos, *Constituent Power*, *supra* note 38, at 134.

sovereignty.⁴⁰ While the constituent power is a derivative of sovereignty, they are not synonymous.⁴¹

But this does not negate the limitless nature of constituent power itself *with regard to its creative power*. The claim is not that the constituent power is universally boundless across all areas of human activity, but only as it pertains to the specific ability to create a new constitutional or legal order. As to this particular element, constituent power is limitless, regardless of its inability to exercise power over other instances of human activity, such as the act of governing. In other words, constituent power is limitless with regards to its object of action, not to all human endeavors. An architect that designs a house is not inherently entitled to live in it or decide which family member gets a specific room. But the absence of that ability does nothing to impede her absolute creativity to design the house if such authority was given.

C. Future uses of the constituent power

Picking up on the query regarding God's ability to create a rock he or she is unable to lift,⁴² constituent power does not include the ability to impede future exercises of constituent power in all respects. This means that "one must exercise constituent power in a way that facilitates the occurrence of future constituent episodes."⁴³ In other words, constituent power cannot be used to sabotage itself.

This is a legitimate observation. Constituent power cannot negate its possible future uses. An inherent characteristic of the constituent power is that it can potentially be used at any time, regardless of a previous instance of its exercise.⁴⁴

But this feature cannot be truly characterized as a limitation on the constituent power itself since any future use of constituent power would involve *the same power*. This means that, regardless of whether it is used at time one or time two, we are not dealing with independent and separate forms of constituent power, where one is superior to the other. They are one and the same, only that they are exercised at different moments.⁴⁵

That a present use of constituent power cannot preclude its exercise in the future is not evidence of its limitation. At most, what we can affirm is that constituent power *cannot destroy itself permanently*. One can attempt to characterize this as a limitation, but it can also be seen as evidence of its inherent omnipotent nature. In fact, it could be argued that this element is simply a logical requirement to avoid an endless loop: since a future exercise of constituent power owes no allegiance to the previous or existing legal order, then it is also not beholden to the constituent power that attempted to bind it.

⁴⁰ See Joel Colón-Ríos, *Of Omnipotent Things*, 52 CONN. L. REV. 1335, 1339 (2021).

⁴¹ For a more detailed exposition of this critical distinction, see *id.* at 1339–44.

⁴² Or Prince Akeem's request, "I command you not to obey me." See *COMING TO AMERICA* (Paramount Pictures 1988).

⁴³ Colón-Ríos, *Constituent Power*, *supra* note 38, at 144; see also Barczentewicz, *Constituent Power*, *supra* note 35, at 1322 (2021).

⁴⁴ Colón-Ríos, *Constituent Power*, *supra* note 38, at 142. ("The theory of constituent power has an important intergenerational dimension.")

⁴⁵ Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381, 1405 (2021).

While a particular exercise of constituent power can make it more difficult to exercise it in the future, as a conceptual matter, it represents no normative limitation to a future exercise. It seems odd to suggest that the constituent power is not limitless simply because it yields to a future use of itself. On the contrary, it seems to confirm its permanently untamable nature. Regardless of whether it is relatively easy or difficult to exercise it at a particular historical moment, the constituent power remains in existence in its full force. Our ability or inability to access it does not affect its independent magnitude.

D. International law

Yaniv Roznai explores the possibility that international law can function as a limit on constituent power.⁴⁶ As a practical matter, this is very enticing. This is because the historical practice regarding constituent power focuses on nation-states.⁴⁷ The existence of a supranational legal order supposes a hierarchical obstacle to the boundless exercise of constituent power in a particular country subject to those international norms.⁴⁸ In other words, international law can void a particular constitution for being contrary to it, regardless of the wishes of the constitution-makers that drafted it.

This argument begs the question: what would happen if there were a successful exercise of constituent power at the international level that produced a world constitution that, for example, established its own supremacy. Unless there is a superior legal order that reigns over the solar system or our galaxy, that constitution would not be beholden to current international law norms—fairly characterized as constituted powers once the supreme international constitution comes into effect—thus impeding its use as a limitation on the constituent power itself.

International law does not really limit constituent power; it can limit its use *in a particular political unit if, in turn, it is subject to supranational legal norms*. In that sense, it is the equivalent of the constituent power exercised in a U.S. state with regard to the federal Constitution. As a sub-national unit, the state constitution maker is bound by the supremacy of federal law—not because of an inherent subordination of constituent power to a superior source—but because of the political level at which it was exercised. A similar phenomenon can exist when a national constitution maker is subject to the supremacy of supranational law.⁴⁹ But an international constitution maker, wielding the full constituent power, would not be subject to any international law norm, since these would be subordinate to the constitution that was produced in the end.

Though a potentially very useful practical limitation—since there is no effective international entity that can currently command the full scope of the constituent power at that level—the existence of a supranational legal regime is not a conceptual limitation of

⁴⁶ *Id.* at 1394–99.

⁴⁷ Rafael Domingo, *Roman Law and Global Constitutionalism*, 21 *SAN DIEGO INT'L L. J.* 217, 233 (2019) (“The idea of constituent power, however, is modern at least in the form in which it emerged with the creation of the nation-state.”).

⁴⁸ One often cited example of an instance that resembles this phenomenon is South Africa. See Erika de Wet, *The “Friendly but Cautious” Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks*, 28 *FORDHAM INT'L L. J.* 1529 (2005).

⁴⁹ *Id.* at 1557.

the constituent power itself. It is merely a response to the interaction between national and international law in our current political reality. Theoretically, constituent power lurks in the international arena, waiting for some entity authorized with its use.

In the end, being in violation of international law does not necessarily impede the will of a national constitution maker from materializing. It is still mostly a political, instead of legal, obstacle. Current international law is, arguably, more political than legal in nature.

E. Morality

Another candidate for the identification of limits to constituent power is morality. For example, while Mikolaj Barczentewicz acknowledges the generally boundless nature of constituent power, “[t]his does not deny that there may be relationships between the law and, for example, the social sense of morality.”⁵⁰ For his part, Kay seems to limit the use of morality as a check on constituent authority instead of on constituent power proper. Specifically, he states that while constituent power exists with no “justification, legal or moral,” constituent authority “involves an evaluation of the rightness of the constituent events.”⁵¹ In democratic societies, this may refer to the ultimate ability of the sovereign people to reject a product of constituent power as being contrary to their shared moral commitments.⁵² But that is an after-the-fact consideration that does not impact the limitless nature of constituent power.

As a result, it seems that Barczentewicz is forced to recognize the difference between *de facto* and *de jure* limitations on constituent power, characterizing morality as an expression of the latter.⁵³ In other words, at best, it is an abstract limitation and not a practical one, much less an internal one.

But even as an abstract limitation, general references to morality seem inadequate and out of place. Moral objections seem more appropriate for instances regarding the *use* of constituent power instead of as a limitation on the constituent power itself.⁵⁴ Even then, morality is too loose a relative concept to act as an effective conceptual external check on the constituent power. Something more palpable and connected is warranted. The notion of *constitutionalism* is a prime candidate as a moral, political, and ideological proposition that incorporates legal language.

III. Constitutionalism as an External Control for the Exercise of the Constituent Power

A. General Approach

⁵⁰ Barczentewicz, *supra* note 35, at 1320.

⁵¹ Richard S. Kay, *Constituent Authority*, *supra* note 38, at 721.

⁵² An example of this is the rejection of a draft constitution submitted to the People of Zimbabwe in 2000. See Gabriel Shumba, *International Standards and the 2002 Presidential Election in Zimbabwe*, 10 ILSA J. INT'L & COM. L. 95, 102 (2003).

⁵³ Barczentewicz, *supra* note 35, at 1317.

⁵⁴ Barczentewicz, *supra* note 35, at 1319 (explaining that a particular use of the constituent power “may, but of course need not, be entirely illegitimate from every moral perspective.”).

Constitutionalism is an ideological proposition, not a legal concept. That is, precisely, the significance and effect of the *ism* attached to the main component of the word. Right from the start, we can appreciate its potential shortcomings as a possible candidate to limit the otherwise unbound nature of constituent power: because it is an *idea* and not a legal figure, it cannot really serve as an internal limit to constituent power. At most, it can only serve an external role. But, as stated earlier, external limitations can be as effective as internal ones.

The next obvious question regarding the role of constitutionalism as a potential external constraint to the exercise of constituent power is, *what is constitutionalism?* Precisely because it is an ideological proposition, it is a contestable, disputed, and somewhat fluid concept. While this lack of precision can hamper its effectiveness as an external constraint to constituent power, it is not a pointless exercise. It is not a radically indeterminate proposition. On the contrary, there is sufficient agreement with regard to most of the core elements of constitutionalism to make it useful as a standard with which to measure the content of any new constitution.

Constitutionalism lives at its core. Outside the core there are multiple additions that can be attached to it, creating different versions.⁵⁵ These range from classic liberal constitutionalism to a more radical post-liberal constitutionalism that rejects the former's emphasis on the protection of property and the central role of the individual.⁵⁶ Contrary to illiberal or anti-liberal systems—which simply fail to meet the basic tenets of constitutionalism—post-liberal and non-liberal systems, like their liberal brethren, comply with the core elements of constitutionalism.⁵⁷

I've proposed that the core components of constitutionalism are: (1) a government whose powers are subject to limits; (2) procedural and substantive limits to the exercise of all forms of power, including private power; (3) a rejection of arbitrary government; (4) the supremacy of the constitution over the rest of the legal order; (5) the availability of some mechanism for the judicial enforcement of the constitution; (6) the existence of basic rights;⁵⁸ (7) the articulation of the constitution in some sort of written document or fixed source; and (8) a basic structure that facilitates democratic self-government.⁵⁹ If a particular constitution complies with these elements, and its additional components do not directly contradict them, it can be fairly described or characterized as constitutionalist. If it does not, it can be denied this politically important label.⁶⁰ The remaining question is what effect, if any, constitutionalism can have on constituent power.

Needless to say, other scholars have pointed to the evident relation between constituent power and constitutionalism.⁶¹ Roznai states that “constituent power has -and should have-

⁵⁵ For a more detailed discussion of this proposal, see Jorge M. Farinacci-Fernós, *Post Liberal Constitutionalism*, 54 TULSA L. REV. 1, 45 (2018).

⁵⁶ *Id.* at 20, 23.

⁵⁷ *Id.* at 25.

⁵⁸ Which rights is a separate, and difficult, issue.

⁵⁹ See Farinacci-Fernós, *supra* note 55.

⁶⁰ See Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U. L. REV. 373,378 (2012).

⁶¹ See, e.g., Oran Doyle, *The Boundaries of Constituent Authority*, 20 GERMAN L. J. 161, 162 (2019).

an immense prominence to constitutionalism.”⁶² On the one hand, he recognizes that constitutionalism is a “movement” and not necessarily a legal imperative.⁶³ This seems to imply that it acts as an *external* element. Yet, Roznai also attempts to turn constitutionalism into a potential *internal* limit to constituent power. His proposal deserves closer attention.

He suggests that “[i]n the past, the idea of constitutionalism seemed to introduce a supra-positivist element of evaluation to constitutional theory by insisting that a law must be ‘legal’ according to positive law but ‘unconstitutional’ if it conflicts with historically received, imperative constitutional norms.”⁶⁴ Roznai continues: “Nowadays, constitutionalism as anchored on certain principles, such as the recognition of the people as the source of all governmental authority; the supremacy of the constitution; the constitutional regulation and limitation of the power of government; and adherence to the rule of law and respect for fundamental rights.”⁶⁵ He then concludes: “These principles of the modern constitutional states which are becoming globally standardized may have a powerful *influence* on the *legitimacy* of the constitution.”⁶⁶

Roznai then makes a bold normative claim regarding the *legal effects* of constitutionalism over the content of a constitution and, by extension, the constituent power itself. He proposes that constitutionalism and constitutions “are inseparably linked.”⁶⁷ The idea seems to be that, if constitutions are in any way subservient or dependent on constitutionalism, then constituent power must abide by the latter’s requirements and content. This would constitute an evident internal limitation to the ability of constitution-makers to design a new legal order.

I agree with Roznai that constitutionalism has a vital role to play in judging a constitution; even one that was the result of the full use of the constituent power. Where we may part ways is on the type of role played by constitutionalism and the normative effects of its interaction with that exercise. As stated earlier, no constitution that was created by the full use of the constituent power can truly ever be considered *unconstitutional*, since the previous—or any other—constitution has no legal effect over the new one, once it is accepted by the particular society that created it. But a constitution can nonetheless still be considered *unconstitutionalist* if it fails to satisfy the basic core elements of constitutionalism or if it incorporates additional elements that are inconsistent with it. But this would be a political and moral—and thus external—assessment, rather than legal and internal.

B. Constitutionalism and the Basic Structure Doctrine

The conceptual distinctions between constitutionalism and the so-called basic structure doctrine highlight this conclusion. The basic structure doctrine has been a somewhat

⁶² Yaniv Roznai, *The Boundaries of Constituent Authority*, 52 CONN. L. REV. 1381,1384 (2021).

⁶³ *Id.* at 1402.

⁶⁴ *Id.* at 1402.

⁶⁵ *Id.* at 1403. Roznai does not elaborate on *which version* of the rule of law he uses, nor to which fundamental rights he is referring. While it may be true that “a common language of constitutionalism is being developed,” the content and meaning of that language is still debated. *Id.*

⁶⁶ *Id.* at 1403 (emphasis added).

⁶⁷ *Id.* at 1381.

problematic mechanism used by some courts to strike down constitutional amendments as being incompatible with the constitution being modified.⁶⁸ The doctrine's ability to strike down attempts to modify a constitution seems to suggest the existence of limitations to the power of creation, since amending a constitution can be seen as parallel to the power to establish one in the first place. Furthermore, the mere existence of this doctrine can lead some to believe that there are binding supra-legal norms that can be called upon to limit this power. The possible use of constitutionalism as the source for these norms fits this narrative.

But the basic structure doctrine mostly deals with exercises of constituted power and is thus subject to the requirements of the current legal order. This represents a conceptually different circumstance from instances of original constitutional creation, where the basic structure doctrine has no bearing. But since constitutionalism still has a role to play, its independence from the basic structure doctrine is clearer. Specifically, the doctrine's claim regarding the ability of a court to assess the constitutional validity of a provision designed to precisely change the constitution itself may be seen as an odd proposition, and, more relevant here, as evidence of a limitation on the constituent power. It is not. The basic structure doctrine only applies to constituted power, not to constituent power. Constitutionalism can be used in either instance, which means that constitutionalism and the basic structure doctrine are conceptually separate from each other.

An amendment to a constitution is not, *necessarily*, an exercise of constituent power. On the contrary, it is typically a formal legal process that is authorized—and therefore conditioned or limited—by the current constitutional order. In that sense, formal amendment mechanisms are mostly an example of *constituted* power,⁶⁹ even if carried out by the People through a referendum. This requires further elaboration.

First, it seems that many of the conceptualizations regarding the basic structure doctrine are premised on systems in which a *legislative body*, not the People directly, are responsible for constitutional amendments.⁷⁰ In these cases, we are undoubtedly dealing with a constituted power, since the legislature is most likely a creature of the constitutional order. As such, it would seem odd that a constituted power can exercise the full constituent power when changing, *without replacing*, the current constitution that reigns over it. The failure to replace negates the possibility of an actual exercise of constituent power. At the very least, when the doctrine is directed at a legislature-driven amendment, it attenuates the tension created when a judicial body exercises the awesome power to strike down an attempt to change the constitution on the grounds that the change is incompatible with the constitution.⁷¹ Here, the battle is normally between two somewhat equal branches of government—both constituted powers.

But when it is the People that are driving and adopting the constitutional amendment, the conceptual plot thickens, and the tension grows. If, in a democratic society, the People are the ultimate sovereign, and, most likely, the permanent custodians of the full

⁶⁸ See Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 3 (2018).

⁶⁹ Doyle, *supra* note 61, at 163.

⁷⁰ See William Partlett, *The Elite Threat to Constitutional Transitions*, 56 VA. J. INT'L L. 407, 418 (2016); Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 744-746 (2011).

⁷¹ See Jorge M. Farinacci-Fernós, *Constitutional Courts as Majoritarian Instruments*, 14 VIENNA J. INT'L CONST. L. 379, 379 (2020).

constituent power, *how can their attempts to change the constitution they themselves adopted be considered unlawful by a body created by the constitution?* This tension can be avoided if one concludes that, when the People decide to use the existing formal amendment mechanisms, they are willingly—though only temporary—sacrificing their ability to access the full measure of the constituent power, and voluntarily subjecting their actions to the current legal requirements, including the need to amend the constitution in a harmonious way, subject to judicial assessment of its compatibility with the principal text.

This leads us to the second main reason why the basic structure doctrine is not in tension with the constituent power. Unless the People are, in fact, exercising their constituent power outside the formal confines of existing law, it is logical to require *compatibility and harmony* between an amendment to the whole and the whole itself.⁷² Thus, the basic structure doctrine should be seen as a straightforward logical and legal exercise of assessing fundamental compatibility between the specific change and the overall system. Those who want to introduce the new content through an amendment that is simply incompatible with the basic structure of the existing constitution should just "write a new one."⁷³ And the ability to do so confirms the difference between formal amendment as a constituted power and new creation as a constituent power.

Imagine this: constitution X has 100 provisions. An intellectually honest analysis of its content produces a common understanding of its basic structure and content. A popular referendum is held to consider an amendment that would add a single provision. Many feel that the amendment is simply incompatible with the fundamental structure of the current constitution. As a result, and using this doctrine as its legal justification, a judicial body can strike down the proposed amendment because of its incompatibility with the constitution's basic content.

In this scenario, the People still have an ace to play: they can access their full constituent powers and write and adopt a *new* constitution that will contain 101 provisions; the original 100 from the now-previous constitution and the rejected amendment. Can a court now declare the 101st provision contrary to the basic structure of the new constitution? Unless a judicial body is given the power to analyze the content of the new constitution prior to its formal adoption, as was the case in South Africa during the 1990s,⁷⁴ the answer is most likely no.

What was different? Instead of exercising a formal, legal process established as a constituted power—the amendment mechanism—the People opted to clear the table and adopt a whole new constitution. At that time, the People are engaged in the exercise of the constituent power, owing legal allegiance to no other legal norm, including the judgment of a judicial body they will create. In their boundless power of creation, the People decided to write a new constitution that includes the rejected amendment, only now as an *integral* part of the constitution or, in other words, of its basic doctrine. In that sense, the constitution-makers have decreed the compatibility of the 101st provision with the rest. Compatibility is

⁷² See Albert, *supra*, note 68, at 161 (explaining that compatible amendments are normally either corrective or elaborative, in contrast to modifications that are not amendments at all, but a form of poison pill meant to destroy the constitution they are affecting).

⁷³ See *id.* at 5.

⁷⁴ *Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) All SA (CC) (S. Afr.).
Certification of the Constitution of the Republic of South Africa 1996 (10) All SA 1 (CC) at 1 (S.Afr.).

not a requirement for the exercise of the constituent power:⁷⁵ constitution-makers are free to write a contradictory constitution if they so wish.

In the end, the basic structure doctrine, even if misguidedly founded on parliamentary-driven amendment processes rather than direct popular mechanisms, is distinct and separate from the constituent power. More relevant here, it is conceptually different from the use of constitutionalism as a measurement to judge the moral, political, or ideological legitimacy of a particular constitution. The contrast with regard to the nature of these concepts—the basic structure doctrine and constitutionalism—reinforces the inability of both—for very different, but related, reasons—to serve as internal limitations on the constituent power.

We must start with the elemental notion that the basic structure doctrine is a *legal concept* that addresses the interaction between formal amendments—fairly characterized as an exercise of constituted power—and the original constitution—arguably the product of an exercise of constituent power.⁷⁶ As such, any irreconcilable tension between the two requires protecting the latter. An amendment should not be able to destroy an entire constitution, and it is up to the courts to avoid such outcomes.

When a court engages in an analysis to determine the compatibility of a formal amendment with the current constitution, it is carrying out a legal function based on hierarchy and sound legal principles.⁷⁷ Regarding the former, since amendments are an exercise of constituted power, they may not contradict, sabotage, or destroy the operation of a working constitution.⁷⁸ Regarding the latter, courts have routinely analyzed interacting legal sources to determine their compatibility. When such incompatibility is impossible, the inferior source yields to the superior one.⁷⁹

But this tension is not present when the content of the amendment is added to the constitution *at the original moment of constitutional creation*. Here, there is no conflict between hierarchically different legal sources. On the contrary, they not only share the same rank, they form part of the same unit. As such, the amendment becomes, by legislative fiat, compatible with the rest of the constitutional structure. Also, because it is adopted as an exercise of the original constituent power, no unauthorized constituted power may judge its validity.

All of this simply proves that the basic structure doctrine is the result of the interaction between an incompatible exercise of constituted power with regard to the constitution. It simply does not reach a primary exercise of the full constituent power. More importantly, it can only be used to assess the validity of proposed amendments that are the result of the exercise of a constituted power.⁸⁰ In other words, the basic structure doctrine is simply unavailable at the moment of original constitutional creation.

Constitutionalism, on the other hand, is, as explained earlier, *not a legal concept*. This provides both an advantage and a disadvantage to the basic structure doctrine.

⁷⁵ See Franciska Coleman, *America's Constitutional Contradictions*, 71 AM. U. L. REV. F. 1, 3 (2021).

⁷⁶ Oran Doyle, *The Boundaries of Constituent Authority*, 20 GER. L. J. 161, 162 (2019) (suggesting that “constitutional systems may be created without the exercise of constituent power.”).

⁷⁷ See Albert, *Constitutional Amendment and Dismemberment*, *supra* note 68 at 5.

⁷⁸ *Id.*

⁷⁹ *Id.* at 15.

⁸⁰ See Coleman, *supra* note 75, at 11.

Unless constitutionalism has been incorporated formally in the constitution, it has no independent legal force, as the basic structure doctrine could have when faced with an incompatible attempt at formal amendment through the established mechanisms. As a result, no court could strike down a constitutional provision—or even amendment—exclusively on the ground that it is contrary to some element of constitutionalism. This is so because the basic structure is derived from the actual existing content of the constitution itself. In other words, it is a legal analysis and conclusion. On the contrary, constitutionalism normally lives *outside* the formal constitution.⁸¹ This puts constitutionalism at a practical disadvantage against the basic structure doctrine since it lacks any legal force.

At the same time, constitutionalism and the basic structure doctrine share a similar problem: they are ineffective when faced with an original exercise of the full measure of constituent power. But least effective is the basic structure doctrine. As we saw, this doctrine cannot prohibit a sovereign People from discarding the current constitution—whose basic structure was deemed incompatible with the amendment—and adopting a new constitution that simply adds the content of the amendment to the rest of the text. As stated earlier, the basic structure doctrine is simply unavailable at the moment *in which that basic structure is being designed for the first time*.

Here lies the advantage of constitutionalism over the basic structure doctrine: constitutionalism can still be used to tame the constituent power *from the outside*. In other words, constitutionalism has an additional role that the basic structure doctrine cannot play: as an external political, moral, and ideological yardstick that can be used to judge, in a non-legal sense, the correctness of the exercise of constituent power.

C. Using Constitutionalism

All constitutions are constitutional, but not all constitutions are constitutionalist. In addition, the mere fact of adopting a legal document called ‘the constitution’ does not speak at all to its content. That is, precisely, one of the primary effects of the limitless nature of constituent power: A constitution can say anything it wants, which explains its endless variety. All constitutions are different, and not just because of style. Their content, structure, ideological foundations, rights provisions, and policy directives, among many others, are completely up to the imagination of the constitutional drafter, provided they were entrusted with sufficient authority to access the full constituent power.

If accepted as valid by a particular society willing—whether through consent or even by force—to live under its commands, the constitution’s *legal* status is assured. Even tyrannical or despotic constitutions—such as the one currently in existence in Saudi Arabia⁸²—are legally

⁸¹ If a constitution-maker decides to formally incorporate constitutionalism into the text of the constitution, then it becomes part of its normative and basic structure. But that requires an affirmative act of incorporation that is separate from the proposal of using constitutionalism *per se* as an independent tool to judge the validity of any legal action, much less the exercise of the constituent power.

⁸² Gábor Halmai, *Varieties of State-Church Relations and Religious Freedom Through Three Case Studies*, 2017 MICH. ST. L. REV. 175, 179 (2017).

valid and ‘constitutional.’ But that does not mean that they are politically, ideologically, or morally legitimate. They are subject to external attack and impeachment.⁸³

Among the most powerful tools in the arsenal to use for such objections is the constitutionalist label. In other words, if the particular constitution complies with the core components of constitutionalism. In that sense, “when a constituent power establishes a legal system that fails to respect these principles, the product will be *illegitimate*.”⁸⁴

Constitutional drafters are not only concerned about the legal validity of their product. They can also be interested in obtaining social acceptance within the community over which the constitution will rule as well as the general community of people. This includes the assessment of international bodies, jurists, political institutions, and other forces. Most dictators do not wish to be labeled as such. By the same token, constitution-makers can be interested in obtaining for their product, the coveted characterization of being labeled as *constitutionalist*. This implies moral legitimacy and acceptance.

Evidently, there are no *legal* means to enforce compliance with the core elements of constitutionalism. The possibility of using supranational bodies only speaks of the hierarchy of legal norms in our current international order and the transfer of sovereignty and constituent power to a higher political unit, such as an international or regional entity. However, assuming that nation-states are still the ultimate source of their individual sovereignty,⁸⁵ it is very doubtful that there are legally legitimate or democratically justified mechanisms for telling a particular nation-state how to rule itself in a way that is consistent with self-determination. Additionally, even if some sort of quasi-legal or political remedy or sanction were made available, that still would not directly affect the nature of the constituent power, only the political willingness of its wielders to bear the cost of exercising in a particular way. In that sense, there are no means of enforcing any legal or moral limits on a misguided constituent subject.”⁸⁶

Whether right or left, modern or classic, neutral or programmatic, the ultimate political prize for any constitution is to receive the constitutionalist label. In addition to serving as a moral yardstick to be used externally as an end in itself, the political and practical desire to receive this label can have important concrete results.

First, it can pressure constitution-makers, even those that were given maximum authority to access the full measure of constituent power, to engage in architectural self-control. This means that, while they are still free to design any constitutional norm as a

⁸³ Yaniv Roznai & Tamar Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, 14 LAW & ETHICS HUM. RTS. 19, 44 (2020) R(suggesting that there could be such a thing as “ a proper or legitimate exercise of the constituent power. . . ”). If their characterization refers to external judgments about the correctness of a particular exercise, then it is a moral and ideological position that is wholly compatible with the internal limitlessness of the constituent power. But it does seem that they are hinting at the possibility of legal impediment to such exercise. I focus on the former possibility.

⁸⁴ Richard S. Kay, *Response to the Contributors*, 52 CONN. L. REV. 1719, 1726 (2021) (emphasis added) (in reference to Roznai’s proposal).

⁸⁵ See Theodore F. DiSalvo, *The Apple-Ireland Tax Case: Three Stories of Sovereign Power*, 28 DUKE J. COMP. & INT’L L. 371, 371–372 (2018); Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT’L L. J. 429, 450 (2012).

⁸⁶ See Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 131 (2014) (stating “[T]here are no means of enforcing any legal or moral limits on a misguided constituent subject.”).

conceptual matter due to the limitless nature of constituent power, they may freely choose to desist from it out of concern that such action could be subject to external moral attack on the grounds that it is inconsistent with the core elements of constitutionalism. Sometimes the best way to control limitless power is to persuade it to control itself.

Second, the ideas of constitutionalism can also be channeled through the tailoring of constituent authority. In other words, the granting of constituent power to a particular constitution-making entity can be conditioned on the observance of the core elements of constitutionalism. While this still represents an indirect mechanism to avoid undesirable uses of constituent power, it is an effective one. As stated earlier, another viable way to control limitless power is to control those who are authorized to wield it.

Third, since constitutionalism is a coveted label, when a constitution fails the constitutionalist test, it runs the risk of becoming a pariah or outcast. This can have important secondary effects, including a shared sense of illegitimacy within the population governed by that constitution.⁸⁷ This, in turn, could generate conditions for an eventual replacement or modification of the constitution, so that it does comply with the core tenets of constitutionalism. Indeed, a constitution that is not deemed to be constitutionalist faces a rough road ahead in terms of establishing its own moral legitimacy.

IV. Final Thoughts

It is wholly understandable that legal scholars react unenthusiastically to the idea of an unlimited source of power. It seems contrary to the whole concept of law. But the constituent power determines what the law is. As such, any limitation to it must reside outside the law, whether it is the physical world or inherent logical requirements, such as the permanent availability of future exercises of constituent power.

That only external, rather than internal, limits exist in this regard does not make them any less effective. On the contrary, if adequately used, they can be just as effective. More importantly, because of the limitless nature of the constituent power, it is much easier to identify external limitations, instead of wandering endlessly in a conceptual cul-de-sac.

Every constitution can be subjected to ideological, political, and moral objections and indictment. That is part of its essence as a political document. Constitutionalism is an ideological precept. While it is not a legal concept, it is drenched in the language of the law. As such, it is a prime candidate to operate as an effective external limitation with regard to the use of constituent power at a particular historical moment.

There is nothing more powerful than telling the emperor that he or she has no clothes. In the realm of constitutions, there is nothing as compelling as denying a particular document the label of constitutionalist. This can have the desired effect on constitution-makers, thus turning the limitless nature of constituent power into a potential that is never used, relying instead on the self-restraint of those who are entrusted with it.

⁸⁷ See Harry Arthurs, *Constitutional Courage*, 49 MCGILL L.J. 1, 15 (2003).



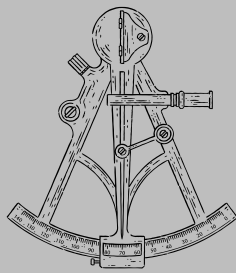
THE ETHICS OF SPACE EXPLORATION:
HARROWING STORIES OF DEATH, SURVIVAL, AND THE UNKNOWN

*Roy Balleste*¹

*“I wish I could help him. I wish I could help the dozens of other Sufferers—all the victims of wounds, maulings, burns, diseases, incipient malnutrition, and melancholic despair — aboard this entrapped ship and her sister ship.... But there is little that I—or any surgeon in the Year of Our Lord 1848—can do.” — Dan Simmons*²

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²DAN SIMMONS, THE TERROR 342 (2007).



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OF
INTERNATIONAL LAW

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I. INTRODUCTION: At the Edge of Reason

The desire to conquer space is irresistible. Most frontiers on Earth have been reached, and eventually, there will be no more terrestrial mysteries to solve. Yet, outer space is still there—reminding and tempting us to pursue that journey of discovery. We are presently in a new age of exploration. When humanity entered outer space for the first time, the Cold War was raging and only two nations enjoyed access to the secrets beyond our atmosphere. Now, a new age of commercialization is propelling humanity’s entry into space. Once again nations are returning to this vast frontier. Beyond the United States and Russia, other nations including India, Israel, Canada, Australia, the United Arab Emirates, and several European nations are pushing the boundaries of the known into the unknown.³ While most present efforts concentrate on deep space probes, it is only a matter of time before crewed vessels enter the race. However, once crewed voyages to Mars and beyond occur, humanity will face a unique kind of terror for the first time in centuries. To understand what this terror is, it is vital to appreciate the significance of space travel. “The goal of space exploration is clear — to generate knowledge.”⁴ But this knowledge will not be obtained easily and will be tied to “operations in areas that offer the prospect of providing goods, improved services, a unique work environment for research, and anything else that visionaries and entrepreneurs see as an opportunity for profit.”⁵ Could there be a situation that challenges all principles of space law, and even perhaps, all notions of law? Space law expert Michel Bourély noted that humanity’s activities in outer space would require rapid development of law.⁶ Bourély understood that behind these activities there was a moral element.⁷ He would have agreed that difficult circumstances will arise or be inescapable simply because exploration exists inextricably from adventure or law.⁸ And these voyages of exploration will be different. No longer associated with the mercantile age of looting artifacts or other valuable possessions, the new space age will be for those seeking innovative scientific discoveries.⁹ “To be sure, all we plan to do now is to explore our own immediate surroundings in the universe, the infinitely small place that the human race could reach even if it were to travel with the velocity of light.”¹⁰ There is an unavoidable outcome associated with these expected voyages. Even if qualified by humanity’s limited technology, our world will be left behind and along with it, all that is known to our senses, beyond our imagination, and into a new reality.¹¹

³ See Park Si-soo, *Israel becomes 15th nation to join Artemis Accords*, SPACENEWS (Jan. 27, 2022), <https://spacenews.com/israel-becomes-15th-nation-to-join-artemis-accords/>. See also Luke Harding, *The space race is back on – but who will win?*, THE GUARDIAN (July 16, 2021, 5:39 AM), <https://www.theguardian.com/science/2021/jul/16/the-space-race-is-back-on-but-who-will-win>.

⁴ Edward Hujsak, *Conquering Space – One Man at a Time*, SPACENEWS (Mar. 26, 2012), <https://spacenews.com/conquering-space-one-man-time/>.

⁵ *Id.*

⁶ Michel Bourély, *Space commercialization and the law*, 4-SPACE POL’Y-131-42 (1988) (Michel Bourély is the former Legal Adviser to the European Space Agency).

⁷ *Id.*

⁸ Annie Brett & Kenneth Broad, *The Litigation of Exploration*, 63 VILL. L. REV. 241, 241 (2018).

⁹ *Id.* at 243.

¹⁰ Hannah Arendt, *Man’s Conquest of Space*, 32 THE AM. SCHOLAR 527, 535 (1963).

¹¹ *Id.*

In 1845, two British warships with 129 men aboard were traveling under orders to find the area of the Arctic known as the Northwest Passage.¹² Both ships, *HMS Erebus* and *HMS Terror*, along with their crews, vanished without a trace.¹³ The mystery that would accompany this voyage continues to disturb historians to this day. Yet, the lessons learned should not be underestimated by those eagerly waiting to survey Mars, Titan, Triton, the Kuiper Belt, and beyond. “The progress of modern science has demonstrated very forcefully to what an extent this observed universe... escapes not only the coarseness of human sense perception but even the enormously ingenious instruments that have been built for its refinement.”¹⁴ Indeed, the solar system is vast but infinitely small compared with just our galaxy. What will be the outcome for astronauts once they enter deep space and find the Earth too far to call for help? Both imagination and scientific inquiry may mix with hallucination and desperation. In other words, when humanity pushes its technological capabilities, it is not unfair to appreciate the merging of science fiction with science fact. “[H. G.] Wells... understood better than most of us the comedy of the individual human being, and yet he never lost sight of his biological background, of the human species emerging from dubious origins and groping its way to an even more dubious destiny.”¹⁵ Indeed, the tests that future astronauts will endure will likely push the limits of their minds, bodies, and souls. This is not to say that Wells had a low opinion of humanity, but instead suggests he was very much aware that the future offers opportunities for intellectual study, while keeping alive a perspective with the historic past.¹⁶ It is into the past that we must journey to find the voyages of the *Francis Mary*, the *William Brown*, the *Mignonette*, and *HMS Terror*, along with the lessons that followed. These lessons and several others will be considered in light of future trends in space law and space travel.

II. The Vanishing Moon

The image of a spaceship leaving our region of space would be like seeing the Moon in a sort of cosmic review mirror. This spaceship would be expected to be equipped with advanced technologies designed for long journeys. We then imagine the astronauts in white coffin-like pods, protected from radiation, with the ability to hibernate for months or even years.¹⁷ By the time the ship arrives in the vicinity of Proxima Centauri b, our Moon is no longer visible. As a matter of fact, crewed vessels traveling into the unknown will raise questions about our duty, as species, to bring our astronauts safely back home. What is the price of space exploration? And what is this metaphysical imperative that makes us reach for the stars?

¹² Niraj Chokshi, *The H.M.S. Terror Sank in the 1840s. See What It Looks Like Now.*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/science/hms-terror-wreck-franklin-expedition.html>.

¹³ *Id.*

¹⁴ Arendt, *supra* note 10, at 528.

¹⁵ Freeman Dyson, *HUMAN CONSEQUENCES OF THE EXPLORATION OF SPACE*, 28 EKISTICS 452, 452 (1969).

¹⁶ *Id.*

¹⁷ Arielle Emmett, *Sleeping Their Way to Mars*, AIR & SPACE MAG. (Apr. 2017), <https://www.airspacemag.com/space/hibernation-for-space-voyages-180962394/>.

Consider the following scenario: It is the year 2157. The *USS Furies* just finished a survey of Proxima Centauri b, the closest exoplanet to Earth. In its departure to our solar system, the captain notices that the bridge's main display is sounding an alarm. This warning is any space traveler's worst fear. The display warns that the propulsion systems are malfunctioning and now the ship is drifting away into the darkness of space. The ship eventually crashes on one of Proxima Centauri b's largest oceans. The impact has caused the top layer of the frozen ocean to crack and melt. The ship now sinks slowly. Only a few survivors manage to swim to the lifeboat. Unfortunately, most of the food supply was destroyed in reentry, and the chances for the crew are grim. The lifeboat is equipped with a communications device and the survivors send the SOS call. As they endure the harsh environment, the space agency discusses the merits and challenges associated with a rescue mission. While there is a small chance for a rescue, the situation is desperate. If the Space Agency manages to send a rescue ship, six months will pass before its arrival.

It is appropriate at this juncture to acknowledge the relevant international law in this case. Article V of the Outer Space Treaty states that:

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.¹⁸

As this treaty provision demonstrates, there is nothing in the language immediately helpful for our astronauts. The *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (Moon Agreement), in Article 10, offers further guidance but is only applicable to the Moon and other celestial bodies within the solar system.¹⁹ The most relevant document, the *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space* (Rescue Agreement), is similarly unhelpful once astronauts venture beyond the Moon or the immediate solar system. This gap in the law is most likely a limitation due to its drafting era. True, Article 5 of the Rescue Agreement notes that a State Party will render all possible assistance to the

¹⁸ G.A. Res. 2222 (XXI) (Dec. 19, 1966).

¹⁹ G.A. Res. 34/68 (Dec. 5, 1979).

astronauts of other States Parties “in outer space and on celestial bodies,” but that assumes that any nation will have an available spaceship within the mentioned area of outer space.²⁰ As it is in the case in some instances, the possibility of rescue may be slim. Here, the drafters of the Rescue Agreement squandered an opportunity to delve more into the historical human condition and instead, dedicated only four of the ten articles to the actual rescue of astronauts.²¹ While all four articles emphasize the importance of rescue and return of astronauts to their original jurisdiction, little else of substance is accomplished.²² The treaty provisions are mainly limited to terrestrial accidents or accidents in the cislunar region.²³ While “celestial bodies” are mentioned, nothing addresses the hazards of long voyages and the inherently dangerous nature of such activities. The return of spacecraft or their parts may be of great value to the organizations and governments involved, but these should have no higher priority than the life of the astronauts.²⁴

Returning to our scenario, the *USS Furies* unfortunately was not designed to land on water. While the space agency managed to send a rescue ship belonging to the European Space Agency, several months passed before the survivors were found. What the rescuers eventually discover is a subject of nightmares. Misery seems to accompany events such as this one. It is a mix, probably, of survival and desperation. All part of the human condition, these potential events must prepare astronauts for the challenges ahead. Thus, to uncover the law of space exploration in order to manage the *Furies* scenario, it is prudent to first look back in time. “We cannot fail to be awed by the dramatic leap from speculative to factual inquiry about issues so profound as the nature and origin of the solar system and the evolution of life within it.”²⁵ Humanity is part of that evolution, pushing the boundaries of travel into the unknown, in search of new worlds, across space and time.

A. (1826) *The Francis Mary*

Every voyage begins with the expectations of a better future. A destination is the ultimate goal of a voyage. But in case of a serious emergency, are we prepared to face the hard realities associated with our existence? When the remaining provisions are not sufficient to preserve the life of all survivors, what protocol should be followed? The crew and passengers exist together in harmony, not thinking much of the expedition or the vessel. Yet in the winter of 1826, those aboard the *Francis Mary* discovered the true meaning of horror in their passage from New Brunswick to Liverpool.²⁶ “The Francis Mary was a 398-ton ship on passage from Canada to Liverpool.”²⁷ While the journey began with good weather, on February 1, 1826, the ship encountered strong winds that dislodged

²⁰ G.A. Res. 2345 (XXII) (Dec. 19, 1967).

²¹ *Id.* art. 1-4.

²² *Id.*

²³ *Id.*

²⁴ *Id.* art. 5.

²⁵ Richard Goody, Michael McElroy & Philip Morrison, *Human Issues in Space Exploration*, 33 BULL. AM. ACAD. ARTS AND SCI. 10, 13 (1980).

²⁶ ANN SAUNDERS, NARRATIVE OF THE SHIPWRECK AND SUFFERINGS OF MISS ANN SAUNDERS 9 (1827).

²⁷ *Id.*

two of its masts.”²⁸ The bad weather along with the waves that drowned the kitchen rendered the vessel immobile, with only cheese and bread remaining for the survivors.²⁹ American ships in the area attempted a rescue, but unfortunately, the harsh weather crushed their efforts.³⁰

Daylight returned, but only to present to our view an additional scene of horror—one of the poor seamen overcome by fatigue, was discovered hanging lifeless by some part of the rigging—his mortal remains were committed to the deep—as this was the first instance of entombing a human body in the ocean, that I had ever witnessed, the melancholy scene made a deep impression on my mind, as I expected such eventually would be my own fate!³¹

As we could guess, food and water did not last and death followed for several of those aboard.³² Ann Saunders’s account of the events as one of the passengers is detailed and saddening.³³ She noted how after nineteen days, another crew member died and the hunger, compounded by the hopelessness, drove the survivors to barbarity.³⁴ On February 22nd, the survivors cut the body of the recently deceased into slices, then washed those at sea, and hung the flesh to dry out before eating.³⁵ Before their rescue by the *HMS Blonde* on March 7th, eight more men perished and the survivors removed their hearts and livers for consumption.³⁶ What made this particular story compelling is how Ann Saunders narrates the events, even admitting to drinking her own fiancé’s blood to survive.³⁷ In the end, despite all the terrible suffering, it seems that cannibalism was at that time a “normal practice among survivors of shipwrecks on the high seas.”³⁸ Today, more than one hundred years after those events, this controversial practice appears surreal to the modern jurist and should belong only in terrible nightmares. The desperation, or more precisely, the ‘necessity’ that drove their behavior—under those particular circumstances—deserves a modern analysis.

B. (1842) *The William Brown*

²⁸ *Id.* at 9; see also Chase Christy, 9 *Shipwrecks Throughout History That Ended In Cannibalism*, RANKER (Feb. 4, 2020), <https://www.ranker.com/list/shipwrecks-ended-in-cannibalism/chase-christy>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Saunders, *supra* note 26 at 11; see also *Narrative of the Shipwreck and Sufferings of Miss Ann Saunders*, LEHIGH UNIV., <https://omeka.lehigh.edu/exhibits/show/crusoe-300/shipwrecks/saunders>.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 13.

³⁵ *Id.*

³⁶ *Id.* at 14.

³⁷ *Id.* at 15.

³⁸ Michigan Law Review, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which it Gave Rise*, 83 MICH. L. REV. 702, 704 (1985).

The first crewed deep space mission will be simultaneously exciting and worrisome. The mission will be the firstborn out of the ongoing developments of NewSpace organizations. The concept of NewSpace encompasses a new age of affordable technology and a wider market of stakeholders along with legal, commercial, and social innovations.³⁹ In many ways, it is reminiscent of romantic notions of the mercantile age. That was an age when “[n]aval and land exploration... connected remote cultures and civilizations, generated new sources of wealth, expanded scientific and technological knowledge and capabilities...”⁴⁰ This is also the spirit of NewSpace ventures. But the story of the *Francis Mary* is not a romantic one. It is a haunting tale. Regrettably, it is not the worst episode in the history of human travel. Yet, this remains a tale that offers clues that all astronauts should remember.

About sixteen years after the events of the *Francis Mary*, another crew descended into madness aboard the *William Brown*. This story begins in a United States Federal Courtroom. Alexander William Holmes is on trial for manslaughter on the high seas.⁴¹ The case is being decided “before the chief justice of the United States circuit court for the eastern district of Pennsylvania, Philadelphia, 1842.”⁴² The unexpectant reader would soon discover the unusual circumstances surrounding this case. The court report offers a horrifying account of the fate of the ship. The judge in this case noted that “[we] sometimes meet in ethics with the question, put by way of hypothesis, how one ought to act, when in such circumstances of peril, that he can only save his own life by the destruction of another’s.”⁴³ This is a question that needs to be considered seriously. One way to tackle this inquiry is to consider its lack of practical application and the difficulties confronted by those that will find themselves in a position to pass judgment on the conduct of another, or even have to face the grueling decisions that were necessary for self-preservation.⁴⁴ It is in this case that the space lawyer encounters the ‘*principle of necessity*.’⁴⁵ This principle should not be confused with the principle of ‘military necessity.’⁴⁶

The challenges associated with the principle of necessity may be more philosophical in nature —yet these remain at the core of the problem given that governments and institutions participating in NewSpace endeavors have not addressed it. The William Brown story highlights the principle of necessity or ‘homicide by necessity.’⁴⁷ Given the circumstances of long space voyages and the integrity of the human beings selected for these important projects, it may be more appropriate to define the legal challenge as the ‘principle of necessity.’ As noted earlier, “[i]n philosophy we sometimes consider the

³⁹ See Ms. Ruvimbo Samanga on *NEWSPACE*, KNOWLEDGE CONSTELLATION (July 2021), <https://constellation.iislweb.space/ruvimbo-samanga-newspace/>.

⁴⁰ INSTITUTE OF MEDICINE, HEALTH STANDARDS FOR LONG DURATION AND EXPLORATION SPACEFLIGHT: ETHICS PRINCIPLES, RESPONSIBILITIES, AND DECISION FRAMEWORK 1 (2014).

⁴¹ Notes, 5 L. REP. 337 (1842) (the case of the William Brown).

⁴² *Id.* at 341.

⁴³ *Id.* at 337.

⁴⁴ *Id.*

⁴⁵ John Alan Cohan, *Homicide by Necessity*, 10 CHAP. L. REV. 119, 120 (2006).

⁴⁶ See, Craig J. S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts*, 37 CAL. W. INT’L L. J. 177 (2007).

⁴⁷ Cohan, *supra* note 45.

question, put by way of hypothesis, of how we should act in the midst of a calamity, disaster, or other danger, if it is apparent that we can save our own life only by the destruction of another's."⁴⁸ How should international space law consider this question? This legal principle addresses those moments that may justify "the killing of innocents in order to produce a greater good or avert a greater evil—usually to save a greater number of lives."⁴⁹ One way to modernize this principle to fit space law conditions would be to recognize it as part of a greater 'astronautical ethics.' Yet, the problem here is that exploring new areas of the solar system will involve risks.⁵⁰ Many of these risks will arrive from unknown situations and environments, which could seriously jeopardize the safety of the astronauts.⁵¹

An accident causing astronauts to be marooned with no hope of rescue would be maddening enough. This was exactly the experience of the crew and passengers of the American ship, the *William Brown*.⁵² The ship departed Liverpool for Philadelphia on March 12, 1841, and "on the night of April 20th, while under full sail off the Grand Banks, she came in collision with an iceberg."⁵³ Once the captain assessed the damage and concluded that the ship was lost, the order soon followed to abandon the vessel.⁵⁴ Eventually the crew and passengers—eighty-two souls in total—discovered that the lifeboats could only accommodate about half of the survivors.⁵⁵ The boat could realistically accommodate only twenty-two passengers, but it was overloaded with over forty squeezed onboard.⁵⁶ The rest of the passengers were sentenced to die in terror while the ship sank under the cold waters of the Atlantic.⁵⁷ The captain collected the names of all the remaining passengers, the purpose of which was left up to grim speculation.

Why ask for their names? All had heard Rhodes tell Captain Harris that if the jolly boat would not take on some of the longboat's load, he would have to lighten the boat some other way, perhaps by lottery, if the seas grew heavy. And so, as the captain wrote down their names, the passengers must have looked at each other and wondered who would be the first to be sacrificed when the winds blew up and the sea grew boisterous.⁵⁸

When the emergency arose, the captain along with other sailors escaped into one of the two available boats—the jolly boat—and the rest of the passengers occupied the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ INSTITUTE OF MEDICINE, *supra* note 40, at 14.

⁵¹ *Id.*

⁵² Notes, *supra* note 41, at 339.

⁵³ *Id.* at 338.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ TOM KOCH, THE WRECK OF THE WILLIAM BROWN 28 (2004).

⁵⁷ *Id.* at 33.

⁵⁸ *Id.* at 57.

longboat.⁵⁹ Alexander Holmes was in charge of lowering the longboat.⁶⁰ The court noted that “Captain Harris, under these circumstances, as he himself states, told the passengers that they could not all be saved by the boats, but that as many as could, might get in.”⁶¹ Holmes, the accused, was the last one to leave the ship before it sank, while risking his life to carry a sick female passenger to the lifeboat.⁶² In time, the jolly boat was rescued, but the longboat remained behind since it was damaged and had begun to sink.⁶³ Captain Harris had left Rhodes, the first mate, in charge of the longboat, yet he proved to be incompetent.⁶⁴ Soon after Rhodes tried to delegate his position, which the other sailors refused to accept.⁶⁵ Eventually, Rhodes motivated some of the sailors to begin tossing passengers overboard, including Holmes.⁶⁶ “Holmes and two or three others of the sailors commenced throwing the passengers over,” with men and women being thrown overboard at random.⁶⁷ While Holmes grabbed several of the passengers and threw them overboard, eventually he lost his desire to continue the killings.⁶⁸ On the other hand, Rhodes did not utilize a lottery system, despite mentioning it to the captain earlier in the day, and he did not consult with the passengers.⁶⁹ Indeed, a lottery system to select who would be thrown out of the boat would have meant that all individuals in the boat, including Rhodes, would have had to participate.⁷⁰ If Rhoads was in charge as first mate, why then was Holmes on trial?

Ironically, the next day, the *Crescent*, an American vessel, arrived to rescue the survivors.⁷¹ But they were found with Holmes in command of the longboat, having offered hope and assurances that the killing was over.⁷² This ended the maritime nightmare and is how the case of Holmes came before Justice Baldwin and the Circuit Court for the Eastern District of Pennsylvania.⁷³ After about ten days, the question remained: would the defense of necessity be accepted?⁷⁴

Two of the points most immediately noticeable in considering the justifiableness of the defendant’s deeds, were, how it happened that the crew took upon themselves to throw out the passengers, and in the second place why some of the passengers were spared in preference to or exclusion of others.⁷⁵

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 25.

⁶¹ Notes, *supra* note 41, at 338.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See KOCH, *supra* note 56.

⁶⁵ *Id.* at 59.

⁶⁶ *Id.* at 61.

⁶⁷ Notes, *supra* note 41, at 340.

⁶⁸ KOCH, *supra* note 55, at 65.

⁶⁹ *Id.* at 62.

⁷⁰ *Id.* at 66.

⁷¹ Notes, *supra* note 40, at 341.

⁷² KOCH, *supra* note 56, at 65.

⁷³ *Id.* at 134.

⁷⁴ Notes, *supra* note 41, at 341.

⁷⁵ *Id.* at 342.

Weeks after the events noted above, Alexander William Holmes was found guilty of manslaughter on the high seas, although given the circumstances, the jury asked for a light sentence from the judge.⁷⁶ Holmes was ultimately sentenced to a twenty-dollar fine and six months of hard labor.⁷⁷ He was eventually seen as a scapegoat and there are no further records of the final days of William Holmes.⁷⁸ In the end, what makes this story terrifying was that over a dozen individuals were pushed overboard to their deaths and yet, the rest would be rescued the very next day. If Holmes had known that they would be rescued within twenty-four hours, would he have acted differently? Does it even matter one way or the other? “Homicide by necessity gives us just one example of how exploration’s norms have become the basis for our laws.”⁷⁹ For this reason, what could be the accepted norms in future space voyages of long duration? The principle of necessity did not excuse Holmes. How should space law manage these unusual situations? If exploration has shaped our interpretation of the law to this day, then it should not be surprising when future and extreme circumstances necessitate that jurists find a level of fairness for their resolution.⁸⁰

C. (1845) *HMS Terror and HMS Erebus*

It is easy to imagine sailors of centuries past looking up at the stars in search of a destination. This includes sailors of the British Navy, which was among the most active navies of the nineteenth century. The Admiralty or “the office of the Lord High Admiral” was the administrative branch of the Royal Navy—His Majesty’s fleet—assigned with the naval defense of the Empire.⁸¹ At the time, it was possible to assume romantic notions surrounding adventure voyages to the farthest corners of the planet. These romantic notions eventually permeated modern ideas of outer space that offer much more. Modern ideas open new discussions about reaching frontiers without borders and humanity as one race searching for new horizons. The flags and symbols of terrestrial powers may have little meaning in the long distances of outer space. For these and other reasons, astronauts are more than the nations they represent. As noted earlier, Article V, paragraph 1 of the Outer Space Treaty highlights that “States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance...”⁸² The spirit of this short statement can also be found in past voyages of exploration. “Captain Sir John Franklin’s two-ship expedition of 1845 was confidently expected to be the first to traverse the archipelago all the way from the Baffin Bay to Bering Strait, linking the

⁷⁶ KOCH, *supra* note 56, at 180.

⁷⁷ *Id.* at 181.

⁷⁸ *Id.*

⁷⁹ Annie Brett & Kenneth Broad, *The Litigation of Exploration*, 63 VILL. L. REV. 241, 244 (2018).

⁸⁰ *Id.*

⁸¹ W. Gillies Ross, *The Admiralty and the Franklin Search*, 40 POLAR REC. 289, 289 (2004).

⁸² G.A. Res. 2222 (XXI) (Dec. 19, 1966).

Atlantic and Pacific oceans by a Northwest Passage.”⁸³ Once progress news from the expedition failed to arrive as expected, the British Admiralty began rescue expeditions.⁸⁴

On April 4, 1850, the *Toronto Globe* published an announcement offering a reward of more than £10,000 for information on the whereabouts of two ships.⁸⁵ The search for the missing ships would last for over a century.⁸⁶ This story began in 1845 when Sir John Franklin departed on a great mission to find the fabled Northwest Passage in the Arctic.⁸⁷ Franklin was in overall mission command of two ships, the *HMS Terror* and *HMS Erebus*, which were last sighted “by Europeans in Baffin Bay, off the coast of Greenland.”⁸⁸ While Franklin was the leader of the expedition, Francis Crozier served as captain of *HMS Terror* and James Fitzjames served as senior officer of *HMS Erebus*.⁸⁹ Both ships, along with their crews totaling 129 men, vanished without a trace.⁹⁰ The disappearance was incomprehensible, given that the ships were built to handle the rigors of the Arctic.⁹¹ Indeed, the front section of their hulls had been sealed off with iron sheets.⁹² Not only were the ships’ hulls strong, but the ships were also equipped with heating systems.⁹³ In addition, each ship was fitted with a steam engine designed mainly to cut through the ice.⁹⁴ There were plenty of provisions aboard, courtesy of a new technology: canned food.⁹⁵ Furthermore, “Sir John Franklin [was] a seasoned polar explorer who had already led two previous searches for the North-West Passage.”⁹⁶ This time, the plan was to travel along the Arctic coastline again, hoping to chart the passage that connected the Atlantic and Pacific Oceans.⁹⁷

The vast distances of the outer space environment once again challenge humanity’s pioneering spirit. But that vastness reminds us that while a rescue mission could concentrate all efforts in a particular geographic location, it would become reasonable to understand the difficulties of those efforts without an identified location. If the situation was to become more desperate, it would be more difficult to restrain the worst impulses of the human spirit. While the disaster of the Franklin mission is the subject of substantial

⁸³ Ross, *supra* note 81.

⁸⁴ *Id.*

⁸⁵ OWEN BEATTIE & JOHN GEIGER, FROZEN IN TIME: THE FATE OF THE FRANKLIN EXPEDITION 58 (2017).

⁸⁶ GILLIAN HUTCHINSON, SIR JOHN FRANKLIN’S EREBUS AND TERROR EXPEDITION: LOST AND FOUND 41 (2017).

⁸⁷ Kat Eschner, *Tales of the Doomed Franklin Expedition Long Ignored the Inuit Side, But “The Terror” Flips the Script*, SMITHSONIAN MAG. (Apr. 6, 2018), <https://www.smithsonianmag.com/arts-culture/heres-how-ame-producers-worked-inuit-fictionalized-franklin-expedition-show-180968643/>.

⁸⁸ *Id.*

⁸⁹ Parks Canada, *Wrecks of HMS Erebus and HMS Terror National Historic Site* (May 27, 2019), <https://www.pc.gc.ca/en/lhn-nhs/nu/epaveswrecks/culture/histoire-history/qui-who>.

⁹⁰ Niraj Chokshi, *The HMS Terror Sank in the 1840s. See What It Looks Like Now.*, N.Y. TIMES (August 30, 2019), <https://www.nytimes.com/2019/08/30/science/hms-terror-wreck-franklin-expedition.html?searchResultPosition=1>.

⁹¹ HUTCHINSON, *supra* note 85.

⁹² *Id.* at 56.

⁹³ Royal Museums Greenwich, *What happened to HMS Erebus and Terror?* (2021), <https://www.rmg.co.uk/stories/topics/what-happened-to-erebus-terror-crew-true-story>.

⁹⁴ HUTCHINSON, *supra* note 86.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

historical analysis for purposes of space exploration, it is the concept of human dignity that highlights the most critical factors now and into the future. The expedition's vanishing triggered "the most extensive, expensive, perverse, ill-starred, and abundantly written-about manhunt in history."⁹⁸ The search missions continued for more than a decade with nearly forty expeditions.⁹⁹ Yet, despite all attempts to find the ships, the obvious solution was ignored. In fact, those looking for the ships "almost always had access to one primary source: Inuit oral histories, more specifically the accounts of the Netsilik Inuit."¹⁰⁰

In 1854, Hudson's Bay fur trader John Rae discovered some of the facts surrounding the final days of the expedition.¹⁰¹ In England, Rae's account was received with disbelief, despite evidence showing how some of the men surrendered to cannibalism.¹⁰² In harrowing moments against a nightmarish icy landscape, some of the crew sliced flesh off the bones of their fallen comrades and cracked their bones open to suck out the marrow.¹⁰³ The evidence showed the following:

Of the 304 bones from the islet in Erebus Bay, 92 showed knife marks, suggesting removal of flesh and probably dismemberment. A single femur, recovered from Booth Point, also showed knife marks, as did 4 of 79 bones recovered in 2013 from another site in Erebus Bay. These findings clearly corroborate the Inuit accounts of cannibalism among the expedition members during their final attempt to reach safety via the Back River.¹⁰⁴

It is difficult to understand why the crew would eventually abandon the relative safety of the ships. Yet, one note was found that may offer some clues. A message found in a canister explained that the men intended to trek over land via the Back River.¹⁰⁵ The note, dated April 1848, was found on King William Island.¹⁰⁶ This tragic story is shocking because it involved a tremendous tragedy despite the use of some of the newest technologies in these military vessels.¹⁰⁷ This story, and the others mentioned here, serve as a reminder that there is no ethical guidance available in space law to resolve these scenarios. The current state of international space law is ill-prepared to address the new realities that will arise out of crewed space exploration. Whether governments consider tourists as astronauts or decide to come up with a lesser designation, the truth is that in the

⁹⁸ Christina LaBarge, *How Two Sunken Ships Caused a War: The Legal and Cultural Battle between Great Britain, Canada, and the Inuit over the Franklin Expedition Shipwrecks*, 42 *LOY. L.A. INT'L & COMP. L. REV.* 79, 81 (2019).

⁹⁹ *Id.*

¹⁰⁰ Eschner, *supra* note 87.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Tia Ghose, *Cracked Bones Reveal Cannibalism by Doomed Arctic Explorers*, *LIVE SCI.* (July 21, 2015), <https://www.livescience.com/51614-doomed-franklin-expedition-cannibalism.html>.

¹⁰⁴ S. Mays & O. Beattie, *Evidence for End-stage Cannibalism on Sir John Franklin's Last Expedition to the Arctic, 1845*, 26 *INT. J. OSTEOARCHAEOL.* 778, 779 (2016).

¹⁰⁵ *Id.* at 778.

¹⁰⁶ *Id.*

¹⁰⁷ HUTCHINSON, *supra* note 86.

end the private sector is on a path to take people to the stars in numbers rivaling and possibly surpassing those of governments.¹⁰⁸ “The underlying ethical question raised here is whether a moral duty to render possible assistance to other persons in space exists, regardless of whether one is a [passenger] or crewmember.”¹⁰⁹ Thus, the future space explorer will arise from the overall space industry, and their challenges will be resolved only by ethical standards applicable across all sectors of the space industry. What then should the marooned crew of the USS *Furies* do?

III. The Ethics of Long Voyages

It is difficult to predict when humanity will set foot on Mars and beyond. It is more probable than not that it will be achieved before the end of this century.¹¹⁰ It is also likely that new knowledge will be revealed once humanity embraces space, reaches other planets, and colonizes off-world outposts. Imagine a future where communities of people live on faraway planets and “in isolated city-states floating in the void, perhaps attached to an inconspicuous asteroid or perhaps to a comet.”¹¹¹ By then there should be known routes of space travel. However, during an otherwise routine mission, a mechanical failure could send a capsule with a crew deep into space, away from traveled routes, with little chance of retrieval. Would these travelers be prepared for the realities of this potential scenario? What would be the next steps to follow once the crew realizes the irretrievability of their capsule? Acts of survival may eventually turn into tones of desperation. But in this case, a rescue would probably be impossible. Additional scenarios and the outcome of more recent events of death and survival offer further light on these questions. The stories already mentioned undoubtedly left an indelible mark in the chronicles of history. Yet, even darker chapters are awaiting travelers on future voyages.

Another remarkable case involved the 1884 voyage aboard the *Mignonette*. “The *Mignonette* was a small yacht built primarily for fishing, and an occasional race.”¹¹² The ship sank on its way to Sydney, Australia, on July 5, 1884, and its four survivors ended up in an improvised lifeboat.¹¹³ The *Mignonette*’s story is acknowledged in the case of *Regina v. Dudley & Stephens*, which offers a horrifying account of tragedy on the high seas.¹¹⁴ After sinking, the survivors experienced an excruciating wait of nineteen days for

¹⁰⁸ Dylan Taylor, *The future of space tourism: op-ed*, SPACE.COM (March 31, 2021), <https://www.space.com/future-of-space-tourism-op-ed>.

¹⁰⁹ Sara M. Langston, *Reimagining Icarus: Ethics, Law and Policy Considerations for Commercial Human Spaceflight*, in *INTO SPACE: A JOURNEY OF HOW HUMANS ADAPT AND LIVE IN MICROGRAVITY 12* (Thais Russomano & Lucas Rehnberg eds., 2018).

¹¹⁰ Issam Ahmed & Lucie Aubourg, *America has sent five rovers to Mars—when will humans follow?* PHYS.ORG (February 20, 2021), <https://phys.org/news/2021-02-america-rovers-marswhen-humans.html>.

¹¹¹ Freeman Dyson, *HUMAN CONSEQUENCES OF THE EXPLORATION OF SPACE*, 28 *EKISTICS* 452, 455 (1969).

¹¹² John Friedl, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the *Mignonette* and the Strange Legal Proceedings to Which it Gave Rise*, 83 *MICH. L. REV.* 702 (1985).

¹¹³ *Id.*

¹¹⁴ *R. v. Dudley & Stephens*, [1884] 14 *QBD* 273.

rescue.¹¹⁵ Initially, the survivors decided to “cast lots among themselves as to who should be killed” to become food for the others.¹¹⁶ However, rather than utilizing this random selection method, the survivors instead chose a young boy named Parker, who had already fallen ill after drinking seawater, to be the unlucky victim.¹¹⁷ To these seamen, a sick and ‘almost dead’ person “with no family connections” meant a forfeited life.¹¹⁸ Two of the three members of the crew—Dudley and Stephens—killed the boy and were eventually charged with murder and sentenced to death, although later commuted to six months in jail.¹¹⁹

A. *Today: On Death and Survival*

More modern stories are no less chilling. One case takes the analysis away from the seas and into the ‘air domain.’ This was the crash of the *Uruguayan Air Force Flight 571* on October 13, 1972.¹²⁰ The survivors had a dreadful choice to make: “whether to die a slow, excruciating death or eat the frozen bodies of their dead friends.”¹²¹ The survivors, rugby team members from Uruguay, along with friends and family members, were traveling to Chile.¹²² What began as a short flight turned into two and half months of survival.¹²³ Eventually, sixteen out of twenty-nine survivors managed to be rescued from the nightmare, but not before resorting to cannibalism.¹²⁴ More recently, in 2001, two men were found “on a coral reef off Haiti,” carrying with them another grim story of cannibalism.¹²⁵ Unfortunately, their boat “of illegal immigrants from the Dominican Republic [on the way to Puerto Rico, survived] for more than three weeks” at sea by consuming the bodies of fellow passengers.¹²⁶ Sixty-one passengers had initially begun the harrowing journey, which ended in tragedy.¹²⁷

In 2008, modern history added another nightmarish scenario of survival born out of the illegal transportation of migrants from the Dominican Republic attempting to reach the shores of Puerto Rico, a United States territory.¹²⁸ While not a story from the mercantile

¹¹⁵ Roger Stephens, *The Story of the Mignonette*, NAT’1 MARITIME MUSEUM CORNWALL, <https://www.maritimeviews.co.uk/focus-on-falmouth/the-story-of-the-mignonette/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Simon Worrall, *After the Plane Crash—and the Cannibalism—a Life of Hope*, NAT. GEO. (April 3, 2016), <https://www.nationalgeographic.com/culture/article/160403-andes-uruguay-rugby-cannibal-plane-crash-canessa-ngbooktalk>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Weekend Edition Sunday, *Story Of The 1972 Andes Plane Crash In ‘Out Of The Silence,’* NPR (June 9, 2019), <https://www.npr.org/2019/06/09/731044367/story-of-the-1972-andes-plane-crash-in-out-of-the-silence>.

¹²⁴ *Id.*

¹²⁵ Ben Macintyre, *Adrift for 24 days, two survivors of shipwreck ‘lived by cannibalism’*, INDEP. (Mar. 22, 2001), <https://www.independent.ie/world-news/americas/adrift-for-24-days-two-survivors-of-shipwreck-lived-by-cannibalism-26094108.html>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ The Associated Press, *Dominican migrant: We ate flesh to survive*, NBC NEWS (Nov. 4, 2008), <https://www.nbcnews.com/id/wbna27531105>.

age, this account offered a similar look at the human condition. What is the threshold of survival for each individual? Twenty-seven migrants had already died after two weeks at sea.¹²⁹ One survivor took out his fisherman's knife, and along with others, began cutting the chest and one leg of a recently deceased migrant.¹³⁰ "We cut little pieces and swallowed them like pills."¹³¹ A US Coast Guard helicopter rescued five survivors of the thirty-three original "migrants who had set out on the tiny, wooden vessel en route to Puerto Rico."¹³²

B. *Tuunbaq*

There is no doubt that the mind of a human being can only tolerate so much. Add isolation and fear to the circumstances and it becomes a nightmare. A scary story may begin as a simple account of past events. Perhaps terrible memories are represented by nightmares. For the men of the 1850s, without a doubt, the journey of *Terror* and *Erebus*, being so far north into the Arctic, would have been similar to traveling to another planet. Becoming visitors to the new land, the British ships would eventually encounter the indigenous population. The *Inuit* saw "the land, water, and ice contained in the Arctic region" as their home.¹³³ The history of the Inuit dates back to 1050 AD, being "culturally related to Inupiat (northern Alaska), Katladlit (Greenland) and Yuit (Siberia and western Alaska)."¹³⁴ The European explorers were fascinated by the Inuit culture, especially shamanism.¹³⁵ This particular subject must have appeared as attractive as it is today. In shamanism, the shaman seems to have supernatural powers that control nature itself.¹³⁶ A shaman could also be understood as a person possessing healing powers, being able to communicate with the dead, and even "influenc[ing] the movements of hunting animals."¹³⁷ These paranormal-like stories potentially could have added a level of anxiety to any crew already overwhelmed by a hostile environment. The story of shamanism, juxtaposed against starvation, and the cold and dark environment of the Arctic, could conjure ideas of the supernatural. "Even today, shamanism-related questions are those most frequently posed. Unfortunately for such seekers, shamanism is the one topic Inuit traditionally do not talk about."¹³⁸ For the Inuit, shamanism was guarded by a few with an ability to delve into the supernatural.¹³⁹

The supernatural phenomenon may have added an aura of mystery to the final days of the crews of *Terror* and *Erebus*. The loss of life associated with the Franklin expedition

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Minie Aodla Freeman, *Inuit*, THE CAN. ENCYCLOPEDIA (Anne-Marie Pedersen et al. eds., 2020), <https://www.thecanadianencyclopedia.ca/en/article/inuit>.

¹³⁴ *Id.*

¹³⁵ Rachel Attitug Qitsualik, *Inuit shamanism and the code of silence*, INDIAN COUNTRY TODAY (Sep. 12, 2018), <https://indiancountrytoday.com/archive/inuit-shamanism-and-the-code-of-silence>.

¹³⁶ MARGARET STUTLEY, SHAMANISM: AN INTRODUCTION I (2002).

¹³⁷ *Id.*

¹³⁸ Qitsualik, *supra* note 135.

¹³⁹ *Id.*

was beyond comprehension. At the service of their nation, those brave men attempted to push the boundaries of human knowledge. But their ultimate goal would not be triumphant. “After several years of ominous silence from the Arctic, it was clear to those in England that the expedition had run into serious problems, if not disaster.”¹⁴⁰ In 1854, explorer John Rae encountered the Inuit, which informed him that “they had seen a group of starving white men in 1850 and had later discovered the bodies,” showing signs of cannibalism.¹⁴¹ And thus, stranded in a nightmarish landscape of frost and isolation, a supernatural horror may have crawled into the darkest corners of their souls.

The novel titled *The Terror*, by Dan Simmons, “involves the destruction of the ice-bound expedition by a malevolent monster on the ice” known as “an evil Inuit spirit called the Tuunbaq.”¹⁴² Old legends and mysteries of the paranormal are scary on their own, even if these form part of local folklore. Imagine arriving at a place that only offers imminent danger; a place where only death awaits. The story of *Terror* and *Erebus* ends with a bone-chilling warning. While historians cannot say for sure what put an end to the Franklin expedition, there is enough information to consider some unfortunate scenarios. Even though encountering evidence of cannibalism alone would give nightmares to any jurist, nothing is more horrifying than the story of the *Tuunbaq*. Was it real?

As it [picked] off the men one by one, the spectral monster soon [came] to represent the metaphysical horror at the heart of humanity, literally represented in the descent of the expedition into cannibalism and brutality.¹⁴³

But what could be said of the western explorers entering these native lands? As noted in *The Terror*:

Not minutes, seconds. Sir John could feel the cold water freezing the life out of him. And there was something terribly wrong with his legs. Not only could he not feel them, but he could feel an absolute *absence* there. And the seawater tasted of his own blood.¹⁴⁴

In the 1860s, one of the explorers that searched for the doomed Franklin expedition, Charles Francis Hall, heard the story of two ships that “brought bad luck to the Boothian region and so two shamans performed so much magic that the fish and game stayed away from the area.”¹⁴⁵ This magic would mean that the

¹⁴⁰ Christina LaBarge, *How Two Sunken Ships Caused a War: The Legal and Cultural Battle between Great Britain, Canada, and the Inuit over the Franklin Expedition Shipwrecks*, 42 LOY. L.A. INT’L & COMP. L. REV. 79, 81 (2019).

¹⁴¹ *Id.*

¹⁴² SHANE MCCORRISTINE, THE SPECTRAL ARTIC: A HISTORY OF DREAMS AND GHOSTS IN POLAR EXPLORATION 215 (2018).

¹⁴³ *Id.*

¹⁴⁴ DAN SIMMONS, THE TERROR 183-184 (2007).

¹⁴⁵ MCCORRISTINE, *supra* note 142, at 54.

explorers would starve to death.¹⁴⁶ Indeed, the Inuit eventually found a big tent full of frozen corpses that “showed flesh all cut off the bones.”¹⁴⁷ For the Inuit, the supernatural served to make sense of unusual events and it seems that the explorers were simply entities subject to the spiritual field of engagement.¹⁴⁸

Then the moist reek enveloped him and huge teeth closed on either side of his face, crunching through bone and skull just forward of his ears on both sides of his head.¹⁴⁹

Professor Carl Christol, a space law expert, once noted the need for “[a] recommitment to the rule of law in world affairs, substantially influenced by a promising and relevant law for the space environment and its natural resources,” serving the needs of humanity.¹⁵⁰ The central idea behind space exploration ethics has always been the betterment of humanity. Article I, paragraph 1 of the Outer Space Treaty, notes that: “[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.”¹⁵¹ This is directly tied to the potential claims that nations could devise versus the rights of the native population.¹⁵² The flawed doctrine of discovery of centuries past empowered Europeans to justify their dominion “over the lands and native populations of the New World.”¹⁵³ These considerations offer important insights into the upcoming human expeditions into deep space that defy the odds. “What does our ability to leave our own planet imply for the future of our species? ... The important questions may never find explicit answers, but a thoughtful discussion could constructively influence decisions whose potential impact upon our species can scarcely be surmised.”¹⁵⁴ These individuals will embrace space, and for that, they will be rewarded with the knowledge that now only we can faintly imagine.

IV. Astronautical Ethics: Anticipating the Unknown

The investigation of *Terror* and *Erebus* continued first into the twentieth century and then into the twenty-first century.¹⁵⁵ Several theories were proposed as the cause of the disaster such as scurvy, hypothermia, starvation, and even lead poisoning from the solder

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ SIMMONS, *supra* note 144, at 184.

¹⁵⁰ CARL Q. CHRISTOL, *SPACE LAW: PAST, PRESENT, AND FUTURE* 495 (1991).

¹⁵¹ G.A. Res. 2222 (XXI), at art. I (Dec. 19, 1966).

¹⁵² Taylor Stanton Hardenstein, *In Space, No One Can Hear You Contest Jurisdiction: Establishing Criminal Jurisdiction of the Outer Space Colonies Tomorrow*, 81 J. AIR L. & COM. 251, 256 (2016).

¹⁵³ *Id.*

¹⁵⁴ Richard Goody, Michael McElroy & Philip Morrison, *Human Issues in Space Exploration*, 33 BULL. THE AM. ACAD. ARTS & SCI. 10, 13 (1980).

¹⁵⁵ GILLIAN HUTCHINSON, *SIR JOHN FRANKLIN'S EREBUS AND TERROR EXPEDITION: LOST AND FOUND* 149 (2017).

used to seal the canned food.¹⁵⁶ Could lead poisoning have impacted the officer's decisions during the mission?¹⁵⁷ The story portrayed by Dan Simmons was similarly illustrated in another story, years apart and completely unrelated to the Franklin expedition. The lesson here is that the future of space exploration will push the boundaries of human reason, law, and ethics into the domain of unknown situations.

Eventually, space law will have to focus on the future. It was on a Monday of February in 1975 that television audiences were horrified by one of the most disturbing science fiction episodes ever produced.¹⁵⁸ But what was so frightening and disturbing? Perhaps human compassion? Maybe a desire to truly understand those mysteries beyond our reach? The *Space 1999* episode, titled the *Dragon's Domain*, presented audiences with the following scenario: the *Ultra Probe*, a spaceship sent from the [Earth] Interplanetary Space Station to investigate the discovery of a new planet discovered in our solar system.¹⁵⁹ The four astronauts assigned to the mission never finished their task.¹⁶⁰ Although they managed to reach the new planet—also named Ultra—they deviated shortly after toward the backside of the planet to investigate a group of abandoned alien-looking ships.¹⁶¹ What could have been the reason for the agglomeration of these derelict ships? In their desire to know more, they docked with one of the ships that seemed suitable and safe.¹⁶² This is what happened next:

A wind blew through the open hatch, and strange lights and sounds came from within... A horrific creature materialized aboard the Ultra Probe...¹⁶³

What probably remained in the minds of those who watched the story as it unfolded in front of their eyes was a vision beyond understanding. The monster emitted mysterious sounds that immobilized and hypnotized the human victims.¹⁶⁴ The monster had long tentacles to ease the capture of the victims and projected a dazzling light from its sole eye.¹⁶⁵ The creature digested the astronauts alive and almost immediately spit out, one by one, their smoldering skeletons.¹⁶⁶ In the end, the last astronaut managed to separate the command module, barely escaping and traveling alone back to Earth.¹⁶⁷

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ A search online will bring up websites that discuss this particular episode, including those whose authors observe that their childhood selves were troubled after watching it for the first time. The author of this article saw the episode at the age of 9 and has remained intrigued till the present. He has only watched the episode twice, thirty years apart.

¹⁵⁹ *Space 1999: Dragon's Domain* (Incorporated Television Company broadcast Oct. 23, 1975); *Dragon's Domain*, MOONBASE ALPHA WIKI, https://moonbasealpha.fandom.com/wiki/Dragon%27s_Domain.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

A. *Ethics and Human Rights for Space Exploration*

The Dragon's Domain was a science-fiction story with a warning that strikes a chord with legal discussions about the unknown, particularly about how first contact with an alien civilization might materialize.¹⁶⁸ Just as the 1898 Tsavo Man-Eaters of Uganda or the terrible green anaconda snake of the Amazon, which swallows its victims whole, it is impossible to know what space explorers may encounter once their spaceships pass beyond the range of Earth's solar system.¹⁶⁹ In the end, survival is the primary focus of space exploration ethics. As governments and the private sector seek innovative ways to enter the second space race, it is also unclear how astronauts may behave during the most arduous situations. In essence, choosing who should die so that the others may live. This terrible choice, by now, can be understood as belonging to those explorers that will undertake expeditions in circumstances that defy normal conditions.¹⁷⁰ "These extreme environments generate problems that push the boundaries of our moral and theoretical understanding of law."¹⁷¹ Indeed, this human expansion into the unknown must be for the greater good.¹⁷² "In the 18th and 19th centuries, homicide by necessity was a relatively accepted, if gruesome, option for stranded and starving explorers. Drawing lots to determine which of the company would be killed and eaten by the remainder so that they could live was considered 'custom.'"¹⁷³ In those circumstances, it was understood that the 'doctrine of necessity' was a defense to murder.¹⁷⁴ Would space law accommodate the 'principle of necessity' or something better as a viable alternative to guide survivors? While the stories previously described here had an element of horror, none add more to the fears of the unknown than the story of Terror and Erebus.

There will be the need for new norms for space exploration to address all matters of the human body, mind, and soul. This holistic approach will be necessary to prepare astronauts in their quest for discovery. The modern law-making institutions have not resolved the issues presented in this article. From suborbital flights, mining of the Moon, traveling to Mars, and deep space voyages, the international forward-thinking that gave the world the first space law treaties no longer offers new solutions. There is plenty to be addressed, yet the treaty-making process has fallen behind. For example, it was reported that when astronaut Lisa Nowak was arrested for trying to kidnap and kill a romantic rival, more disturbing questions arose about human behavior in space.¹⁷⁵ "What would happen if an astronaut came unglued in space and, say, destroyed the ship's oxygen system or tried to

¹⁶⁸ FRANCIS LYALL & PAUL B. LARSEN, *SPACE LAW: A TREATISE* 498 (2nd ed. 2020).

¹⁶⁹ Paul Raffaele, *Man-Eaters of Tsavo*, SMITHSONIAN MAG. (Jan. 2010), <https://www.smithsonianmag.com/science-nature/man-eaters-of-tsavo-11614317/>; *Largest Snake in the Amazon: Top 10 Anaconda Facts*, RAINFOREST CRUISES (June 8, 2015), <https://www.rainforestcruises.com/guides/largest-snake-in-the-amazon-jungle-anaconda-facts/>.

¹⁷⁰ Annie Brett & Kenneth Broad, *The Litigation of Exploration*, 63 VILL. L. REV. 241, 252 (2018).

¹⁷¹ *Id.*

¹⁷² *Id.* at 263.

¹⁷³ *Id.* at 244.

¹⁷⁴ *Id.*

¹⁷⁵ The Associated Press, *NASA Has Plan If Astronauts "Lose It,"* CBS NEWS (Feb. 23, 2007, 3:43 PM), <https://www.cbsnews.com/news/nasa-has-plan-if-astronauts-lose-it/>.

open the hatch and kill everyone aboard?”¹⁷⁶ Most likely, an emergency will arise far away from the jurisdiction of any nation or space agency to enforce national laws. These issues and their resolution will belong to a separate law of space exploration. “An expanding international law of outer space will inevitably contribute to the excitement of discovering a new order of human experiences and relationships.”¹⁷⁷ The ethics of space exploration will strengthen this body of law.

Issues that will initially challenge the ethics of space law originated in the past of human exploration. Plus, the dangers of degrees will exist in space.¹⁷⁸ “Acute risks are abrupt and cause serious harm rapidly, such as a crash or explosion. Chronic risks are continuous or long term, and the harm is constant or builds up over time.”¹⁷⁹ Resolving these issues will open new doors to the norms that humanity needs. “Astrophysicist Carl Sagan may be the most responsible for the rumor that NASA astronauts carry suicide pills. Sagan, a two-time recipient of the NASA Distinguished Public Service Medal, was absolutely adamant about it, even featuring the controversial notion in his book *Contact*.”¹⁸⁰ NASA denies that this is the case,¹⁸¹ but we must wonder whether NASA would prefer to keep practices and directives secret, favoring instead not to disturb the general public with the painful reality. Undeniably, to leave a person stranded on the Moon without some kind of countermeasure would be cruel. This countermeasure or self-help measure would probably be more in the spirit of the Outer Space Treaty. “The... Treaty applies only one requirement to individual spacefarers. Article V stipulates that astronauts in space ‘shall render all possible assistance’ to other astronauts in space and on celestial bodies. This is the only personal duty required of astronauts... and stems from traditional maritime principles and law of the sea.”¹⁸² As a result, in order to identify the ethics of space exploration, space law jurists must conduct a painful analysis. This is a discussion that embraces human rights principles and the human dignity of the astronauts. Consider that there are several questions about space exploration that have been raised and ultimately result in loss of life:¹⁸³

- Should a spaceship crew adopt the standards of submarine navigation that utilize air-tight doors to seal damaged compartments and preserve the submarine as a whole?
- If a spacecraft is damaged and the remaining air is insufficient, should necessity dictate the sacrifice of an astronaut?
- Who should volunteer to die to save the others?
- How does the crew select this volunteer?
- Should the crew select the volunteer by vote?
- Should the mission commander be entrusted with the decision?

¹⁷⁶ *Id.*

¹⁷⁷ CARL Q. CHRISTOL, *SPACE LAW: PAST, PRESENT, AND FUTURE* 495 (1991).

¹⁷⁸ BRIAN PATRICK GREEN, *SPACE ETHICS* 207 (2022).

¹⁷⁹ *Id.*

¹⁸⁰ Ross Pomeroy, *Do Astronauts Carry Suicide Pills?*, REAL CLEAR SCI. (Oct. 3, 2013), <https://www.realclearscience.com/blog/2013/10/astronauts-and-suicide-pills.html>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ LYALL & LARSEN, *supra* note 168, at 133.

- How should this choice be executed? Perhaps by suicide pill?¹⁸⁴

Article 6, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR) states the following:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.¹⁸⁵

A greater explanation of these words is offered by the Human Rights Committee in General Comment #36 of 2018, where it states in paragraph #63, the following:

States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.¹⁸⁶

What should the marooned crew of the USS *Furies* do? The Human Rights Committee offers guidance that can be extrapolated to outer space. The taking of human life, the committee explains, may be appropriate under very specific conditions. For purposes of outer space activities, the committee notes that:

In order [for the deprivation of life] not to be qualified as arbitrary under ICCPR article 6... it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; ... The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.¹⁸⁷

This is the basic guidance needed by the commander of the USS *Furies*, and no doubt, in the spirit of necessity under extreme conditions. While General Comment #36 does not directly address outer space, this feels more like a simple oversight. Space law experts should not wait to draft guidance after the fact. Instead, experts should adopt new principles and guidelines with the foresight shown by the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) of the 1960s and boldly anticipate what will no doubt be needed to guide new space explorers. UNCOPUOS and the private sector stakeholders must move forward and embrace the next generation of explorers. “Ethics does not stop once the countdown reaches T-0:00. It is not the kind of thing that we will ever be done with, at least if it is the kind of ethics that reaches deep within our human lives and the things we do.”¹⁸⁸ A Futurism article from December 2021 noted that, “[a]s if

¹⁸⁴ *Id.*

¹⁸⁵ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

¹⁸⁶ *Id.* at ¶ 63.

¹⁸⁷ *Id.* at ¶ 12.

¹⁸⁸ James S.J. Schwartz & Tony Milligan, “*Space ethics*” according to *space ethicists*, SPACE REV. (Feb. 1, 2021), <https://www.thespacereview.com/article/4117/1>.

things weren't going to be tough enough for future space colonists, experts now say that they're likely going to face food troubles — and that might just turn them into cannibals.”¹⁸⁹ Hopefully, this past scenario will be avoided with new guidelines and countermeasures. It has been suggested that a good point of departure would be the work of the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), in particular, their *Recommendations of the Ethics of Outer Space*.¹⁹⁰ For example, section A, paragraph 1, notes, “[a]t present the Ethics of Science and Technology is no longer an option but a necessity.”¹⁹¹ Paragraph 2, observes that “UNESCO has set up in 1998 the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST)...”¹⁹² Section C, paragraph 6 states that “COMEST favors the view that thoughts must be given to the notion of outer space regarded as common heritage of mankind and not as a mere ‘apanage’. Outer space must be placed at the service of all humankind.”¹⁹³ Finally, section D(h) observes the need “[t]o ask outer space agencies to look into the possibility of setting up groups to study the ethics of outer space in order to guide their scientific choices.”¹⁹⁴

V. CONCLUSION

The future of space exploration is inevitable. Sooner rather than later humanity will go back to the stars and new challenges will arise simply because it is unavoidable. Human nature will intervene one way or another—mistakes will happen. Just as in the high seas, the outer space domain will present hostile environments to the brave new explorers that will venture into the great expanse. The solution rests with an accessible document drafted to offer ethical guidance to all stakeholders participating in space activities.¹⁹⁵ And we must incorporate the best lessons of the past and never underestimate those brave individuals that survived the tragedies of the *Francis Mary*, the *William Brown*, the *Mignonette*, and *HMS Terror and Erebus*. These observations and recommendations are about humanity. Human rights and human dignity must permeate future policies and standards. This article assessed the ethics of space exploration, hoping that this analysis offers guidance on the much-needed ethical standards for the modern mariner of the stars. These lessons must be applied to the outer space industry and draw inspiration from the rule of law recognized by the Outer Space Treaty and the Rescue Agreement.

¹⁸⁹ Tony Tran, *Space Colonists Will Likely Resort to Cannibalism*, *Scientist Says*, FUTURISM (Dec. 30, 2021), <https://futurism.com/space-colonists-resort-cannibalism>.

¹⁹⁰ LYALL & LARSEN, *supra* note 168, at 134.

¹⁹¹ UNESCO Executive Board, *Recommendations of the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST)*, Annex I, 165 EX/13 (2002), <https://unesdoc.unesco.org/ark:/48223/pf0000127026>.

¹⁹² *Id.* at ¶ 2.

¹⁹³ *Id.* at ¶ 6.

¹⁹⁴ *Id.* at D(h).

¹⁹⁵ Zvi Sever, *An ethical code for living in space*, ROOM (2020), <https://room.eu.com/article/an-ethical-code-for-living-in-space>.