
Through Space and Time: The Retrospective Application of Criminal Law in Space

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Where outer space is accompanied by significant challenges in ensuring the timely communication of information, the unique circumstances arising from this will complicate the realization of the right to self-determination and the rule of law across the final frontier. Herein, differences between developing circumstances across isolated human communities in space and upon other celestial bodies, combined with temporal factors, may facilitate conflict and injustice in the application of *ex post facto* laws - where central authorities enact laws which retroactively change the legal consequences of actions that were committed across isolated human communities prior to the law's enactment.

William Golding's novel *Lord of the Flies* provides a theoretical conceptualisation of the need to have laws to prevent anarchy. *Lord of the Flies* details a lawless environment that brought out the worst in humanity, providing a cautionary tale against the lack of rules and regulation that could be used to form a society. In the outer space context potential jurisdictional issues arise, where absent the formal adoption and enforcement of laws establishing crimes in space, there is the potential for actions considered to be prohibited on Earth to be permissible in space. Ambiguity and uncertainty in the application of the law is detrimental to the rule of law, and the rise of anarchy among isolated communities in space has the potential to harm innocent lives, disrupt law and order, endanger political and economic interests, and jeopardize the peaceful use of outer space.

Multiple civil society and private organisations including the [Mars One Settlement](#) organisation have evidenced an intention to place a human civilisation on Mars, while signatories to the [Artemis Accords](#) and other states have expressed the intent to inhabit a celestial body in the near future. With growing sentiment that a human settlement upon another celestial body is inevitable, the international community must assess governance frameworks and consider the potential autonomy of such settlements. This raises questions concerning the enforcement of law and order from a human rights-based approach, focused upon the established non-derogable right prohibiting the retrospective application of criminal laws. The operation of this *jus cogens* principle must therefore be clarified as a precondition to the proliferation of isolated human communities and colonies in space, to ensure the security and stability of future human settlements across the final frontier.

Self-Determination and Self-Governance of Outer Space Settlements

The notion of self-determination entails the entitlement of peoples to have control over their destiny and to be treated respectfully, elements crucial to the stability and prosperity of future human communities in outer space. The international community recognises the importance of the Right to Self-Determination (RSD) as encapsulated under Article 1(2) of the [Charter of the United Nations](#). Other international covenants have further enshrined this principle: with Article 1 of the [International Covenant on Civil and Political Rights](#) ('ICCPR') advancing the right to self-determination, which is also mirrored under Article 1 of the [International Covenant on Economic, Social and Cultural Rights](#) ('ICESCR'). RSD [is collective](#) in nature, being exercised by a group rather than an individual.



However, there exist practical limitations to the enjoyment of these rights, despite the positive obligations designed to protect these peoples. In Communication No 547/1993, the UN Human Rights Committee noted that the practical needs of development of technology and other economic and practical requirements may imply that the right to self-determination is limited on the condition of negotiation and inclusiveness. In the outer space context, it is envisioned that disruptive activities (i.e. mining and in-situ resource utilization) may have to be negotiated with the original settlers and their descendants.

Part of a nation, or peoples, right to self-determination is the freedom to pursue their economic, social and cultural development. In doing so, it is natural that the first human settlement upon a celestial body would wish to establish their own laws and methods of self-regulation in the absence of a centralized authority. In that endeavour, states [must facilitate the establishment of these systems, and not interfere in their internal affairs](#). This is not hindered by the notion that the state is operating outside of its territory, with the International Court of Justice [affirming on multiple occasions](#) that states must respect the ICCPR and human rights generally extraterritorially. Therefore, the rights of the first settlers in outer space allow for these individuals to determine the laws by which they might abide. Although individuals would have to respect international law, per Article 1 of the 1967 [Outer Space Treaty](#) (OST) and other international space law (ISL) agreements, there is little understanding of the criminal jurisdiction in outer space.

While the ideal vision of outer space governance by terrestrial governments involves the efficient, timely and quality administration of justice, temporal differences and geographical separation from isolated communities in space frustrates this vision. The timing and mechanisms which enact these laws from a centralized authority on earth may be created months or years into the establishment of the first settlement. By that time, a *Lord of the Flies*-esque situation may be present. If a crime is committed during such a transitory period where no laws have been formally enacted, it may prove tempting for these initial settlers to retroactively criminalise certain actions.

Prohibitions on the Retrospective Application of Criminal Law

Under international human rights law (IHRL), some rights are considered absolute and non-derogable - meaning that such rights cannot be limited or derogated from under any circumstance. Per Article 4(2) of the ICCPR, the protection against the retrospective application of criminal laws is considered non-derogable. Article 15 (1) of the ICCPR similarly states that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” The only exception applies when it violates general principles of law.

The case of David Hicks, an Australian man previously held in Guantanamo Bay between 2002-7 as an “enemy combatant”, proves relevant. At the time of his arrest there was no crime to prosecute Mr. Hicks under Australian law for his conduct. However, the US and UK governments proposed that Australia enact retrospective laws that were [intended only to prosecute these individuals](#). Although the Australian government ultimately rejected the idea, the US later created a Military Commission trial designed to prosecute Mr. Hicks for his crimes. This was later quashed by the US District Court ruling in [Hamdan v Rumsfeld](#), holding that the trial could not proceed. Further questions remained over whether Mr. Hicks was capable of being charged for his offences including conspiracy - which [was not an offence in international law](#) except when considered under the charge of genocide. Consequently, in February 2015, the [US Military Court](#) overturned Mr. Hicks’ conviction. The case of David Hicks exposes the dangers and consequences of the retrospective application of criminal law, particularly when the crimes did not exist in international law.

Additionally, the European Court of Human Rights (‘ECtHR’) experienced a further dilemma in *Kononov v. Latvia*. The ECtHR acknowledged [the need to look to external sources of law](#), including the elements of national and international law, to determine whether the principle of legality is upheld. Further, the ECtHR recognised the second element of the analysis - whether the individual would have appreciated that his conduct would attract criminal responsibility.



In the outer space context, this issue is complicated and writ-large where crimes may not be contemplated as illegal, or the individual may not appreciate that these crimes may attract criminal responsibility or the degree of perceived severity. Potential examples may concern the manipulation/theft/destruction of public utilities and resources such as food, water, oxygen, electricity, and so forth.

Herein, the application of retrospective laws have often been [justified](#) where there exists a “strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity.” Such reasoning has been applied in prosecuting offences related to people smuggling, historical sexual abuse, the proceeds of crime, and hoaxes using the postal service.

Additionally, international [legal experts have recently drafted and published a definition of ecocide](#). Should this definition be accepted and incorporated into the Rome Statute by the International Criminal Court (ICC), ecocide may be considered an international crime applicable to outer space activities. Consequently, currently permissible activities under international law [such as mining or ecological destruction](#) may suddenly be criminalised. The potential retrospective application of such environmental laws may be reasoned in accordance with the Common-but-Differentiated Responsibilities” Principle, and in adhering to the Principle of Intergenerational Equity.

Potential Circumvention of Self-Governance via Extraterritorial Jurisdiction

Consequently, the international community may elect to exercise extraterritorial jurisdiction across outer space and upon other celestial bodies through four principles: 1) The Nationality Principle; 2) The Territorial Principle; 3) The Passive Personality Principle; and 4) The Universal Principle. The consequence of this invites the application of criminal legislation upon offences committed across isolated human communities in space.

For example, in 2019 NASA astronaut Anne McClain was charged under US legislation for accessing her spouse’s bank records using computer systems aboard the International Space Station. Although she [was subsequently acquitted of that charge](#), the incident set a precedent in demonstrating how states could just extend their jurisdiction to circumvent the issue of retrospective application of criminal laws.

However, from a human rights-based approach, the right to self-determination would suggest that simply permitting other states to criminalise acts and practice long-arm jurisdiction over one’s citizens would stand contrary to the principle prohibiting the retrospective application of laws. Such a solution may not prove feasible where an isolated community is unable to be contacted, or where communications are not received in a timely manner - bringing into question time restrictions surrounding the statute of limitations on certain offences.

Summary

While the retrospective application of criminal laws in the outer space context may be viewed as essential by governments, temporal differences and geographical separation, combined with developing sentiments surrounding the desire for self-determination and self-governance among isolated human communities, will contribute to diverse and subjective perspectives surrounding law and order in outer space.

The retrospective application of criminal laws illustrates the broader necessity of clarifying the obligations that astronauts, human spaceflight participants, and future colonists must adhere to in upholding the rule of law. Prior to the establishment of future settlements, the creation of foundational legal documents (i.e. Constitution, Bill of Rights) by individual communities will foster a general appreciation of law and order as core elements of a stable and prosperous society.

