

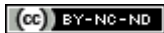
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ASTRONAUTS AND ASYLUM: INVESTIGATING THE INTERSECTION BETWEEN OUTER SPACE AND IMMIGRATION

Kaleigh Dryden*

ABSTRACT

This Note explores the emerging intersection of outer space and immigration, specifically whether the United States can lawfully adjudicate asylum claims from astronauts. Although the prospect of astronauts seeking asylum in the United States may seem farfetched, this Note concludes that the U.S. immigration system can legally accept astronauts claiming asylum. However, more than the specific conclusion of this thought exercise, the analysis herein underscores the necessity of discussing other potential scenarios in this evolving frontier to develop a comprehensive legal framework. In a world where international agreements may only partially anticipate emerging challenges, proactive legal practitioners must lay the foundation for addressing security issues in the new space age.

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INTRODUCTION

Every day, people around the world choose to leave their home country. Some leave temporarily for education, economic opportunity, or adventure. Others leave for a temporary reason that becomes permanent due to a change in circumstances at home, such as regime change or significant natural disaster. Still, others leave permanently for reasons ranging from the ordinary, such as marrying someone abroad, to the extraordinary, like fleeing political tyranny.

Unfortunately, the extraordinary is becoming more ordinary by the day, and projections anticipate that global immigration will continue to increase.¹ Over recent decades, rising global turmoil has resulted in a dramatic and steady increase in people fleeing their home country to seek refuge in another.² In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights and boldly declared, “[e]veryone has the right to seek and enjoy in other countries asylum from persecution.” Thankfully for those facing the extraordinary today, the declaration continues to safeguard the right of all people to live free from persecution.³

The unifying thread between all displaced individuals is the need for travel, often spanning thousands of miles via various modes of transportation like planes, trains, boats, or even on foot in pursuit of refuge. Consequently, modern immigration policy must consider all modes of transportation. Notably, the transportation industry is rapidly expanding to accommodate travel to, from, and through outer space, and it is therefore plausible that one day people will immigrate in this way. While mass immigration via outer space might be years away, it is prudent to contemplate the intersection of outer space and immigration before it occurs.⁴

¹ Nat’l Intel. Council, *The Future of Migration*, OFF. OF THE DIR. OF NAT’L INTEL. (Apr. 2021), <https://www.dni.gov/files/images/globalTrends/GT2040/NIC-2021-02486--Future-of-Migration--Unsourcesd--14May21.pdf> [https://perma.cc/X8DX-3SAZ].

² United Nations High Commissioner for Refugees (UNHCR), *2021 Forced Migration Report*, at 12 U.N. Doc. (June 17, 2022) (showing that the number of forcibly displaced people doubled from 2012 to 2021).

³ G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948); see *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration> [https://perma.cc/8PPW-JZ74] (last visited Dec. 16, 2022). The U.N. Universal Declaration of Human Rights is binding on the United States as customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMPAR. L. 278, 320–22 (1998), for a discussion of the declaration and its impact on U.S. and international law.

⁴ See, e.g., Enzo Bleeze & Nick Orenstein, *Opinion, The US Needs a New Immigrant Visa for the Space Industry*, THE HILL (Dec. 13, 2022, 5:00 PM), <https://thehill.com/opinion/technology/3773951-the-us-needs-a-new-immigrant-visa-for-the-space-industry/> [https://perma.cc/FZ8P-5G56].

One early point of convergence between outer space and immigration may emerge within the realm of asylum law. Given that contemporary space travel is limited to scientific researchers and the exceptionally affluent, it is more likely that the United States and other space-faring nations will sooner confront individual astronauts seeking to immigrate through the asylum system than encounter mass immigration through outer space. However, due to the celebrity status of astronauts and the globally collaborative nature of space exploration, immigration cases for astronauts carry weightier ramifications than ordinary immigration cases. To adequately protect international order, human rights, and national security, the United States must contemplate its response to this deceptively complex issue before it arises.

This Note explores the complex issue of whether it would be lawful for the United States to adjudicate immigration matters for astronauts. Part I explains the U.S. framework for adjudicating immigration cases and discusses the status of astronauts. Part II analyzes and resolves a critical conflict between existing outer space treaties and international immigration laws. Part III concludes with a discussion of future implications of space travel on immigration.

I. INTERSECTION BETWEEN IMMIGRATION LAW AND SPACE TRAVEL

A. *United States Framework for Adjudicating Refugee and Asylum Immigration Cases*

Presently, United States immigration is governed by the Immigration and Nationality Act (INA). Enacted by Congress in 1952, INA is codified in Title 8 of the United States Code (U.S.C.).⁵ Further, as created by the Homeland Security Act of 2002, United States Citizenship and Immigration Services (USCIS) is a bureau of the Department of Homeland Security⁶ and is the primary entity responsible for overseeing “lawful immigration to the United States” and naturalization of new American citizens.⁷

⁵ *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERV. (July 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> [https://perma.cc/RK65-UNF6].

⁶ Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(a), 116 Stat. 2195, 2135–2321 (Nov. 25, 2002) (codified at 6 U.S.C. § 271(a)(1)).

⁷ *Mission and Core Values*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Feb. 9, 2022), <https://www.uscis.gov/about-us/mission-and-core-values> [https://perma.cc/AN8Z-TQPP]; 6 U.S.C. § 271(b) (explaining that the

People come to the United States in a variety of ways that include both permanent and temporary resettlement. One way to permanently resettle in the United States is through the refugee and asylum process.⁸ In the United States, refugees and asylum seekers are similar but different. Specifically, “refugee” is defined in 8 U.S.C. § 1101 as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹

Within this definition, all asylum seekers are refugees but not all refugees are asylum seekers. To be granted asylum in the United States, one must be physically present in the United States and meet the above statutory definition of “refugee.”¹⁰ Conversely, to be considered for refugee status, an individual who fled their home country but is not present in the United States and is in a third temporary country must first register with the United Nations High Commissioner for Refugees (UNHCR) in the country to which they fled and then apply for protections through the Department of State’s U.S. Refugee Admissions Program.¹¹ Each year, the President determines the number of people who can be admitted to the United States as refugees.¹² No similar cap exists with respect to asylum applications that can be favorably adjudicated.¹³

The critical difference between refugees and asylum seekers is that asylum seekers apply for protections from *within* the United States, whereas refugees apply

USCIS’s functions include adjudicating petitions relating to immigrant visas, naturalization, and refugee and asylum applications).

⁸ Within the INA, Sections 1157–59 contain specific provisions related to refugees and asylum seekers. See 8 U.S.C. §§ 1157–59.

⁹ 8 U.S.C. § 1101(a)(42)(A).

¹⁰ 8 U.S.C. §§ 1158(a)(1), 1158(b)(1)(B)(i).

¹¹ *About Refugee Admissions*, U.S. DEP’T OF STATE, <https://www.state.gov/refugee-admissions/about/> [<https://perma.cc/QF6B-SL85>] (last visited Sept. 8, 2023).

¹² 8 U.S.C. § 1157.

¹³ Note the absence of a statutory limit in 8 U.S.C. § 1158, as opposed to the limits set forth in § 1157.

for protections after they leave their home country but *before they arrive* in the United States.¹⁴ Additionally, asylum can be applied for proactively or retroactively as a defense to removal proceedings.¹⁵ However, both categories seek to protect those who are suffering from, or have a well-founded fear of, persecution on the basis of one of five protected grounds—race, religion, nationality, membership in a particular social group, or political opinion—and who are unable to be protected by their own government.¹⁶ Ultimately, both processes provide individuals with the protection of the U.S. government and a pathway to U.S. Citizenship.¹⁷

B. Astronauts and Their Immigration Needs

For simplicity, in this Note, “astronaut” will mean “any personnel of a spacecraft,” and “spacecraft” will be “any craft which travels beyond the earth’s atmosphere.”¹⁸ This definition distinguishes people traveling to, from, and through

¹⁴ 8 U.S.C. § 1158(a)(1) (explaining that any alien physically present in the United States can apply for asylum).

¹⁵ *Defensive Asylum*, UNHCR, <https://www.unhcr.org/en-us/defensive-asylum.html> [<https://perma.cc/B3CX-95WX>] (last visited Dec. 16, 2022); *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGR. SERV. (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [<https://perma.cc/4FQB-QBUY>].

¹⁶ 8 U.S.C. § 1101(a)(42)(A).

¹⁷ 8 U.S.C. § 1159.

¹⁸ Is an astronaut truly any “person who travels beyond the earth’s atmosphere,” as suggested by the *Merriam-Webster Online Dictionary*? See *Astronaut*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/astronaut> [<https://perma.cc/6GVN-SZCW>] (last visited Dec. 16, 2022). As travel into space becomes more prevalent, it will be important to differentiate between the types of people traveling into space—in order to accurately ensure the “astronauts” rights and obligations are upheld. The U.S. government began this process by noting the difference between “government astronaut” and “space flight participant.” 51 U.S.C. §§ 50902(4) and (20). Moreover, due to increased space tourism, in the last year, the U.S. Federal Aviation Administration changed who qualifies as an “astronaut” for the purposes of getting wings for commercial flights. See Joey Roulette, *Jeff Bezos is Getting Astronaut Wings. But Soon, the F.A.A. Won’t Award Them*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/science/astronaut-wings-faa-bezos-musk.html> [<https://perma.cc/QQB5-7JUG>]. Critically, foundational U.N. treaties do not explicitly define “astronaut.” The seminal treaty, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, is not very helpful, as it merely provides that “States Parties to the Treaty shall regard astronauts as envoys of mankind.” G.A. Res. 2212 (XXI) art. V (Dec. 19, 1966). The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the Rescue and Return Agreement), is more helpful—yet, it still does not explicitly define “astronaut.” G.A. Res. 2345 (XXII) (Dec. 19, 1967). Note that the Rescue and Return Agreement calls on State Parties to assist the “personnel of a spacecraft” and yet in the title states that it is an agreement on the “Rescue . . . and Return of Astronauts.” *Id.* (emphasis added). It is therefore possible to deduce that “astronaut” can mean “personnel of a spacecraft.”

space from people traveling via commercial aircraft; it encompasses both civilian and military personnel traveling to outer space for government or private sector sponsored research or activities, as well as space tourists.

There are many reasons why an astronaut might want or need to use the U.S. immigration system. This Note does not discuss the ordinary immigration matters which face the space community, such as bringing a foreign astronaut to the United States to participate in a manned mission.¹⁹ Only reasons pertaining to an astronaut's need to avail themselves of specific asylum and refugee protections of the United States are discussed.

Recall that refugees apply for protection outside the United States and asylum seekers apply for protection within the United States. As the largest and most active space-faring nation,²⁰ there are two conceivable scenarios where the United States may encounter an astronaut-asylee. The first scenario is that of an astronaut who travels to the United States to participate in a space launch and who does not wish to return to their home country at the end of their mission. The second scenario arises if the United States rescues a spacecraft, terrestrially or otherwise, and brings the crew back to the United States for evaluation before sending them home. Suppose an astronaut is aboard a spacecraft that lands in or around a third country upon re-entry, and, due to some terrestrial circumstance, fears persecution should they return home. In that case, the United States may encounter an astronaut refugee through UNHCR. However, it is more likely that an astronaut would find themselves within the United States for some reason and be able to avail themselves of the asylum process. Thus, moving forward, this Note will focus specifically on astronauts seeking asylum protections, with the potential for refugees discussed further in Part III.

¹⁹ For example, Samantha Cristoforetti is an Italian astronaut from the European Space Agency who travelled to the United States to participate in the NASA-SpaceX Crew-4 mission to the International Space Station which launched from the Kennedy Space Center in Florida on April 27, 2022. Jason Costa, *NASA's SpaceX Crew-4 Underway as Freedom Journeys to Station*, NASA: NASA'S SPACEX CREW-4 MISSION (Apr. 27, 2022), <https://blogs.nasa.gov/crew-4/> [<https://perma.cc/G8F2-62UD>].

²⁰ As evidence, the United States consistently launched the most payloads of any other nation since the 1990s, has sent the most people to outer space, and remains the only space program to send humans to the moon. See *Space Environment: Payloads Launched by Country*, AEROSPACE SECURITY (Sept. 1, 2022), <https://aerospace.csis.org/data/space-environment-total-payloads-launched-by-country/> [<https://perma.cc/WKA9-GMS4>]; *Countries with Space Programs 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/countries-with-space-programs> [<https://perma.cc/3A5D-QKLF>] (last visited Dec. 16, 2022); *International Astronaut Database*, AEROSPACE SECURITY (July 5, 2022), <https://aerospace.csis.org/data/international-astronaut-database/> [<https://perma.cc/9CD5-ZHWB>].

Within these two scenarios, two categories of astronauts may find themselves needing U.S. protection. The first category encompasses astronauts participating in a launch originating in the United States. Non-U.S. citizen astronauts launching from within the United States must have traveled to and entered the United States with a valid U.S. visa. Launch crews originating in the United States will be returned to the United States even if the spacecraft re-enters and lands in another country's territory. Thus, an astronaut with a U.S. visa who needs to avail themselves of U.S. protections can do so through asylum since they already have a valid way to be present in the United States.

The second category comprises astronauts who participate in a launch originating outside of the United States and where, upon re-entry, the spaceship lands in U.S. territory or astronauts are rescued by the United States post-landing. On the surface, such astronauts could apply for protection through the domestic asylum process after entry into the United States. Nevertheless, when examining this second category within the broader framework of outer space law, an intriguing complexity arises that demands a solution to ensure the United States can effectively fulfill its international commitments.

II. CONFLICT BETWEEN EXISTING OUTER SPACE TREATIES AND INTERNATIONAL IMMIGRATION LAWS

A. *The International Aspect of Immigration Law*

Domestic asylum law is supplemented and supported by international asylum law. International law contains two important protections for asylum seekers: (1) the international right to seek asylum and (2) the non-refoulement principle.²¹ The right to seek asylum is an affirmative right of all people—echoed in domestic U.S. law—under the 1948 United Nations Universal Declaration on Human Rights, which explicitly states, “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”²²

²¹ G.A. Res. 217 A (III), *supra* note 3, art. 14; U.N. High Commissioner for Refugees, Note on the Principle of Non-Refoulement (Nov. 1997), <https://www.refworld.org/docid/438c6d972.html> [<https://perma.cc/85TZ-6M3B>].

²² G.A. Res. 217 A (III), *supra* note 3. The United States drafted and original voted in favor of the General Assembly Resolution adopting the UDHR; in 2020, the United States recommitted “to the Declaration and its foundational ideal that certain principles are so fundamental as to apply to all human beings, everywhere, at all times.” *Joint Statement on the Universal Declaration of Human Rights*, U.S. MISSION TO THE U.N. (Dec. 10, 2020), <https://usun.usmission.gov/joint-statement-on-the-universal-declaration-of-human-rights> [<https://perma.cc/9H5R-5C2F>]. U.S. asylum law, found at 8 U.S.C. § 1158, is highly inclusive and states that all people who are physically present in the United States, regardless of their legal

The non-refoulement principle does not guarantee asylum will be granted in any particular case, but it does safeguard the right to seek asylum for all people.²³ This principle protects individuals who are outside their country of origin from being returned or sent to countries where they could face persecution.²⁴ Non-refoulement is considered international law by treaty and by custom, discussed *infra*, but it is debatable whether it is a peremptory norm of international law from which no derogation can be allowed (*jus cogens*).²⁵

The UNHCR notes that the principle of non-refoulement is a “cornerstone of asylum” and “reflects the commitment of the international community to ensure to all persons the enjoyment of human rights. . . .”²⁶ In fact, scholars assert that “the protection . . . refugees are owed would be illusory if it did not include protection against forcible return.”²⁷ UNHCR recognizes that the principle of non-refoulement protects many human rights, including the rights to life, liberty and security, as well as freedom from torture and inhumane treatment.²⁸ Such rights “are threatened when a refugee is returned to persecution or danger,” and thus, the non-refoulement principle is justified.²⁹

status or how they arrived in the United States, are able to apply for asylum protections. Whether they actually receive asylum from the United States is discretionary.

²³ U.N. High Commissioner for Refugees, *supra* note 21 (“The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”).

²⁴ Tilman Rodenhäuser, *The Principle of Non-Refoulement in the Migration Context*, HUMANITARIAN LAW & POL’Y (Mar. 30, 2018), <https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/> [<https://perma.cc/YKW4-9EPY>].

²⁵ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (“[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”).

²⁶ U.N. High Commissioner for Refugees, *supra* note 21.

²⁷ Catherine Costello & Michelle Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT’L L. 273, 274 (2016) (citing Jean-François Durieux, *The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection*, in THE GLOB. REACH OF EUR. REFUGEE L., 225, 225–57 (Hélène Lambert et al., eds. 2013)).

²⁸ U.N. High Commissioner for Refugees, *supra* note 21.

²⁹ *Id.*

Those seeking asylum are also entitled to the protection of non-refoulement under international law. The UNHCR takes the position that “refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.”³⁰ Thus, non-refoulement applies “not only to recognized refugees, but those who have not had their status formally declared,” such as asylum seekers.³¹ Therefore, the United States also is obligated to not engage in refoulement with those who are seeking asylum from within the United States.³²

The prohibition on non-refoulement is found in the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³³ Although the United States was not a party to the original Convention, it later ratified the 1967 Protocol Relating to the Status of Refugees, which specifically incorporated the articles pertaining to non-refoulement contained in the original Convention, thereby binding the United States to refrain from refoulement.³⁴ The essential principles of non-refoulement are also found in other treaties, including the Convention Against Torture, the Convention on Enforced Disappearances, and the

³⁰ U.N. High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Jan. 27, 2007), <https://www.unhcr.org/4d9486929.pdf> [<https://perma.cc/WD47-7VQF>].

³¹ *Id.* at 2–3 n.9 (discussing the affirmation of the Executive Committee of UNHCR that non-refoulement applies to people who have not yet been declared refugees).

³² Although the international community recognizes non-refoulement for asylum seekers, the U.S. position is somewhat controversial. Human Rights Watch (HRW) takes the position that “[t]he MPP program conflicts with longstanding [U.S.] obligations under both national and international refugee law.” HRW justifies its position by stating that the United States adopted and codified the international definition of non-refoulement under the 1980 Refugee Act. This note does not presently discuss the MPP program or U.S. views about non-refoulement; however, that would be an interesting note to add. *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/B4T7-YNXR>].

³³ U.N. High Commissioner for Refugees (UNHCR), Convention and Protocol Relating to the Status of Refugees, art. 33 (Dec. 2010), <https://www.unhcr.org/en-us/3b66c2aa10> [<https://perma.cc/K93J-8MLF>]. The 1951 Convention Relating to the Status of Refugees was drawn up out of general concern for human rights stemming from the Universal Declaration of Human Rights. *Id.*

³⁴ See *Treaties in Force*, U.S. DEP’T OF STATE (Jan. 2020), <https://www.state.gov/treaties-in-force/> [<https://perma.cc/G3FQ-S3PV>].

International Covenant on Civil and Political Rights.³⁵ The United States further reflects the commitment to non-refoulement in the U.S. Code, whereby Congress expressly limits the ability to remove a foreign national from the United States to a country where their life or freedom might be threatened on the basis of one of the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion).³⁶

Customary international law is more difficult to deduce, as it emerges over time from state practice out of a “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (*opinio juris*).³⁷ Customary international law is binding on States that voluntarily accede to it, but much of international law does not rise to the level of *jus cogens*, a norm from which no derogation by any State is permitted.³⁸ However, the non-refoulement principle exists in three major domains of international law—human rights law, humanitarian law, and refugee law—and is “unanimously considered a customary norm.”³⁹ Non-refoulement’s *jus cogens* status is unclear, but scholars generally agree that non-refoulement either attained *jus cogens* status or is, at a minimum, “ripe for recognition as *jus cogens*.”⁴⁰ Regardless,

³⁵ Costello & Foster, *supra* note 27, at 284–85.

³⁶ 8 U.S.C. § 1231(b)(3); *cf.* Costello & Foster, *supra* note 27, at 285 (“Although the texts differ in terms of the focal harms, the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations, unless the risk in question is not sufficiently ‘real.’”).

³⁷ North Sea Continental Shelf Cases (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgement, 1969 I.C.J. 3, ¶ 77 (Feb. 20); RESTATEMENT (THIRD) THE FOREIGN REL. L. OF THE UNITED STATES § 102(2) (AM. L. INST. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

³⁸ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

³⁹ See Seline Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANK U.N.Y.B. L. 205, 213–15 (2008) (discussing how non-refoulement has been reaffirmed in several arenas of law and thus is “unanimously considered a customary norm”); *see also* U.N. High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93* (Jan. 31, 1994), <https://www.refworld.org/docid/437b6db64.html> [<https://perma.cc/A44R-FAPL>] (“The view that the principle of non-refoulement has become a rule of international customary law is based on a consistent practice combined with a recognition on the part of States that the principle has a normative character.”); *see also* Costello & Foster, *supra* note 27, at 282–86 (“[T]he evidence points overwhelmingly to the establishment of *non-refoulement* as a norm of customary international law.”).

⁴⁰ This is not a Note on the *jus cogens* status of non-refoulement, but it is worth mentioning that the United Nations International Law Commission Report in 2019 identified non-refoulement as a peremptory norm supported by ample evidence. *See* Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session,

it has been noted that giving *jus cogens* status to non-refoulement is not likely to impact the way States regard the matter, as it is already profoundly ingrained in human rights law via custom and treaty; the impact would likely be limited to affecting duties between States.⁴¹

Therefore, astronauts seeking asylum are shielded not only by domestic law but also by the international principle of non-refoulement, which guarantees their right to seek asylum in the United States and safeguards them from being forcibly returned to a perilous situation in their home country. This principle extends to all categories of astronauts, whether they arrive in the United States voluntarily for space tourism or research or are brought to the United States after landing. However, the complexities arising from international law governing State conduct in outer space add intricacies to the analysis, particularly concerning astronauts brought to the United States post-landing. Nevertheless, a favorable resolution is attainable.

B. Outer Space Law

Like immigration, both domestic and international law govern outer space. In 1958, the earliest domestic laws about outer space were promulgated under the National Aeronautics and Space Act (NASA Act).⁴² Today, most U.S. space law can

U.N. Doc. A/74/40, ¶¶ 61–65 (Aug. 20, 2019). However, during discussions leading up to the report, members of the working group pondered whether non-refoulement could truly be a peremptory norm from which no derogation was allowed because “even under the Convention relating to the Status of Refugees, [non-refoulement] was not an absolute rule, since there was an exception related to national security.” See Int’l Law Comm’n, Provisional Summary Record of the 3461st Meeting, U.N. Doc. A/CN.4/SR.3461, at 14 (June 11, 2019). Thus, it is excluded from the non-exhaustive list of norms the International Law Commission included in the Annex of their 2022 report. See Dire Tladi (Special Rapporteur), *Fifth Report on Peremptory Norms of General International Law (jus cogens)*, at 82–84, U.N. Doc. A/CN.4/747 (Jan. 24, 2022). Notably, UNHCR took the position in an advisory opinion which the International Court of Justice relied upon that non-refoulement “constitutes an essential and non-derogable component of international refugee protection” in and of itself, but also that the prohibition of torture necessarily includes non-refoulement within it. U.N. High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶ 21 (Jan. 27, 2007) (citations omitted), <https://www.unhcr.org/en-us/publications/manuals/4d9486929/unhcr-protection-training-manual-european-border-entry-officials-6-treatment.html> [<https://perma.cc/NH5J-ZVZ4>]; see Costello & Foster, *supra* note 27, at 309; see also *The Prosecutor v. Katanga*, ICC-01/04-01/07-34-05-tENG, Decision on the Application for the Interim Release of Detained Witnesses, Trial Chamber II, ¶ 30 (Oct. 1, 2013).

⁴¹ Costello & Foster, *supra* note 27, at 283–86, 310–19 (specifically, see the discussion at 315 regarding the impact of giving non-refoulement *jus cogens* status on State responsibility under the International Legal Commission’s Draft Articles on State Responsibility).

⁴² COMM. ON SCI., SPACE, AND TECH., 116TH CONG., COMPILATION OF SPACE LAW, U.S. & INTERNATIONAL SPACE LAW, DOCUMENTS AND AGREEMENTS, at IV (Comm. Print 2019),

be found in Titles 10 and 51 of the U.S. Code.⁴³ Several U.S. agencies share the burden of enforcing domestic space laws, developing new space technologies, and leveraging the outer space arena for the benefit of the United States.⁴⁴

Because outer space is a relatively new domain that lacks clarity and, thus, lacks fully crystallized customary international law specific to space, treaty law is the dominant source of international law applicable to outer space.⁴⁵ As previously discussed, customary international law evolves based on consistent practices followed by states out of a sense of legal obligation.⁴⁶ However, it is asserted that immediately upon humanity's entrance into outer space, several principles emerged, including those later codified in the Outer Space Treaty and those that may reach the status of *jus cogens*, such as the principle of the "free" use of outer space for the "common interest."⁴⁷ Regardless of the status of specific customs related to behavior

<https://www.govinfo.gov/content/pkg/CPRT-116HPRT38136/pdf/CPRT-116HPRT38136.pdf> [<https://perma.cc/8D2Y-UGS2>] [hereinafter COMPILATION OF SPACE LAWS].

⁴³ Title 10 pertains to the Armed Forces, while Title 51 pertains to National and Commercial Space Programs. *Id.* at 3. Importantly, this report references Title 42, Chapter 159, which is no longer good law. *Id.*

⁴⁴ Including the National Aeronautics and Space Administration (NASA), the Federal Communications Commission (FCC), the Department of Commerce (DoC), the National Oceanic and Atmospheric Administration (NOAA), the Department of State (DoS), the Federal Aviation Administration (FAA), and the Department of Defense (DoD). Milton Smith, *Introduction to the National Legal, Regulatory and Policy Framework*, THE L. REVS. (Dec. 9, 2020).

⁴⁵ Customary international law evolves through state practice and *opinio juris*; in outer space, a new area of law with relatively little state practice, it is difficult to determine whether new custom fully crystallized. *See generally* Ram S. Jakhu & Steven Freeland, *The Relationship Between the Outer Space Treaty and Customary International Law* (The 59th Colloquium on the Law of Outer Space at the 67th International Astronautical Congress, 2016) (citing Vladlen S. Vereshchetin & Gennady M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 22 (1985); and then citing North Sea Continental Shelf Cases (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgement, 1969 I.C.J. 3 at 219 (dissenting opinion by Lachs, J.)).

⁴⁶ North Sea Continental Shelf Cases, 1969 I.C.J. 3 ¶ 77; RESTATEMENT (THIRD) THE FOREIGN REL. L. OF THE UNITED STATES § 102(2) (AM. L. INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

⁴⁷ A peremptory norm of general international law (*jus cogens*) can be defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); *see also* Jakhu & Freeland, *supra* note 45, at 6 (citing North Sea Continental Shelf Cases, 1969 I.C.J. 3 at 219, 230 (dissenting opinion by Lachs, J.)) ("To give a concrete example: the first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how

in outer space, general principles of customary international law apply to outer space just as they apply to any other area of law.

The five major United Nations treaties governing use and exploration of outer space entered into force between 1967–1984.⁴⁸ For this Note, only three are relevant to the discussion on asylum for astronauts: (1) the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty); (2) the Agreement on the Rescue of Astronauts, the Return of Astronauts and Return of Objects Launched into Outer Space (the Rescue Agreement); and (3) the Convention on Registration of Objects Launched Into Outer Space (the Registration Convention).⁴⁹ Adding to the body of international law governing outer space are five United Nations General Assembly Resolutions making declarations on legal principles, satellites and broadcasting, remote sensing from outer space, nuclear power sources in outer space, and international cooperation.⁵⁰

The Outer Space Treaty entered into force in October 1967.⁵¹ The first of its kind, this treaty is largely considered the cornerstone of international space regulation—cementing the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space into international law and declaring that “exploration and use of outer space . . . shall be carried out for the benefit and interests of all countries.”⁵² Aside from setting forth general principles of space exploration, the Outer Space Treaty requires State Parties to render assistance in the event of “accident, distress, or emergency landing on the territory

the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time.”).

⁴⁸ U.N. Office for Outer Space Affairs, *Space Law Treaties and Principles*, U.N. Doc. ST/SPACE/61/Rev.2 (2017).

⁴⁹ Not discussed is the Convention on International Liability for Damage Caused by Space Objects (the Liability Convention), the Convention on Registration of Objects Launched into Outer Space (the Registration Convention), and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement). *Id.*

⁵⁰ *Id.*

⁵¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

⁵² *Id.* art. I; see Sophie Goguichvili et al., *The Global Legal Landscape of Space: Who Writes the Rules of the Final Frontier?*, WILSON CTR. (Oct. 1, 2021), <https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier> [<https://perma.cc/QDL2-E2B3>]; see G.A. Res. 1962 (XVIII) (Dec. 13, 1963).

of another State Party or on the high seas.”⁵³ It further requires that “[w]hen astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.”⁵⁴

The Rescue Agreement entered into force less than one year later with the intent that it “develop and give further concrete expression” to the rescue and return duties enumerated within the Outer Space Treaty.⁵⁵ The Rescue Agreement emphasizes the importance of assisting astronauts in times of distress and cemented the requirement for State parties to do so, stating:

If, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of a Contracting Party, [the Contracting Party] shall immediately take all possible steps to rescue them and render them all necessary assistance.⁵⁶

The Rescue Agreement extends the assistance requirement to cover not only astronauts physically present in space, but those who have landed back on Earth either on land or in the sea.⁵⁷ Article 4 reiterates the return language of the Outer Space Treaty by stating, “personnel . . . shall be safely and promptly returned to representatives of the launching authority.”⁵⁸

Notably, the Rescue Agreement and the Outer Space Treaty are not consistent as to where Parties should return astronauts upon rescue; the Outer Space Treaty specifies the “State of registry of their space vehicle,” while the Rescue Agreement specifies the “representatives of the launching authority.”⁵⁹ However, for the purposes of rescue and return, these authorities are the same. According to the Rescue Agreement, “[f]or the purposes of this Agreement, the term ‘launching authority’ shall refer to the State responsible for launching, or, where an international

⁵³ *Id.* at art. V.

⁵⁴ *Id.*

⁵⁵ See G.A. Res. 2345 (XXII) at 121 (Dec. 19, 1967).

⁵⁶ *Id.* art. 2.

⁵⁷ *Id.* art. 3 (even when astronauts land in territory not under control of a contacting party, the nearest contracting party should help out).

⁵⁸ *Id.* art. 4.

⁵⁹ *Id.*; Outer Space Treaty, *supra* note 51, art. V.

intergovernmental organization is responsible for launching, that organization”⁶⁰ Under the Registration Convention, the State responsible for launching must list the space object being launched on its registry, making it the “State of registry.”⁶¹ Thus, read together, for rescue and return, the “State of registry” and “launching authority” are the same.⁶² This distinction is crucial because it could contain critical implications for which States may seek remedies against rescuing Parties who do not return astronauts “safely and promptly” to their launching authority.⁶³

III. INTERPRETATION OF GOVERNING LAWS AND RESOLUTION OF CONFLICT

Because “safe and prompt” return is mandated, the question becomes whether the Outer Space Treaty and Rescue Agreement compels rescuing States to engage in refoulement when presented with an astronaut who does not wish to return to their launching authority. Determining State responsibilities under a treaty requires interpretive analysis. Domestically, “U.S. courts have final authority to interpret [an] agreement’s meaning.”⁶⁴ However, this interpretive process is guided by the customary international law codified in the Vienna Convention on the Law of Treaties (the Vienna Convention).⁶⁵

Adopted in 1969 and entered into force in 1980, the Vienna Convention is the international treaty regarding the making and breaking of treaties; specifically, it provides “a substantive legal framework on drafting treaties, interpreting vague or

⁶⁰ G.A. Res. 2345, *supra* note 55, art. 6.

⁶¹ G.A. Res. 3235 (XXIX), art. I (Sept. 15, 1976).

⁶² Critically, the Registration Convention has a different definition of “launching State” than the Rescue Agreement, which could indicate that a non-launching State could procure a launch from a third party/State and be considered the “launching authority.” *Id.* art. I. For the purposes of this Note, such a distinction is vital, as it has more to do with registering space objects than rescuing them.

⁶³ Moreover, the Outer Space Treaty states that the State of registry “retain[s] jurisdiction and control” over objects and personnel “while in outer space or on a celestial body.” Outer Space Treaty, *supra* note 51, art. VIII.

⁶⁴ CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, at 21 (2018) (first citing *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006), and then citing *Air France v. Saks*, 470 U.S. 392, 397 (1985)).

⁶⁵ RESTATEMENT (FOURTH) THE FOREIGN RELS. L. OF THE UNITED STATES § 306, cmt. A (AM. L. INST. 2018) (“Although the United States has not ratified the Vienna Convention on the Law of Treaties, these articles are now generally accepted as reflecting customary international law, including by the United States.”).

ambiguous language, withdrawing from treaties, hostilities, disagreements, and amending, ratifying, or making reservations to treaties.”⁶⁶ Apart from being internationally applicable to State Parties as treaty law, the Vienna Convention is widely considered customary international law and thus, is binding on all States, regardless of ratification status.⁶⁷ Notably, Articles 31 and 32 of the Vienna Convention regarding treaty interpretation have been expressly recognized by the United States as reflecting customary international law and therefore, are applicable in this context.⁶⁸

The Restatement Fourth of the Foreign Relations Law of the United States (the Restatement) provides insight into U.S. interpretation methods and follows the Vienna Convention rules of interpretation near verbatim.⁶⁹ Specifically, the Restatement and the Vienna Convention provide that “[a] treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.”⁷⁰ This approach combines three methods of treaty interpretation—objective, subjective, and teleological.⁷¹ However, the “treaty interpretation must rely primarily on the terms of a treaty while context and the treaty’s object and purpose must inform its meaning.”⁷² U.S. Supreme Court practice follows this interpretation pattern, beginning with examining the text and context of the treaty, then moving to a consideration of the object and purpose of the

⁶⁶ COMPILATION OF SPACE LAWS, *supra* note 42, at 487; see Karl Zemanak, *Vienna Convention on the Law of Treaties*, U.N. AUDIOVISUAL LIBR. OF INT’L L. (Jan. 2009), <https://legal.un.org/avl/ha/vclt/vclt.html> [<https://perma.cc/3S46-B5M7>]; see Paul V. McDade, *The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969*, 35 INT’L & COMP. L.Q. 499, 500 (July 1986).

⁶⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see RESTATEMENT (FOURTH) THE FOREIGN RELS. L. OF THE U.S. § 102, cmt. d. (AM. L. INST. 2018) (discussing how customary international law becomes binding on states through acquiescence and positive state practice, except for states which openly indicate dissent from an emerging custom, in which case it will not be bound by that rule “even after it matures”).

⁶⁸ See RESTATEMENT (FOURTH) THE FOREIGN RELS. L. OF THE U.S. § 306 (AM. L. INST. 2018).

⁶⁹ Compare *id.* with Vienna Convention on the Law of Treaties arts. 31–33 May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

⁷⁰ RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306, cmt. A (AM. L. INST. 2018) (quoting Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980)).

⁷¹ See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 577–78 (2010).

⁷² *Id.* at 578 (note that in n.76, the author comments that where it exists, subsequent actions and state practice should “count for more than prior drafting history”).

agreement, and finally, to an examination of extratextual materials, if necessary.⁷³ Therefore, such a process will be used to examine the U.S. requirements under the Outer Space Treaty and Rescue Agreement; the following sections will examine the text, context, object and purpose, and extratextual evidence associated with the treaty.

A. *The Text*

The Outer Space Treaty explains that “[w]hen astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.”⁷⁴ This language is reiterated in the Rescue Agreement: “personnel . . . shall be safely and promptly returned to representatives of the launching authority.”⁷⁵ The Vienna Convention provides that “[a] special meaning shall be given to a term if it is established that the parties so intended[;],” however, neither “safely” nor “promptly” are defined in either agreement.⁷⁶ U.S. canons of statutory interpretation confirm this, requiring courts to determine whether a word is being used “in a narrower, specialized sense or as a term of art” or whether it is being used in the “‘ordinary,’ ‘general dictionary’ sense.”⁷⁷ Neither “safely” nor “promptly” is defined in either agreement; thus, the ordinary meaning of the terms must be ascertained.

In each agreement, “safely” and “promptly” are both adverbs modifying “returned.” In order to apply the ordinary meaning, it is appropriate to look to the dictionary to define the words at issue.⁷⁸ “Promptly” is defined by *Merriam-*

⁷³ CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, at 21–22 (2018) (first quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985); then quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and then quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006)).

⁷⁴ Outer Space Treaty, *supra* note 51 art. V.

⁷⁵ G.A. Res. 2345, *supra* note 55, art. 4.

⁷⁶ Vienna Convention on the Law of Treaties art. 31(4), May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980).

⁷⁷ LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014).

⁷⁸ *Id.* at 8 (“Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, frequently derived from the dictionary.”) (first citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); then citing *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012); then citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); and then citing *Comm’r v. Soliman*, 506 U.S. 168, 174 (1993)).

Webster's Online Dictionary as “without delay” or “very quickly or immediately.”⁷⁹ In looking at the requirement to “safely and promptly” return spacecraft personnel to their State of origin, it appears that the “promptly” requirement would limit the rescuing State’s ability to adjudicate an asylum claim due to the time-consuming nature of any such adjudication. According to the Transactional Records Access Clearinghouse at Syracuse University, the average wait time for an asylum case adjudication is, on average, 1,621 days, or four and a half years.⁸⁰ Though scholarship and case law is lacking on the subject, it is unlikely any State would see a wait time of four and a half years as meeting the “promptly” requirement under the ordinary meaning of the word. But because they are coupled, “promptly” must be interpreted in light of “safely.” Thankfully for astronauts everywhere, the “safely” requirement alone effectively frees States from the apparent restriction imposed by “promptly” under a good-faith interpretation.

“Safe” is defined by *Merriam-Webster's Online Dictionary* as “free from harm or risk” and “affording safety or security from danger, risk, or difficulty.”⁸¹ The “safely” requirement, as used to modify “returned,” indicates that States return astronauts to their State of origin in a manner which is “free from harm or risk.”⁸² Not only must States act in a safe manner when returning astronauts to their State of origin, but this ordinary meaning of “safely” also indicates that States have a responsibility to refrain from returning astronauts to a State of origin where they might be unsafe, aligning with the non-refoulement principle.⁸³ Thus, the ordinary meaning of the treaty text indicates that States are not required to promptly return an

⁷⁹ *Promptly*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/promptly> [<https://perma.cc/EJ59-Z4XQ>] (last visited Nov. 20, 2022); *also see* *Discuillo v. Allstate Ins. Co.*, No. 3:17-CV-234 (KAD), 2019 WL 499255, at *3 (D. Conn. Feb. 8, 2019) (looking to the dictionary to define “promptly” as requiring immediate action).

⁸⁰ *A Mounting Asylum Backlog and Growing Wait Times*, TRAC IMMIGRATION (Dec. 21, 2021), <https://trac.syr.edu/immigration/reports/672/> [<https://perma.cc/LA79-5HHP>].

⁸¹ *Safe*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/safe#dictionary-entry-2> [<https://perma.cc/B9UL-BVJT>] (last visited Nov. 18, 2022).

⁸² *Id.*; *Adverb*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/safe> [<https://perma.cc/MZD8-V6HD>] (last visited Nov. 18, 2022); Outer Space Treaty, *supra* note 51, art. V; G.A. Res. 2345, *supra* note 55, art. 2, at 121–22.

⁸³ It is possible that the ordinary meaning of “safely” does *not* include making sure that astronauts return to a safe place. For example, “Jane was returned safely home” is a sentence where “safely” is used. “Safely” could be interpreted two ways: (1) Jane was returned home in a safe manner (where it is uncertain whether Jane was returned to a safe home) or (2) Jane was returned home in a safe manner *and* to a safe location (where it is presumed that Jane was returned in a safe manner to a safe home).

astronaut if it would be in an *unsafe* manner, allowing the lawful adjudication of an astronaut asylum claim.

B. *The Context*

It is necessary to examine the words in the context of the treaties in question to decide whether this interpretation of “safely and promptly” is reasonable.⁸⁴ The context is comprised of the whole text, the preamble and annexes, and any other agreements or instruments adopted in connection with the treaty by all Parties to the treaty.⁸⁵ Additionally, subsequent agreements between the parties regarding interpretation of the treaty or applicability of its provisions, subsequent practice in the application of the treaty, and relevant rules of international law should be considered.⁸⁶

The preamble of the Outer Space Treaty affirms the importance of international cooperation in the peaceful exploration and use of outer space and recognizes that the treaty is an essential step in developing the rule of law in a new area of human endeavor.⁸⁷ The treaty indicates that States should use outer space for peaceful purposes that benefit humankind and that astronauts should be regarded as “envoys of mankind.”⁸⁸ The text of the treaty itself takes on a hopeful tone, likely derived from the inspirational moment at the time of drafting. The Outer Space Treaty was clearly written with international cooperation and goodwill in mind, as Article IX states the following:

In the exploration and use of outer space . . . States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct

⁸⁴ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980) (instructing interpreters to examine ordinary meaning in light of the context).

⁸⁵ *Id.*; RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 306(2), cmt. Fb. (AM. L. INST. 2018).

⁸⁶ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980); RESTATEMENT (FOURTH) THE FOREIGN RELS. L. OF THE U.S. § 306(3), cmt. F. (AM. L. INST. 2018).

⁸⁷ Outer Space Treaty, *supra* note 51, pmb., at 13.

⁸⁸ *Id.* arts. I, IV, V, at 13–14.

all their activities in outer space . . . with due regard to the corresponding interests of all other States Parties⁸⁹

There are no explicit provisions in the Outer Space Treaty or Rescue Agreement indicating how their provisions should be interpreted or applied, nor are there any subsequent agreements or practices between the Parties on interpretation or application. However, Article III of the Outer Space Treaty does require that “States Parties to the Treaty shall carry on activities in the exploration and use of outer space . . . in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.”⁹⁰ In light of the foregoing, it is possible to see that the textual interpretation conforming to the principle of non-refoulement is proper, as the non-refoulement principle is minimally universally accepted international custom, if not *jus cogens*.⁹¹ Moreover, the United States has noted that “the incidences of existing treaties violating later-emerging *jus cogens* are exceedingly rare.”⁹²

In that context, it is unlikely that drafters of the Outer Space Treaty would have contemplated a situation in which a State must forcibly return an astronaut to a country where they face danger upon being rescued. Similarly, it is unlikely that the drafters of the Rescue and Return Agreement would have created such strict requirements for States to render all possible assistance to astronauts in extraterrestrial danger, only to return them to a dangerous terrestrial situation.⁹³ It is also unlikely that even if non-refoulement were to crystallize fully into *jus cogens*, neither the Outer Space Treaty nor Rescue Agreement would violate the principle. In this manner, the context confirms the textual reading of “safely and promptly” and, thus, conforms with the principle of non-refoulement.

⁸⁹ *Id.* art. IX, at 14. As further evidence of the desire for cooperation and goodwill, the Preamble to the Outer Space Treaty states that Parties believed that “co-operation [regarding outer space] will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples.” *Id.* at 13.

⁹⁰ *Id.* art. III, at 13–14.

⁹¹ See *supra* note 40 for a discussion on the debate on non-refoulement.

⁹² UNITED STATES, COMMENTS U.S. ON INT’L L. COMM’N’S DRAFT CONCLUSIONS ON PEREMPTORY NORMS GEN. INT’L L. (*JUS COGENS*) AND DRAFT ANNEX (2021), https://legal.un.org/ilc/sessions/73/pdfs/26nglish/jc_us.pdf [<https://perma.cc/8R5V-HB4H>].

⁹³ See generally G.A. Res. 2345, *supra* note 55.

C. *The Object and Purpose*

The final consideration required under the Vienna Convention, Restatement, and U.S. Supreme Court practice is the object and purpose of the treaty.⁹⁴ The “object and purpose” is recognized as “a term of art without a workable definition.”⁹⁵ Ultimately, scholars note that “it refers to a treaty’s essential goals . . . [or] the essence of a treaty.”⁹⁶

The clear purpose of the Outer Space Treaty is to codify certain principles as to behavior in outer space to develop “the rule of law in this new area of human endeavour” and “further the purposes and principles of the Charter of the United Nations.”⁹⁷ The purpose of the Rescue Agreement is to “develop and give further concrete expression” to the duties enumerated in the Outer Space Treaty regarding “the rendering of all possible assistance to astronauts[,] . . . the prompt and safe return of astronauts, and the return of objects launched into outer space[.]” as well as to “promote international co-operation in the peaceful exploration and use of outer space.”⁹⁸

Neither purpose speaks explicitly to the refoulement of astronauts. However, it is worth noting that the treaties prioritize “safe” return over “prompt” return and do not run contrary to the stated purposes.⁹⁹ Thus, while the object and purpose do not confirm the textual reading, it can be argued that the textual interpretation—which emphasizes “safe” return over “prompt” return—is reasonable.

D. *Extratextual Confirmation*

The Vienna Convention provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the

⁹⁴ See RESTATEMENT (FOURTH) THE FOREIGN RELS. L. OF THE UNITED STATES § 306(1) (AM. L. INST. 2018); Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980); see also CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, at 21–22 (2018).

⁹⁵ Jonas & Saunders, *supra* note 71, at 567.

⁹⁶ *Id.*

⁹⁷ Outer Space Treaty, *supra* note 51, pmbl., at 13.

⁹⁸ G.A. Res. 2345, *supra* note 55, pmbl., at 121.

⁹⁹ See *id.*

application of Article 31.”¹⁰⁰ The meaning derived from application of Article 31 is that the Outer Space Treaty and Rescue Agreement do not mean to subvert the principle of non-refoulement by requiring State Parties to “safely and promptly” return astronauts to their launching authority post-rescue; the primary duty is to return astronauts in a safe manner and to a safe place.

To confirm such an interpretation, an analogy can be made to the law of the sea, maritime law, which heavily influenced the development of outer space laws.¹⁰¹ In the development of laws pertaining to outer space, analogies are more frequently made to the law of the sea rather than to the law of the air.¹⁰² As Arthur C. Clarke notes in, *Profiles of the Future: An Inquiry into the Limits of the Possible*, “[s]pace flight has . . . very little in common with aviation; it is much closer in spirit to ocean voyaging. . . .”¹⁰³ In fact, although initially appealing, the analogy between airspace and outer space fell out of favor with legal bodies in the 1960s, specifically during the preparatory work for the Outer Space Treaty; it was subsequently overtaken with analogies to the law of the sea.¹⁰⁴ In part, this was because of the incompatibility of aviation law’s division of airspace with the nature of outer space air space, where sovereignty springs up from the territorial boundaries of a State; however, “lawyers and governments alike had trouble conceiving how a country might claim sovereignty over a vacuum whose location was constantly shifting” due to orbital

¹⁰⁰ Vienna Convention on the Law of Treaties art. 33, at 13, May 23, 1969, 1155 U.N.T.S. 33 (entered into force Jan. 27, 1980).

¹⁰¹ M.J. Peterson, *The Use of Analogies in Developing Outer Space Law*, 51 INT’L ORG. 245, 254 (1997) (“Debate in the United Nations (UN) General Assembly’s First Committee in 1958 revealed that the high seas analogy had wider support among governments [than the analogy to laws of national airspace].”).

¹⁰² See, e.g., Paul B. Larson, *Is There a Legal Path to Commercial Mining on the Moon?*, 83 U. PITT. L. REV. 1, 18 n.113, 46 n.339 (2021) (describing how Law of the Sea negotiations and international administration protocols regarding deep ocean seabed mining influenced the development of the Moon Agreement and provisions on the commercial use of space resources). See generally Carol R. Buxton, *Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property*, 69 J. AIR L. & COM. 689 (2004) (describing the “common heritage of mankind” concept as common to both outer space and the ocean but not with air space). But see generally Elizabeth Mendenhall, *Treating Outer Space Like a Place: A Case for Rejecting Other Domain Analogies*, 16 INT’L J. SPACE POL. & POL’Y 97 (2018) (describing why analogies to other domains should not be used for the development of outer space law).

¹⁰³ ARTHUR C. CLARKE, *PROFILES OF THE FUTURE: AN INQUIRY INTO THE LIMITS OF THE POSSIBLE* 89 (Harper & Row 1962).

¹⁰⁴ Peterson, *supra* note 101, at 255–56.

mechanics and the way spaceflight must necessarily work.¹⁰⁵ As such, the law of the sea provided a more compatible framework that accounted for the “vastness of space and the difference between the near-vacuum of space itself and the more solid, natural celestial bodies found within it,” which is comparable to a vast ocean—largely unexplored with solid continents and islands found within.¹⁰⁶ Therefore, analogizing outer space rescue operations to maritime rescue is not unfounded.

Maritime search and rescue’s longstanding history has resulted in robust laws developed to regulate it, including treaties, norms, and judicial decisions. The International Maritime Organization (IMO) is the United Nations body responsible for maritime safety, among other issues.¹⁰⁷ In 1979, the IMO worked with UN Member States, including the United States, to create the International Convention on Maritime Search and Rescue (the “SAR Convention”).¹⁰⁸ The SAR Convention set forth the international obligation to render assistance at sea and was amended in 2004 to clarify “existing procedures to guarantee that persons rescued at sea will be provided a place of safety regardless of their nationality, status or the circumstances in which they are found.”¹⁰⁹ This amendment also added Paragraph 3.1.9, which requires that the Party responsible for the search and rescue region ensures “survivors assisted are disembarked from the assisting ship and delivered to a place of safety . . . to be effected as soon as reasonably practicable.”¹¹⁰

The same day as the SAR amendment’s enactment, an IMO resolution was released which provided further guidance and clarified what was meant by

¹⁰⁵ *Id.* at 268.

¹⁰⁶ *Id.* at 252. It is also worth mentioning that the analogy of outer space to Antarctica developed once man reached the moon and found the solid lunar surface to be more comparable to Antarctica than to islands. *Id.* at 257–59. However, the ocean was still the favored analogy for the vacuum of space itself, even as the Antarctic-analogy became the prominent analogy for solid masses. *Id.* at 260.

¹⁰⁷ *Brief History of IMO*, INT’L MARITIME ORG., <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx> [<https://perma.cc/9PGD-R93Z>] (last visited Sept. 28, 2022). The Maritime Safety Committee (MSC) is the body within the IMO which deals with maritime safety and thus, all resolutions discussed in this note were passed by the MSC.

¹⁰⁸ International Convention on Maritime Search and Rescue, pmbl., at 119 n.1, Apr. 27, 1979, 1405 U.N.T.S. 119 (entered into force June 22, 1985). The SAR Convention is a treaty in force for the United States. *See Treaties in Force*, *supra* note 34, at 29 (Jan. 1, 2020), <https://www.state.gov/treaties-in-force/> [<https://perma.cc/K8J4-8QL9>].

¹⁰⁹ International Maritime Organization Res. 155(78), at 1 (May 20, 2004).

¹¹⁰ *Id.* ¶ 3.1.9.

“ensur[ing] survivors” were delivered to a “place of safety. . . .”¹¹¹ The resolution, “Guidelines on the Treatment of Persons Rescued at Sea,” enshrined the non-refoulement principle into maritime search and rescue and clarified that a “place of safety” is both “a location where the rescue operations are considered to terminate” and “a place where the survivors’ safety of life is no longer threatened. . . .”¹¹²

No such clarifying resolution has been passed regarding the definition of “safely and promptly” for the Outer Space Treaty or the Rescue Agreement. However, the SAR Convention provides guidance for the interpretation of “safe” and “prompt” within the outer space context by prioritizing the disembarkation at a place of safety and adding a reasonableness aspect to the timeframe in which disembarkation must take place.¹¹³ The SAR Convention was enacted decades after the Outer Space Treaty and Rescue Agreement. Nevertheless, because the preparatory work for laws in outer space historically drew an analogy from the law of the sea, we can reasonably parallel rescue at sea in this context to conclude that returning an astronaut to a potentially hazardous location would violate international law, notwithstanding the requirement to return them “promptly” to their launching authority. Additionally, it is unlikely that State Parties would view a difference between adherence to non-refoulement in one rescue arena (the sea) and another, similarly-situated arena (outer space). Thus, this aspect of the preparatory work confirms the textual interpretation of the “safely and promptly” requirement.

Applying the Vienna Convention’s interpretation method, it is possible to see that a textual reading of the “safely and promptly” requirement would not undermine the international principle of non-refoulement. In fact, both the Outer Space Treaty and the Rescue Agreement emphasize “safe” return over “prompt” return, as evidenced by the objective text, the subjective context, the teleological analysis, and the examination of an extratextual analogy to the law of the sea. This analysis demonstrates that if the United States were to face an astronaut’s claim for asylum, it would be permitted to hear and adjudicate the claim without violating the Outer Space Treaty and Rescue Agreement requirement to return the astronaut “safely and promptly” to its launching authority.

IV. FUTURE IMPLICATIONS

The analysis undertaken in Part III is important in the broader context of issues arising in outer space. Such an analysis of whether the United States can lawfully

¹¹¹ *Id.* ¶¶ 5.1–5.2.

¹¹² *Id.* ¶ 6.12.

¹¹³ *Id.* ¶ 3.1.9.

hear and adjudicate astronaut asylum claims is relatively simple; however, more complex matters could arise in the future. This Note is not meant to indicate that the United States is likely to face an impending refugee crisis from outer space, but instead, calls attention to the fact that there are many unexplored legal questions regarding expansion into outer space.

For example, plans are in the works for the establishment of permanent lunar bases by the United States and China.¹¹⁴ Even though the establishment of such bases will not occur for several years in the future, consider a world where dozens or hundreds of people from all nations and religions live and work on the moon. In such a future scenario, consider what occurs when a hypothetical astronaut, Astronaut X, belongs to an ethnic minority from Country Y. Astronaut X's ethnic group has faced centuries of marginalization. Country Y, being a space-faring nation, launched Astronaut X and their crew to the moon 200 days ago. Since Astronaut X's departure, the persecution of their ethnic group has dramatically escalated, to the extent that the international community is now deliberating whether the events unfolding in Country Y should be classified as genocide. The return of Astronaut X's crew to Earth is imminent, and conditions in Country Y are unlikely to improve by the time Astronaut X returns. Consequently, Astronaut X approaches the U.S. lunar base seeking asylum because they fear that, upon landing back in Country Y, they will be in danger.

As humanity expands its extraterrestrial footprint to the moon, Mars, and beyond, such a hypothetical is not outside the realm of possibility. How would the United States handle such a case? Would the United States make the astronaut return to Country Y, or could the United States allow Astronaut X to ride back to Earth with the U.S. crew? Could the United States grant asylum status while Astronaut X is still on the moon?¹¹⁵ Unless the United States and other space-faring nations work today

¹¹⁴ Meghan Bartels, *NASA Unveils Plan for Artemis 'Base Camp' on the Moon Beyond 2024*, SPACE.COM (Apr. 3, 2020), <https://www.space.com/nasa-plans-artemis-moon-base-beyond-2024.html> [<https://perma.cc/X374-BSG2>]; Tereza Pultarova, *Russia, China Reveal Moon Base Roadmap but No Plans for Astronaut Trips Yet*, SPACE.COM (June 17, 2021), <https://www.space.com/china-russia-international-lunar-research-station> [<https://perma.cc/JMJ4-KMBA>].

¹¹⁵ Likely not. Presently, in order to be granted asylum status, one must meet the physical presence requirement set out in 8 U.S.C. § 1158(a)(1). Because lunar bases would not likely be considered a "U.S. territory," an astronaut could not affirmatively be granted asylum while still on the moon. *See* Outer Space Treaty, *supra* note 51, art. II ("Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."). This likely prohibits the United States from claiming that the moon land it builds its bases on as "U.S. territory." *See also* Larson, *supra* note 102, at 12–13 (discussing how no state can own the Moon due to the provisions in the Outer Space Treaty).

to cement the laws that will apply tomorrow, conflict over how to handle such issues could easily become a flashpoint for international disaster.¹¹⁶

Asylum seekers arriving via space shuttle is not the only intersection between outer space and immigration law. Take, for instance, the prevalent use of outer space for reconnaissance. With the development of Synthetic Aperture Radar (SAR), current space technology can see conditions on Earth at all times of day and in all weather conditions.¹¹⁷ Could government law enforcement lawfully leverage SAR data to track and prohibit migrants from crossing borders or would such practice run afoul of the non-refoulement principle and the charge in international treaty law to use space for peaceful purposes? Such questions extend beyond the scope of this Note. However, the international community must proactively determine the extent to which space technologies can be used as they proliferate.

More relevant today, an astronaut claiming asylum from a nation they travel to or are rescued by is likely to create or exacerbate international tensions in a way that traditional asylum seekers do not. Today, the astronauts in outer space include seven individuals on the International Space Station (three from Roscosmos, the Russian space agency, three from NASA, and one from the European Space Agency), and three individuals at Tiangong, the Chinese space station.¹¹⁸ At present, relations between Russia, China, and the United States are consistently on edge, and an

¹¹⁶ Tensions already exist terrestrially between the United States and China and outer space is another domain of competition which could easily flare up as both countries race back to the Moon. *See, e.g.*, William J. Broad, *How Space Became the Next "Great Power" Contest Between the U.S. and China*, N.Y. TIMES, <https://www.nytimes.com/2021/01/24/us/politics/trump-biden-pentagon-space-missiles-satellite.html> [https://perma.cc/FW2J-G8TL] (last updated May 6, 2021); *see also* Bryan Bender & Jacqueline Klimas, *Space War is Coming—and the U.S. is Not Ready*, POLITICO (Apr. 6, 2018, 5:11 AM), <https://www.politico.com/story/2018/04/06/outer-space-war-defense-russia-china-463067> [https://perma.cc/2K8Q-H443].

¹¹⁷ Ricardo Rendon Cepeda, *Applications of Synthetic Aperture Radar Satellites to Environmental Monitoring*, CTR. FOR STRATEGIC INT'L STUD. (Nov. 9, 2020), <https://www.csis.org/blogs/technology-policy-blog/applications-synthetic-aperture-radar-satellites-environmental> [https://perma.cc/9NRG-4DRW] (describing Synthetic Aperture Radar technology and its ability to "see" through clouds, smoke, vegetation, snow, sand, and other conditions to monitor environmental changes in an unprecedented manner). *See* Kelsey Herndon et al., *What is Synthetic Aperture Radar?*, EARTHDATA, <https://www.earthdata.nasa.gov/learn/backgrounders/what-is-sar> [https://perma.cc/4GYT-2WTQ] (last visited Sept. 30, 2022), for general information about Synthetic Aperture Radar.

¹¹⁸ Mike Wall, *Three Chinese Astronauts Arrive at Tiangong Space Station for Six Month Stay*, SPACE.COM (June 5, 2022), <https://www.space.com/china-shenzhou-14-mission-arrives-tiangong-space-station> [https://perma.cc/3KJ9-L4J7]; *Expedition 67*, NASA, https://www.nasa.gov/mission_pages/station/expeditions/expedition67/index.html [https://perma.cc/E2PY-2M7A] (last updated Sept. 29, 2022).

astronaut from Russia or China attempting to seek asylum in the United States could set off a chain reaction for which the world is unprepared. Therefore, even though the United States appears to be legally justified in hearing an astronaut's asylum case, the United States should contemplate the ways it would mitigate international tensions, should these types of asylum cases arise.

CONCLUSION

In conclusion, the United States can lawfully hear and adjudicate asylum claims from astronauts. Although it appears that there is a conflict between international human rights obligations and international outer space obligations, this conflict is easily overcome through interpreting relevant provisions through the Vienna Convention on the Law of Treaties. The preceding analysis focused on the context and purpose of the treaties, as well as the analogy to the law of the sea, confirms the textual interpretation permitting a rescuing State to prioritize a "safe" return over a "prompt" return. Of note, the Outer Space Treaty subjects all activities in outer space to general international law.¹¹⁹ The non-refoulement principle, protecting individuals who are outside their country of origin from being returned or sent to countries where they might be persecuted, is well established as customary international law and may even have *jus cogens* status.¹²⁰ Thus, activities in outer space, including the rescue and return of astronauts, should not be conducted in a manner which would require States to engage in refoulement.

Although the possibility of an astronaut claiming asylum in the United States might seem far-fetched, it is critical that the United States begin to think about these kinds of possibilities as the world enters this new space age. One major issue in the current legal regime is the vague language, which leaves treaties vulnerable to "expansive legal interpretations."¹²¹ It is recognized that the preceding legal analysis is somewhat fanciful, as it is unlikely the United States will face a migration crisis from outer space in the next few decades. However, existing international agreements do not contemplate, or leave up to interpretation, many real security

¹¹⁹ Outer Space Treaty, *supra* note 51, art. III.

¹²⁰ See *supra* note 40; see also Rodenhäuser, *supra* note 24.

¹²¹ See Rajeswari Pillai Rajagopalan, *The Outer Space Treaty: Overcoming Space Security Governance Challenges*, COUNCIL ON FOREIGN RELS. (Feb. 23, 2021), <https://www.cfr.org/report/outer-space-treaty> [<https://perma.cc/B8E3-8VQ4>]; see also Sophie Goguichvili et al., *The Global Legal Landscape of Space: Who Writes the Rules of the Final Frontier?*, WILSON CTR. (Oct. 1, 2020), <https://www.wilsoncenter.org/article/global-legal-landscape-space-who-writes-rules-final-frontier> [<https://perma.cc/9253-EW6S>].

concerns.¹²² These gaps, if left unfilled, will create serious security issues for the United States.¹²³ Thus, it is important for today's legal practitioners to conduct thought exercises for future space scenarios in order to build a comprehensive legal framework for the new space age.

¹²² Rajagopalan, *supra* note 121 (“The OST and four subsidiary legal instruments . . . are open to expansive legal interpretations, which prevent them from restricting the weaponization of outer space. Unless more effective rules are developed . . . continued access to and management of outer space will face increasing difficulties, to the detriment of all countries. . . . This dilemma was evident at the most recent UN Group of Governmental Experts (UNGGE) on the Prevention of an Arms Race in Outer Space The UNGGE’s inability to reach a consensus and produce an outcome report in its final session testifies to the enormous difficulties in space governance and the lack of consensus among the major powers on the definition of vital space security concepts, including what a space weapon is, what constitutes an armed attack in outer space, and the application of the right to self-defense.”).

¹²³ Marc M. Harrold, *Asylum-Seekers in Outer Space, a Perspective on the Intersection Between International Space Law and U.S. Immigration Law*, 32 J. SPACE L. 15, 30 (2006) (stating that security concerns may cause the United States to act in a manner “that does not strictly comply with applicable immigration laws or Treaty obligations”).