EXPLORING THE POSSIBILITY OF AN INTERGENERATIONAL RIGHT TO RETURN TO EARTH

Dr. Anna Marie Brennan[*]

Abstract

If human civilisation realises its grand ambitions to establish extraterrestrial human settlements on Mars in the not-so-distant future, how will human rights apply and be enforced? Rather than States, it is thought that space companies such as SpaceX, Blue Origin and the Sierra Nevada Corporation will be the first to establish extraterrestrial settlements. Rapid technological developments over the last decade mean that these ambitions are no longer science fiction. This article considers the scope of the right to freedom of movement in outer space, especially the right to return to Earth. Due to the perilous nature of the journey from Earth to Mars and the harsh environment in which the first settlements will be established, this article considers whether there are any legitimate and, indeed, permissible circumstances where the right to return to Earth will be restricted. The final part of this article will explore the possibility that future descendants of the first wave of settlers to Mars will have an intergenerational right to return to Earth despite having been born on the Red Planet.

Keywords: Customary international law – Extraterrestrial settlement – Human rights – ICCPR - Own Country

Introduction

With Mars located approximately 140 million miles from Earth, NASA estimates the precise duration of the journey there and back to be approximately 21 months. In view of these arduous journey times, it is unlikely that many of the first wave of settlers to Mars will seek to return to Earth. Nevertheless, there is a possibility that a small proportion of these first settlers, as well as their future descendants, may wish to do so. Elon Musk has grand plans to colonise Mars with one million humans by 2050, but questions remain about how migration between Mars and Earth will be regulated and configured. There continues to be no guidance at the international level on this question despite rapid technological advancements making multi-planetary residency an increasing possibility.

Seminal research by Ram Jakhu and Joseph Pelton asserts that the enforcement of human rights in outer space is critical for protecting it as a 'shared international commons' and 'province of all [hu]mankind.'[1] However, 'simply transposing Earth-based laws… to outer space [would be]… a lazy exercise failing to consider the multiple scientific differences that will necessarily carry legal implications.' Nevertheless, some scholars believe that Earth-based human rights systems can at least provide a starting point to consider the breadth and scope of human rights in outer space especially on extraterrestrial human settlements. An in-depth hypothesis of how and the extent to which the right to liberty of movement will be exercised in outer space, as well as a scholarly analysis of whether the first wave of settlers to extraterrestrial human settlements and their future descendants will retain a right to return to Earth, is largely absent in the literature. Some scholars may argue that as settlers' community and property interests, as well as their familial connections, fade on Earth, their right to return will dissipate. At the same time, it is conceivable that the first wave of settlers on Mars will retain some expectation that they may return despite the logistical, medical and technological challenges in doing so and may plan their lives accordingly. The more difficult question for scholars to answer is whether the future descendants of the first wave of settlers will also retain a right to return that is similar in breadth and scope to the right their parents and grandparents had.

The Scope of a Potential Right to Return to Earth

Article 1 of the Outer Space Treaty definitively proclaims that '[o]uter space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on the basis of equality and in accordance with international law.' While it can be suggested that the phrase 'free for exploration' in Article 1 encapsulates a right to liberty of movement, its precise scope and application in outer space have thus far not been widely delineated either at the international level or in scholarly literature. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) affirms that all individuals legally present within the territorial boundaries of a State not only have a right to freedom of movement but also a right to return. While a reading of this provision, in tandem with Article 1 of the Outer Space Treaty, suggests that all individuals resident on Earth have a right to liberty of movement in outer space, it remains to be seen whether individuals who opt to move to extraterrestrial

settlements will have a right to return to Earth if they wish to do so. Scholars such as Cockell have suggested that extraterrestrial settlements will be self-governing with their own distinct legal systems and human rights mechanisms.[2] Given the isolated location of these hypothetical extraterrestrial settlements, perhaps self-governance would be logical and preferred given the arduousness of Earth-based States endeavouring to govern and administer them. If somehow, Earth-based law does apply and is enforceable on extraterrestrial settlements; inhabitants would enjoy 'the right to remain, or the right to stay, or even the right to return, [which are all]… expressions of the freedom of movement.' However, the practicalities of exercising this freedom in outer space remain underexplored. Indeed, the high costs involved in spacefaring and establishing potential extraterrestrial settlements may lead States to impose limitations and even a moratorium on the exercise of this right.

The drafting and negotiation of the ICCPR showcases the possibility that States and space companies will adopt divergent approaches to freedom of movement on extraterrestrial settlements. For instance, several States have defined freedom of movement as 'an important right and one which was an essential part of the right to personal liberty,' while other States blatantly refused to recognise it as a fundamental guarantee.[3] In particular, the United States, which is a signatory party to the ICCPR, has disputed the treaty's extraterritorial application. It has also cited this reason for its withdrawal from negotiations for the adoption of the UN Draft Treaty on Business and Human Rights. With several corporations seeking to establish extraterrestrial settlements registered in the United States, a prevailing question is whether serious human rights violations on future extraterrestrial human settlements could occur in the conquest for profit maximisation. Before plans to develop extraterrestrial human settlements advance any further, an international collaborative mechanism needs to be instituted to consider the practicalities and realities of life in future extraterrestrial settlements. To what extent will risk assessment, mitigation and remediation processes exist on extraterrestrial settlements to decipher the impact of corporate activity on human rights is a moot question to be answered.

The Evolution of Customary Law

The acquisition of nationality in spacefaring nations has long been predicated on the doctrines of *ius soli* and *ius sanguinis* and the birthplace of a person residing on a future extraterrestrial settlement may likely be an important factor for establishing entry/residency rights on Earth. Customary international law has also long embraced the right for a person to enter their own country and this has been espoused in several international treaties. Article 12(4) of the ICCPR states that '[n]o one shall be arbitrarily deprived of the right to enter [their]… own country.' Crucially, it has been noted that 'the right applies equally to citizens and permanent residents' and individuals can 'return from a journey abroad to what had in effect become their country.' As noted in the Summary Record of the 315th Meeting of the UN Commission on Human Rights, 'citizenship and nationality [are] not the final determinants' of a right to enter a State. Indeed, the decisive factor is whether the State was the individual's permanent residence. A definitive study of future space migration and its implications for the development of human societies and their cultures on extraterrestrial settlements has not yet been undertaken. With the drive to make extraterrestrial settlements viable and permanent, it is conceivable that restrictions will be placed on residents' right to return to Earth in the interests of safeguarding the long-term success of the settlement.

Article 12(4) of the ICCPR provides that the right to enter a State is an individual right and not a collective one, 'the significance of which lies in the fact that any agreement concluded enabling the return of some but not all… could be challenged as being in violation of this provision.'[4] As Hurst Hannum notes, interference with the right could possibly happen if a person is not granted entry in a manner that is 'incompatible with the objective of protection.'[5] In the context of extraterrestrial settlements, interference could potentially include not regularly maintaining and repairing spacecraft in a timely manner to facilitate individual's travel to Earth. A literal interpretation of the ICCPR suggests that the right to leave an extraterrestrial settlement and return cannot be subjected to restrictions 'except those provided by law.' This is emphasised by the *travaux préparatoires* which posit that 'while the right was not absolute, it should not be made subject to the same kind of restrictions as the other rights.' Similarly, the UN Human Rights Committee has proclaimed in paragraph 21 of General Comment No. 27 that 'there are few, if any circumstances in which deprivation of the right to enter one's

own country could be reasonable.' While it remains to be seen what legitimate grounds could be proffered to refuse a person's entry to Earth after prolonged periods spent residing on extraterrestrial settlements, it can be posited that possible reasons would include public health and order grounds as well as national security concerns. There will likely be scenarios where a person's entry to Earth occurs unintentionally because of an accident, emergency or unintended landing. Even if the person lands in the ocean or in the territory of a State of which they are not a citizen, Article 3 of the Rescue Agreement clearly provides that 'Contracting Parties which are in a position to do so shall, if necessary, extend assistance in search and rescue operations for such personnel to assure their speedy rescue.' Arguably, an individual's nationality must not be taken into consideration by the States when determining whether they can rescue them.

One of the crucial questions facing future lawyers is whether descendants of the first generation of settlers of extraterrestrial settlements will be able to exercise a right to return to Earth under Article 12(4) of the ICCPR despite not having been born here. While research on the health and well-being impacts of a visit and stay on Earth for Mars-born people remains in its infancy, scientists posit that perhaps the health risks would outweigh the benefits of returning to Earth either temporarily or permanently. Medical concerns include that the heart muscles of individuals residing on Mars will pump blood more easily since there will be little to no gravity to exert the circulatory system. Returning to Earth would run the risk that the person's heart would not be able to pump blood against the force of gravity. Nevertheless, Article 12(4) provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country.' So how should the phrase 'his own country' be interpreted, and does the inclusion of this phrase mean that individuals born in extraterrestrial settlements will not be able to exercise this right? These are all moot questions to be answered.

Proukaki, who has examined this issue in the context of forcible displacement during armed conflicts, argues that Article 12(4) 'is not intended to be restricted to those individuals who lived in the [S]tate of origin as opposed to individuals who never lived there.' If we are to apply Proukaki's reasoning to the descendants of the first generation of settlers on extraterrestrial settlements, it is possible to suggest that despite not having been born on Earth, they will not face restrictions

in their exercise of this right. Paragraph 19 of General Comment 27 of the UN Human Rights Committee potentially supports this conclusion:

> [t]he right of a person to enter his or her own country recognises the special relations of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country.

While it is likely that some States will contend that descendants of the first generation of settlers will not have a right to enter, it is important to note that Article 12(4) of the ICCPR does not contain any condition that the exercise of the right is subject to being a citizen of the State concerned. According to Proukaki, the crucial factor 'is the effectiveness of the links that an individual has with the said country.' Thus, an individual, despite having been born on an extraterrestrial settlement, will have a right to enter States on Earth that they have an effective link with. While it is unclear what factors will demonstrate this effective link, we can hypothesise that ancestry, as well as family/community bonds and property interests, are likely to be important factors.

If a person ordinarily residing on an extraterrestrial settlement has special ties to a State or States on Earth, they 'cannot be considered to be a mere alien.'[6] While there is a dearth of case law in outer space law generally, this interpretation of Article 12(4) is scaffolded by the UN Human Rights Committee's views in *Stewart v. Canada.* Here, the applicant was born in the United Kingdom but was a permanent resident of Canada. Immigration authorities sought to deport him to the United Kingdom as he had accrued a significant criminal record. However, the applicant argued that Canada was 'his own country' within the meaning of Article 12(4) of the ICCPR. While the applicant did not yet have Canadian citizenship, he successfully argued that he should be categorised as a *de facto* Canadian citizen. The UN Human Rights Committee confirmed at paragraph 5 of its view that 'the existence of a formal link to the State is irrelevant… [instead the ICCPR is] concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it.'

Constructing a Human Rights Framework for Celestial Bodies

Space companies, States and international organisations have not yet proffered a mechanism to examine the breadth and scope of human rights for residents of extraterrestrial settlements. Since it is predicted that many extraterrestrial settlements will be established by space companies, an examination of the extent to which these companies must exercise human rights due diligence remains in its infancy. The analysis above suggests that as long as a resident of an extraterrestrial settlement can preserve close connections with a State on Earth, their right to enter that State is enforceable. The practicalities of an individual returning to that State remain to be seen, and the logistics will undoubtedly be complicated. However, customary international law may eventually evolve to recognise an all-encompassing right for residents of extraterrestrial settlements to enter Earth, no matter how fragile their connection is to a State. Clearly, a migration governance framework will need to be developed in the near future to consolidate the fundamental elements required to safeguard the punctilious, safe, and responsible mobility and migration of people in outer space through efficient and well-administered migration policies.

Proposed principles to foster the necessary conditions for well-managed migration in outer space include State and non-state actor compliance with migrant rights and proactive engagement and consultation with all space actors, including States that are not yet classified as spacefaring. In formulating this governance framework, an analysis of the meaning of 'close and enduring connections' will be imperative, as what legal ramifications will arise if the first generation of settlers, as well as their future descendants, are unable to sustain these links. There is potential that some States and space companies will argue that freedom of movement is not an absolute right and that due to the logistical, financial and technological implications of residing on an extraterrestrial settlement, individuals have actual and implied knowledge that this could impede their ties and connections to their families and former communities on Earth. If customary international law develops to include an all-embracing right for residents of extraterrestrial settlements to return to Earth, rather than just the State of which they or their ancestors were citizens or permanent residents, perhaps it would help to solve some of the challenges that have been explored in this article, especially since States have espoused different definitions of the phrase 'his own country.' Moreover, it would not be inane to suggest that customary law may develop to oblige the governing authorities of self-sustaining extraterrestrial settlements to

make potential residents aware that if they opt to sign up to reside on Mars, there is a strong likelihood that their ability to return to Earth, whenever they wish to do so, will be significantly impeded.

Concluding Thoughts

The above analysis indicates that given the vast distances between Earth and Mars, endeavours to ensure that States and space companies exercise human rights due diligence will be subject to scepticism. However, the implications of restricting the exercise and enforcement of human rights on extraterrestrial settlements, especially the right to liberty of movement, cannot be underestimated. While we are at least another couple of decades away from landing the first human on Mars, dialogue needs to begin in earnest at the international level about what human rights 'will look like' in outer space. In the absence of a bespoke human rights framework, perhaps we can posit that the long-term viability of these settlements will be questionable. Thus, the existence of a comprehensive legal framework would enable individuals to critique the impact residing on Mars would have on their human rights, especially their right to liberty of movement, not only within the settlement itself but also potentially to other settlements on the celestial body.

It is foreseeable that States and space companies will need to substantiate to potential residents that they will retain a right to return to Earth not only for familial and economic reasons but also in the event of disasters, famine or armed conflict. A transparent risk assessment process, as well as a risk mitigation and remediation mechanism, will need to be instituted to examine the impact of the governing authority on human rights. How the international community endeavours to resolve these concerns before the first humans land on Mars remains to be seen. But it is indisputable that the mode of governance of extraterrestrial settlements, either by a State or space company alone or a hybrid State-space company authority, will have significant repercussions for the interpretation, monitoring and protection of freedom of movement, especially the right to return. Finding a solution sooner rather than later will be key to the future viability and durability of extraterrestrial settlements.

Notes and References:

* Author is a Senior Lecturer at the University of Waikato, New Zealand.

[1] Ram Jakhu & Joseph Pelton, 'Space Migration and Colonisation', in Ram Jakhu and Joseph Pelton (eds.), *Global Space Governance: An International Study*, (Dordrecht: Springer, 2017) pp. 479-518 at p. 489.

[2] Charles Cockell, 'Mars Is An Awful Place To Live', *Interdisciplinary Science Review*, Vol. 27, No. 1, 2002, Pp. 32-38 At P. 33.

[3] Marc J. Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights*, (The Hague: Martinus Nijhoff, 1987) p. 253.

[4] Elena Proukaki, 'The Right to Return Home and the Right to Property Restitution under International Law' in Elena Proukaki, (ed.), *Armed Conflict and Forcible Displacement: Individual Rights under International Law*, (Oxford: Routledge, 2018) pp. 46-83 at p. 57.

[5] Hurst Hannum, *The Right to Leave and Return in International Law and Practice*, (The Hague: Martinus Nijhoff, 1987) pp. 44–45.

[6] Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (Oxford: Oxford University Press, 2000) p. 2.