# Solidarity at the Border: How the EU and US Criminalize Aid to Migrants

Delphine Rodrik*



https://doi.org/10.15779/Z38CF9J73K

* J.D. Harvard Law School, 2020. Thanks to many whose conversation or comments helped shape this Note: Sabrineh Ardalan, Naz Modirzadeh, Hanaa Hakiki, Matija Vlatkovic, Ioannis Kalpouzos, and the BJIL editors.

*In both European States and the United States, humanitarians, activists, community leaders, and lawyers supporting asylum seekers and migrants have increasingly been penalized for acts of solidarity with these communities—whether in the form of food and essentials, legal services, or a pathway to safer ground. State actors in both regions have utilized criminal law frameworks, primarily those envisioned to target smuggling, to scrutinize the actions of those who leave water and supplies in the desert borderlands of the US-Mexico frontier, offer shelter from rough terrains separating European States, and rescue those in distress at sea. This Note attempts to bring together and trace recent European and American trajectories of these efforts side by side, highlighting their striking similarities and evaluating applications of the EU Facilitator's Framework and 8 U.S.C. § 1324, the respective legislations enabling much of this criminalization. Drawing on analogous examples from both contexts and cases from the US and France, in particular, it examines arguments through which criminalization using these frameworks has been pursued and countered. This comparison demonstrates that anti-smuggling laws in both regions have been repurposed to cement barriers to access of the international protection regime while punishing perceived dissent to the State's migration policies. Ultimately, this Note argues that the continued abuse of these tools to target such support, even where effectively and importantly challenged, undermines the overall viability of the international protection framework: Attempting to erect an additional border between migrants and citizens, these efforts disavow the legitimate acts of solidarity on which it depends.*

## INTRODUCTION

In March 2019, three teenagers from Guinea and the Ivory Coast were accused of hijacking a commercial ship that had rescued them and over 100 other asylum seekers and migrants and forcing it to head toward Malta.[1] After boarding the *El-Hiblu 1* from their deflating rubber boat, those rescued report that its captain told them they would be taken to Europe, while radio transcripts document an EU aircraft directing the captain to return them instead to Libya, from where they had fled.[2] When members of the rescued group realized the boat was heading

1. AMNESTY INT'L, *Malta: The El Hiblu 1 Case – Three Teenagers in the Dock for Daring to Oppose Their Return to Suffering in Libya* 1 (Oct. 23, 2019), https://www.amnesty.org/download/Documents/EUR3312702019ENGLISH.PDF.

2. Ariana Mozafari, *Refugees or hijackers? Teenagers charged with terrorism in Malta*, AL JAZEERA (Dec. 16, 2019), https://www.aljazeera.com/news/2019/12/refugees-hijackers-teenagers-charged-terrorism-malta-191216221706120.html.

back toward Libya, they said they began to protest until the captain, alarmed at their apparent distress, shifted course. The captain, however, reported to Maltese authorities that he was changing course because he had "lost command of his ship."[3] Maltese special forces and members of its counterterrorism unit boarded the ship as it entered Maltese waters.[4] The three teenagers—who, as English speakers, had facilitated communication with the ship's crew[5]—were detained, charged with terrorism and piracy, and imprisoned for more than seven months before being released on bail.[6] As of late March 2021, when this Note was last updated, they still face a trial that could condemn them to life imprisonment.[7]

Despite conflicting accounts of how this change in the *El-Hiblu 1*'s course came about, the false narrative of migrants violently taking control of a ship soon captivated media and political discourse. Newspapers covering the story led with headlines such as, "Malta seizes merchant ship hijacked by migrants."[8] Italy's Interior Minister at the time, Matteo Salvini, used these events to support his pledge to prevent ships carrying migrants from docking in Italy: "These are not migrants in distress, they are pirates," he announced.[9] In grouping all those rescued on board as a collective threat, the authorities had "accused the three [teenagers] of being our leaders," said one individual who had been aboard and praised the teenagers' efforts to calm down the group and relay information between them and the ship's crew.[10] But, he explained, "none of us know each other—only, all of us have black skin."[11] In addition, sensational claims ignored that those on the ship "faced systematic human rights violations upon return to Libya, including arbitrary detention, torture, sexual violence, and forced labor."[12]

3. *Id.*

4. Zach Campbell, *The Rescue*, ATAVIST MAG. (Sept. 2019), https://magazine.atavist.com/the-rescue-mediterranean-migrants-malta-europe-crisis.

5. THE EL-HIBLU 3, https://elhiblu3.info/index (Mar. 9, 2021).

6. Common Statement: Bail Request for 'El Hiblu Three' Approved by Court. Trial Proceedings Still Delayed for Teenage Refugees, https://sea-watch.org/wp-content/uploads/2019/11/191120_Statement_BailDecision_EH3.pdf.

7. AMNESTY INT'L, *Malta: The El-Hiblu 3 Case - Update* (Mar. 26, 2021), https://www.amnesty.org/download/Documents/EUR3338842021ENGLISH.PDF.

8. Jared Malsin & Giovanni Legorano, *Malta Seizes Merchant Ship Hijacked by Migrants*, WALL ST. J. (Mar. 28, 2019), https://www.wsj.com/articles/malta-seizes-merchant-ship-hijacked-by-migrants-11553777670.

9. Lorenzo Tondo, Jennifer Rankin & Angela Giuffrida, *Ship hijacked by migrants off Libya escorted to Malta*, GUARDIAN (Mar. 28, 2019), https://www.theguardian.com/world/2019/mar/28/ship-hijacked-by-migrants-off-libya-escorted-to-malta. While Salvini's comments appear intended to assign a moral, rather than legal, categorization, it is worth noting that the actions of the three accused would not qualify as piracy under the Law of the Sea. *See* Valentin J. Schatz, *The alleged seizure of the El Hiblu 1 by rescued migrants: Not a case of piracy under the law of the sea*, VÖLKERRECHTSBLOG (Mar. 31, 2019).

10. THE EL-HIBLU 3, *supra* note 5.

11. *Id.*

12. UN Off. for the High Comm'r on Hum. Rts., Press Briefing Note on Malta (May 7, 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24569&LangID=E.

These depictions also disregarded that their alleged wrongdoing was demanding that they not be refouled directly to a country where they had faced torture and other grave human rights violations—that one of the key tenets of international refugee law be upheld.[13]

Today, the word "migration" is often linked to similar rhetoric of danger and threat, bolstered by imagery of individuals traveling in caravans or on overcrowded boats toward the borders of the Global North.[14] While some leaders still purport to acknowledge the needs of those seeking protection in the United States and Europe, global policies have instead tightened access to asylum procedures and other legal migration pathways, aiming to deter refugees from arriving.[15] The United States has narrowed applicants' asylum eligibility;[16] attempted to outsource its migration management by returning asylum seekers to Central American countries and otherwise obstructing their access to the border;[17]

13. *See* 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S 137, art. 33 (enshrining the principle of *non-refoulement*, under which "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"). This principle has been interpreted in human rights law to prohibit States from returning individuals to States where they would face torture or cruel, inhuman, or degrading treatment. *See generally* OFF. FOR THE HIGH COMM'R ON HUM RTS., *The principle of non-refoulement under international human rights law*, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

14. *See, e.g.*, Victoria Danilova, *Media and Their Role in Shaping Public Attitudes Towards Migrants*, U.N. UNIV. (July 16, 2014), https://gcm.unu.edu/publications/articles/media-and-their-role-in-shaping-public-attitudes-towards-migrants.html.

15. *See* Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 241 (2015) (describing the "politics of *non-entrée*," whereby "even as powerful states routinely affirmed their commitment to refugee law, they have worked assiduously to design and implement *non-entrée* policies that seek to keep most refugees from accessing their jurisdiction, and thus being in a position to assert their entitlement to the benefits of refugee law"); *see also* Thomas Gammeltoft-Hansen & Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. ON MIGRATION & HUM. SEC. 28 (2017) (outlining the general trajectory of the "deterrence paradigm").

16. *See, e.g.*, Matter of A-C-M-, 27 I & N Dec. 303 (B.I.A 2018) (determining an asylum seeker to be ineligible for asylum because cooking, cleaning, and washing clothes for guerillas that had kidnapped her constituted "material support" to a terrorist organization); Matter of L-E-A-, 27 I & N Dec. 581 (A.G. 2019) (holding that most nuclear families are not "particular social groups" on which applicants can claim asylum); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (proposed June 15, 2020), EOIR Docket No. 18-0002, A.G. Order No. 4714-2020 (proposing a litany of adjustments that narrow grounds of asylum eligibility and increase the burden on applicants).

17. *See* Sonia Pérez D. & Christopher Sherman, *'Deportation with a layover:' US sends migrants to Guatemala*, ASSOCIATED PRESS (Feb. 24, 2020), https://apnews.com/0056c79cff65cd790349f2ad8b45a571; s*ee also* US DEP'T OF HOMELAND SEC., *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador,* https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf; s*ee also* US DEP'T OF HOMELAND SEC., *Policy Guidance for*

and weakened already minimal protections against removal of non-citizens within its borders.[18] Similarly, the European Union has placed the burden of refugee processing on countries on its borders[19] and incentivized restricted access to its territories;[20] negotiated unchallengeable deals[21] designating non-EU States as safe countries to which refugees can be returned despite scant evidence that they offer lasting protection;[22] and authorized the immediate removal of asylum seekers without process from the European territories to which they manage to arrive.[23] In both regions, restrictive policies are inseparable from racism and colonial legacies, with Black asylum seekers and migrants often facing harsher treatment than others as suggested by the case of the teenagers on board the *El-*

*Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

18. *See, e.g.*, CTR. FOR DISEASE CONTROL, *Order Suspending The Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (Oct. 13, 2020), https://www.cdc.gov/coronavirus/downloads/10.13.2020-CDC-Order-Prohibiting-Introduction-of-Persons-FINAL-ALL-CLEAR-encrypted.pdf (enabling authorities to expel arriving migrants and asylum seekers from US territory in the name of COVID-19 precautions); *see also* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in DHS v. Thuraissigiam*, JUST SEC. (Aug. 25, 2020) (discussing how the Supreme Court's decision in *DHS v. Thuraissigiam,* 140 S. Ct. 1959 (2020) creates uncertainty over "how far from the border, and how long after an alleged entry," the lack of procedural due process protections for non-citizens may be upheld).

19. "Regulation (EU) No 604/2013 of the European Parliament and of the Council," June 26, 2015, OJ No 604/2013, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF (Under the EU's "Dublin III" system, the EU member state in which asylum seekers first arrive is often responsible for processing that individual's asylum application, unless they have familial connections in, or a visa or residency from, another member state. Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)).

20. *See, e.g.*, Ashley Binetti Armstrong, *You Shall Not Pass! How the Dublin System Fueled Fortress Europe*, 20 CHI. J. INT'L L. 332, 337 (2020) (arguing that the Dublin system has "catalyz[ed] the construction of Fortress Europe, which aims to prevent refugees from accessing protection altogether").

21. When the 2016 EU-Turkey Joint Statement, more commonly known as the "EU-Turkey deal," which authorized the return of many "irregular" migrants and asylum seekers arriving on the Greek islands to Turkey, was challenged before the EU General Court, the Court determined it lacked jurisdiction, because the statement "cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union." Order of the General Court of the European Union (First Chamber, Extended Composition), Feb. 28 2017 E.C.R., para. 71, http://curia.europa.eu/juris/document/document.jsf?text=&docid=188483&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=426840.

22. For instance, via Turkey's geographic restriction to the 1951 Refugee Convention, the country offers non-European asylum seekers, such as Syrians, "temporary protection" status under its Temporary Protection Regulation of October 2014. *See* Law on Foreigners and International Protection, art. 91 on "Temporary Protection."

23. *See* N.D. and N.T. v. Spain, No. 8675/15 & 8697/15 (Feb. 13, 2020), https://hudoc.echr.coe.int/spa#{%22itemid%22:[%22001-201353%22]}.

*Hiblu 1*.[24] These practices perpetuate the narrative that those who cross borders without authorization are "illegal"[25] or "unlawful"[26] (if not criminals or terrorists[27]), undeserving of protection, and ultimately responsible for the often deadly consequences of attempting irregular entry.[28] Conveniently, this narrative also obscures the role of State decision-making in dismantling nearly all plausible legal means of accessing the international protection regime.

Broadly, such efforts are representative of developments in "crimmigration" practices, namely the means by which States have merged criminal law theories of deterrence and punishment into the immigration context,[29] and border externalization efforts, by which States pass off migration management and administration to extraterritorial actors.[30] This Note explores the convergence of

24. *See, e.g.*, *Pushbacks in Melilla: ND and NT v. Spain*, FORENSIC ARCHITECTURE (June 15, 2020), https://forensic-architecture.org/investigation/pushbacks-in-melilla-nd-and-nt-vs-spain (highlighting "structural racism embedded in Europe's border policies" manifested by a complete lack of access to legal routes to asylum for sub-Saharan individuals attempting to reach Spain from Morocco); *see generally* JULIANA MORGAN-TROSTLE, CARL LIPSCOMBE & KEVIN ZHEN, THE STATE OF BLACK IMMIGRANTS (2018) (finding, for example, that "Black immigrants are disproportionately represented among detained immigrants facing deportation in immigration court on criminal grounds").

25. *See* Erika Sabrina Quiñonez, *(Un)welcome to America: A Critical Discourse Analysis of Anti-Immigrant Rhetoric in Trump's Speeches and Conservative Mainstream Media* (June 2018) (M.A. thesis, Cal. State University, San Bernardino) (Electronic Theses, Projects, and Dissertations), https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1710&context=etd (empirically analyzing that "the use of demagogic and dehumanizing language, along with more subtle discursive strategies, are being used to stoke fear and anti-immigrant sentiment and to strip individuals of their humanity for the purpose of rendering them unworthy of dignity and of the same rights and benefits as those to which groups considered *insiders* and 'real Americans' are entitled").

26. *See, e.g.*, Maximilian Pichl & Dana Schmalz, *'Unlawful' may not mean rightless* VERFASSUNGSBLOG (Feb. 14, 2020), https://verfassungsblog.de/unlawful-may-not-mean-rightless/ (discussing "the invention of 'unlawfulness' as a means to limit rights" of migrants).

27. *See, e.g.*, Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L. J. 81 (2005); Eugene Scott, *Trump's most insulting – and violent – language is often reserved for immigrants*, WASH. POST (Oct. 2, 2019); UN Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Doc. No. A/71/384 (Sept. 13, 2016).

28. *See, e.g.*, Ioannis Kalpouzos, *International Criminal Law and the Violence against Migrants*, 21 GERMAN L. J. 571, 576 (2020) ("The close association of criminal law and migration therefore goes mostly one way: Irregular migrants as the criminals endangering states, not as victims of state crimes").

29. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006) (describing a "crimmigration crisis" resulting from the criminalization of immigration law, a "convergence" which "brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien").

30. *See, e.g.*, Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization on Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4(4) J. OF MIGRATION & HUM. SEC. 190-220 (2016) (defining "externalization" as "extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims").

the two trends on individuals acting in solidarity with those whom these tactics lock out. While the principle of solidarity may be seen as essential to the proper functioning of an international protection framework,[31] this Note examines how States instead punish those that act in its spirit by supporting migrants and, by extension, punish the targets of its protection themselves. Often called the criminalization of solidarity, compassion, or simply "Good Samaritan" acts, States have attempted to stunt what former UN Special Rapporteur on extrajudicial executions Agnès Callamard describes as the "unspoken backbone of the international refugee assistance regime:"[32] those who formally or informally assist migrants and asylum seekers by providing assistance and services like food, shelter, legal advice, or pathways to safer ground. Today, those who leave water for, or offer shelter to, migrants in the desert borderlands of the United States-Mexico frontier or the rough terrain between European States, rescue migrants in distress at sea, or accompany migrants in caravan or protest face investigation and prosecution for their acts. A study from the Research Social Platform on Migration and Asylum ("ReSOMA"), for example, documented at least 49 cases of prosecutions or investigations into 158 individuals in Europe for such actions between 2015 and 2018.[33] According to Syracuse University's Transactional Records Access Clearinghouse, more than 4,500 individuals were charged with "bringing in and harboring migrants into the US" in the 2018 fiscal year alone, ensnaring similar groups in what has been described as an "enforcement dragnet."[34] Among those scrutinized include religious leaders, journalists, lawyers, activists, and humanitarians, often the only witnesses to State-sanctioned violence against non-citizens at these borders.[35] Yet, under the European Facilitator's Framework and the United States' criminal statute on bringing in and harboring non-citizens, it is they who are sanctioned for facilitation or smuggling.

31. *See generally* Obiora Chinedu Okafor, *The Future of International Solidarity in Global Refugee Protection*, HUM. RTS. REV. (Mar. 24, 2020) (noting, for instance, that the "contemporary refugee protection 'crisis' that is often discussed passionately—and sometimes rather hysterically—in the media and academe alike, cannot be logically understood as a crisis of numbers," but rather "a function of the unwillingness of all-too-many States (especially in the far richer Global North) to accept as many refugees as they could and should").

32. Agnès Callamard (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Saving lives is not a crime,* ¶ 65 U.N. Doc. No. A/73/314 (Aug. 7, 2018).

33. Lina Vosyliute & Carmine Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants: Final Synthetic Report*, RSCH. SOC. PLATFORM ON MIGRATION & ASYLUM (RESOMA) 24–25 (June 2019). It is worth noting that the criminalization of these acts is not completely new in Europe, with NGO-chartered SAR boats denied entry to European ports and accused of human smuggling at least as far back as 2004; however, the scale and scope of such incidents has increased dramatically in the past few years. *See, e.g.*, United Nations Human Rights Council, "Report of the Independent Expert on human rights and international solidarity" (Doc. No. A/HRC/41/44) (16 April 2019), ¶¶ 6–7.

34. *See* Tania Karas, *Crimes of Compassion: US follows Europe's lead in prosecuting those who help migrants*," PUB. RADIO INT'L (June 6, 2019).

35. *See generally* Vosyliute & Conte, *supra* note 33.

This Note puts in focus American and European efforts to criminalize their actions—which will be referred to broadly as migrant solidarity[36]—to shed light on how these frameworks have been repurposed to further erode protections for asylum seekers and migrants, while also cracking down on dissent against anti-migrant policies. Drawing on key examples and cases from both contexts, it demonstrates that the United States and European States have employed remarkably similar tactics. On both continents, legal arguments through which this criminalization has been pursued and challenged highlight that even appeals to protected humanitarianism and association, expression, or religious belief are under threat in a climate that has politicized the foundations of the international protection framework. And by eroding space for legitimate assistance, the criminalization of migrant solidarity through anti-smuggling legislation, in effect, criminalizes migrant and asylum seekers' access to these already limited yet fundamental protections. In fact, this Note argues, the application of these regimes to migrant solidarity further incentivizes offloading blame on those that manage to make it past today's fortified borders, erecting another barrier—or border—in an ever-narrowing maze to protection.

Before exploring the anti-smuggling frameworks increasingly applied in this context, Section I sketches developments in the crackdown on migrant solidarity in both Europe and the United States, tracing their shared features.[37] Section II introduces the international framework on migrant smuggling,[38] as well as other international legal regimes implicated by the criminalization of migrant solidarity, and then explores the European and American anti-smuggling frameworks utilized to delegitimize acts of solidarity. Section III then reviews cases from the United States and France that challenge the criminalization of migrant solidarity via constitutionally- or statutorily-protected belief, expression, and association. Finally, the Conclusion returns to the case of the *El-Hiblu 1* to depict how the application of these frameworks to such solidarity undermines and upends the

36. "Migrant" here is intended to encompass all individuals who enter a different State seeking opportunity or protection notwithstanding whether they could legally be recognized as refugees, in addition to refugees and asylum seekers. For a discussion of European States' response to migrants that fall outside the scope of the refugee definition and challenging the legitimacy of excluding so-called "economic migrants" from their borders, *see* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

37. While relevant laws and their application of course vary among European States, such a comparison can still be useful as EU States share the overarching anti-smuggling framework that has been enacted, interpreted, and applied on a State level.

38. Although smuggling and trafficking are often linked in political discourse, this Note does not address trafficking, an offense distinct from smuggling as it requires, among other elements, the use of threat, force, or other coercion or deception, as well as a purpose to exploit the trafficked individual. *See* G.A. Res. 55/25 (II), Art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Sept. 29, 2003), https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

international protection framework by fundamentally disavowing legitimate acts of solidarity and the connections on which it depends.

## II.
## PARALLEL TRAJECTORIES TARGETING MIGRANT SOLIDARITY

In migration regimes centered on deterrence, it is no coincidence that the actors facing criminalization for their work often operate to provide support to asylum seekers and migrants that States have become reluctant to provide themselves. While their work is commonly framed as filling the resulting "gap" in services, critics of formal humanitarianism highlight that independent acts of solidarity may be understood as "*creat[ing] cracks*" in existing border regimes as a type of resistance that acts independently from, rather than in collaboration with, restrictive State policies.[39] This Section takes stock of some of the American and European governmental reactions to this solidarity. Both the United States and European countries have obstructed independent humanitarian support to migrants and asylum seekers; placed pressure on individuals providing legal assistance to these communities; selected high-profile activists for investigation and prosecution; and promulgated narratives painting acts of migrant solidarity as nefarious. Taken together, these strategies reveal similar government tactics to vilify those assisting migrants and asylum seekers, despite frameworks ostensibly designed to help them and protect work doing so.

### *A. Surveilling Humanitarian Actors*

In both Europe and the United States, as debates over how to respond to arriving migrants and asylum seekers have pushed leaders into political deadlock,[40] countless individuals and groups of volunteers have offered their own forms of support at points of arrival. When the number of asylum seekers arriving in Europe dramatically increased in 2015, then-European Commission President Jean-Claude Juncker appealed to EU leaders to share responsibility: "If ever European solidarity needed to manifest itself, it is on the question of the refugee crisis," he pleaded.[41] This State solidarity did not come. Instead, individuals assisting asylum seekers on their own accord became the "first responders"

39. *See* Deanna Dadusc & Pierpaolo Mudu, *Care without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity*, GEOPOLITICS 3 (Apr. 17, 2020), https://www.tandfonline.com/doi/full/10.1080/14650045.2020.1749839 (criticizing the tendency of studies of criminalization in the European context to "blur the notions of humanitarianism and solidarity" and proposing a distinction between "*autonomous* solidarity" and humanitarianism, the former being the target of criminalization).

40. For an argument that the abandonment of refugees in Europe constitutes a "calculated necropolitical *in*action" and a form of structural violence, *see* Thom Davies et. al., *Violent Inaction: The Necropolitical Experience of Refugees in Europe*, 49 ANTIPODE 1263 (2017).

41. *See, e.g.,* European Commission Press Release, Refugee Crisis: European Commission takes decisive action (Sept. 9, 2015), http://europa.eu/rapid/press-release_IP-15-5596_en.htm (outlining an initial, and ultimately unsuccessful, plan for European cooperation to address the "refugee crisis").

offering shelter and other forms of assistance to asylum seekers who reached European borders.[42] Official conversations centered on limiting arrivals rather than on humanitarian reception. For example, Italy ended its humanitarian search-and-rescue operation "Mare Nostrum" in 2014 as the EU replaced it with "Joint Operation Triton," the primary purpose of which was not saving lives at sea, but "border management."[43] The EU's 2015 Action Plan against Migrant Smuggling set its sights on increased policing of smuggling networks, for instance, through the creation of a "list of suspicious vessels likely to be used in the Mediterranean" and greater information sharing via "monitoring of pre-frontier area for earlier identification of smugglers and prevention of irregular departures of migrants."[44] These anti-smuggling mechanisms were "artificially framed as migration management tools" that deployed border guards to arrival points, as well as EU and NATO ships to counter smuggling in the Mediterranean.[45] In the words of a study commissioned by the European Parliament's Policy Department for Citizens' and Constitutional Affairs, State actors accordingly "portrayed the humanitarian assistance provided by civil society actors as non-cooperative and suspicious, if not overall counterproductive, to the underlying goal of 'stemming the flows.'"[46]

As NGO-chartered search and rescue (SAR) ships in the Mediterranean responded to the EU's decisions by rescuing those stranded at sea themselves, they were met with smear campaigns, intimidation through surveillance, and logistical and administrative challenges to their operations.[47] Independent NGOs were quickly labeled "migrant taxis" by prominent political leaders of Italy's anti-immigrant Five Star Movement, who alleged they facilitated migration to the country, while a prosecutor claimed they acted in collusion with smugglers.[48] In 2017, Italy imposed a mandatory code of conduct on NGO-run SAR vessels that wished to access Italy's ports, which civil society argued "institutionalized

42. EUR. PARL. POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFF., FIT FOR PURPOSE? THE FACILITATION DIRECTIVE AND THE CRIMINALIZATION OF HUMANITARIAN ASSISTANCE TO IRREGULAR MIGRANTS: 2018 UPDATE 9 (Dec. 2018) [hereinafter FIT FOR PURPOSE?].

43. *See* EUROPEAN COUNCIL OF REFUGEES & EXILES, *MareNostrum to end – New Frontex operation will not ensure rescue of migrants in international waters* (Oct. 10, 2014), https://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/.

44. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Action Plan against migrant smuggling (2015 - 2020), at 3, 5, COM (2015) 285 final (May 27, 2015).

45. FIT FOR PURPOSE?, *supra* note 42, at 13.

46. *Id.*

47. *See, e.g.*, Communication to the Office of the Prosecutor of the International Criminal Court: EU Migration Policies in the Central Mediterranean and Libya, ¶¶ 161–202 (2019).

48. *See, e.g.*, Anna Momigliano, *In Italy, conspiracy theories about collusion between smugglers and charities rescuing migrants are spreading*, WASH. POST (May 2, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/05/02/in-italy-conspiracy-theories-about-collusion-between-smugglers-and-charities-rescuing-migrants-are-spreading/.

suspicion and introduced an exceptional application of international maritime law so that it applied only to civil society and *not* to merchant or government ships."[49] At the same time, the Italian government directly surveilled independent humanitarian actors. This included, for instance, its placement of undercover agents on board rescue ships—such as Save the Children's *Vos Hestia* in 2017—to investigate alleged collusion with smugglers and gather intelligence that eventually led to the Italian government's impounding of key rescue ships and prosecutions against their operators.[50] That summer, Italian authorities seized the rescue ship *Iuventa* on grounds that it had potentially aided and abetted unlawful immigration and contorted evidence to suggest it had done so in bringing criminal proceedings against its crew.[51] In 2019, when captain of the rescue ship *Sea Watch 3*, Carola Rackete, entered Italian waters despite authorities' objections sixteen days after rescuing forty migrants and refusing to return them to Libya, she was detained for "resisting a war ship" and investigated for facilitating illegal immigration.[52] Outrage among some ran so high that Rackete also faced death and rape threats and was forced to move to a secret location as a result.[53] A concerted effort to punish rescue ships and crew also employed more creative administrative means, such as the seizure of the Doctors Without Borders and SOS Méditerranée-operated *Aquarius* on the grounds that it had incorrectly labelled waste so as to not indicate that "discarded clothes worn by the migrants […] could have been contaminated by HIV, meningitis, and tuberculosis."[54] By mid-December 2020 the European Union Fundamental Rights Agency had recorded, across Europe, "some 50 administrative and criminal proceedings against crew members or vessels" conducting SAR operations in the past two years alone.[55]

49. FIT FOR PURPOSE?, *supra* note 42, at 14.

50. *See, e.g.*, Richard Hall, *Inside Italy's plot to infiltrate migrant rescue boats in the Mediterranean*, GLOB. POST INVESTIGATIONS (June 28, 2018).

51. *See* FORENSIC OCEANOGRAPHY & FORENSIC ARCHITECTURE, *Blaming the Rescuers: The Iuventa Case* (2018), https://blamingtherescuers.org/iuventa/ (detailing how the authorities' narrative of events "decontextualiz[ed] factual elements and recombin[ed] them into a spurious chain of events").

52. Elisabetta Povoledo, *Italy Arrests Captain of Ship that Rescued Dozens of Migrants at Sea*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/world/europe/italy-migrants-captain-arrest.html.

53. Letter to Italy from the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on violence against women, its causes and consequences, Doc No AL ITA 6/2019 (July 12, 2019).

54. Lorenzo Tondo, *Italy orders seizure of migrant rescue ship over 'HIV-contaminated' clothes*, GUARDIAN (Nov. 20, 2018).

55. European Union Agency for Fundamental Rights, *December 2020 Update—NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them* (Dec. 18, 2020) https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal#TabPubOverview0.

In yet other European countries, surveillance and harassment were palpably felt on shore. In northern France, which in sites like Calais hosted growing numbers of migrants and asylum seekers attempting to reach the United Kingdom, humanitarian groups supporting them documented 646 instances of police abuse between 2017 and 2018, including "unjustified parking fines; photo and video recording by police officers with personal phones; frequent ID checks; body and vehicle searches; insults and threats; and several cases of assault."[56] As recently as September 2019, the EU border control agency Frontex issued a (later-cancelled) call for tenders to surveillance companies that could collect and analyze data of social media users as related to "future irregular migratory movements impacting external borders" of the EU and Schengen Zone countries, including migrants, traffickers, and smugglers—and civil society within the EU.[57]

US-based actors have faced patterns of intimidation and surveillance similar to those in Europe, with one humanitarian organization characterizing a recent Border Patrol raid of a humanitarian aid station in the Arizona desert as "a massive show of armed force," in which "agents armed with assault rifles […] smashed windows, broke doors, and destroyed essential camp infrastructure as well as supplies."[58] Individuals supporting migrants in the desert areas of the US-Mexico border had certainly been the focus of government enforcement schemes in the past, for instance, through littering charges brought against them for leaving water jugs for migrants in the desert.[59] But the intensity of these efforts at the federal level escalated in 2017, after then-Attorney General Jeff Sessions issued a memo directing the Department of Justice to "vigorously" pursue smuggling crimes. Sessions's instructions prioritized prosecutions under 8 U.S.C. § 1324 for

56. Amnesty Int'l, *Punishing Compassion: Solidarity on Trial in Fortress Europe*, AI Index EUR 01/1828/2020 (Mar. 3, 2020), https://www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF.

57. *See* European Border and Coast Guard Agency (Frontex), *Service Contract for the Provision of Social Media Analysis Services Concerning Irregular Migration Trends and Forecasts (as part of Pre-warning Mechanism)* (Frontex/OP/534/2019/DT) (Sept. 25, 2019), https://etendering.ted.europa.eu/cft/cft-display.html?cftId=5471. The call for tender was cancelled without further explanation after Privacy International sent Frontex a list of questions about how the collection of such information would be compatible with the EU's data protection laws. *See* PRIVACY INT'L, *#PrivacyWins: EU Border Guards Cancel Plans to Spy on Social Media (for now)* (Nov. 19 2019), https://privacyinternational.org/advocacy/3289/privacywins-eu-border-guards-cancel-plans-spy-social-media-now.

58. NO MORE DEATHS, *Second Military Style Raid in Two Months: Border Patrol detains 12 people receiving humanitarian aid* (Oct. 7, 2020), https://nomoredeaths.org/second-military-style-raid-in-two-months-border-patrol-detains-12-people-receiving-care-at-humanitarian-aid-station/.

59. *See, e.g.*, Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71 (2012) (discussing efforts to prosecute No More Deaths activists on these grounds and providing an overview of the efforts of various state legislatures to criminalize individuals for harboring or transporting undocumented immigrants); Andrew Burridge, *Differential Criminalization under Operation Streamline: Challenge to Freedom of Movement and Humanitarian Aid Provision in the Mexico-US Borderlands*, 26(2) REFUGE: CAN. J.L ON REFUGEES 78 (2009).

"bringing in and harboring aliens," outlining that districts were to "consider for prosecution any case involving the unlawful transportation or harboring of aliens, or any other conduct proscribed pursuant to [the statute]."[60] Shortly before a caravan of thousands of Central American asylum seekers was set to arrive in Tijuana, Mexico in late 2018, the Trump Administration—which had referred to those in the caravan as "criminals" and "unknown Middle Easterners"[61]—launched "Operation Secure Line." The administration announced that the Department of Defense was "providing [the Department of Homeland Security] DHS and [Customs and Border Protection] CBP a range of assistance . . . to enhance the agency's ability to impede or deny illegal crossings and maintain situational awareness as it contributes to CBP's overall border security mission."[62] Journalists, activists, and lawyers exiting and entering Mexico soon became the targets of a "sweeping intelligence-gathering operation"[63] in which they were filmed while working by Border Patrol agents, subjected to detention and interrogation at ports of entry, shown headshots of and asked for information about border workers, and, in some cases, denied entry into Mexico.[64] A number of UN Special Rapporteurs later found these events "as presented show a pattern and practice of U.S. authorities misusing international systems designed for combating organised crime and terrorism, by issuing flags and migratory alerts in retaliation against the lawful actions of human rights activists, journalists, and lawyers."[65] When CBP responded in May 2019 to a letter from civil society groups requesting information on the grounds on which it had surveilled fifty-nine such individuals on the Mexico-United States border, it wrote that it had been "investigating possible violations under 8 U.S. Code § 1324" and asserted that "a number of journalists and photographers were identified by Mexican Federal Police as possibly assisting migrants in crossing the border illegally and/or as

60. Renewed Commitment to Criminal Immigration Enforcement: Memorandum from the Attorney General for all Federal Prosecutors, AILA Doc. No. 17041132, Att'y Gen. (Apr. 11, 2017). It also noted that "[p]riority should also be given to prosecuting any offenses under section 1327 ("aiding or assisting criminal aliens to enter") and section 1328 ("importation of aliens for immoral purposes")." *Id.*

61. *See* Linda Qu, *Trump's Evidence-Free Claims about the Migrant Caravan*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/us/politics/migrant-caravan-fact-check.html.

62. U.S. CUSTOMS & BORDER PROT., *As Migrant Caravan Continues Toward U.S. Border, CBP Partners with DoD to Secure the Line* (Nov. 6, 2018), https://www.cbp.gov/newsroom/spotlights/migrant-caravan-continues-toward-us-border-cbp-partners-dod-secure-line.

63. Ryan Devereaux, *Border Official Admits Targeting Journalists and Human Rights Advocates with Smuggling Investigations*, INTERCEPT (May 17, 2020).

64. *Id.*

65. Letter to the United States from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on the human rights to safe drinking water, Doc No AL USA 2/2020, (May 6 2020) at 5.

having some level of participation in the violent incursion events."[66] The Federal Government's acknowledgment that it had invoked an anti-smuggling framework to target actors providing critical services indicated a sweeping interpretation of the statute's potential scope.

### *B. Scrutinizing Legal Aid*

In addition to casting doubt on the intentions of migrant solidarity work, the United States and European governments have attempted to introduce further limitations on interaction with migrants and asylum seekers by targeting the provision of legal assistance itself. In Hungary, a controversial package of reforms included an amendment to the Hungarian Penal Code chapter on crimes against public order by labeling those who conduct "organizational activities" in support of migrants as facilitators of illegal entry.[67] The package also imposed a 25 percent tax on "immigration-supporting activities."[68] Cloaked in an anti-facilitation framework, the law was upheld by the Hungarian Constitutional Court ("HCC") as consistent with Hungary's Fundamental Law (constitution). The HCC found it sufficient to establish that the law only triggers criminal liability if those assisting migrants were aware that they were providing assistance to someone who was ineligible for protection under the refugee definition, or knew that their presence would be unlawful; that the criminalization of expressing opinion only applies to speech that aims to "incite others to commit an illegal act;" and that legal representation was excluded from its purview.[69] In July 2019, the European Commission referred Hungary to the European Court of Justice over the legislation, arguing that it "curtails applicants' right to communicate with and be assisted by" relevant actors, in violation of the EU's Asylum Procedures Directive and Reception Conditions Directive.[70] Yet, in a similar move, Germany months before had considered (and ultimately abandoned) legislation making information about planned deportations a state secret, which would have criminalized providing information about impending removals to asylum seekers.[71]

66. Randy J. Howe, *U.S. Customs and Border Protection Letter* (May 9, 2019), https://cdt.org/wp-content/uploads/2019/05/2019-05-17-CBP-response-to-DHS-Coalition-letter.pdf.

67. *See* Hungarian Helsinki Comm., *Unofficial Translation: The Government of Hungary: Bill No. T/333 amending certain laws relating to measures to combat illegal immigration* (May 2018), https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf.

68. Viktor Z. Kazai, *Stop Soros Law Left on the Books – The Return of the "Red Tail"?*, VERFASSUNGSBLOG (Mar. 5, 2019), https://verfassungsblog.de/stop-soros-law-left-on-the-books-the-return-of-the-red-tail/.

69. *Id.*

70. *See* Eur. Comm'n, *Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones* (July 25, 2019), https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260.

71. *See* Carla Ferstman, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States*, EXPERT COUNCIL ON NGO L. 88 (Dec.

The United States has turned to new applications of existing laws to strain the legitimate work of immigration attorneys and advocates. In 2017, the Department of Justice attempted to enforce previously enacted rules of professional conduct against a legal services provider to argue it could no longer provide know-your-rights presentations and legal orientations to asylum seekers without taking on their full representation. After receiving a cease-and-desist letter warning of possible sanctions due to its support of *pro se* asylum applicants, the Northwest Immigrant Rights Project ("NWIRP") filed a lawsuit arguing this interpretation of the rules would "cripple pro bono legal aid to immigrants" and violated (*inter alia*) lawyers' First Amendment rights to free speech, free assembly, and to petition the government.[72] In granting the plaintiffs' request for a preliminary injunction, the District Court stressed "the principle that non-profit organizations may not be threatened when 'advocating lawful means of vindicating legal rights,'"[73] and the case was later resolved through settlement.[74] Despite the outcome, it is difficult to see this attempted enforcement as anything other than an effort to limit the scope of services NWIRP could provide to immigrants. One year later, individuals facing scrutiny under Operation Secure Line were lawyers affiliated with legal organizations providing assistance to those in the migrant caravan.[75]

### *C. Targeting High-Profile Solidarity Activists*

As the examples discussed above indicate, the criminalization of migrant solidarity has taken place through a range of tactics and legal tools; however, these efforts follow a pattern of targeting highly-visible actors, in particular. Consistent action against such individuals suggests that these actors are targeted precisely because of their public or vocal resistance to restrictive anti-migrant policies—and their wide reach. In the European context, this has led some to argue that "the harshest punishments have been reserved for those who have been most politically articulate about the refugee crisis."[76] Similarly, the US government's focus on individuals supporting migrants at the border with Mexico has been described as a "politically motivated campaign" against their work.[77] While examples of such

2019), https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969.

72. *See* Compl. for Declaratory and Injunctive Relief, *Northwestern Immigrant Rts. Project v. Sessions*, No. 2:17-cv-00716-RAJ, 2017 WL 3189032 (W.D. Wash. 2017).

73. *Northwestern Immigrant Rts. Project v. Sessions,* No. 2:17-cv-00716-RAJ, 2017 WL 3189032, at *3 (W.D. Wash. July 27, 2017).

74. *See* Notice of Settlement and Filing of Settlement Agreement, *Northwestern Immigrant Rights Project v. Sessions*, No. 2:17-cv-00716-RAJ, 2017 WL 3189032 (W.D. Wash. 2017).

75. Devereaux, *supra* note 63.

76. Ferstman, *supra* note 71, ¶ 90.

77. AMNESTY INT'L, '*Saving Lives Is Not a Crime': Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA* 6 (2019), https://www.amnesty.org/download/Documents/AMR5105832019ENGLISH.PDF.

enforcement are too numerous to capture here, the following brief sketch attempts to highlight the breadth.

One of the most covered solidarity cases in Europe is the prosecution of Sarah Mardini and Seán Binder. Mardini is herself a refugee, who famously saved the lives of others on the boat on which she fled to Greece in 2015 after she and her sister kept it afloat when it was at risk of sinking.[78] Three years later, she and Binder, who both worked for an NGO conducting SAR operations in Lesvos, were accused of facilitating irregular entry, espionage, money laundering, and forgery due to their work. They each spent over one hundred days in detention in Greece before being released on bail and faced charges of up to twenty-five years in jail,[79] a saga which sent a clear warning to similar actors on the Greek islands.[80] In Spain, authorities investigated activist Helena Maleno Garzón for human trafficking after she sent distress calls to the Spanish coast guard when migrant boats departed from North Africa,[81] but perhaps also for bearing witness to Spain's unlawful conduct, as "a key source of evidence and documentation concerning illegalities and abuses at the border fences in the Spanish enclaves of Ceuta and Melilla."[82] In Switzerland—which applies the EU's framework on smuggling—local parliamentarian Lisa Bosia Mirra was forced to resign from her position when she was initially convicted of facilitating irregular entry, exit, and stay of migrants after accompanying minors at the Italian border to enter Switzerland in order to claim asylum.[83] In Germany, members of an activist

78. *See* Richard Pérez Peña, *She Was Called a Hero for Helping Fellow Refugees. Doing So Got Her Arrested*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/world/europe/greece-migrant-aid-arrests.html.

79. Amnesty Int'l, *supra* note 56, at 50.

80. Greece's targeting of NGO workers has continued to as recently as September 2020, when it accused thirty-three NGO workers of facilitating illegal entry of migrants into Greece, as well as with espionage, participation in a criminal organization, and violation of state secrets. *See* AP NEWS, *Greek police accuse 33 people of helping migrant smuggling* (Sept. 28, 2020), https://apnews.com/article/turkey-smuggling-archive-greece-crime-c4ed5af7b15d54aa38191adf93d03edc.

81. *Spain-Morocco: Criminal Investigation against Spanish human rights activist Helena Maleno closed*, STATEWATCH (Mar. 12, 2019), https://www.statewatch.org/news/2019/march/spain-morocco-criminal-investigation-against-spanish-human-rights-activist-helena-maleno-closed/.

82. Yasha Maccanico, et al., *The shrinking space for solidarity with migrants and refugees: how the European Union and Member States target and criminalize defenders of the rights of people on the move* 16, TRANSNAT'L INST. (Sept. 2018).

83. Amnesty Int'l*, supra* note 56, at 82–83. The conviction was later overturned. Also drawing Swiss attention was the case of the pastor Norbert Valley, charged with facilitating the illegal stay of a Togolese asylum seeker by repeatedly providing him with food and shelter after he had lost his claim. On appeal, Valley was acquitted on the finding that his assistance was not sufficiently "regular and intensive" to constitute a violation of the law, still leaving open the potential for convictions based on many other acts of kindness. *See Swiss pastor who helped rejected asylum seeker acquitted*, EVANGELICAL FOCUS (Mar. 13, 2020), http://evangelicalfocus.com/europe/5176/Swiss_pastor_who_helped_rejected_asylum_seeker_acquitted_.

collective that helped migrants cross the Austrian border were "handcuffed, strip-searched, and detained in 'container cells'" for over 30 hours.[84] And in Croatia, a volunteer with Are You Syrious? ("AYS"), a civil society group focused on refugee rights, was charged with facilitating illegal migration, because he was present as an observer when an Afghan family requested asylum from the Croatian police.[85] Croatian authorities advocated for the highest possible punishment of imprisonment, a ban of the organization's work, and a 43,000 Euro fine, which AYS argues represents retaliation for its separate efforts to support litigation against the police after the death of a migrant rejected at the border.[86] Regardless of result, these charges are not without impact: AYS has stressed that the prosecution, paired with public vilification of their work and a campaign of police harassment of its staff,[87] provoked direct attacks on its offices and death threats against members.[88]

In the United States, law enforcement has also targeted those that publicly criticize the State's immigration regime. Perhaps the most prominent example is the prosecution of Scott Warren, a teacher and volunteer with the organization No More Deaths/No Más Muertes—the same group whose aid station Border Patrol raided, as described above—for harboring and transporting migrants. Warren believes his arrest was in retaliation for a video that No More Deaths had published only hours before, showing CBP agents "behaving cruelly and unprofessionally" by destroying water supplies left in the desert.[89] Warren filed a pretrial motion to dismiss the case by arguing the government had put forward a selective prosecution that violated his Fifth Amendment Equal Protection Rights.[90] The motion argued that "Dr. Warren is an active, vocal, and highly visible" member of No More Deaths; CBP had "provided a patently pretextual explanation" for their choice to surveil the organization's facilities; and agents "swiftly arrested Dr. Warren, whom they knew to be a leader of NMD, for harboring, without evidence that Dr. Warren himself had done anything illegal." Despite the motion including communications between the arresting officers that suggested discriminatory intent, it was rejected by the court.[91]

84. Ferstman, *supra* note 71, ¶ 90.

85. Amnesty Int'l, *supra* note 56, at 30–31.

86. *Id.*

87. *See AYS Special: When governments turn against volunteers – the case of AYS*, ARE YOU SYRIOUS? (Dec. 30, 2018).

88. Amnesty Int'l, *supra* note 56, at 32–33.

89. *See* Miriam Jordan, *An Arizona Teacher Helped Migrants. Jurors Couldn't Decide if It Was a Crime*, N.Y. TIMES (June 11, 2019).

90. *See* Motion to Dismiss Indictment Due to Selective Enforcement, United States v. Warren, No.CR-18-00223-001-TUC-RCC (BPV), (D. Ariz. Mar. 14, 2019), https://www.courtlistener.com/recap/gov.uscourts.azd.1081102/gov.uscourts.azd.1081102.172.0.pdf.

91. United States v. Warren, No. MJ-17-0241-TUC-BPV, 2018 WL 6809430 (D. Ariz. 2018).

### *D. Framing Narratives*

Ultimately, efforts to undermine migrant solidarity are communications campaigns as much as legal strategies. Because these acts of migrant solidarity often call into question the validity and virtue of State migration policy, efforts to discredit them require depicting support to migrants and asylum seekers as threats to national security that should be deterred and punished, rather than as legitimate acts of support that must be protected. It is worth noting that this framing contradicts contemporary understandings of similar actions in historical contexts. Frances Webber, for instance, notes Europe's "long history" of like support, without profit, "as a response born of human solidarity, which older Europeans recall—whether bringing Jews out of Germany and Nazi-occupied territories before and during the second world war [*sic*], or helping people cross the Berlin Wall during the Cold War."[92] Many of the individuals whose support to migrants has been sanctioned share perceptions that such solidarity is rooted in history, their varying political and religious perspectives or philosophies aside.[93] "It's part of our [Hautes-Alpes] partisan history and heritage to help out those in need," described a French activist prosecuted for facilitating the entry of migrants into France, in reference to the Alps' history as a place of escape for persecuted communities.[94] "In the desert, where we live, if somebody comes to your door and they're thirsty, the right thing to do is to give them water. And that's been happening for generations here in Ajo," Scott Warren said of Arizona.[95] The original American Sanctuary activists of the 1980s, who offered churches as refuge and openly transported Central Americans fearing deportation into northern States—and in whose tradition many of today's US solidarity activists

92. Frances Webber, *The Legal Framework: When Law and Morality Collide* in Humanitarianism: the unacceptable face of solidarity, INST. OF RACE RELS. 7–8 (2017).

93. For instance, many of those responding to migrants and asylum-seekers' needs do so in clear and active resistance to State policies and practice, while others claim politics are irrelevant. *See, e.g.*, Dadusc & Mudu, *supra* note 39 at 3; Lorenzo Tondo & Maurice Stierl, *Banksy funds refugee rescue boat operating in the Mediterranean*, GUARDIAN (Aug. 27, 2020) (reporting that the ten crew members of the vessel, named after French feminist anarchist Louise Michel, "all identify as anti-racist and anti-fascist activists advocating for radical political change"); Benjamin Boudou, *The Solidarity Offense in France: Egalité, Fraternité, Solidarité!*, VERFASSUNGSBLOG (July 6, 2018), https://verfassungsblog.de/the-solidarity-offense-in-france-egalite-fraternite-solidarite/ (describing how one activist described his solidarity as stemming from "a feeling of responsibility," with any political statement merely "a by-product"); Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 GERMAN L. J. 598, 614–16 (2020) (describing independent search and rescue efforts at sea as a form of civil disobedience by which activists claim that "they are better placed to uphold the law" than the governments that argue they contravene it).

94. Louise Nordstrom, *'The Alps have always protected people,' says Frenchman convicted of helping migrants*, FRANCE24 (Dec. 16, 2018), https://www.france24.com/en/20181216-france-alps-migrants-mountains-activists-convicted-winter-deaths-far-right-protests-refugee.

95. Callamard, *supra* note 32, at 38.

follow[96]—cited their inspiration not only in Biblical history but also in the Underground Railroad transporting slaves escaping the American South.[97] The application of anti-smuggling frameworks in these contexts ignores these parallels and again associates support to migrants strictly with criminality and danger, as facilitation of irregular entry and stay.

Framing crackdowns on this action as anti-smuggling efforts also allows States to justify continued border militarization while concurrently narrowing legal and safe pathways to asylum. By shifting blame for irregular migration onto smugglers, the United States and Europe have framed the motivation for these policies as the protection of migrants and asylum seekers themselves. The EU's 2015 Action Plan against Migrant Smuggling is a strong example of this depiction. In laying out its rationale for "the fight against migrant smuggling," the document paints a dire picture of "ruthless criminal networks" that "treat migrants as goods," resulting in "scores of migrants drown[ing] at sea, suffocat[ing] in containers or perish[ing] in deserts"[98]—but does not acknowledge that restrictive immigration policies drive those seeking protection into greater vulnerability toward smugglers and more dangerous routes.[99] Ala Sirriyeh's analysis of anti-smuggling narratives in the American context provides a similar example of stark imagery in the CBP's 2014 "Danger Awareness Campaign" in Central America, which, while dissuading asylum seekers from attempting the journey north, portrays CBP officers as "compassionate and morally righteous white American men saving brown women and children from the cruelties inflicted on them by

96. *See, e.g.*, *No More Deaths: An Interview with John Fife*, YALE REFLECTIONS (2008), https://reflections.yale.edu/article/who-my-neighbor-facing-immigration/no-more-deaths-interview-john-fife. For a sketch of how the concept of sanctuary in the United States has evolved "beyond its conventional public and private definitions," *see* Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 UC DAVIS L. REV. 549 (2018).

97. *See, e.g.*, Sophie H. Pirie, *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 YALE J. L. & HUM. 381 (1990).

98. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Action Plan against migrant smuggling (2015 - 2020), at 3, 5, COM (2015) 285 final (May 27, 2015). For an example of the link between limits on access to asylum procedures and the use of smugglers in Europe, see HUM. RTS. WATCH, '*As Though We Are Not Human Beings:' Police Brutality Against Migrants and Asylum Seekers in Macedonia*, App'x 1: Letter from Ministry of Interior of Republic of Macedonia (Sept. 21, 2015) (finding that after the enactment of a law offering individuals who had entered Macedonia without authorization to submit an asylum application within 72 hours, "the number of registered cases of smuggling migrants has been reduced, and there [have been] no accidents with casualties among illegal migrants").

99. *See, e.g.*, Gabriella Sanchez, *Migrant Smuggling in the Libyan Context: Re-examining the Evidence*, *in* MIGRATION IN WEST AND NORTH AFRICA AND ACROSS THE MEDITERRANEAN 230 "Migration in West and North Africa and across the Mediterranean: Trends, risks, developments and governance" (International Organization for Migration ed., 2020), https://publications.iom.int/system/files/pdf/migration-in-west-and-north-africa-and-across-the-mediterranean.pdf (arguing that stricter border controls and a lack of safe and legal pathways for migration "have led to the emergence of unequal, abusive and violent interactions between migrants and facilitators [smugglers]").

savage and inhumane smugglers."[100] Sirriyeh highlights that such depictions allow the direction of outrage not "towards government policies and actions that cause or amplify suffering," but rather "towards the vilified figures" of smugglers and irregular migrants, "draw[ing] on the legacy of colonial discourse about threatening and dangerous southern men."[101]

To stand, these narratives must also write out the possibility of support to migrants and asylum seekers taken out of solidarity or obligation, acts that question their legitimacy. One recent example of efforts to do so is US then-Homeland Security Secretary Kirstjen Nielsen's 2018 testimony on DHS's proposed budget before the Senate Homeland Security and Governmental Affairs Committee, in which she stressed: "Human smuggling operations are lining the pockets of transnational criminals. They are not humanitarian endeavors […but rather, they support] groups that are fueling greater violence and instability in America and the region."[102] While Nielsen's words reflect an understanding of smuggling that should exclude assistance provided individually, and for no compensation, they place a sense of mistaken humanitarianism under the umbrella of dangerous activity. Although anti-smuggling frameworks are not the only means by which migrant solidarity has been targeted, they are in this way some of the most effective in narrowing space for this work: Erasing legitimate solidarity from the frame, they both rely on and reinforce narratives that divert focus away from arriving asylum seekers' needs for protection and instead frame them as those from whom protection is needed.[103] These are the frameworks to which this Note now turns.

## II.
## DOMESTIC AND INTERNATIONAL FRAMEWORKS IN TENSION

While the Refugee Convention of 1951 sets out the central international framework for the protection of asylum seekers, it does not explicitly provide contours for the protection of those who assist them. However, the criminalization of solidarity implicates international refugee law insofar as that criminalization

100. ALA SIRRIYEH, THE POLITICS OF COMPASSION: IMMIGRATION AND ASYLUM POLICY 79, 88 (2018).

101. *Id.* at 79 (citing GAYATRI CHAKRAVORTY SPIVAK, CAN THE SUBALTERN SPEAK? (1988)).

102. *See* Glenn Kessler, *Are human-smuggling cartels at the U.S. border earning $500 million a year?*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/05/21/are-human-smuggling-cartels-at-the-u-s-border-earning-500-million-a-year/.

103. This also enables—and is exemplified by—a focus on interviewing asylum seekers about potential smuggling networks immediately on their arrival to European countries, rather than about their reasons for arriving in the first place. *See, e.g.*, Report of the Special Rapporteur on the human rights of migrants on his mission to Greece ¶ 41, UN Doc No A/HRC/35/25/Add.2 (June 23, 2017) (describing that Frontex conducts "debriefing interviews to gather intelligence" with individuals arriving by sea to Greece and stressing that "such interviews may increase their fear of the authorities and lead them to hide protection needs, abuse suffered, or vulnerabilities experienced").

facilitates violations of the key rights of asylum seekers, such as the principle of *non-refoulement* outlined in Article 33 of the Refugee Convention (today accepted as customary international law),[104] and further solidifies their lack of access to asylum procedures.[105] An overview of the international legal framework directly tackling smuggling and the rights-based regimes invoked by its enforcement against migrant solidarity demonstrates that even accepting disagreement about the appropriate scope of restrictions on entry of asylum seekers and migrants, the criminalization of this type of support is counter to the spirit of both fields. This Section first explores the international legal frameworks concerned in this context and then introduces the relevant European and American legal regimes that target smuggling, highlighting how such legislation conflicts with international standards.

### *A. International Law*

#### *1. UN Protocol Against the Smuggling of Migrants by Land, Sea and Air*

The key international treaty guiding States' approaches to combating migrant smuggling is the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air.[106] This treaty clearly exempts the types of actions that have been sanctioned under domestic smuggling frameworks from its definition of punishable smuggling. Article 3(a) of the treaty, which both the United States and the European Union have signed, defines migrant smuggling as:

> the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.[107]

The Protocol's *travaux préparatoires* explicitly notes that the article's "intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties."[108] In addition, the Legislative Guide to the Protocol indicates awareness that an overbroad definition

104. *See* 1951 Convention and 1967 Protocol Relating to the Status of Refugees ("Refugee Convention"), art. 33.

105. Art. 31 of the Refugee Convention also explicitly prevents States from penalizing asylum seekers for unauthorized presence in a country, underscoring the illogic of penalizing those who assist them.

106. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, U.N. Doc. A/55/383 (Entered into force Jan. 28, 2004. The Protocol is part of the United Nations Convention Against Transnational Organized Crime.).

107. *Id.* art. 3.

108. Ad Hoc Comm. on the Elaboration of a Convention against Transnat'l Organized Crime, Rep. on the Work of Its First to Eleventh Sessions, *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, ¶ 88, U.N. Doc. A/55/383/Add.1. (Nov. 3, 2000).

of smuggling might interfere with the right to seek asylum and shows clear concern for maintaining asylum seekers' access to protection, noting that "the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons."[109] According to the UN Office of Drugs and Crime's 2018 Global Study on Migrant Smuggling, "the inclusion of financial or other material benefit as a constitutive element of the migrant smuggling crime is a clear indication of the [Protocol]'s focus on tackling those—particularly organized crime groups—who seek to benefit from smuggling migrants."[110] Agnès Callamard has written that the treaty's drafters "recognized the need to protect humanitarian motives" in limiting their definition of smuggling in this manner.[111]

It is worth noting that even with the Protocol's intended carve-out for humanitarian work, its definition of migrant smuggling is still quite malleable and has been criticized. The Oxford Refugee Studies Center has written that the "for-profit/humanitarian binary" in the Protocol is troublesome "as it rests on the premise that acts for gain cannot be humanitarian."[112] The Center points out that actors operating on humanitarian grounds could still be paid for their work, such as individuals employed by humanitarian organizations.[113] In addition, a broad construal of "material benefit" could conceivably encompass other acts perceived to result in gains as part of political or ideological activism.[114] In fact, domestic courts have questioned whether an action taken out of principle could result in an indirect benefit that would undermine a "humanitarian" purpose of the actor, as discussed further in Section III.[115] However, it is clear that the Protocol's definition of smuggling was intended to exclude support provided for no compensation in solidarity with migrants, establishing it as an important authoritative counterweight to how the US and European States have drafted and implemented their domestic anti-smuggling frameworks.

109. U.N. Off. on Drugs & Crime, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, U.N. Sales No. E.05.V.2 (2004).

110. U.N. OFF. ON DRUGS & CRIME, GLOBAL STUDY ON SMUGGLING OF MIGRANTS 18 (2018).

111. Callamard, *supra* note 32, ¶ 71.

112. Rachel Landry, *Decriminalising 'Humanitarian Smuggling,'* UNIV. OF OXFORD REFUGEE STUD. CTR. (Mar. 2017).

113. *Id.*

114. Canada's Supreme Court, however, has found that the inclusion of a material or financial gain in the Protocol's definition meant it was not framed to criminalize humanitarian aid and included an explicit humanitarian exemption in its relevant legislation. R. v. Appulonappa, [2015] SCC 49, [2015] 3 SCR 754.

115. *See infra* Part III (discussing "the case of "Briançon 7" and prosecution of Scott Warren).

*2. Other Applicable International Legal Regimes*

The criminalization of assistance to migrants and asylum seekers through anti-smuggling legislation interferes with a number of other international legal frameworks, particularly International Human Rights Law, the International Law of the Sea, and International Humanitarian Law. Many commentators, such as UN Special Rapporteurs of various mandates, have drawn attention to how these regimes are implicated by the criminalization of migrant solidarity.[116] As such, this Section provides a non-exhaustive overview of relevant international law to frame the inherent tension between crackdowns on migrant solidarity and international regimes that generally safeguard action protecting their rights.

First, the criminalization of humanitarian and legal support to asylum seekers and migrants that results in their return to countries in which they face grave harm violates the principle of *non-refoulement*, which is reflected in Article 33 of the 1951 Refugee Convention, Article 3 of the Convention Against Torture ("CAT"), and Articles 6 and 7 of the International Covenant on Civil and Political Rights ("ICCPR").[117] Efforts that reduce migrants' access to life-sustaining services also threaten their right to an adequate standard of living protected by Article 11 of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), which encompasses necessities like food and housing. This type of deprivation may also constitute a breach of States' obligations under ICCPR Article 6, which outlines the non-derogable right to life.[118] Along this line of reasoning, a number of UN Special Rapporteurs have together argued that "laws and policies aimed at seeking to prevent the provision of life-saving and life-sustaining services to populations because of their ethnicity, religion or immigration status constitute a violation of [ICCPR] Article 6."[119] Non-discrimination provisions in both the

116. *See* Callamard, *supra* note 32; Michael Forst, *Rep. of the Special Rapportuer on the Situation of Human Rights Defender*s, U.N.Doc. A/HRC/37/51 (Jan. 16, 2018); Obiora Okafor, *Rep. of the Independent Expert on Human Rights and International Solidarity*, U.N. Doc. A/HRC/41/44 (Apr. 16, 2019).

117. *See*, *e.g.*, U.N. Human Rights Council, Letter of the Special Rapporteur on the situation of human rights defenders; the Independent Expert on Human Rights and International Solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children to Italy, AL ITA 4/2019 (May 15, 2019) [hereinafter Letter to Italy of the Special Rapporteurs].

118. Agnès Callamard, for instance, points out the UN Human Rights Committee has stressed that the right to life imposes positive obligations on the State to ensure access to basic conditions necessary to protecting life, and that restrictions to services such as food, health, and sanitation are contrary to this obligation. *See* Callamard, *supra* note 32, ¶ 20 (citing HR1/GEN/1/Rev.1, part I and CCPR/C/ISR/CO/4, ¶ 12).

119. Letter to Italy of the Special Rapporteurs, *supra* note 117.

ICCPR[120] and ICESCR[121] are also likely implicated in criminalization efforts to crackdown on support to asylum seekers and migrants on the basis of their country of origin or legal status.

Efforts to criminalize these acts of solidarity also impact the rights of actors providing such support. The targeting of individuals who employ various means of protest in solidarity with migrants implicates their rights to freedom of expression and peaceful assembly protected by ICCPR Articles 19(2) and 21, respectively.[122] While the ICCPR allows States to limit the right to freedom of expression "for respect of the rights or reputations of others" or "for the protection of national security or of public order, or of public health or morals,"[123] UN Independent Expert on International Solidarity Obiora Okafor has argued that "except in the case of protests on board aircraft, the criminalization or suppression of protests in solidarity with irregular migrants and refugees is manifestly unjustifiable, even under any of these permissible limitations."[124] Individuals who feel compelled to assist migrants for deeply held personal or religious convictions may (and do, as discussed below) claim laws preventing them from doing so violate their right to freedom of thought, conscience, and religion, protected by ICCPR Article 18's outlined freedom "to manifest [their] religion or belief in worship, observance, practice and teaching."[125] Finally, it is worth briefly noting the UN's Declaration on Human Rights Defenders,[126] which was created and adopted by the UN General Assembly, specifically to outline existing human rights obligations relevant to the protection of human rights defenders' work, although it is not, on its own, a binding treaty.[127] Its "first and foremost" State obligation "is the requirement that a State create what has been termed a

120. ICCPR art. 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

121. ICESCR art. 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See also* Committee on Economic, Social, and Cultural Rights, *General Comment 12: The Right to Adequate Food (art. 11)*, ¶ 19, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

122. *See* ICCPR art. 19(2) and 2. Itamar Mann has highlighted the significance of freedom of assembly, in particular, as a protection for those providing rescue to migrants in the maritime context, in what he calls "maritime civil disobedience." *See generally* Mann *supra* note 93.

123. *See* ICCPR Article 19(3)(a), (b).

124. Okafor, *supra* note 116, at ¶ 38.

125. *See* ICCPR art. 18.

126. Formally titled the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

127. Margaret Sekaggya (Special Rapporteur on the situation of human rights defenders), *Human rights defenders*, U.N. Doc. A/66/203 (July 28, 2011).

'safe and enabling environment'" for human rights defenders,[128] which "includes establishing a legal, institutional and administrative framework conducive to [their] activities."[129] State efforts to intimidate and penalize human rights defenders attempting to support migrants come into direct conflict with this affirmative obligation.

When acts of assistance take place at sea, they are generally not only protected but compelled by the duty to rescue enshrined in the International Law of the Sea.[130] UN Convention on the Law of the Sea ("UNCLOS") Article 98, considered customary international law,[131] mandates that States require captains to "render assistance to any person found at sea in danger of being lost" and "proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him."[132] It also requires that coastal States carry out "adequate and effective" search and rescue activities.[133] This duty applies "to all persons in distress, without distinction," and "regardless of the nationality or status of such a person or the circumstances in which that person is found."[134] After rescuing such persons in distress, rescuers must treat them humanely,[135] with the site of disembarkation importantly cabined by States' *non-refoulement* obligations, which prohibit returning individuals to places where they would face persecution. Itamar Mann writes that the law of the sea "provides a generally auspicious context for private volunteer rescue operations," and "creates opportunities for

128. Michael Forst, the UN's Special Rapporteur on the situation of human rights defenders defines human rights defenders "broad[ly] and inclusive[ly]" to include "affected communities and individuals, lawyers, judges and academics," "government officials, civil servants, members of the private sector," "whistle-blowers," and "ordinary people who have themselves been displaced or have chosen to migrate, or who have witnessed the suffering of people on the move; they may not even be aware that they are acting as human rights defenders." Michel Forst (Special Rapporteur on the situation of human rights defenders), Human Rights Council (HRC), *Report of the Special Rapporteur on the situation of human rights defenders*, ¶ 13, U.N. Doc. A/HRC/37/51 (Jan. 16, 2018).

129. Michel Forst (Special Rapporteur on the situation of human rights defenders), *Situation of human rights defenders*, ¶ 27, U.N. Doc. A/73/215 (July 23, 2018).

130. While this Note will not discuss them, it is worth noting that various European countries enshrine a duty to rescue in domestic law, while the US generally does not. *See*, *e.g.*, German Strafgesetzbuch [StGB] [Penal Code] § 323c (Failure to provide assistance), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p3022 (Eng.); French Code Pénal [C. pén.] [Penal Code] art. 223-6 (non-assistance to a person in danger).

131. *See, e.g.*, Irini Papanicolopulu, *The duty to rescue at sea, in peacetime and in war: A general overview*, 902 INT'L REV. OF THE RED CROSS 491 (2016).

132. U.N. Convention on the Law of the Sea art. 98, Dec. 10, 1982, 1833 U.N.T.S. 397.

133. *Id*.

134. Papanicolopulu, *supra* note 131, at 495; s*ee also* International Convention on Maritime Search and Rescue ¶ 2.1.10, Apr. 27, 1979, 1403 U.N.T.S 119.

135. *See* Int'l Maritime Org. [IMO], *Guidelines on the Treatment of Persons Rescued at Sea* §5.1.2, IMO Doc. MSC 78/26/Add.2 (May 20, 2004); *see also* Int'l Maritime Org. [IMO], Amendments to the International *Convention for the Safety of Life at Sea, 1974*, *As Amended* at Reg. 33.6, IMO Doc. MSC 78/26/Add.1 (May 20, 2004).

transnational solidarity."[136] Indeed, Irini Papanicolopulu notes that criminalizing actors who refuse to disembark asylum seekers and migrants in unsafe locations, such as Libya, punishes them for acting in accordance with "one of the fundamental duties under the law of the sea."[137]

Finally, practitioners and activists alike have noted the relevance of International Humanitarian Law's ("IHL") protections for humanitarian work in this context, despite the fact that the application of this regime is not triggered outside situations of armed conflict. Early sanctuary activists were motivated in part by the principles of humanitarian law,[138] and Scott Warren of No More Deaths recently described his work as "the same thing that groups like the International Red Cross do in conflict zones around the world," stressing that "[i]t is the neutral provision of aid in the midst of a humanitarian crisis, and it is legal."[139] While IHL places the primary obligation to provide humanitarian assistance to those in need on States, it contemplates humanitarian action by independent actors and expressly requires States to allow such independent, impartial assistance when they do not meet that required on their own.[140] Callamard has recently noted that IHL's "obligation to allow and not impede humanitarian action has increasingly been recognized by 'soft law' instruments in emergency situations."[141] The application of a principle of humanitarianism derived from IHL does some work to underscore that many of the solidarity actions criminalized today are part and parcel of the proper functioning of an international framework purporting to offer humanitarian relief for seekers of international protection. The domestic cases discussed below demonstrate that humanitarianism may be a challenging lens through which to counter attacks on migrant solidarity, particularly because of the apolitical neutrality it has been understood to require. Yet, together, the wide range of international legal protections for such work offers a strong foundation for the legitimacy of migrant

136. Mann, *supra* note 93, at 609.

137. Papanicolopulu, *supra* note 131, at 503. In February 2020, Italy's Court of Cassation held that the captain of the *Sea Watch 3*, a migrant rescue boat that entered Italian port last June, despite being ordered not to by Italian authorities, had acted appropriately and as required by UNCLOS, noting that the "notion of 'safe place' can't be limited only to the physical protection of people but necessarily includes the respect of their fundamental rights." ANSA, *Rackete Upheld Rescue Duty: Italy's Top Court*, INFOMIGRANTS (Feb. 24 2020), https://www.infomigrants.net/en/post/22951/rackete-upheld-rescue-duty-italy-s-top-court.

138. *See, e.g,* Pirie, *supra* note 97, at 390.

139. *See* Ryan Devereaux, *Scott Warren Not Guilty in Trial for Border Humanitarian Work*, INTERCEPT (Nov. 23, 2019), https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/.

140. *See* Additional Protocol (I) to the Geneva Conventions arts. 70(2), 71(2), June 8, 1977, 1125 U.N.T.S. 4; s*ee also* INT'L COMM. OF THE RED CROSS, *Customary IHL Database*, Rules 31 and 55 (2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

141. Callamard, *supra* note 32, at ¶25.

solidarity action under international law. Despite this, domestic frameworks used to target such work have ignored and chipped away at these protections.

### *B. Regional and Domestic Legal Frameworks*

#### *1. EU Legal Framework: The Facilitator's Package*

The EU legislation central to understanding the criminalization of migrant solidarity in Europe is the 2002 Facilitator's Package,[142] intended to implement the UN's Smuggling Protocol, coordinate member States' legislation, and combat irregular migration. The package directs EU member States to sanction the facilitation of unauthorized entry, transit, and residence of irregular migrants, and sets minimum penalties for these actions.[143] Article 1(1) of the EU Council Directive 2002/90/EC ("the Facilitation Directive") defines a facilitator as:

> any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens [or]
> any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of Member State in breach of the laws of the State concerned on the residence of aliens.[144]

Notably, the facilitation of entry and transit offense (Subsection (a)) leaves out the UN Protocol's requirement of a material or financial benefit. Article 1(2) of the Directive provides that Member States "may decide not to impose sanctions with regards to the behavior defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned," but it does not provide any guidance as to how "humanitarian assistance" should be defined.[145] The corresponding Council Framework Decision sets out the penal framework for the facilitation offenses quite broadly, specifying that criminal penalties "may be accompanied" by other measures, such as "the prohibition to practice the occupational activity in which the offense was committed" and deportation.[146]

While the Facilitator's Package aimed to unify the EU States' approach to smuggling, an analysis of its implementation commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs found that instead, the "EU Facilitators' Package has itself created legal

142. *See* Council of the European Union, Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence. Council Directive 2002/90/EC, 2002 O.J. (L 328); s*ee also* Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence. Council Framework Decision 2002/946/JHA, 2002 O.J. (L 328).

143. *See* Council Framework Decision 2002/946/JHA, *supra* note 142.

144. Council of the European Union, Directive 2002/90/EC, *supra* note 142, art. 1(1)(a) and (b).

145. *Id.* art. 1, ¶ 2.

146. Council Framework Decision 2002/946/JHA, *supra* note 142, art. 2.

uncertainty over *what is (not) a crime of migrant smuggling*."[147] This lack of clarity has enabled the framework to be repurposed in an environment increasingly hostile to migrants. The 2018 study found that only Germany, Ireland, Luxembourg, and Portugal's domestic legislation complied with the UN's Protocol's smuggling standards, as the only four EU member States that tied definitions of smuggling to the presence of a financial or material benefit.[148] Although it noted "some forms of explicit exemption" for humanitarian assistance in Belgium, Greece, Spain, Finland, Italy, Malta, and the United Kingdom, the report documented prosecutions of humanitarian actors even in jurisdictions with these supposed exemptions.[149] A 2019 ReSOMA study documented prosecutions of solidarity via this framework in Belgium, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden, and the UK.[150]

The Facilitator's Package is also in tension with other EU law. The Policy Department's study argues that the absence of an explicit humanitarian exemption in the legislation puts it in conflict with the EU's Fundamental Rights Charter and with Article 214 of the European Union Treaty ("TEU"),[151] which establishes that the EU will "provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations."[152] The Package also risks coming into conflict with the European Parliament's Asylum Procedures Directive, intended to facilitate access of asylum seekers to support by setting out that "[m]ember States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders" (Article 8) and that asylum "applicants shall be given the opportunity to consult . . . in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection" (Article 22).[153] In addition, the ReSOMA study suggests that the Facilitator's Package may violate the "right to good administration" outlined in Article 41 of the EU's Fundamental Rights Charter due to the legal uncertainty it engenders.[154] Despite reflecting an attempt to secure the borders of

147. FIT FOR PURPOSE?, *supra* note 42, at 10.

148. *Id*. at 11.

149. *Id*. at 11. Some European States, however, such as France and Austria, have established that humanitarian assistance to migrants will not alone constitute a criminal act. France's case is discussed in Part IV below.

150. Vosyliute & Conte, *supra* note 33, at 23.

151. FIT FOR PURPOSE?, *supra* note 42, at 11.

152. Consolidated Version of the Treaty on the Functioning of the European Union, Part Five, Title III, Chapter 3 (Humanitarian Aid), art. 214.

153. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L 180).

154. Vosyliute & Conte, *supra* note 33, at 41.

the EU, the Facilitator's Package disturbs the treaties and agreements that bind it together.

### *2. US Legal Framework: Bringing in, Transporting, Harboring, or Encouraging*

Within the United States, the key statute recently utilized to criminalize migrant solidarity is 8 U.S.C. § 1324, titled "Bringing in and harboring certain aliens." The statute sets out five categories of felonies concerning contact with migrants who are not authorized to be in the country: (1) smuggling; (2) transporting; (3) harboring; (4) encouraging or inducing illegal entry or stay; and (5) conspiracy to commit or aiding and abetting any of these offenses.[155] The statute defines the first smuggling offense as:

> knowing that a person is an alien, bring[ing] to or attempt[ing] to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry . . . regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien.[156]

Individuals with knowledge or reckless disregard of the fact that a non-citizen is present in the United States without legal authorization will be liable for harboring if they "conceal[], harbor[], or shield[] from detection, or attempt to [do the same to] such alien in any place, including any building or any means of transportation,"[157] and for transporting if they "transport[] or move[] or attempt to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law."[158] The statute's encouraging and inducing subsection penalizes those who "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."[159] Sentences may be increased up to ten years if the action was taken "for the purpose of commercial advantage or private financial gain,"[160] and the statute includes no humanitarian exemption.[161]

Like its European counterpart, the statute's broad language and unclear definitions of these crimes has resulted in uncertainty about their proper application. Earlier incarnations of the statute famously facilitated the prosecution of the Sanctuary activists of the 1980s for "master-minding and running a modern-day underground railroad that smuggled Central American natives across the

155. 8 U.S.C. § 1324(a)(1)(A)(i)-(v).

156. *Id.* § 1324(a)(1)(A)(i).

157. *Id.* § 1324(a)(1)(A)(iii).

158. *Id.* § 1324(a)(1)(A)(ii).

159. *Id.* § 1324(a)(1)(A)(iv).

160. *Id.* § 1324(a)(1)(B)(i).

161. It does exempt individuals who have entered to pursue certain nonprofit religious activity. *See id.* § 1324(a)(1)(C).

Mexican border with Arizona," in the words of a judge who found unsuccessful activists' attempts to raise defenses under mistake of law, humanitarian concern, and religious motivations, among others.[162] In addition to smuggling, the Sanctuary activists of the time were also arrested on transporting and harboring grounds.[163] More recently, the statute's harboring clause has been criticized for its "racist and exclusionary" origins, which failed to contemplate the ways in which natural connections between non-citizens and citizens would complicate such a broad offense.[164] The term "harboring" is left undefined by the statute, but conflicting, and often expansive, circuit court decisions on its definition have "signaled that there [is] little room for U.S. citizens to legitimately interact with unauthorized aliens," with "the practical effect of forcing citizens to choose between ignoring unauthorized friends, neighbors, and family members who sought their assistance, or run the risk of violating criminal law."[165] The "inducing and encouraging" provision has also been challenged for infringing on constitutionally protected speech, recently prompting the Ninth Circuit to hold that the subsection was constitutionally overbroad, a decision that was then overturned by a Supreme Court decision this term as discussed in the Section below.[166] At their broadest, the statute's provisions could bring into the realm of criminality the actions of anyone who might offer a ride to young migrants stranded in the desert, such as the attorney in Texas who did so and found herself detained and searched on suspicion of "transporting illegal aliens,"[167] or even a mayor who offers unused State facilities to house children waiting for their immigration hearings.[168] Here, as in the European context, the statute's lack of clarity has enabled prosecutions of migrant solidarity, examined in the following Section.

162. *United States v. Aguilar,* 883 F.2d 662, 666, 709 (9th Cir. 1989) (upholding conviction of defendants under § 1324 as it stood in 1982).

163. *See, e.g.,* Pirie, *supra* note 97, at 408.

164. Eisha Jain, *Immigration Enforcement and Harboring Doctrine,* 24 GEO. IMMIGR. L.J. 147, 157 (2010) (discussing the 1952 bill drafters' derogatory discussions of its application to single Mexican male laborers they perceived to have little lasting connection to the US).

165. *Id.* However, the Second and the Seventh Circuits had interpreted "harbor" more narrowly, with the Seventh and Second Circuits interpreting it to require the "intent to evade detection." *See* Mary L. Dohrmann, *Hemming in "Harboring": The Limits of Liability under 8 U.S.C. § 1324 and State Harboring Statutes,* 115 COLUM. L. REV. 1217, 1231 (2015) (citing *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d. Cir 2013) and *United States v. Costello,* 666 F.3d 1040, 1050 (7th Cir. 2012)).

166. *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018).

167. *See* Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. TIMES (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html.

168. *See* Mary L. Dohrmann, *Hemming in "Harboring: The Limits of Liability under 8 U.S.C. § 1324 and State Harboring Statutes,* 115 COLUM. L. REV. 1217, 1217 (2015).

## III.
## DOMESTIC LEGAL CHALLENGES AND THEIR LIMITS

While a few legal actions have challenged the criminalization of migrant solidarity through international frameworks,[169] national courts have handled the most direct tests, determining the degree to which applications of anti-smuggling frameworks to migrant solidarity will be permitted. This Section explores recent cases challenging the criminalization of migrant solidarity in France and the United States, which have in both contexts appealed to constitutional protections for exercise, expression, or association. However, the trajectory of these cases suggests that those prosecuted have been targeted precisely because their acts of solidarity have been interpreted by State actors as evincing particular political opinions disfavored by the State. While cases from the French context appear to have moved toward a narrower understanding of punishable "facilitation"—theoretically exempting punishment for actions that do not bring migrants and asylum seekers across borders—both French and US courts have applied the relevant legislative framework to situations in which alleged actions only tenuously (and implausibly) support entry and even stay. In addition, cases from both jurisdictions demonstrate that defenses grounded in humanitarian appeal are continuously undermined by arguments framing solidarity itself as a manifestation of intent to violate State policy.

### *A. "Fraternité": A French Constitutional Principle, In Principle*

In France, a number of prosecutions under the facilitation framework have been leveraged against volunteers aiming to save lives on the mountains dividing France and Italy, where frigid temperatures and dangerous terrain can result in the same deadly consequences as the harsh conditions on the US-Mexico border.[170] ReSOMA has recorded 31 individuals investigated or prosecuted on facilitation charges in France between 2015 and 2018.[171] Although those charged with facilitation have successfully argued to broaden the scope of the French legislation's humanitarian exemption, prosecutors have still utilized the facilitation framework to scrutinize acts of solidarity and concurrently widened

169. For example, a recent communication to the International Criminal Court alleges European complicity in crimes against humanity committed in Libya, in part, due to its criminalization of SAR at sea. It describes an "EU policy of 'persecution by prosecution,'" through its targeted attempts to harass and prosecute individuals saving migrants at sea. *See* Communication to the Office of the Prosecutor of the International Criminal Court: EU Migration Policies in the Central Mediterranean and Libya, ¶ 199.

170. *See, e.g.*, *Refugees on the Pass of Death between Italy and France*, AL JAZEERA (July 26, 2017), https://www.aljazeera.com/features/2017/7/26/refugees-on-the-pass-of-death-between-italy-and-france; *A Path to America, Marked by More and More Bodies*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/interactive/2017/05/04/us/texas-border-migrants-dead-bodies.html.

171. Vosyliute & Conte, *supra* note 33, at 26.

its reach, as demonstrated in the cases of Cédric Herrou, the "Briançon 7," and Pierre Mumber.

*1. Cédric Herrou's Constitutional Challenge*

In what has been called a "highly instructive and progressive"[172] decision, France's Constitutional Council recently acknowledged that the former French facilitation framework was incompatible with the constitutional principle of *fraternité*. Underlying the case were the actions of Cédric Herrou, a French farmer, who headed a group of volunteers described by journalists as an "underground railroad" assisting migrants at the French-Italian border to continue further into France without detection.[173] Herrou had been arrested before for this work, with prosecutors dropping an earlier case against him after conceding that he had acted on humanitarian grounds.[174] In 2017, however, Herrou was charged with facilitating illegal irregular entry and movement of migrants under Article L622-1 of the French Code for Entry and Residence of Foreign Persons and the Right of Asylum, which—in line with the EU Facilitator's Package—penalized facilitating or trying to facilitate directly or indirectly "the irregular entry, movement, or residence of a foreign national in France" by up to five years imprisonment and a 30,000 Euro fine.[175] The French law included an exemption for actions that:

> did not give rise to any direct or indirect compensation and consisted of providing legal advice or providing food, shelter or medical care intended to ensure the foreign national aimed at ensuring humane and decent living conditions, or any other assistance aimed at preserving the dignity or physical integrity of this individual.[176]

However, at the time, the exemption was only applicable to offenses linked to illegal residence, rather than to Herrou's charges of facilitating irregular entry and movement.[177]

172. Okafor, *supra* note 116, ¶ 20.

173. *See* Adam Nossiter, *A French Underground Railroad, Moving African Migrants*, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/world/europe/france-italy-migrants-smuggling.html.

174. *See French Farmer on Trial for Helping Migrants Across Italian Border*, AGENCE FRANCE-PRESSE (Jan. 4, 2017), https://www.theguardian.com/world/2017/jan/04/french-farmer-cedric-herrou-trial-helping-migrants-italian-border.

175. Conseil Constitutionnel [CC] [Constitutional Court] Decision No. 2018-717/718 QPC, July 6 2018, (Fr.), [hereinafter Constitutional Council Decision] https://www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm.

176. *Id*.

177. *Id.*

On appeal, after Herrou received a suspended fine of 3,000 Euros,[178] the public prosecutor (*procureur de la République)* argued that "when aiding is part of a global contestation of the law, it serves an activist cause and constitutes a compensation." This suggests that the "direct or indirect compensation" necessary to render the irregular residence humanitarian exemption inapplicable could extend beyond that ordinarily considered as material.[179] In upholding Herrou's initial conviction and imposing a four-month suspended sentence,[180] the Appeal Court put forward that "Herrou's actions, as he himself claimed and confirmed several times, are part of an activist endeavor, which aims at shielding migrants from controls of public authorities used to enforce the legal dispositions related to immigration."[181] This language implies that Herrou's conviction was upheld at least partially because the court found Herrou acted on principles incompatible with its own conception of acceptable humanitarianism and for that reason constituted breaking the law for the sake of doing so.

Herrou and Pierre-Alain Mannoni, who had been prosecuted under the facilitation legislation for giving a ride to three Eritrean women in need of assistance, petitioned the Constitutional Council to consider a "priority constitutionality question"—a procedure that allows petitioners to challenge the constitutionality of particular legislation—alleging that what they called a "solidarity offense" (*delit de solidarité*) collided with the *fraternité* enshrined in the country's motto, "Liberty, Equality, Fraternity." The Council's July 2018 decision formally recognized *fraternité* as a constitutional principle for the first time, stressing that "it follows from the principle of fraternity the freedom to help one another, for humanitarian reasons, without consideration as to whether the assisted person is legally residing or not within the French territory." [182] It noted that:

> by criminalizing any assistance to the free movement of an [irregular] immigrant, including when it is the accessory to the assistance to residence [offense] and is given for humanitarian reasons, the [legislature] has failed to reconcile in a balanced manner the principle of fraternity and the objective of protecting public order.[183]

Although the Council's decision decriminalized humanitarian support to irregular circulation and residence, it upheld the lack of exemptions to the prohibition of facilitating irregular *entry*.[184] In response to this ruling, the French

178. Benoît Morenne, *French Farmer Who Aided Migrants is Given Suspended Fine*, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/world/europe/cedric-herrou-farmer-france-migrants.html.

179. Boudou, *supra* note 93.

180. *See A French Farmer Who Helped Migrants Crossing From Italy Has Been Sentenced*, PUB. RADIO INT'L (Aug. 8, 2017), https://www.pri.org/stories/2017-08-08/french-farmer-who-helped-migrants-crossing-italy-has-been-sentenced.

181. Boudou, *supra* note 93.

182. Constitutional Council Decision, *supra* note 175, ¶ 8.

183. *Id*. ¶ 13.

184. *Id.*

legislature amended the law to extend the humanitarian exemption to its facilitation of irregular movement offense, when provided for "exclusively humanitarian purpose" and without direct or indirect compensation.[185] It did so as part of a package of asylum reforms that sped up the deportation process for non-citizens and instituted other strict migration-related reforms, however.

Many commentators have praised the Constitutional Council's decision as holding promise for the future. Herrou's lawyer wrote that it allows volunteers to assist migrants already inside the country and in need "without fear of criminal conviction" and that it should "put an end to the practices of the police force of intimidating activists."[186] In February 2020, a separate ruling by the Court of Cassation, the country's highest court for civil and criminal cases, held that the humanitarian exemption for movement or illegal stay was not "limited to purely individual and personal actions," but could also extend to organized activism undertaken as part of an association.[187] Yet, although in Herrou's case the Court of Cassation separately annulled his suspended sentence after the Constitutional Council's decision,[188] many of the same issues arose in his retrial before the Lyon Court of Appeal. There, the Advocate General (*avocat général*) noted that the humanitarian exemption still did not apply to facilitation of entry, and stressed, despite the ruling clarifying the humanitarian exemption's extension to activism, that Herrou "has chosen to be, in the literal sense of the term, an outlaw," who "did not have an exclusively humanitarian aim but an ideological, [activist] claim."[189] Herrou was finally acquitted of all charges in May 2020 with the Court of Cassation rejecting a final appeal from the prosecution in March 2021, an important confirmation that such aid should not be attacked.[190] However, his

185. Law 2018-778 for controlled immigration, an effective right of asylum and successful integration (Sept. 10, 2018), Article 38 (amending Law 622-4 of the code for the entry and stay of foreigners and the right to asylum) https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037381808&categorieLien=id.

186. Patrice Spinosi, *La fraternité, enfin un principe constitutionnel!,* 369 REVUE PROJECT, no. 2, 2019, at 79-82.

187. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Feb. 26, 2020, no. 33. (09-81.561.) (Fr.).

188. Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] crim., Dec. 12, 2018, no. 2923 (17-85736,85.736) (Fr.), https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2923_12_40928.html. ; *see also French Court Rejects Sentences for Helping Illegal Migrants*, AGENCE FRANCE-PRESSE (Dec. 12, 2018), http://www.digitaljournal.com/news/world/top-french-court-rejects-sentences-for-helping-illegal-migrants/article/538832.

189. *See Aid to Migrants; 8 to 10 Months Suspended Prison Sentence Required Against Cédric Herrou*, ARCHYDE, (Mar. 11, 2020), https://www.archyde.com/aid-to-migrants-8-to-10-months-suspended-prison-sentence-required-against-cedric-herrou/.

190. *French Court Scraps Farmer's Conviction for Helping Migrants Cross Border,* AGENCE FRANCE-PRESSE (May 13, 2020), https://www.theguardian.com/world/2020/may/13/french-court-

retrial highlights continued State willingness, despite a broader exemption and constitutional support, to attack such work by demonizing the premise of solidarity itself.

*2. The Prosecution of the "Briançon 7"*

A test of the Constitutional Council's interpretation of *fraternité* arose immediately following its decision. In April 2018, a group of activists undertook a solidarity march from Italy to France in counter-protest to an "Operation Defend Europe" demonstration, in which far-right participants aimed to obstruct access to migrants and asylum seekers traveling through the mountains.[191] Only one day after the Constitutional Council's decision, seven of the counter-protestors were charged with facilitating illegal entry of migrants into France, the offense to which the Council's decision had not extended a humanitarian exemption. All seven were convicted and given at least partially suspended sentences; at the time of writing, an appeal date has been set for spring 2021.[192]

In the proceedings, investigators asserted that the "Briançon 7" had organized the march specifically to conceal the entry of non-citizens into France within the group. However, there was scant direct evidence that the marchers had directly assisted individuals the police later found within French territory.[193] Critics present at the trial argued that "the public prosecutor did not even bother to establish the individual responsibility" of the seven accused.[194] Instead, these claims rested on the observation that "protesters were perfectly organized surrounding continu[ous]ly the individuals susceptible to be in illegal status who were easily identifiable with their black skin colour and their winter outfits despite the warm weather."[195] The Court also took note of the activists' "chants hostile to law enforcement officers" and political sympathies to open borders expressed on a Facebook page before the event as an indication of their unlawful conduct, again indicating that these beliefs were relevant to their conviction.[196] In an interview about the case with Amnesty International, the prosecutor of the Gap

scraps-olive-farmers-conviction-for-helping-migrants-cross-border; *Symbole de l'aide aux migrants en France, Cédric Herrou relaxé définitivement*, LE MONDE (Mar. 31, 2021), https://www.lemonde.fr/police-justice/article/2021/03/31/symbole-de-l-aide-aux-migrants-en-france-cedric-herrou-relaxe-definitivement_6075129_1653578.html. Pierre-Alain Mannoni was also acquitted of all charges in October 2020. *See Aide aux migrants: Pierre-Alain Mannoni relaxé en appel*, LA CROIX (October 28, 2020), https://www.la-croix.com/France/Aide-migrants-Pierre-Alain-Mannoni-relaxe-appel-2020-10-28-1201121749.

191. Amnesty Int'l*, supra* note 56, at 40.

192. Adrien Citeau, *Hautes-Alpes/3+4 de Briançon: le jugement en appel fixé au 27 mai à Grenoble*, DICI (Jan. 22, 2021) https://www.dici.fr/actu/2021/01/22/hautes-alpes-34-de-briancon-jugement-appel-fixe-27-mai-grenoble-1486845.

193. Amnesty Int'l*, supra* note 56, at 40–42.

194. Gisti, *Une audience exceptionelle dans un contexte d'intimidations des personnes migrantes et des militant·e·s solidaires*, (Nov. 8, 2018). https://www.gisti.org/spip.php?article6029

195. Amnesty Int'l*, supra* note 56, at 41.

196. *Id.* at 42.

tribunal that heard the case said, "I cannot accept arguments that people are prosecuted for solidarity. To offer help is something different. Here there was not financial gain but an 'activist' [type of] gain."[197] His words more explicitly frame the justification for their prosecution as the fact that the accused's actions were ostensibly grounded in a particular belief that the State had deemed suspect.

This case is also a particularly transparent example of the discriminatory and pretextual ways in which the facilitation framework can be applied. The investigators' identification of the "foreigners" by their skin color presumes both non-French nationality and unlawful status, along with the supposedly subversive views of those who assist them. Such an application of the French law clearly demonstrates how even with the Constitutional Council's relatively progressive interpretation of *fraternité*, protest is interpreted as evidence of smuggling rather than as permissible and exempted humanitarianism. Amnesty International has highlighted that, as such, this case illustrates that a facilitation offense that does not require a material benefit and encompasses modes of ambiguous, indirect support, "leaves discretion to the authorities to use the law to curb solidarity expressed through protest" and targets activists "potentially based on ideological preconceptions."[198] Finally, the case highlights the limitations of the newly articulated constitutional principle, called into question when deemed to have unacceptable political implications. While *fraternité* may reach those already within French territory, it is unclear how it may extend to individuals on its borders.

### *3. Pierre Mumber's Uneasy Acquittal*

In October 2018, the prosecution of Pierre Mumber highlighted another troubling interpretation of the facilitation framework in France. Mumber was a mountain guide who offered his lodge as shelter for asylum seekers in the area. In fact, he was giving warm clothes and drinks to asylum seekers he had encountered when police officers found the group and attempted to detain them.[199] After two asylum seekers managed to escape, Mumber faced charges under the French facilitation law for obstructing their arrest.[200] In January 2019, Mumber was convicted, in the Court's words, of "direct or indirect assistance, facilitation or attempts to facilitate the entry of three persons in an irregular situation […] by accompanying them when crossing the border and by intervening directly to prevent the police officers from dismissing them."[201] He was acquitted in

197. *Id.*

198. *Id.* at 42, 47.

199. Nicolas Vaux-Montagny & Claire Parker, *French Courts Face Touchy Test: Is Helping Migrants a Crime?,* AP NEWS (Nov. 21, 2019), https://apnews.com/article/f5b9729cd7e94c2d81fb1c62c41547fc.

200. Amnesty Int'l, *supra* note 56, at 39.

201. *Id.*

November 2019[202] when the judges on appeal reviewed a video supporting Mumber's claims that he had not interfered with the arrest.[203]

Despite Mumber's acquittal, the implications of its logic create further barriers to acts of migrant solidarity. Amnesty International's commentary on the case points out that the judge who convicted Mumber stressed that he had "no intention to drive the migrants to the border control to declare their entry into the national territory, and that only the identity check operation by the police ensured that people without documents could be prevented from entering the national territory."[204] This prosecution, as such, attempted to hold Mumber accountable for not enforcing the law on his own accord. In so doing, the proceeding placed the burden on Mumber to show that his assistance to the migrants had fallen under the humanitarian exemption and was not criminal.[205] Extending a line of reasoning that narrows the utility of the humanitarian exemption by presuming solidarity with migrants to be illegitimate unless shown otherwise, Mumber was guilty until proven innocent. "I had proof of my innocence, but if I did not have that proof, I do not know where I would be today," Mumber reported to media on his acquittal.[206]

### *B. Freedom of Expression and Religion-Based Challenges in the US*

Individuals whose solidarity with migrants has been targeted under the United States' smuggling, harboring, and inducing legislation have launched constitutional challenges drawing primarily on First Amendment principles. Notably, they have also pushed forward an argument that attacking migrant solidarity may violate the Religious Freedom Restoration Act ("RFRA"),[207] a statute that protects religious exercise more broadly than the Constitution's Free Exercise Clause.[208] However, whether these arguments can stand up to expansive applications of 8 U.S.C § 1324 remains unclear.

202. Naira Davlashyan & Sandrine Amiel, *'Relieved and a Bit Bitter': Court Acquits Mountain Guide Charged with Helping Asylum Seekers*, EURONEWS (Nov. 21, 2019), https://www.euronews.com/2019/11/20/crime-or-act-of-kindness-french-mountaineer-faces-suspended-sentence-for-helping-asylum-se.

203. Amnesty Int'l, *supra* note 56, at 39–40.

204. *Id.* at 40.

205. *Id.*

206. Davlashyan & Amiel, *supra* note 202.

207. 42 U.S.C. § 2000bb-1. It is worth noting the potentially wide-ranging implications of this argument, as the RFRA has usually been affiliated with a "conservative Christian moral agenda." *See* Stephanie Russell-Kraft, *Activists Are Invoking Religious Freedom to Save Migrants' Lives*, NATION (Apr. 15 2019), https://www.thenation.com/article/archive/no-more-deaths-migrant-catholic-border/ (explaining the invocation of the RFRA to allow Hobby Lobby to justify not covering contraceptives under its employees' health insurance).

208. *See* 42 U.S.C.A. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held the RFRA unconstitutional as applied to the States; however, it can still be invoked against the federal government, as here.

*1. No More Deaths Activists and RFRA*

Scott Warren, well-known for his migrant solidarity in the American context, was prosecuted in the context of his volunteer work with No More Deaths/No Más Muertes, the faith-based humanitarian group that provides aid to migrants traveling north from Mexico across the desert.[209] Warren had provided food, water, and shelter to migrants navigating the inhospitable landscape at the organization's "barn," which federal agents had surveilled and where they claimed they saw Warren "appearing" to give directions.[210] In February 2018, Warren was charged with the felonies of harboring illegal aliens under § 1324 (a)(1)(A)(iii), and of conspiracy to harbor and transport them under § 1324(a)(1)(A)(v),[211] with the total potential punishment up to 20 years in prison.[212] Along with the motion to dismiss for selective enforcement discussed above in Part I, the court denied another motion to dismiss that argued the UN's Protocol Against Smuggling of Migrants by Land, Sea, and Air protected Warren's actions, because they were humanitarian and thereby non-criminal; it noted that the Protocol had no impact on domestic criminal law enforcement.[213]

Warren's initial trial resulted in a mistrial with a hung jury, with eight of twelve jurors concluding that his intention had been to provide humanitarian aid rather than to conceal migrants from authorities. At the close of Warren's second trial in November 2019, the jury found him not guilty, closing a nearly two-year ordeal.[214] However, the Department of Justice attorney's statement to the press belittled what the jury had determined to be a humanitarian intention by focusing on its political implications with language that mirrors those of French prosecutors: "We won't distinguish between whether somebody is trafficking or harboring for money or whether they're doing it out of you know, what I would say is a misguided sense of social justice or belief in open borders or whatever."[215] As with the French cases discussed above, this description implies that social or political motivations for solidarity should be on equal footing with financial incentives as punishable behavior under the statute.

209. NO MORE DEATHS, https://nomoredeaths.org/about-no-more-deaths/ (Mar. 26, 2021).

210. *See* Isaac Stanley-Becker, *An Activist Faced 20 Years in Prison for Helping Migrants. But Jurors Wouldn't Convict Him*., WASH. POST (June 12, 2019), https://www.washingtonpost.com/nation/2019/06/12/scott-warren-year-sentence-hung-jury-aiding-migrants/.

211. *United States v. Warren*, No. CR-18-00223-001, 2018 WL 4403753, at *1 (D. Ariz. 2018).

212. *See* Stanley-Becker, *supra* note 210.

213. *United States v. Warren,* No. MJ-17-0241-TUC-BPV, 2018 WL 6809430 (D. Ariz. 2018).

214. *See* Ryan Devereaux, *Humanitarian Volunteer Scott Warren Reflects on the Borderlands and Two Years of Government Persecution*, INTERCEPT (Nov. 23, 2019), https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/. Jurors found that Warren had not harbored the two non-citizens "with intent to violate the law." Closing Jury Instructions Given on Nov. 20, 2019, *United States v. Warren,* No. CR-18-00223-001-TUC-RCC, 2018 WL 4403753 (D. Ariz. 2018).

215. *Id*.

Yet another significant result followed from Warren's not guilty verdict for harboring, when Judge Raner Collins dismissed one of his misdemeanor charges (abandonment of property) on RFRA grounds.[216] RFRA can exempt individuals from federal laws that "substantially burden the exercise of their religious beliefs," offering "very broad protection for religious liberty."[217] Where claimants can show that (1) the relevant government action burdens a "sincere exercise of religion," and (2) the burden is substantial, RFRA will be violated unless the burden imposed on the individual "furthers a compelling government interest" and is the least restrictive means of doing so.[218] Although an additional pretrial motion to dismiss Warren's felony charges on RFRA claims had been rejected on the grounds that the RFRA is an "affirmative defense" that rested on then-unresolved questions of fact,[219] in evaluating his misdemeanor charges, Judge Collins took Warren "at his word" that his beliefs were sincerely held; found he was "obliged to leave water jugs" because of them; and concluded that, because it burdened his religious beliefs, "enforcing the regulation against abandonment of property is not the least restrictive means to achieve the Government's interest in protecting the pristine state of the wildlife refuge or in securing the border."[220]

A second RFRA claim in defense of related misdemeanor charges against other No More Deaths volunteers was also successful.[221] In March 2019, four volunteers were convicted of entering the Cabeza Prieta National Wildlife Refuge—the crossroads for many migrants who enter the United States from Mexico and "one of the most extreme environments in North America"[222]—without required permits and abandoning property (namely, food and water) in violation of the Refuge's regulations.[223] Reviewing their judgments of conviction, District Court Judge Rosemary Márquez examined the appellants' testimony, particularly their professed affinity to Sanctuary leader Reverend John Fife as a motivating factor for their work, and dismissed the Government's contention that they had "'recited' religious beliefs for the purpose of draping religious garb over their political activity'" by denying a bright-line legal distinction between political and religious motivations.[224] She held that the four

216. *United States v. Warren,* No. 17-00341MJ-001-TUC-RCC (D. Ariz. 2019).

217. *United States v. Hoffman,* 436 F. Supp. 3d 1272, 1279 (D. Ariz. 2020) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)).

218. *Id*. at 1280.

219. *United States v. Warren,* No. CR-18-00223-001-TUC-RCC, 2018 WL 4403753 (D. Ariz. 2018) at *2.

220. *Warren,* No. 17-00341MJ-001-TUC-RCC. Warren's second misdemeanor, for Operating a Motor Vehicle in a Wilderness Area, was not dismissed under the RFRA, because his "religious beliefs did not compel him to drive his vehicle into the restricted area." *Id*.

221. *Hoffman*, 436 F. Supp. 3d 1272.

222. *Id*. at 1277.

223. *Id*. at 1278.

224. *Id*. at 1284.

volunteers had met their burden of establishing that their activities were sincere exercises of their religious beliefs, and that the Government had not demonstrated that enforcing regulations against them was the "least restrictive means of accomplishing a compelling interest."[225] Judge Márquez also indicated deep skepticism at the Government's own claims that appellants' actions had "furthered and encouraged illegal smuggling activity in the [Refuge]," writing:

> The Government seems to rely on a deterrence theory, reasoning that preventing clean water and food from being placed on the Refuge would increase the risk of death or extreme illness for those seeking to cross unlawfully, which in turn would discourage or deter people from attempting to enter without authorization. In other words, the Government claims a compelling interest in preventing Defendants from interfering with a border enforcement strategy of deterrence by death.[226]

Stressing that such "gruesome logic is profoundly disturbing," she ruled it was "speculative and unsupported by evidence."[227] The judge's findings here, particularly those declining to find that allegedly political motivations overshadowed or undermined a claim to religiously-protected action, may be instructive in protecting similar action challenged under 8 U.S.C § 1324. In addition to RFRA-based challenges, recent scholarship puts forward that the work of No More Deaths activists "in this unique context" constitutes expression protected by the First Amendment's Free Speech Clause,[228] an argument that may well arise before the courts if similar prosecutions continue.

*2. Kaji Dousa's Challenge to Operation Secure Line*

One lawsuit, pending as of late March 2021, directly challenges the Government's surveillance of activists through "Operation Secure Line" and its alleged justification under 8 U.S.C. § 1342. Kaji Dousa, a pastor who traveled to Tijuana as a member and an organizer of the "Sanctuary Caravan" that prayed with and offered ministerial services to migrants,[229] was called into a secondary screening on her return from Tijuana and interrogated by CBP, who "revealed disturbingly deep knowledge of her personally."[230] Dousa later realized she was included on the Government's list of surveilled "Suspected Organizers,

225. *Id*. at 1289.

226. *Id.* at 1288–89.

227. *Id.* at 1289.

228. Jason A. Cade, *"Water is Life!" (And Speech!): Death, Dissent, and Democracy in the Borderlands*, 96 IND. L. J. 261, 289 (2020).

229. *See, e.g.,* Kaji Dousa, *I Prayed with Migrants in the Caravan. Now the Government is Tracking Me*, BUZZFEED NEWS (Mar. 24, 2019), https://www.buzzfeednews.com/article/kajidousa/opinion-i-prayed-with-migrants-now-the-government-is.

230. Protect Democracy, *Overview: Dousa v. DHS*, https://protectdemocracy.org/project/dousa-v-dhs/.

Coordinators, and Media" linked to the Migrant Caravan.[231] In July 2019, she filed a lawsuit against the DHS, Immigrations and Customs Enforcement ("ICE"), and CBP, requesting declaratory and injunctive relief against the government's surveillance of her work, which she argued was contrary to both the Free Speech and Free Exercise Clauses of the First Amendment, as well as RFRA.[232] Her complaint argued that DHS's targeting "impedes her ministry" by "burden[ing] her ability to continue answering God's call to minister to migrants and refugees, which cannot happen without confidence in confidentiality."[233] In January 2020, the Southern District of California ruled that Dousa had standing to pursue her claims due to the concrete harm of the surveillance's chilling effect on her ministry activities,[234] finding "no indication that the surveillance will stop without court intervention."[235] It denied the government's motion to dismiss for lack of jurisdiction, but also denied Dousa's request for a preliminary injunction, finding her unlikely to succeed on the merits of both her Free Exercise and RFRA claims, writing that the harms "do not rise above a subjective chill,"[236] in addition to her retaliatory First Amendment claims. However, the court noted that "[w]ith additional evidence […] it is plausible that the Government's pattern of continued surveillance might rise to the level of a 'substantial burden' that would support a Free Exercise or RFRA claim," and that "she might uncover additional evidence showing that the surveillance was so pervasive that it is actionable as a First Amendment retaliation claim."[237] Dousa's ability to sustain a RFRA claim in contesting her surveillance would have large implications on RFRA as a tool to challenge surveillance launched under 8 U.S.C. § 1324, as well as a defense to prosecutions brought under the statute.

*3. "Encouraging and Inducing" as Constitutionally Overbroad*

The Supreme Court has also recently weighed in on the compatibility of 8 U.S.C § 1324 with constitutional protections, despite ultimately refraining from deciding the matter. In February 2020, the Court heard a challenge that attacked the encouraging and inducing subsection of 8 U.S.C. § 1324 as facially unconstitutional.[238] The case stemmed from the Ninth Circuit's 2018 decision that 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), permitting the felony conviction of

231. Comp. for Declarative and Injunctive Relief, *Dousa v. Department of Homeland Security, et al.,* No. 19-cv-1255-LAB (KSC), 2020 WL 434314 (S.D. Cal. 2019).

232. *Id.* at 19.

233. *Id.* at 3.

234. Order Den. Pl.'s Mot. For a Prelim. Inj.; Order Granting in Part and Den. in Part Def.'s Motion to Dismiss at 3-5, *Dousa v. Dep't of Homeland Sec.,* No. 19-cv-1255-LAB (KSC), 2020 WL 434314, (S.D. Cal. 2019).

235. *Id.* at 5.

236. *Id.* at 8 (internal quotation marks omitted).

237. *Id.* at 11.

238. *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020).

an individual who "encourages or induces an alien to come to, enter, or reside in the United States" if they knew or recklessly disregarded that it would be a violation of the law, was constitutionally overbroad in violation of the First Amendment.[239] Evelyn Sineneng-Smith ran an immigration consulting firm in California, working with individuals hoping to adjust their statuses to green cards through applying to a labor certification program, including some who she knew were ineligible to receive the labor certification because they had entered the US after its expiration date.[240] She was charged and then convicted in a jury trial of encouraging and inducing aliens to remain unlawfully in the United States, and of doing so for commercial advantage or private financial gain.[241] On appeal, she argued first that the speech restriction in the statute was "content-based and viewpoint-discriminatory, because it criminalizes only speech *in support* of aliens coming to or remaining in the country," and, alternatively, that even if it did target conduct, it was overbroad in encompassing protected speech.[242] Finding that "[a]t the very least, it is clear that the statute potentially criminalizes the simple words—spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client—'I encourage you to stay here,'" the Ninth Circuit found that it criminalizes constitutionally protected speech.[243] It determined that the statute reached "pure advocacy on a hotly debated issue in our society"—using the example of encouraging undocumented immigrants to remain in the US and fight for legalization of their status—which "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[244]

Arguing in support of the statute, the government asserted that it only encompassed unprotected speech inciting individuals to break the law. However, the Ninth Circuit found that this interpretation "rewrites the statute,"[245] holding instead that the "only reasonable construction of Subsection (iv) restricts a substantial amount of protected speech in relation to the narrow band of conduct and unprotected expression that the statute legitimately prohibits."[246] In interrogating what actions the words "encourage and induce" may cover, the court also rejected the government's interpretation that "encourage and induce" covers acts that provide *substantial* assistance to undocumented migrants[247]—an interpretation from the Third Circuit that read a causation requirement into the

239. *United States v. Sineneng Smith*, 910 F.3d 461 (9th Cir. 2018).

240. *Id*. at 468.

241. *Id*. at 467.

242. *Id.* at 470.

243. *Id*. at 467.

244. *Id.* at 484 (citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

245. *Id.* at 472.

246. *Id*. at 471.

247. *Id*. at 477.

statute[248]—and the government's comparison of the provision to an aiding and abetting statute.[249] Finally, the court stressed the practical impact of such overbreadth on the lives of many:

> While we are aware that the Supreme Court is skeptical of "fanciful hypotheticals" in overbreadth cases, we do not think that the scenarios raised here are fanciful. […] We think that they are part of every-day discussions in this country where citizens live side-by-side with non-citizens. Buttressing our assessment that the following hypotheticals are not overly speculative, the government has already shown a willingness to apply Subsection (iv) to potentially protected speech.[250]

The government successfully petitioned the Supreme Court to review this decision, arguing that the Ninth Circuit had erroneously construed the statute, overbreadth doctrine, and First Amendment law.[251] The government's brief framed the encouraging or inducing subsection as a successor to a prior contract laborer provision that had prohibited inducing the immigration of contract laborers in the United States.[252] It highlighted its import as a tool against smuggling[253] and took issue with the fact that the constitutional overbreadth argument put forward was not relevant to the statute, as applied.[254] The government's brief also argued that "encourage" and "induce" have established meanings in the criminal law context of the statute, which is to "require that the defendant actively *facilitate* or *solicit* the underlying illegal conduct," and that "a prohibition on facilitating or soliciting unlawful actions cannot reasonably be understood to criminalize abstract advocacy."[255] Most significantly, it painted the Court of Appeals' concern about the practical impact of the law on legitimate speech as a "parade of hypotheticals," citing no "realistic danger" of prosecutions for such conduct to argue that its prosecutions via the statute are legitimate.[256] An Amicus Brief submitted on behalf of Amnesty International demonstrated the opposite, putting forward findings that the statute has "repeatedly" been "used to interfere with and chill a substantial amount of protected speech along the southern border."[257] The Brief cited the government's watchlist—including of individuals like Dousa—and its purported design to enforce the "encourage and induce" provision of § 1324, arguing that the fifty-nine individuals surveilled in

248. *Id*.

249. *Id*. at 481–82 (finding that, since aiding and abetting appears as a separate offense in 8 U.S.C § 1324, Congress intended to limit a wider range of actions with this subsection).

250. *Id.* at 483 (citing *United States v. Henderson*, 857 F. Supp. 2d 191, 204–08 (D. Mass. 2012)).

251. *See* Br. for the United States, *United States v. Evelyn Sineneng-Smith*, No. 19-67, 140 S. Ct. 36 (2019).

252. *Id.* at 5.

253. *Id.* at 6.

254. *Id.* at 13.

255. *Id.* at 14 (emphasis added).

256. *Id.* at 32–33.

257. *See* Br. of Amnesty Int'l as Amicus Curiae in Support of Resp't at 2*, United States v. Evelyn Sineneng-Smith*, No. 19-67, 140 S. Ct. 36 (2019).

Operation Secure Line were targeted based on protected speech and political opinion.[258]

In oral argument, the justices also indicated concern about the potentially wide-reaching application of the statute. Justice Breyer noted the possibility that the statute's scope could extend to universities, sanctuary cities, and churches for helping non-citizens, and the government's attorney acknowledged that the statute contained no exemptions for charitable or humanitarian activities such as provision of food.[259] Justices Ginsburg and Sotomayor asked explicitly about the prosecution of a woman who, after learning her housekeeper was undocumented, had warned her that she may not be able to return to the United States if she left, with the government attorney admitting that such conduct could conceivably come within the scope of the statute.[260] The Court's March 2020 decision chose not to engage the overbreadth claim and vacated the Ninth Circuit's decision, finding that its choice to entertain an argument not originally raised by the plaintiff "departed so drastically from the principle of party presentation" that it had been an abuse of discretion.[261] Yet, with the Court entertaining the far-reaching implications of the statute, this case makes clear that there remain more questions than answers about the permissible application of 8 U.S.C. § 1324, and that various forms of migrant solidarity are conceivably under threat.

### *C. Implications of Cases in Both Contexts*

Overall, these cases highlight that in both the French and American contexts, challenges to smuggling-related charges may continue to rest largely on judicial determinations of the legitimacy of individuals' motivations in assisting migrants and asylum seekers, however they choose to do so. They also suggest that the selection of cases to prosecute and the theories behind them hinge on whether authorities can link such acts to any belief suggesting opposition to the State's migration policy in the first place. Challenges based on humanitarian association (or *fraternité*) grounds, such as in the France, or those rooted in protected exercise and expression, such as in the United States, have already helped to shift judicial precedent toward a narrower understanding of facilitating and a more expansive vision of legitimate solidarity. These cases, however, also demonstrate the extent to which the abuse of these frameworks has legitimized scrutiny of actions that are already fundamentally in line with and protected by international law. Such

258. *Id*. at 3–8.

259. *See* Gabriel Chin, *Argument Analysis: Will a broad statute be saved by a narrowing construction?*, SCOTUS BLOG (Feb. 26, 2020), https://www.scotusblog.com/2020/02/argument-analysis-will-a-broad-statute-be-saved-by-a-narrowing-construction/.

260. *Id.*

261. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020). In a concurring opinion, Justice Thomas argued that this case "highlight[s] the troubling nature of this Court's overbreadth doctrine," particularly its tendency to "encourage speculation about imaginary cases […] and summon[s] forth an endless stream of fanciful hypotheticals." *Id*. at 1583–86.

skepticism of migrant solidarity in its various forms has enforced a presumption of guilt on these actors, as well as on the migrants that they help.

## CONCLUSION

In both Europe and the United States, the application of anti-smuggling frameworks to migrant solidarity has justified continued State suspicion of this work, shrinking space for interaction with asylum seekers and migrants, as well as their access to key protections. By targeting actors perceived to challenge securitized and deterrence-based migration policies, this use of anti-smuggling legislation superimposes a focus on dissent and criminality on actions fundamentally in line with the international protection framework—and, by extension, on migrants' and asylum seekers' needs for protection in the first place. European and American actors, however, at least benefit from the increased public scrutiny their cases receive, as well as the wider range of constitutional rights they can attempt to vindicate in court by virtue of citizenship. Scott Warren and Cédric Herrou are cases in point. The experiences of immigrants such as Maru Mora Villalpando, whom the United States placed into deportation proceedings after her campaigning against human rights abuses of migrants, suggests that the targeting of activists via their immigration status is a real tactic of immigration enforcement with potentially devastating outcomes.[262] Moreover, a recent transfer of ICE detainees to a detention facility where many contracted COVID-19, merely to facilitate the deployment of DHS "tactical teams" to Black Lives Matter protests via the same charter flights, demonstrates the often unclear boundaries between State efforts to police dissent and migration, with immigrants paying the price.[263]

Returning to Malta's prosecution of the teenagers aboard the *El-Hiblu 1* helps to demonstrate how even indirect applications of anti-smuggling frameworks to migrant solidarity redistribute blame in line with the narratives that legitimize them. One observer who attended relevant court proceedings in Malta described efforts to prosecute the three teenagers as such:

> A criminal act was committed in a legal sense, and someone has to be punished for this. Either the ship was hijacked, and the three teenagers accused are guilty, or the

262. *See* U.N. OFF. FOR THE HIGH COMM'R ON HUM. RTS., *US Urged to Protect Rights Defenders as Activist Maru Mora Villalpando Faces Deportation Case* (Feb. 14, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22657&LangID=E. *See also* John Washington & José Olivares, *ICE Medical Misconduct Witness Slated for Deportation Is a U.S. Citizen, Says Lawyer*, INTERCEPT (Nov. 2, 2020), https://theintercept.com/2020/11/02/ice-medical-misconduct-us-citizen-deportation/ (describing how ICE moved to deport a "key witness" for allegations that a doctor in a Georgia Detention Center carried out "unnecessary or overly aggressive" gynecological procedures on almost sixty women).

263. Antonio Olivo & Nick Miroff, *ICE Flew Detainees to Virginia So the Planes Could Transport Agents to D.C. Protests. A Huge Coronavirus Outbreak Followed*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html.

> crew fraudulently portrayed the situation in order to get access to Maltese waters, which would fall under smuggling charges. The perspective of the prosecution is that this has to be resisted by the government in a way to not to give any rescue ship carte blanche.[264]

Other commentators have also entertained the idea that the ship's crew may have "wanted to be a good Samaritan but also avoid criminal charges"[265] by describing its shift in course as one made under duress. This is a stark example of how the application of these frameworks forces a nonsensical choice: either sanction those compelled to protect migrants and asylum seekers from *refoulement*, or punish migrants and asylum seekers for insisting that rights guaranteed to them under international law be respected. In the former case, rescuers must be conceptualized as smugglers; and in the latter, asylum seekers and migrants are framed instead as hijackers, pirates, or terrorists blamed for having made it into State territory in spite of obstacles intended to deny them every opportunity.

In this way, European and American abuse of these frameworks does more than whittle away at the contours of the humanitarianism States purport to respect; it aims to deny the very possibility of genuine solidarity even as it persists. These efforts attempt to widen the gap and impose another border between migrants and citizens, yet in impacting citizens and non-citizens alike, they also highlight the important ways that their rights are intertwined—by eroding protections for both. While the dangerous impacts of these framings will likely continue to meet important challenges in court, the abuse of these frameworks further reduces the concept of international protection into an illusory promise rarely accessible without the risk of criminal prosecution.

264. Ariana Mozafari, *Refugees or Hijackers? Teenagers Charged with Terrorism in Malta*, AL JAZEERA (Dec. 16, 2019), https://www.aljazeera.com/news/2019/12/refugees-hijackers-teenagers-charged-terrorism-malta-191216221706120.html.

265. Campbell, *supra* note 4.