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Human Dignity Has No Borders: Respecting the Rights of “People on the Move” and the Rights and Religious Freedom of Those Who Aid Them

Christine M. Venter

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Human Dignity Has No Borders: Respecting the Rights of “People on the Move” and the Rights and Religious Freedom of Those Who Aid Them

*Christine M. Venter**

CONTENTS

INTRODUCTION	1369
I. THE OVERWHELMING NATURE OF THE REFUGEE AND MIGRANT CRISIS.....	1374
A. Drivers of Migration to Europe.....	1375
B. Drivers of Migration to the United States.....	1378
II. TERMINOLOGY AND SPECIFIC INTERNATIONAL AND REGIONAL PROTECTIONS FOR MIGRANTS AND REFUGEES.....	1381
A. Terminology.....	1382
B. International Treaties Protecting Refugees and Migrants	1384
C. Measures to Combat the Smuggling or Trafficking of People	1386
III. THE RIGHT OF INDIVIDUALS AND GROUPS TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.....	1389
A. Respecting the Dignity of Migrants and Refugees – A Motivating Factor for Both Religious and Humanitarian Groups	1390
IV. PROSECUTIONS OF RELIGIOUS AND HUMANITARIAN GROUPS.....	1395
A. Prosecutions of Humanitarian Groups in Europe	1396
B. U.S. Criminalization of Aid to Migrants: The Hoffman and Scott Warren Cases	1402
CONCLUSION	1408

INTRODUCTION

The refugee crisis is one of the great crises of our age. Currently the United Nations High Commissioner for Refugees (UNHCR)

* Christine M. Venter is Teaching Professor and Director of the Legal Writing Program at Notre Dame Law School; Gender Studies Affiliated Faculty at the Gender Studies Program of University of Notre Dame.

estimates 1% of the world's population is displaced.¹ There are about 26 million refugees, 4 million asylum seekers, along with an additional 45 million internally displaced people, and over 4 million stateless individuals.² Forty percent of the world's displaced people are children.³ War, climate change, natural disasters, poverty, and persecution all contribute to this monumental movement of people, and numbers are only expected to rise.⁴ Adding to the crisis, refugee fatigue is beginning to set in.⁵ Countries are tightening requirements for asylum and placing restrictions on immigrants, not only because of COVID-19, but also because of anti-immigrant and refugee sentiment.⁶ Even those countries with stellar humanitarian infrastructures have been overwhelmed by the sheer numbers of those seeking refuge from persecution or merely a better life.⁷ The Syrian crisis, which has resulted in the displacement of close to 11 million people, has placed extreme strain on the resources of many European countries,⁸ while violence, persecution, and poverty in the Northern Triangle countries has caused many to flee to the United States.⁹

1. U.N. High Comm'r for Refugees, *Figures at a Glance* (June 18, 2020), <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

2. *Id.*

3. *Id.*

4. See U.N. High Comm'r for Refugees, *Global Trends: Forced Displacement in 2019* (June 18, 2020), <https://www.unhcr.org/5ee200e37.pdf>.

5. As early as 2013, Pope Francis noted that a "globalization of indifference" was emerging in respect of refugees. See Uri Friedman, *Refugees and the "Globalization of Indifference"*, ATLANTIC (Apr. 16, 2016), <https://www.theatlantic.com/international/archive/2016/04/refugees-pope-francis-lesbos/477870/>; see also POPE FRANCIS, *ENCYCLICAL LETTER: FRATELLI TUTTI* para. 37 (2020), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html ("Certain populist political regimes, as well as certain liberal economic approaches, maintain that an influx of migrants is to be prevented at all costs.").

6. See Anabel Kuntz, Eldad Davidov & Moshe Semyonov, *The Dynamic Relations Between Economic Conditions and Anti-Immigrant Sentiment: A Natural Experiment in Times of the European Economic Crisis*, 58 INT'L J. COMPAR. SOCIO. 392 (2017).

7. Arno Tanner, *Overwhelmed by Refugee Flows, Scandinavia Tempers Its Warm Welcome*, MIGRATION POL'Y INST. (Feb. 10, 2016), <https://www.migrationpolicy.org/article/overwhelmed-refugee-flows-scandinavia-tempers-its-warm-welcome>.

8. *Id.*

9. Sarah Bermeo, *Violence Drives Immigration from Central America*, BROOKINGS INST.: FUTURE DEV. (June 26, 2018), <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>.

In 2016, faced with this crisis, member states of the United Nations adopted the New York Declaration for Refugees and Migrants.¹⁰ This Declaration sought to reaffirm the right of refugees and migrants to “a people-centered, sensitive, humane, dignified, gender-responsive and prompt reception.”¹¹ It also guaranteed “full respect and protection for their human rights and fundamental freedoms.”¹² Those rights include the right to have one’s dignity recognized¹³ and the right to a dignified life.¹⁴ At the same time, the United Nations was mindful of the fact that some countries appeared to be overwhelmed by the growing number of refugees and migrants. The Declaration therefore reiterated the right of states to “manage and control their borders,”¹⁵ as long as that management occurred “in conformity with applicable obligations under international law, including international human rights law and international refugee law.”¹⁶ Member states were also urged to “build on existing bilateral, regional and global cooperation and partnership mechanisms” by including groups like local governmental and non-governmental organizations, as well as “civil society and migrant and diaspora groups” in responding to the crisis.¹⁷

The New York Declaration was followed by the non-binding Global Compact on Refugees in December 2018.¹⁸ According to the Compact, its guiding principles “emanate[] from fundamental principles of humanity and international solidarity.”¹⁹ Like the New York Declaration, the Compact urges member states to

10. G.A. Res. 71/1, New York Declaration on Refugees and Migrants Resolution (Sept. 19, 2016) [hereinafter New York Declaration]. The Compact was reissued and reaffirmed on September 13, 2018, for technical reasons.

11. *Id.* ¶ 22.

12. *Id.*; see also *id.* ¶ 41 (“We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times.”).

13. See *id.* ¶ 41.

14. *Id.* ¶ 11 (“We also recall our obligations to fully respect their human rights and fundamental freedoms, and we stress their need to live their lives in safety and dignity.”).

15. *Id.* ¶ 24.

16. *Id.*

17. *Id.* ¶ 54.

18. U.N. High Comm’r for Refugees, Global Compact on Refugees, U.N. Doc. A/73/12 (Sept. 13, 2018) [hereinafter Global Compact].

19. *Id.* ¶ 5.

coordinate and facilitate with “all relevant stakeholders.”²⁰ Among these stakeholders are humanitarian groups and non-governmental organizations, whose missions consist of providing aid and relocation assistance to refugees.

While these two documents reiterate states’ commitments to treating refugees with dignity in accordance with existing human rights norms, rising anti-refugee sentiment directed not only towards refugees themselves, but also those who assist them, has undermined these principles. It is not only anti-immigrant groups who evince hostility towards these refugees and those who aid them; states too have used intimidatory practices as well as domestic laws to prosecute humanitarian groups for providing assistance, to both deter refugees from coming and humanitarian groups from assisting them. Despite this, many humanitarian groups have persisted in providing aid. Some do so because of their commitment to humanitarian and human rights principles. Some feel compelled to help refugees because of their religious convictions that mandate assisting and welcoming “the stranger.” Their actions are consistent with religious precepts that call on the faithful to “assure assistance and acceptance to migrants.”²¹

Attempts by European states to prevent secular and religious groups from doing this work violate international human rights treaties, specifically Article 11 of the European Convention, by denying the right of freedom of association.²² In the United States, the Religious Freedom Restoration Act and Free Exercise Clause offer

20. *Id.* ¶ 20.

21. See POPE FRANCIS, *supra* note 5, ¶ 40; see also *id.* ¶ 61 (reminding Catholics that “[i]n the oldest texts of the Bible, we find a reason why our hearts should expand to embrace the foreigner”). In the encyclical, Pope Francis also cites to the parable of the Good Samaritan to remind humanity that we should help those who need aid. *Id.* ¶ 67. Although these are Catholic documents, many other religions embrace the call to assist migrants, as will be discussed in Section III.A *infra*.

22. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 [hereinafter European Convention on Human Rights]. Article 11(1) of the Convention provides that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others.” Article 11(2) asserts, “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

legal protections to those who aid migrants because they feel called by their faith to do so.²³

This Article argues that states must desist from and be held accountable for the ongoing practices of denying refugees due process and denying humanitarian groups the rights to freely associate and freely exercise their religion in assisting refugees. It makes three claims. First, states are violating their obligations under existing humanitarian and human rights law in their actions towards refugees and humanitarian groups who seek to aid them. Specifically, states are disregarding provisions of the Refugee Convention, while misusing the Protocol against the Smuggling of Migrants by Land, Sea and Air and domestic anti-harboring statutes to criminalize the acts of those who are only providing humanitarian aid. Second, states that prosecute humanitarian workers who engage in refugee assistance because of their religious beliefs are violating the First Amendment and RFRA in the United States, and Article 11 of the European Convention on Human Rights in Europe. Third, by choosing to prosecute these groups, states are fracturing civil society, ignoring the principles established in 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.²⁴ States are also creating an atmosphere of distrust and incurring both unnecessary societal and economic costs.

The Article will proceed as follows: Part I will detail the migrant crisis to illustrate the vast scale of the problem and detail the drivers of migration. Part II will describe the problem of determining the legal status and appropriate descriptive legal classification of those who flee their own countries and seek refuge elsewhere. It will also canvass the Refugee Convention and its 1967 Protocol, the UN

23. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb [hereinafter RFRA]. Section 2 of RFRA provides that “(1) the framers of the [American] Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws ‘neutral’ toward religion may substantially burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification.” *Id.* § 2000bb(a)(1)–(3).

24. G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Mar. 8, 1999) [hereinafter Declaration to Protect Human Rights].

Convention on the Smuggling of Migrants, and other international and regional conventions designed to protect the rights and dignity of refugees and migrants and accord an appropriate role to humanitarian groups which assist them. Part II ends with a discussion of European and American domestic Anti-Harboring Statutes, which have recently been used to prosecute humanitarian groups, and argue these statutes are being misused. Part III will briefly describe the religious and secular motivations that inspire some humanitarian groups to aid refugees, focusing specifically on Catholic Social Teaching (CST) and the concept of dignity in human rights law. Part IV will examine and critique the recent responses of the United States and Europe towards migrants using representative cases of recent prosecutions of individuals and groups as illustrations. I will argue that these prosecutions constitute violations of humanitarian practice and international human rights law, as well as violations of religious freedom, as many of the humanitarian aid workers assisting migrants are manifesting their religious or humanitarian beliefs in providing such assistance. Part V will briefly make specific recommendations and conclude.

I. THE OVERWHELMING NATURE OF THE REFUGEE AND MIGRANT CRISIS

The United Nations High Commissioner for Refugees disclosed in 2019 that more than seventy million people are fleeing war, persecution, and conflict.²⁵ This is double the figure from twenty years ago and may well be a conservative estimate.²⁶ The High Commissioner has also pointed out that some migration may be voluntary; some migrants leave their home countries in search of a better life for themselves and their families.²⁷ However, the Commissioner notes that

[a]n increasing number of migrants are forced to leave their homes for a complex combination of reasons, including poverty, lack of access to healthcare, education, water, food, housing, and

25. U.N. High Comm'r for Refugees, *supra* note 1.

26. *Id.*

27. See INT'L ORG. FOR MIGRATION, IOM AND LABOUR MIGRATION (2008), https://www.iom.int/sites/default/files/our_work/ICP/IDM/Labour-Migration-Infosheet-2008.pdf.

the consequences of environmental degradation and climate change, as well as the more “traditional” drivers of forced displacement such as persecution and conflict.²⁸

In managing this mass migration of people, the United Nations’ goal is to

reduce the adverse factors that motivate people to move out of necessity in unsafe, often desperate and dangerous, conditions while enabling migration to be safe, regular and orderly, so that the beneficial impact of migration is maximised for migrants as well as the countries and communities of destination and of origin.²⁹

If these mass movements of humanity are ever to diminish, states must first determine the drivers of migration and endeavor to address them at their source.

A. Drivers of Migration to Europe

Identifying the drivers of migration is key to successfully implementing the ultimate goal of a safe and well-regulated process.³⁰ Until March of 2020, Europe and the United States both saw an increase in people seeking refuge or migrating; numbers have declined over the last year, in part due to COVID-19, the closure of many European borders, and the draconian border control policies being enforced in the United States against refugees.³¹ The influx of people is likely to resume when borders

28. *About Migration and Human Rights*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Migration/Pages/about-migration-and-human-rights.aspx> (last visited Mar. 4, 2021).

29. Addressing Drivers of Migration, Including Adverse Effects of Climate Change, Natural Disasters and Human-Made Crises, Through Protection and Assistance, Sustainable Development, Poverty Eradication, Conflict Prevention and Resolution, Inter-agency Issue Brief for the Second Informal Thematic Session, in letter dated May 1, 2017 from the Special Representative of the Secretary-General on International Migration to the President of the General Assembly, 2 (May 1, 2017) [hereinafter U.N. Issue Brief], https://refugeesmigrants.un.org/sites/default/files/final_issue_brief_2.pdf.

30. Part of this goal may consist of providing an optimal environment in migrants’ countries of origin so that those who would not normally choose to migrate can remain in their own countries. *See id.*

31. One example of these policies is the separation of families at the border. *See Family Separation under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline>.

reopen. The UNHCR notes that “[v]iolent conflicts in different parts of the world including Syria, Somalia, Afghanistan and Iraq, along with turbulence and oppression in countries such as Pakistan, Nigeria and Eritrea, have contributed to a significant increase in migration into Europe.”³²

Human made crises, specifically conflict-related crises, are the primary drivers of migration.³³ Civil wars have tripled over the past two decades.³⁴ Recent examples of this type of protracted conflict include Libya and Syria. The Syrian conflict alone has generated an estimated 6.7 million refugees.³⁵ Instability and violence in Afghanistan also continues to be a driver of migration.³⁶ Researchers have argued that it is often a combination of factors, including conflicts, political instability, and lack of economic security, that drives migration.³⁷ Even after a conflict is ostensibly resolved, its impact on the economies of those countries and the ability of people to earn a living or access basic services may still drive migration, as might weak governments and ensuing corruption.³⁸ Given this combination of factors, it is likely at least some of the people migrating to Europe may be entitled to refugee status. However, as discussed in Part IV, they often do not receive the opportunity to apply for it.

32. Majbritt Lyck-Bowen & Mark Owen, *A Multi-Religious Response to the Migrant Crisis in Europe: A Preliminary Examination of Potential Benefits of Multi-Religious Cooperation on the Integration of Migrants*, 45 J. ETHNIC & MIGRATION STUD. 21, 22 (2019); see also U.N. HIGH COMM’R FOR REFUGEES, EUROPE REFUGEE & MIGRANTS EMERGENCY RESPONSE: NATIONALITY OF ARRIVALS FROM GREECE, ITALY AND SPAIN, <https://reporting.unhcr.org/sites/default/files/Monthly%20Arrivals%20by%20Nationality%20to%20Greece%2C%20Italy%20and%20Spain%20-%20Jan-Dec%202015.pdf>.

33. U.N. Issue Brief, *supra* note 29.

34. See SEBASTIAN VON EINSIEDEL, LOUISE BOSETTI, RAHUL CHANDRAN, JAMES COKAYNE, JOHN DE BOER & WILFRED WAN, MAJOR RECENT TRENDS IN VIOLENT CONFLICT 2 (2014).

35. Zoe Todd, *By the Numbers: Syrian Refugees Around the World*, PBS: FRONTLINE (Nov. 19, 2019), <https://www.pbs.org/wgbh/frontline/article/numbers-syrian-refugees-around-world/>.

36. See JOINT RSCH. CTR., INTERNATIONAL MIGRATION DRIVERS 72 (2018), http://publications.jrc.ec.europa.eu/repository/bitstream/JRC112622/imd_report_final_online.pdf.

37. See *id.*

38. See U.N. Issue Brief, *supra* note 29.

The European Union has identified what it terms “push/pull” factors in analyzing why people migrate.³⁹ Among the push factors which drive people to leave their homes are “famine, poverty, low wages, unemployment, overpopulation, high taxes, discrimination, religious persecution, civil war, violence and crime, forced family military service [and] social immobility.”⁴⁰ Among the “pull” factors are “high wages, employment, property rights, personal freedom, economic freedom, law and order, peace, religious freedom, educational opportunity, social mobility, low taxes [and] family reunion.”⁴¹ Wealth disparities between the country of origin and the country of destination are also important factors, with most migrants and refugees moving from low or middle income countries to high income countries.⁴²

It is clear that climate change drives migration, as evidenced by the influx of citizens from “climate vulnerable” countries.⁴³ Environmental and industrial disasters often have an impact on people becoming displaced.⁴⁴ In 2018, the World Bank estimated that three regions (Latin America, sub-Saharan Africa, and Southeast Asia) will generate 143 million more climate migrants by

39. *Exploring Migration Causes – Why People Migrate*, EUROPEAN PARLIAMENT (Oct. 30, 2020, 08:54), <https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate>.

40. ÖRN B. BODVARSSON & HENDRIK VAN DEN BERG, *THE ECONOMICS OF MIGRATION: THEORY AND POLICY* 7 (2009).

41. *See id.*

42. *See id.* at 24.

43. *Climate Vulnerable Forum*, DARA, <https://daraint.org/climate-vulnerable-forum/> (last visited Feb. 15, 2020).

44. *See* 1 NANSEN INITIATIVE, *AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE* 6 (Dec. 2015), https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_low_res.pdf; *see also* INTERNAL DISPLACEMENT MONITORING CTR. (IDMC), *GLOBAL REPORT ON INTERNAL DISPLACEMENT* (2016), <https://www.internal-displacement.org/sites/default/files/publications/documents/2016-global-report-internal-displacement-IDMC.pdf>. The 2016 IDMC Report notes that El Niño-driven drought in the Horn of Africa resulted in increased displacement of people in 2015 and 2016. *Id.* at 22–23, 55.

2050.⁴⁵ Islands in the Pacific are threatened by rising sea levels,⁴⁶ while Northwest Africa is facing rising sea levels, drought, and desertification.⁴⁷ The United Nations estimates an average of 21.5 million people are “forcibly displaced by weather-related sudden onset hazards” each year.⁴⁸ The report described the rise in natural disasters in the last twenty years as “staggering,”⁴⁹ noting that there were almost twice as many natural disasters recorded between 2000 and 2019 as were recorded between 1980 and 1999. These disasters have affected 4.03 billion people and resulted in 1.23 million deaths.⁵⁰ Currently the United Nations does not accord refugee status to climate migrants.⁵¹

B. Drivers of Migration to the United States

Push/pull factors also profoundly influence migration to the United States. Two of the most prominent drivers of migration appear to be violence and poverty in the Northern Triangle countries as well as better economic opportunities in the United States. The Congressional Research Service notes that there has recently been an increase in what it terms “mixed migration, with some individuals traveling north for economic opportunity, others

45. KANTA KUMARI RIGAUD, ALEX DE SHERBININ, BRYAN JONES, JONAS BERGMANN, VIVIANE CLEMENT, KAYLY OBER, JACOB SCHEWE, SUSANA ADAMO, BRENT MCCUSKER, SILKE HEUSER & AMELIA MIDGLEY, WORLD BANK GRP., GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION 110 (2018), <https://openknowledge.worldbank.org/handle/10986/29461>.

46. Amrita Deshmukh, *Disappearing Island Nations Are the Sinking Reality of Climate Change*, QRIUS (May 17, 2019), <https://qrius.com/disappearing-island-nations-are-the-sinking-reality-of-climate-change/>.

47. Michael Werz & Laura Conley, *Climate Change, Migration, and Conflict in Northwest Africa*, CTR. FOR AM. PROGRESS (Apr. 18, 2012, 9:00 AM), <https://www.americanprogress.org/issues/security/reports/2012/04/18/11439/climate-change-migration-and-conflict-in-northwest-africa/>.

48. *Frequently Asked Questions on Climate Change and Disaster Displacement*, U.N. HIGH COMM’R FOR REFUGEES (Nov. 6, 2016), <https://www.unhcr.org/en-us/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html>.

49. U.N. OFF. FOR DISASTER RISK REDUCTION, HUMAN COST OF DISASTERS: AN OVERVIEW OF THE LAST 20 YEARS 3 (2020), <https://www.undrr.org/sites/default/files/inline-files/Human%20Cost%20of%20Disasters%202000-2019%20FINAL.pdf>.

50. *Id.*

51. See *Climate Change and Disaster Displacement*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/en-us/climate-change-and-disasters.html> (last visited Mar. 4, 2021) (describing “climate refugee” as a term that “does not exist in international law”).

seeking refuge from violence and insecurity, and many in search of both.”⁵²

Mexico has traditionally been “the top origin country of the U.S. immigrant population,” with China, India, the Philippines, and El Salvador making up the next largest groups.⁵³ However, immigration from the Northern Triangle countries has recently increased because of lack of economic opportunities, political turmoil, and humanitarian crises.⁵⁴ The Congressional Research Service notes that “[a]lthough motives vary by individual, difficult socioeconomic and security conditions—exacerbated by natural disasters and poor governance—appear to be the most important drivers of the current mixed migration flow.”⁵⁵ COVID-19 has also disrupted the economies of many countries, and countries which recover more quickly from the crisis will likely continue to see an influx of people.⁵⁶

Médecins Sans Frontières (MSF) asserts that the crisis in the Northern Triangle is an overlooked humanitarian crisis, with “unprecedented levels of violence outside of a war zone.”⁵⁷ Honduras, El Salvador, and Guatemala rank among the countries with the highest murder rates in the world.⁵⁸ According to MSF’s research, “[d]irect attacks, threats, extortion or a forced recruitment attempt by criminal organizations were given as main reasons for survey respondents to flee their countries Of the surveyed population, 40 percent left the country after an assault, threat,

52. PETER J. MEYER & MAUREEN TAFT-MORALES, CONG. RSCH. SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY (2019), <https://fas.org/sgp/crs/row/IF11151.pdf>.

53. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>.

54. See Allison O’Connor, Jeanne Batalova & Jessica Bolter, *Central American Immigrants in the United States*, MIGRATION POL’Y INST. (Aug. 15, 2019), <https://www.migrationpolicy.org/article/central-american-immigrants-united-states>.

55. MEYER & TAFT-MORALES, *supra* note 52.

56. *Global Report: Red Cross Warns of Significant post-Covid-19 Migration as WHO Responds in United States*, FR24 NEWS (July 24, 2020), <https://www.fr24news.com/a/2020/07/global-report-red-cross-warns-of-significant-post-covid-19-migration-as-who-responds-in-united-states-world-news.html>.

57. MÉDECINS SANS FRONTIÈRES, FORCED TO FLEE CENTRAL AMERICA’S NORTHERN TRIANGLE 8 (2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-american-northern-triangle_e.pdf.

58. *Id.* at 8.

extortion or a forced recruitment attempt.”⁵⁹ Moreover, “citizens are murdered with impunity, kidnappings and extortion are daily occurrences. Non-state actors perpetuate insecurity and forcibly recruit individuals into their ranks and use sexual violence as a tool of intimidation and control.”⁶⁰ This would seem to suggest that at least some of these people may be eligible for refugee status. The UNHCR has concurred with this assessment and noted that “[t]hese groups are particularly vulnerable to sexual assault, human trafficking and other risks both in countries of origin and during displacement.”⁶¹ Unfortunately, many people fleeing these countries, who may be eligible for refugee status, do not get a determination of their status.

The U.S. Agency for International Development (USAID) has pointed out that “[i]n the Western Highlands of Guatemala, where significant out-migration has occurred over the past year, 76% of the population lives in poverty and 27% lives in extreme poverty.”⁶² The World Food Programme attributes this to the five-year drought in Central America, which has led to crop failures.⁶³ In Guatemala, El Salvador, Honduras, and Nicaragua, it is estimated that 1.4 million people need food assistance.⁶⁴ The Migration Research Series also asserts that “30% of the households with migrants in the affected areas cited climate-induced lack of food as the main reason for leaving their homes and becoming migrants.”⁶⁵

The United States also settles a number of refugees under its Resettlement program. In 2019, about 30,000 refugees from the Democratic Republic of Congo, Myanmar, Ukraine, Eritrea, and

59. *Id.* at 11.

60. *Id.* at 8.

61. See U.N. HIGH COMM’R FOR REFUGEES, PROTECTION AND SOLUTIONS STRATEGY FOR THE NORTHERN TRIANGLE OF CENTRAL AMERICA: 2016–2018, <https://reporting.unhcr.org/sites/default/files/Protection%20and%20Solutions%20Strategy%20for%20the%20Northern%20Triangle%20of%20Central%20America%202016-2018.pdf>.

62. MEYER & TAFT-MORALES, *supra* note 52.

63. *Dry Corridor Crisis (Guatemala, El Salvador, Honduras, Nicaragua)*, RELIEFWEB (Oct. 4, 2019), <https://reliefweb.int/report/guatemala/dry-corridor-crisis-guatemala-el-salvador-honduras-nicaragua-september-2019>.

64. *Id.*

65. Jeff Masters, *Fifth Straight Year of Central American Drought Helping Drive Migration*, SCI. AM. (Dec. 23, 2019), <https://blogs.scientificamerican.com/eye-of-the-storm/fifth-straight-year-of-central-american-drought-helping-drive-migration/>.

Afghanistan were resettled primarily in Texas, Washington, New York, and California.⁶⁶

II. TERMINOLOGY AND SPECIFIC INTERNATIONAL AND REGIONAL PROTECTIONS FOR MIGRANTS AND REFUGEES

Because migration is often driven by a combination of complex factors, it is difficult to ascertain what legal protections under international law people might be entitled to without an assessment being conducted by legally trained immigration officers. Unfortunately, these assessments often do not occur, as refugees may be turned away or detained before they can reach their country of destination, with some dying on the journey.⁶⁷ This Article will generally use the term “migrants” to refer to people who have left their homes for a multiplicity of reasons, although the Special Rapporteur in the *Report on the Situation of Human Rights Defenders* suggests that the term “people on the move” might be appropriate, as it encompasses all legal classifications and circumstances.⁶⁸ It may well be that at least some of the people on the move are entitled to refugee or asylee status. No matter their

66. See *The U.S. Refugee Resettlement Program – An Overview*, OFF. OF REFUGEE RESETTLEMENT (Sept. 14, 2015), <https://www.acf.hhs.gov/orr/resource/the-us-refugee-resettlement-program-an-overview>.

67. The UNHCR has pointed out that 85% of those rescued or intercepted in the newly established Libyan Search and Rescue Region (SRR) were disembarked in Libya, where they faced detention in appalling conditions (including limited access to food and outbreaks of disease at some facilities, along with several deaths). *Desperate Journeys*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/desperatejourneys/> (last visited June 25, 2020). Moreover, the Agency estimates that 2,275 people perished in the Mediterranean in 2018. *Id.*

68. Report of the Special Rapporteur on the Situation of Human Rights Defenders, U.N. Doc. A/HRC/37/51, ¶ 9 (Jan. 16, 2018) [hereinafter Report of the Special Rapporteur]. The Special Rapporteur notes that

[t]he term “people on the move” is used to capture the diverse populations and circumstances of individuals and communities that find themselves in new locations. Sometimes movement has been voluntary, in search of new economic opportunities or new social horizons; at other times, movement has been forced as a result of armed conflict, discrimination or human rights violations. In reality, the distinction between voluntary and forced movement is blurred and challenged by the multiplicity of reasons for movement.

Id.

status, all people are entitled to human rights, including the right to have their dignity recognized and protected.⁶⁹

A. Terminology

There is no official definition of the generic word “migrant” in international law, although specific categories of migrant work are defined by Article 2 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.⁷⁰ That Convention covers both documented and undocumented migrants and details their rights.⁷¹ These include the right to be free from discrimination,⁷² the right to life,⁷³ freedom from cruel, inhuman, and degrading treatment,⁷⁴ and, if arrested, the right to be treated “with humanity and with respect for the inherent dignity of the human person.”⁷⁵

69. See New York Declaration, *supra* note 10; see also Report of the Special Rapporteur, *supra* note 68, ¶ 8, where the Special Rapporteur notes that “the international instruments that set out international and regional human rights regimes extend their protections to all individuals within the jurisdiction of a State, regardless of whether they are a national or non-national, regardless of how far they are from their place of birth.”

70. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Convention on Rights of Migrant Workers]; see also *Key Migration Terms*, INT’L ORG. FOR MIGRATION (IOM), <https://www.iom.int/key-migration-terms#Migrant> (last visited Sept. 30, 2020). The U.N. uses this term to reflect

the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants.

Id. Two approaches are generally adopted to define the term “migrant”: the inclusivist approach, followed among others by IOM, considers the term “migrant” as an umbrella term covering all forms of movements; the residualist approach excludes from the term “migrant” those who flee wars or persecution. Jorgen Carling, *What Is the Meaning Of ‘Migrant’?*, MEANINGOFMIGRANTS.ORG, <https://meaningofmigrants.org/> (last visited Mar. 4, 2021).

71. See generally Convention on Rights of Migrant Workers, *supra* note 70. The Convention describes a “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” *Id.* art. 2.

72. *Id.* art. 7.

73. *Id.* art. 9.

74. *Id.* art. 10.

75. *Id.* art. 17.

Refugee has also become a somewhat generic term to describe someone fleeing his or her home, usually as a result of violence or environmental disaster. However, the legal definition of a refugee in international law is

any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁶

The legal distinction between refugees and asylum seekers is based on where they apply for refuge; a refugee applies inside his or her country of origin while an asylee applies in the country in which she intends to seek asylum. The International Organization for Migration has noted that “recognition as a refugee is declaratory and not constitutive.”⁷⁷ Under UN guidelines,

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁷⁸

Aside from those who clearly fall within the legal definition of refugee or asylee, there may be others fleeing their homes whose status is not so clear cut. Some may be fleeing domestic violence or gang violence.⁷⁹ Others may be so-called environmental refugees or

76. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137, 152.

77. *Key Migration Terms*, *supra* note 70; see also *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) (Nov. 25, 2013), https://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf.

78. U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 17 (2019 ed.).

79. The U.N. Refugee Agency has pointed out that gang and other violence in the Northern Triangle countries has been responsible for a dramatic escalation in the number of people seeking refuge in the United States. See *Central America Refugee Crisis*, U.N. HIGH

migrants, fleeing storms, resource scarcity, fires or some other environmental disaster. Although the term may be commonly used, there is no legal definition of a climate refugee, “as it does not exist in international law.”⁸⁰ It is therefore difficult to determine who qualifies as a refugee or asylee and who has merely migrated or fled some kind of disaster. These categories and the differing legal protection—or lack thereof—are compounded by the fact that the large numbers of refugees and migrants put a strain on the bureaucracies charged with processing them. Many people on the move therefore never have their legal status properly determined.

B. International Treaties Protecting Refugees and Migrants

Since World War II, the international community has recognized the right of people to seek refuge and a better life. The 1951 Refugee Convention⁸¹ and its 1967 Protocol⁸² outline the rights of refugees,⁸³ articulate the principle of non-refoulement so that refugees are not forced to return to dangerous situations,⁸⁴ and standardize the grounds on which refugees might seek asylum.⁸⁵ In its Recommendations, the Convention notes that “in the moral, legal and material spheres, refugees need the help of suitable welfare services, especially that of appropriate nongovernmental organizations.”⁸⁶ The international community therefore recommended that Governments and intergovernmental bodies “facilitate, encourage and sustain the efforts of properly qualified organizations.”⁸⁷ The role of nongovernmental organizations

COMM’R FOR REFUGEES, <https://www.unrefugees.org/emergencies/central-america/> (last visited Mar. 4, 2021). In some instances, those refugees may be able to prove that they fall within the category of “membership in a particular social group” if they have a well-founded fear of persecution on account of their membership in a group which is recognized as a “social group” by relevant legal authorities. *See, e.g.,* *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1077 (9th Cir. 2020).

80. *Climate Change and Disaster Displacement*, *supra* note 51.

81. Convention Relating to the Status of Refugees, *supra* note 76.

82. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

83. Convention Relating to the Status of Refugees, *supra* note 76, 156–77.

84. *Id.* at 176.

85. *Id.* at 152.

86. *Id.* at 146.

87. *Id.*

(NGOs) and intergovernmental organizations (IGOs) working with people on the move is therefore long-established.⁸⁸

The international community has also stressed that migrants are a vulnerable population and are protected by all international human rights instruments; it has also taken specific steps to protect them from exploitation, smuggling, and forced labor.⁸⁹ As early as 1930, the International Labour Organization (ILO) recognized that migrants may be particularly vulnerable to forced labor. It therefore enacted the Forced Labour Convention.⁹⁰ That Convention was reinforced with a Protocol added in 2014, recognizing the connection between trafficking in persons and forced labor.⁹¹ The 1949 ILO Convention on Migrant Workers also urged signatories to provide information to migrants about their state laws relating to migration and ensure that migrants received equal treatment, equal pay, and equal benefits as nationals.⁹² The 1975 Supplemental Convention reminded member states “to respect the basic human rights of all migrant workers.”⁹³ It also urged signatories “to suppress clandestine movements of migrants for employment and illegal employment of migrants,”⁹⁴ and to act against “the organisers of illicit or clandestine movements of migrants for employment . . . and against those who employ workers who have immigrated in illegal conditions.”⁹⁵ Additional relevant ILO Conventions and Recommendations include the Convention concerning Migration for Employment,⁹⁶ the Convention concerning Migrations in Abusive Conditions and the Promotion

88. It has also been confirmed by the Declaration to Protect Human Rights, *supra* note 24.

89. These include the Universal Declaration of Human Rights, G.A. Res. 217 (III) A (Dec. 10, 1948), the International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200A (XXI) A, annex (Dec. 16, 1966), and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) A, annex (Dec. 16, 1966).

90. Forced Labour Convention, June 28, 1930, 39 U.N.T.S. 56.

91. Protocol of 2014 to the Forced Labour Convention, June 11, 2014, 53 I.L.M. 1232.

92. Migration for Employment Convention art. 6, July 1, 1949, 120 U.N.T.S. 71.

93. Migrations in Abusive Conditions and the Promotion of Equality and Opportunity and Treatment of Migrant Workers Convention art. 1, June 24, 1975, 1120 U.N.T.S. 323.

94. *Id.* art. 3.

95. *Id.*

96. Migration for Employment Convention, *supra* note 92, art. 6.

of Equality of Opportunity and Treatment of Migrant Workers,⁹⁷ the Recommendation concerning Migration for Employment,⁹⁸ the Recommendation concerning Migrant Workers⁹⁹, and the Convention concerning Abolition of Forced Labour.¹⁰⁰

The UN Migrant Convention—the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990—defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”¹⁰¹ Refugees are specifically excluded from the protections of the Convention as their rights are protected by the Refugee Convention. The protections offered to migrant workers and their families are essentially a reiteration of the human rights guaranteed by the main UN Human Rights instruments.¹⁰²

C. Measures to Combat the Smuggling or Trafficking of People

It should be acknowledged that immigrants, whether refugees or migrants, are particularly vulnerable to exploitation because they are displaced from their home countries, their status may be uncertain, and they may be desperate, given their circumstances. Not surprisingly, several UN conventions that pertain to the rights of migrants specifically focus on measures to combat the smuggling of migrants and forced or compulsory labor.¹⁰³ It is in the legitimate interest of states and migrants themselves to ensure that people do not fall prey to smugglers. As migrant smuggling became increasingly profitable, the United Nations recognized that international cooperation was necessary to combat this transnational crime. Three UN Conventions designed to combat

97. Migrations in Abusive Conditions and the Promotion of Equality and Opportunity and Treatment of Migrant Workers Convention, *supra* note 93.

98. INT’L LAB. ORG., MIGRATION FOR EMPLOYMENT RECOMMENDATION (NO. 86) (1949).

99. INT’L LAB. ORG., MIGRANT WORKERS RECOMMENDATION (NO. 151) (1975).

100. Abolition of Forced Labour Convention, June 25, 1957, 320 U.N.T.S. 291.

101. Convention on Rights of Migrant Workers, *supra* note 71, art. 2.

102. *See, e.g., id.* art. 8 (freedom of movement), art. 10 (right to be free from cruel and inhuman treatment).

103. *See, e.g.,* Convention Against Transnational Organized Crime, Sept. 29, 2003, T.I.A.S. 13127, 2225 U.N.T.S. 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Dec. 25, 2003, T.I.A.S. 13127, 2237 U.N.T.S. 319; Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Jan. 28, 2004, T.I.A.S. 13127, 2241 U.N.T.S. 507.

this phenomenon entered into force in 2000. These Conventions – the United Nations Convention against Transnational Organized Crime (Organized Crime Convention);¹⁰⁴ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol);¹⁰⁵ and the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁰⁶ – are designed to strengthen international efforts and cooperation to disrupt the smuggling or trafficking of persons. They also aim to protect people who have been smuggled or trafficked.¹⁰⁷

Additionally, the European Union has also tried to develop its own response to the flood of refugees and the increased smuggling of migrants. In 2002, the European Union adopted a Directive aimed at combatting the smuggling of migrants and illegal immigration generally.¹⁰⁸ It purported to create a common definition of the facilitation of unauthorized entry, transit, and residence.¹⁰⁹ At the same time, the European Union established a Framework Decision urging member states to impose criminal sanctions on those intentionally facilitating the unlawful entry of migrants, or facilitating their entry for financial gain.¹¹⁰ The Framework provided that offenders should be subjected to imprisonment for at least eight years to act as a deterrent.¹¹¹ The Framework focuses on encouraging states to take “measures . . . to combat the aiding of illegal immigration both in connection with unauthorized crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.”¹¹²

104. Convention Against Transnational Organized Crime, *supra* note 103.

105. Protocol to Prevent Trafficking in Persons, *supra* note 103.

106. Protocol Against the Smuggling of Migrants, *supra* note 103.

107. *See id.*

108. *See* Council Directive 90/EC, 2002 O.J. (L 328) 17.

109. *Id.*

(a) 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; (b) 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 a Member State in breach of the laws of the State concerned on the residence of aliens.

Id. art 1. para. 1.

110. Council Framework Decision 946/JHA, 2002 O.J. (L 328) 1.

111. *Id.* art 1. para. 3.

112. *Id.* at (2).

Although the Directive was aimed at combating human smuggling, twenty-four member states criminalized the facilitation of entry of unauthorized persons, even if that facilitation was done *without* the intent to profit from it.¹¹³ Germany, Ireland, Luxembourg, and Portugal were the only member states that required intent to derive financial gain for a conviction under these statutes.¹¹⁴ The UN Protocol Against the Smuggling of Migrants had defined “smuggling of migrants” as “the procurement, in order to obtain directly or indirectly, a *financial or other material benefit*, of the illegal entry of a person into the State Party of which the person is not a national or a permanent resident.”¹¹⁵ Financial benefit is thus a necessary prerequisite under the UN Convention. Nevertheless, some EU states began to criminalize those who assisted migrants solely on humanitarian grounds, without intent to profit. Thus, for example, in 2016, Pierre-Alain Mannoni, a French national, who helped three exhausted female migrants he encountered near the Italian border with France, “was convicted for facilitating the irregular circulation of foreign nationals,” although he provided only humanitarian assistance.¹¹⁶ That conviction was subsequently overturned; however, he faces a new trial.¹¹⁷

In further efforts aimed at preventing the exploitation of migrants by criminal networks, both the European Agenda on Migration¹¹⁸ and the European Agenda on Security¹¹⁹ identified the

113. Those member states are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. See DIRECTORATE-GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT, FIT FOR PURPOSE? THE FACILITATION DIRECTIVE AND THE CRIMINALISATION OF HUMANITARIAN ASSISTANCE TO IRREGULAR MIGRANTS 30–31 (2016). The United Kingdom has now left the European Union but at the time was a member state.

114. *Id.* at 11.

115. Convention Against Transnational Organized Crime, *supra* note 103, art. 3 (emphasis added).

116. AMNESTY INT’L, PUNISHING COMPASSION: SOLIDARITY ON TRIAL IN FORTRESS EUROPE 38 (2020) [hereinafter PUNISHING COMPASSION], <https://www.amnesty.org/download/Documents/EUR0118282020ENGLISH.PDF>; *Délit de solidarité: jugé pour avoir porté secours à des demandeuses d’asile*, AMNESTY INT’L FR. (Jan. 8, 2020), <https://www.amnesty.fr/refugies-et-migrants/actualites/delit-de-solidarite-juge-pour-avoir-porte-secours>.

117. PUNISHING COMPASSION, *supra* note 116.

118. *A European Agenda on Migration*, COM (2015) 240 final (Mar. 3, 2015).

119. *The European Agenda on Security*, COM (2015) 185 final (Apr. 28, 2015).

fight against migrant smuggling as a priority. In May 2015, the Council adopted an Action Plan against Migrant Smuggling designed to transform smuggling from a “high profit, low risk” activity into a “high risk, low profit” business, while ensuring the full respect and protection of migrants’ human rights.¹²⁰ The Council’s goal was to create a humane and effective return policy by encouraging migrants to return voluntarily to their home countries. The Council also hoped to standardize procedures for the return of migrants and do so in accordance with the principles articulated in the European Charter, and the Asylum, Migration and Integration Fund.

III. THE RIGHT OF INDIVIDUALS AND GROUPS TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The treaties, directives, and obligations outlined above, are part of international humanitarian and human rights law, which is based on a recognition of the fundamental dignity of the human person.¹²¹ However, states are not the only entities charged with protecting human rights and dignity. Since 1999, the United Nations has recognized that individuals and civil organs of society also bear the responsibility to protect and enforce human rights.¹²² 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 notes in

120. *Irregular Migration and Return*, EUR. COMM’N, https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en (last visited Feb. 13, 2021).

121. WILL MOKA MUBELA, *RECONCILING LAW AND MORALITY IN HUMAN RIGHTS DISCOURSE: BEYOND THE HABERMASIAN ACCOUNT OF HUMAN RIGHTS* (2017); *see also* JACK DONNELLY, *HUMAN DIGNITY AND HUMAN RIGHTS* (June 2009), <https://www.legal-tools.org/doc/e80bda/pdf/>.

122. The Declaration on Human Rights Defenders provides that “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” Declaration to Protect Human Rights, *supra* note 24, art. 1.

Article 12(1) that “[e]veryone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.”¹²³ States are also required to

take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.¹²⁴

Thus, human rights defenders, whether individuals or groups, are entitled to assist people on the move and ensure their rights and dignity are not being violated.

Respect for human dignity is a not only a secular concept but one that is shared by many religions, including Catholicism. Respect for rights and dignity are often motivating factors for religious and humanitarian groups, which choose to assist refugees.¹²⁵ Norenzayan argues that individuals who espouse strong religious beliefs may feel more compassionate towards immigrants.¹²⁶ Others may be motivated by secular humanitarian convictions. In this section, the common motivations of both groups will be explored and their right to express solidarity with people on the move will be canvassed.

A. Respecting the Dignity of Migrants and Refugees – A Motivating Factor for Both Religious and Humanitarian Groups

This Section will discuss the precepts of caring for the stranger and recognizing the dignity of each human being, that is common to many religions and humanitarian groups. Religious motivations

123. *Id.* art. 12.

124. *Id.* (emphasis omitted).

125. ARA NORENZAYAN, *BIG GODS: HOW RELIGION TRANSFORMED COOPERATION AND CONFLICT* (2014).

126. *Id.*; see also Douglas S. Massey & Monica Espinoza Higgins, *The Effect of Immigration on Religious Belief and Practice: A Theologizing or Alienating Experience?* 40 SOC. SCI. RSCH. 1371 (2011); Pazit Ben-Nun Bloom, Gizem Arikan & Marie Courtemanche, *Religious Social Identity, Religious Belief, and Anti-Immigration Sentiment*, 109 AM. POL. SCI. REV. 203, 204 (2015) (describing “[t]he religious compassion hypothesis,” which “anticipates that the activation of religious beliefs contributes to more positive feelings towards immigrants”).

will be explored using Catholic Social Teaching (CST) as an example of a theological foundation that motivates a group like Catholic Relief Services, among others.¹²⁷ Along with CST, the sanctity of life, and the recognition of human dignity are long-established principles in many religious traditions. Stephanie Nawyn argues that “[t]he idea of welcoming the stranger is central to Christianity, Judaism and Islam. It originally arose from cultures born in deserts where leaving someone outside the city gates could be a death sentence.”¹²⁸ Pazit Ben-Nun Bloom and others have argued that “all major religious traditions emphasize the responsibilities of the devout towards fellow human beings, promote benevolence, and preach caring for others; religious beliefs are often said to evoke compassion towards the disadvantaged, which may be expected to extend to attitudes towards immigrants.”¹²⁹ In fact, a body of research finds religious belief to be associated with positive attitudes towards immigrant populations, as the devout tend to have internalized values like solidarity, religious compassion, and altruism.¹³⁰

The religious precept of caring for others is predicated on the concept of the dignity of the human person. In Catholic Social Teaching, for example,

the rights of . . . refugees, immigrants, asylum seekers, migrant workers, and internally displaced persons[,] . . . begin with . . . the dignity and sanctity of the human person. The right to life and the

127. CST was chosen as it has a robust theology related to immigration. CST, through a tradition of papal, conciliar, and episcopal documents, has been developed around seven themes: the life and dignity of the human person, the call to family community and participation, rights and responsibilities, the preferential option for the poor and vulnerable, the dignity of work and the rights of workers, solidarity, and care for God’s creation. See *Seven Themes of Catholic Social Teaching*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/seven-themes-of-catholic-social-teaching> (last visited Mar. 5, 2021).

128. Stephanie J. Nawyn, *Religion and Refugees Are Deeply Entwined in the US*, CONVERSATION (Oct. 31, 2018, 6:41 AM), <https://theconversation.com/religion-and-refugees-are-deeply-entwined-in-the-us-105923>; see also Stephanie J. Nawyn, *Faithfully Providing Refuge: The Role of Religious Organizations in Refugee Assistance and Advocacy* (Univ. of Cal., Working Paper No. 115, 2005); JAYME R. REAVES, *SAFEGUARDING THE STRANGER: AN ABRAHAMIC THEOLOGY AND ETHIC OF PROTECTIVE HOSPITALITY* (2017).

129. Ben-Nun Bloom et al., *supra* note 126, at 205; see also Shalom H. Schwartz & Sipke Huismans, *Value Priorities and Religiosity in Four Western Religions*, 58 SOC. PSYCH. Q. 88 (1995).

130. See, e.g., Ben-Nun Bloom et al., *supra* note 126, at 203.

conditions worthy of life – when threatened by poverty, injustice, religious intolerance, armed conflict, and other root causes – give rise to the right to migrate.¹³¹

The U.S. Conference of Catholic Bishops has developed several principles in respect of migration. These principles build on Pope Pius XII's Papal Encyclical *Exsul Familia* (*The Emigre Family*), which articulated the Church's solidarity with migrants seeking safety in the wake of the fall of the Nazi empire and the creation of the Soviet "Iron Curtain."¹³² This concept was further developed into the preferential option for the poor, which mandates serious attention to the "common good, human dignity, and the social nature of the human person."¹³³

Pope Francis' most recent Papal Encyclical, *Fratelli Tutti*, traces the Biblical references to caring for the stranger and reminds the faithful that migrants "possess the same intrinsic dignity as any person"¹³⁴ and that catechists should "speak more directly and clearly about the social meaning of existence, the fraternal dimension of spirituality, our conviction of the inalienable dignity of each person, and our reasons for loving and accepting all our brothers and sisters"¹³⁵ as the Good Samaritan did.

One principle of Catholic Social Teaching that specifically pertains to immigrants, that was echoed in *Fratelli Tutti*, is that "people have the right to migrate to sustain their lives and the lives of their families."¹³⁶ Additionally, "[e]very person has an equal

131. Fred Kammer, *Catholic Social Teaching (CST) and Migration*, JUSTSOUTH Q., Summer 2009, at 5.

132. POPE PIUS XII, APOSTOLIC CONSTITUTION: *EXSUL FAMILIA* (1952), http://www.vatican.va/content/pius-xii/la/apost_constitutions/documents/hf_p-xii_apc_19520801_exsul-familia.html; see also *Welcoming the Stranger Among Us: Unity in Diversity*, U.S. CONF. OF CATH. BISHOPS (Nov. 15, 2000), <https://www.usccb.org/committees/pastoral-care-migrants-refugees-travelers/welcoming-stranger-among-us-unity-diversity#introduction>.

133. POPE JOHN PAUL II, ENCYCLICAL LETTER: *CENTESIMUS ANNUS*, para. 57 (1991), http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

134. POPE FRANCIS, *supra* note 5, para. 39.

135. *Id.* para. 86.

136. *Catholic Social Teaching on Immigration and the Movement of Peoples*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/catholic-teaching-on-immigration-and-the-movement-of-peoples> (last visited Feb. 15, 2021). Similarly, Pope Francis's *Fratelli Tutti* notes that "[m]any migrants

right to receive from the earth what is necessary for life—food, clothing, shelter. Moreover, every person has the right to education, medical care, religion, and the expression of one's culture."¹³⁷ These principles are entirely consistent with international human rights principles expressed in the Covenants on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights, as well as the Universal Declaration of Human Rights.¹³⁸

Catholic Social Teaching also recognizes the principle that a country has a right to regulate its borders and to control immigration and is not obliged to accept all immigrants.¹³⁹ However, the Catholic Conference of Bishops has noted the impact that war, poverty, and climate change have had on the lives of many people, forcing them to migrate. The Bishops also point out that economic, political, and social decisions must be made with regard for the common good.¹⁴⁰ This implies that decisions about whom to admit should be made in conjunction with other countries. Once again, this is consistent with the Global Compact for Migration, which expressed support for international cooperation on the governance of international migration.¹⁴¹ It is also consistent with target 10.7 of the Sustainable Development Goals (SDGs), which aims to "facilitate orderly, safe, regular, and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies."¹⁴² The target also aims to "reduce inequality within and among countries."¹⁴³

Another principle of Catholic Social Teaching is that a country must regulate its borders with justice and mercy. The U.S. Conference of Bishops has asserted that

have fled from war, persecution and natural catastrophes. Others, rightly, 'are seeking opportunities for themselves and their families. They dream of a better future and they want to create the conditions for achieving it.'" POPE FRANCIS, *supra* note 5, para. 37.

137. *Catholic Social Teaching on Immigration and the Movement of Peoples*, *supra* note 136.

138. G.A. Res. 217 A (III), *supra* note 89, at 71.

139. Letter from Catholic Bishops of Mexico and the United States, *Strangers No Longer: Together on the Journey of Hope* (Jan. 22, 2003), para. 39 ("The Church recognizes the right of a sovereign state to control its borders in furtherance of the common good.").

140. *Id.*

141. Global Compact, *supra* note 18, art. 15(b).

142. *SDG Indicators: Goal 10*, U.N. STAT. DIV., <https://unstats.un.org/sdgs/metadata/?Text=&Goal=10&Target=10.7> (last visited Mar. 5, 2021).

143. *Id.*

[a] country's regulation of borders and control of immigration must be governed by concern for all people and by mercy and justice. A nation may not simply decide that it wants to provide for its own people and no others. A sincere commitment to the needs of all must prevail.¹⁴⁴

The Bishops went to point out that “[u]ndocumented persons are particularly vulnerable to exploitation by employers, and they are not able to complain because of the fear of discovery and deportation.”¹⁴⁵ Once again, this resonates with international humanitarian law's concern for the most vulnerable. Moreover, CST asserts that exclusion of people from basic goods and services is never appropriate, no matter their legal status: “It is the position of the Catholic Church that pastoral, educational, medical, and social services provided by the Church are never conditioned on legal status. All persons are invited to participate in our parishes, attend our schools, and receive other services offered by our institutions and programs.”¹⁴⁶

The core mission of treating refugees and migrants with dignity is also often reflected in the mission statement of non-religiously affiliated humanitarian groups. For example, Sunrise USA, one of the leading providers of humanitarian assistance to refugees, states they are committed to protecting the dignity of their beneficiaries.¹⁴⁷ The Refugee Council in the United Kingdom states that its vision is that “[t]he UK will be a country that respects the dignity of everyone who seeks protection, regardless of the outcome of their claims for asylum, and ensures that those granted asylum are supported to live safe and fulfilling lives.”¹⁴⁸ Similarly, the International Rescue Committee's code of conduct states its commitment to “affirm and enforce human rights consistent with

144. *Catholic Social Teaching on Immigration and the Movement of Peoples*, *supra* note 136.

145. *Id.*

146. *Id.*; see also POPE LEO XIII, *ENCYCLICAL LETTER: RERUM NOVARUM* (1891), http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html (describing the duty of individuals and the Catholic Church to provide for the needs of the poor).

147. *Mission & Core Values*, SUNRISE USA, <https://sunrise-usa.org/who-we-are/mission-core-values/> (last visited Mar. 5, 2021).

148. *Vision, Mission and Values*, REFUGEE COUNCIL, <https://www.refugeecouncil.org.uk/about-us/vision/> (last visited Mar. 5, 2021).

the UN Universal Declaration of Human Rights, [and] the Convention on the Rights of the Child.”¹⁴⁹

Human rights are based on the concept of the dignity of the human person, “which grounds a duty to treat people not as mere means but also as ends in themselves.”¹⁵⁰ The concept of human dignity is at the core of the Universal Declaration of Human Rights and is reaffirmed in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Bayefsky argues that the recognition of the inherent human dignity of others “mandates certain forms of treatment at the hands of others.”¹⁵¹ Thus the values espoused and the work done, both by religious and humanitarian groups in respect to refugees, is entirely consistent with the work of the UN Refugee Agency. Moreover, it is clear that organizations which seek to put their religious or humanitarian principles into practice are exactly the kinds of organizations that the United Nations had in mind when calling for partnerships with NGOs in the New York Declaration and the Global Compact.¹⁵² The work of these organizations is also protected under 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.

Despite this, recent trends show that not only have states been falling short in respect to honoring their own obligations under international humanitarian law, as well as the Compact, Guidelines, and Declaration; they have also sought to stifle and intimidate religious and humanitarian groups from assisting migrants by prosecuting these groups.

IV. PROSECUTIONS OF RELIGIOUS AND HUMANITARIAN GROUPS

This Section will examine recent prosecutions against religious and humanitarian groups in Europe and the United States. It will argue that by impeding the work of organizations that work with

149. INT’L RESCUE COMM., THE IRC WAY: OUR STANDARDS OF PROFESSIONAL CONDUCT 2, <https://www.rescue.org/sites/default/files/document/2802/theirwayenglish.pdf>.

150. Rachel Bayefsky, *Dignity, Honour, and Human Rights: Kant’s Perspective*, 41 J. POL. THEORY 809, 811 (2013).

151. *Id.* at 811, 816.

152. See New York Declaration, *supra* note 10; Global Compact, *supra* note 18.

migrants and refugees, states are undermining the principles of human rights law. This occurs when states blur the distinctions between traffickers and humanitarians. These actions widen distrust in civil society, increase human and security costs, and deprive society of potential contributions that could be made by humanitarian organizations. Moreover, in this section, I argue that states which treat humanitarian groups' efforts to aid migrants as akin to those of traffickers, violate the religious freedom of volunteers who are motivated by their religious affiliations.

A. *Prosecutions of Humanitarian Groups in Europe*

In Europe, the approach towards migrants and those who aid them has not been uniform among member states. Lyck-Bowen and Owen claim that “[c]ountries such as Sweden and Germany have generally emphasized the humanitarian imperative to help and welcome migrants, whereas others including Hungary, Poland, and the United Kingdom have been notably more skeptical and reluctant to open their borders.”¹⁵³ In practice this has frequently meant that boats carrying refugees and migrants have been intercepted in the Aegean and Mediterranean, and their occupants have been returned to countries of origin or detained, often without a determination of their status as potential asylum seekers.¹⁵⁴ Unsurprisingly, the UNHCR has called for a moratorium on all interceptions and returns of refugees, reminding states that international law protects migrants from being returned to dangerous situations.¹⁵⁵ States which engage in this practice are privileging a securitarian over a humanitarian approach. While states are entitled under international law to secure their borders, this draconian approach appears to violate international humanitarian law.

In criminalizing aid to migrants and refugees, states often rely on statutes and policies that were intended to protect migrants

153. Lyck-Bowen & Owen, *supra* note 32.

154. See Sarah Hucal, *Volunteers from the Ship Iuventa Saved Thousands of Migrant Lives on the Mediterranean; Now They Could Face Prison*, ABC NEWS (June 20, 2019), <https://abcnews.go.com/International/volunteers-ship-iuventa-saved-thousands-migrant-lives-mediterranean/story?id=63696655>.

155. This is known as the principle of non-refoulement. *UN Rights Office Concerned Over Migrant Boat Pushbacks in the Mediterranean*, UN NEWS (May 8, 2020), <https://news.un.org/en/story/2020/05/1063592>.

from being trafficked, smuggled, or otherwise exploited by unscrupulous operators.¹⁵⁶ These statutes were intended to deter and punish those who derive profit from smuggling. Currently, however, some courts are using them to punish humanitarian workers, not people or groups who are smuggling for profit.¹⁵⁷ This Section will provide examples from recent cases to argue that in criminalizing these forms of humanitarian aid, states are not only violating the human rights of the refugees, but in many cases violating the humanitarian aid workers' rights to religious expression and their right to participate in civil society.

Since states have taken to intercepting refugees before they reach destination countries, refugees are seeking alternate routes to make it to Europe. Given that many of them may potentially die in the attempt, humanitarian groups often provide assistance in helping them reach their destinations.¹⁵⁸ In Europe, this has often taken the form of sending boats to pick up refugees trying to make their way to Greece or Italy. However, these types of actions have resulted in criminal prosecutions of those who undertake them. Carrera has noted that increasing criminalization has become more apparent since 2015.¹⁵⁹ He and others argue that this has resulted in the "rule of law backsliding and [a] subsequent reduction of space for civil society to fulfil its mission to uphold the values of a

156. See, e.g., 18 U.S.C. § 1590 (prohibiting the "transport [of] any person for labor or services"); 8 U.S.C. § 1324(a) (prohibiting "alien smuggling, domestic transportation of unauthorized aliens, [and] concealing or harboring unauthorized aliens").

157. For an analysis of the criminalization of humanitarian aid, see Shailini Bhagarva Ray, *Saving Lives*, 58 B.C. L. REV. 1225 (2017). Ray's article illustrates how members of humanitarian organizations have been prosecuted under section 1590 of the Trafficking Victims Protection Act (TVPA) which prohibits the "transport [of] any person for labor or services," despite the fact that these organizations intended to provide aid to migrants, not traffic them. *Id.* at 1253. Ray also points out the varying ways in which federal courts have interpreted the term "harboring" when reviewing the convictions of those charged with "alien smuggling, domestic transportation of unauthorized aliens, [and] concealing or harboring unauthorized aliens" pursuant to 8 U.S.C. § 1324(a). See *id.*

158. See Sergio Carrera, Steven Blockmans, Daniel Gros & Elsepth Guild, *The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities*, 20 CTR. EUR. POL'Y STUD. 1 (2015).

159. Sergio Carrera, Jennifer Allsopp & Lina Vosyliūtė, *Policing the Mobility Society: The Effects of EU Anti-Migrant Smuggling Policies on Humanitarianism*, 4 INT'L J. MIGRATION & BORDER STUD. 236 (2018).

democratic society.”¹⁶⁰ The Research Social Platform on Migration and Asylum (ReSOMA) refers to this as a “criminalization of solidarity.”¹⁶¹ It is particularly problematic as some of the people seeking to enter Europe or the United States may have valid claims for asylum. Since some organizations and individuals engage in this type of work out of religious beliefs that center around helping immigrants, criminalizing such behavior violates Articles 1 and 12 of 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.¹⁶² It may also constitute a violation of Article 11 of the European Convention, which protects freedom of association.¹⁶³

The prosecution of NGO members by several EU member states appears to have begun in earnest around 2016, seemingly as part of a concerted strategy to deter NGOs from assisting refugees and migrants and further deter migrants and refugees from attempting to enter Europe. As acknowledged by the Global Compact and New York Declaration, states have a legitimate interest in protecting their borders,¹⁶⁴ particularly since over one million asylum seekers landed or attempted to land in Europe during 2015.¹⁶⁵ Moreover, combatting migrant smuggling was recognized as a key political policy by the European Agenda on Migration and

160. REsOMA, POLITICAL AND LEGAL TRENDS LIMITING CIVIL SOCIETY SPACE 1, 4 (2019); see also AMNESTY INT’L, LAWS DESIGNED TO SILENCE: THE GLOBAL CRACKDOWN ON CIVIL SOCIETY ORGANIZATIONS (2019), <https://www.amnesty.org/download/Documents/ACT3096472019ENGLISH.PDF>.

161. REsOMA, *supra* note 160, at 5.

162. Declaration to Protect Human Rights, *supra* note 24, arts. 1, 12.

163. Article 11 provides that

[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others[.] No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

European Convention on Human Rights, *supra* note 22, art. 11.

164. Global Compact, *supra* note 18, art. 15(c) (recognizing “the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law”); New York Declaration, *supra* note 10, art. 24.

165. *Asylum Statistics*, EUROSTAT: STAT. EXPLAINED, https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (last visited Mar. 5, 2021).

the European Agenda on Security.¹⁶⁶ However, the kind of migrant smuggling that international and European law aims to deter is smuggling for profit or financial gain. These are not the activities in which legitimate humanitarian groups are engaged. In fact, by acting to aid refugees and migrants, humanitarian groups may be protecting them from unscrupulous agents who might take advantage of them.

Rising xenophobia has contributed to the harsh actions that some governments are taking against humanitarian groups. In Italy for example, rising right-wing groups began referring to NGOs as a “migrant taxi service” and accused them of doing business with traffickers.¹⁶⁷ Italy is not alone in seeing the rise of anti-immigrant sentiment and rhetoric, along with a concomitant rise in prosecutions of civil society groups.¹⁶⁸ For example, in the United Kingdom, a volunteer member of a migrant support group was charged with attempting to facilitate illegal immigration for smuggling an Albanian woman and her two sons into the United Kingdom. Despite the defendant asserting that her actions were based on humanitarian grounds, she was sentenced to fourteen months in prison.¹⁶⁹ Additionally, in October 2015, Rob Lowrie, a British man, tried to smuggle an Afghan girl from the “Calais Jungle” (a migrant camp outside of Calais) to the United Kingdom.¹⁷⁰ He was doing so at the request of the girl’s father, who wanted his daughter to be with relatives in Britain. Lowrie was arrested in France and charged with human smuggling. His defense was based on the fact that his actions were humanitarian.

166. See *Migration and Home Affairs: New Pact on Migration and Asylum*, EUR. COMM’N, https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration_en (last visited Mar. 5, 2021).

167. See *The Aquarius: Migrant Taxi Service or Charitable Rescuers?*, BBC NEWS (June 23, 2018), <https://www.bbc.com/news/world-europe-44581764>.

168. See, e.g., Karen Kahn, *Criminal Prosecutions of Migrant-Aiding Volunteers Grow Under Zero Tolerance*, NONPROFIT Q. (June 14, 2019), <https://nonprofitquarterly.org/criminal-prosecutions-of-migrant-aiding-volunteers-grow-under-zero-tolerance/>. For a general discussion of the criminalization of humanitarian aid, see Liz Fekete, *Migrants, Borders and the Criminalisation of Solidarity in the EU*, 59 J. RACE & CLASS 65 (2018); and Carrera et al., *supra* note 159.

169. LIZ FEKETE, FRANCIS WEBBER & ANYA EDMOND-PETTITT, INST. OF RACE RELS., *HUMANITARIANISM: THE UNACCEPTABLE FACE OF SOLIDARITY* 56 (2017); see also ReSOMA, *supra* note 160.

170. Daniel Wilsher, *Immigration Detention: The Migration of a Policy and Its Human Impact*, 32 REFUGEE: CAN.’S J. REFUGEES 153 (2016).

While he was ultimately acquitted, his persecution by French authorities drove him to attempt suicide.¹⁷¹

Likewise, in Belgium, twelve individuals were charged with human trafficking and membership in a criminal international organization.¹⁷² The case became known as the “solidarity trial” because four members of the group Platform for Refugee Support argued that they were motivated purely by humanitarian reasons when they sheltered refugees in their homes.¹⁷³ Two of the accused are journalists: Myriam Berghe, a freelance reporter, and Anouk Van Gestel, editor in chief of *Marie-Claire Belgique* magazine.¹⁷⁴ The court acquitted those four defendants on the grounds that they were motivated by humanitarian reasons.¹⁷⁵ Article 77(2) of the Belgian Immigration Act specifically provides that if the assistance to illegal immigrants was provided for humanitarian reasons the person providing that assistance should not be subjected to prosecution.¹⁷⁶ However, this judgment has been recently appealed, showing the government’s willingness to use resources on these types of prosecutions.¹⁷⁷

In Croatia, one volunteer of the NGO “Are You Syrious” was convicted for committing a misdemeanor under Article 43 of the

171. *Id.*

172. *See Belgians Accused of Harboring Illegal Immigrants Acquitted*, BRUSSELS TIMES (Dec. 13, 2018), <https://www.brusselstimes.com/all-news/belgium-all-news/justice-belgium/52490/belgians-accused-of-harboring-illegal-immigrants-acquitted/>.

173. *Id.*

174. *Id.*

175. *Id.*; *see also* Carrera et al., *supra* note 159.

176. EUR. UNION AGENCY FOR FUNDAMENTAL RTS., ANNEX: EU MEMBER STATES’ LEGISLATION ON IRREGULAR ENTRY AND STAY, AS WELL AS FACILITATION OF IRREGULAR ENTRY AND STAY 2 (2014), https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf.

177. *Stop Criminalising Solidarity with Refugees and Migrants, NGOs Urge*, BRUSSELS TIMES (July 26, 2019), <https://www.brusselstimes.com/news/belgium-all-news/61509/stop-making-solidarity-with-refugees-and-migrants-a-crime-ngos-urge-belgium-and-other-eu-states/>.

Alien Act.¹⁷⁸ That statute prohibits providing assistance to aliens unlawfully crossing the border into Croatia.¹⁷⁹

The French Constitutional Council, in contrast, recently recognized the rights of individuals to assist migrants, if in so doing they were acting on humanitarian grounds.¹⁸⁰ The case involved a French farmer, Cédric Herrou, who was prosecuted for smuggling migrants across the French-Italian border and into southern France's Roya Valley.¹⁸¹ He was initially convicted and fined three thousand euros.¹⁸² However, on appeal, the Constitutional Council accepted his claim that he had been motivated purely by humanitarianism. In overturning his conviction, the Council held, "[t]he principle of fraternity confers the freedom to help others, for humanitarian purposes, regardless of the legality of their presence on national territory."¹⁸³ It emphasized, however, that had Herrou acted out of financial gain, the result would not have been the same.¹⁸⁴

In Germany, Christian Hartung and four other pastors have been placed under investigation in Rhineland-Palatinate for hosting refugees from Sudan in their homes and churches.¹⁸⁵ They

178. See *Croatia: Criminalising Solidarity: Are You Syrious? Statement on Politically Motivated, Unjust Guilty Verdict for our Volunteer*, STATEWATCH (Sept. 26, 2018), <https://www.statewatch.org/news/2018/september/croatia-criminalising-solidarity-are-you-syrious-statement-on-politically-motivated-unjust-guilty-verdict-for-our-volunteer/>.

179. Article 43 of the Alien Act prohibits individuals from assisting aliens, stating, "It is forbidden to assist an alien to illegally cross the border, to transit through the territory if the alien has unlawfully entered the Republic of Croatia, to stay illegally." EUR. AGENCY FOR FUNDAMENTAL RTS., *supra* note 176, at 4.

180. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718 QPC, July 6, 2018, J.O. 0155 (Fr.). For a description of the case, see *France: Constitutional Council Upholds Principle of "Fraternity" and Safeguards Humanitarian Assistance to Migrants Regardless of their Status*, EDAL (July 6, 2018), <https://www.asylumlawdatabase.eu/en/content/france-constitutional-council-upholds-principle-%E2%80%9Cfraternity%E2%80%9D-and-safeguards-humanitarian>.

181. CC, decision No. 2018-717/718 QPC, July 6, 2018, J.O. 0155.

182. *Id.*

183. *Id.*; see also Elian Peltier & Richard Pérez-Peña, 'Fraternité' Brings Immunity for Migrant Advocate in France, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/world/europe/france-migrants-farmer-fraternity.html>.

184. CC, decision No. 2018-717/718 QPC, July 6, 2018, J.O. 0155.

185. Nandini Archer, Claudia Torrisi, Claire Provost, Alexander Nabert & Belen Lobos, *Hundreds of Europeans 'Criminalised' for Helping Migrants – as Far Right Aims to Win Big in European Elections*, OPEN DEMOCRACY (May 18, 2019), <https://www.opendemocracy.net/en/5050/hundreds-of-europeans-criminalised-for-helping-migrants-new-data-shows-as->

were accused of joining the NGO Emergency Response Centre International (ERCI), which prosecutors described as a criminal organization consisting of more than three persons, and acting with intent to facilitate entry of refugees.¹⁸⁶

By prosecuting those who aid migrants based on their humanitarian or religious convictions, several EU states are violating the human rights of those who engage in such behavior and fracturing civil society. The European Union needs to commit to absolve from prosecution individuals and organizations who assist refugees for religious or humanitarian purposes. The European Union should use its prosecutorial resources on those who smuggle people for profit.

B. U.S. Criminalization of Aid to Migrants: The Hoffman and Scott Warren Cases

Meanwhile, the United States under the Trump Administration has pursued an openly hostile approach towards refugees, migrants, and those who aid them. The U.S. immigration system was last comprehensively overhauled in the mid-1990s. Since that time, comprehensive immigration reform has often been discussed, but has not come close to being accomplished. In 2014, anti-immigrant sentiment increased among some sectors of the population after an increase in the number of immigrants illegally entering the country. Since Trump assumed office in 2016, there has been a 41% increase in the number of immigrants arrested.¹⁸⁷

Fatma Marouf has argued that “[b]oth President Trump and former Attorney General Jeff Sessions have equated the rule of law with deportation, not fair adjudication.”¹⁸⁸ On August 8, 2017, the Department of Justice (DOJ) issued a press release, which boasted about a substantial increase in the total number of removal orders

far-right-aims-to-win-big-in-european-elections/ (detailing multiple cases of ordinary people prosecuted for assisting migrants, including people charged after giving migrants rides in their cars).

186. *Id.*

187. Dara Lind, *Jeff Sessions Gave Trump the Immigration Crackdown He Wanted*, VOX (Nov. 7, 2018), <https://www.vox.com/2018/5/23/17229464/jeff-sessions-resign-trump-immigration>.

188. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 711 (2019).

compared to the same period in 2016.¹⁸⁹ Penalties for fraudulent asylum applications have increased and the standard of proof for claiming asylum has been heightened.¹⁹⁰ A preliminary determination about whether an immigrant may be eligible for asylum is often made by Customs and Border Protection (CBP) agents. The U.S. Commission on International Religious Freedom has documented that the CBP frequently fails to ask the requisite credible fear questions and fails to record responses accurately.¹⁹¹ Additionally, any asylum seeker who has passed through a third country on her way to seek asylum in the United States must apply for asylum in that country and remain in that country until her claim is adjudicated.¹⁹² This is known as the “Remain in Mexico” policy.¹⁹³ It appears to violate the Refugee Convention.¹⁹⁴

189. Press Release, Exec. Off. of Immigr., Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

190. Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

191. ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 20–23 (2016) (“While many asylum seekers in ICE detention centers reported that CBP officers did ask them about fear of return, others reported that CBP officers did not ask them the fear questions, asked them incorrectly, recorded ‘no’ when interviewees answered ‘yes,’ inquired into their fear claims in detail, and/or dismissed assertions of fear.”); *see also* HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER: BLUEPRINT FOR U.S. GOVERNMENT POLICY 12 (2014), <https://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf> (“In approximately half of inspections observed by USCIRF researchers, inspectors failed to inform the immigrant of the information in [the credible fear] part of the script.”); MARK HETFIELD, KATE JASTRAM, ALLEN KELLER, CHARLES KUCK, CRAIG HANEY & FRITZ SCHEUREN, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 57 (U.S. Comm’n on Int’l Religious Freedom ed., 2005).

192. Policy Guidance for Implementation of the Migrant Protection Protocols, 84 Fed. Reg. 6811 (Feb. 28, 2019).

193. *Id.* But *see* Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8269 (Feb. 2, 2021) (executive order instructing Department of Homeland Security to “promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols (MPP)”).

194. Convention Relating to the Status of Refugees, *supra* note 76. Article 26 of the Convention provides that “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory” *Id.* By preventing asylum seekers from entering the U.S., or by removing asylum seekers from the U.S. to Mexico, the U.S. appears to be violating Article 26, which guarantees

Moreover, on March 20, 2020, in response to the spread of COVID-19, the CDC issued an order that purports to prohibit people from Mexico and Canada from crossing into the United States.¹⁹⁵ This ban essentially eliminates the opportunity for asylum seekers and refugees to apply to remain in the United States, even if they are fleeing persecution. The ban is based on a rule issued under the Public Health Act, which permits the Surgeon General to suspend the “introduction of persons or property” into the United States on public health grounds.¹⁹⁶ There is no appeal process and the United States appears to be disregarding its obligations under the Refugee Convention and its 1967 Protocol, as well as its own Trafficking Victims Protection Act (TVPA).¹⁹⁷ Aside from questions about the constitutionality of this Order, one of its unintended effects may be to encourage asylum seekers and others to cross into the United States via routes other than the official ports of entry. Summer, with its high temperatures, can mean death for immigrants trying to cross the hot and dry terrain into states like Arizona, New Mexico, California, and Texas.

A similar pattern of prosecution of humanitarian workers has also emerged in the United States using the Federal Harboring Statute as the basis for prosecution or invoking federal trespassing and property abandonment statutes in attempts to deter humanitarian groups and individuals from providing any form of assistance to refugees and migrants.¹⁹⁸ Although the so-called “Harboring Statute” has gained notoriety recently with some highly publicized prosecutions, the statute was actually added to federal immigration laws by Congress in 1917.¹⁹⁹ The statute was

freedom of movement for asylum seekers. Moreover, Article 16 of the Refugee Convention provides that “A refugee shall have free access to the courts of law on the territory of all Contracting States.” *Id.* This right does not appear to be available to asylum seekers sitting in refugee camps, awaiting a decision on their claims in the U.S.

195. 85 Fed. Reg. 17060 (Mar. 26, 2020).

196. 42 U.S.C. § 265.

197. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7114.

198. 8 U.S.C. § 1324.

199. Provisions related to the harboring of immigrants initially appeared in section 8 of the Immigration Act of 1917. That section provided that

any person . . . who shall bring into or land in the United States [or shall attempt to do so] or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place . . . any alien not duly admitted by an

amended in 1952 to prohibit individuals and organizations from moving or transporting aliens within the United States; from concealing, harboring, or shielding them from detection; and from encouraging them to enter the United States illegally.²⁰⁰ “Willful harboring” became a felony.²⁰¹ Congressional records reveal that the purpose of amending the statute was to discourage the exploitation of immigrants from Mexico,²⁰² although it should be noted that the Congressional debate was rife with racist references.²⁰³ The statute was amended multiple times in the late 1990s and early 2000s, with the trend being to increase the penalties for contravening its provisions and lower the intent required from “willful” to “knowing or reckless disregard.”²⁰⁴

Despite the Harboring Statute, various NGOs, like No More Deaths²⁰⁵ and Humane Borders,²⁰⁶ have committed to providing humanitarian assistance to refugees crossing into Arizona, Texas, and California. These groups often leave food, water, and other supplies for immigrants to aid them on their perilous journeys through places like the Sonoran Desert in Arizona. They do this because at least more than 2,800 people have died attempting to

immigrant inspector or not lawfully entitled to enter or to reside within the United States . . . shall be deemed guilty of a misdemeanor. . .

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

200. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

201. *Id.*

202. 98 Cong. Rec. 1346 (1952).

203. See *id.* at 1345-47, 1351, 1353 (referring to “wetbacks” or “wetback bill”); see also Mary Dohrmann, *Hemming in “Harboring”: The Limits of Liability Under 8 U.S.C. § 1324 and State Harboring Statutes*, 115 COLUM. L. REV. 1217, 1254 (2015) (“Throughout the record, some members of Congress refer to ‘wetbacks’ and to the bill as a ‘wetback bill.’”).

204. The statute was amended in 1994, 1996, and 2004. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5401, 118 Stat. 3638, 3737; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(a)-(d), 110 Stat. 3009, 3009-565 to -566; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60024, 108 Stat. 1796, 1981-82.

205. No More Deaths is a faith-based organization. It is an active ministry of the Unitarian Universalist Church of Tucson, articulates a set of “faith-based proposals” for immigration reform, and describes “witnessing and responding” as part of its mission. See *About No More Deaths*, NO MORE DEATHS, <https://nomoredeaths.org/about-no-more-deaths> (last visited Mar. 5, 2021).

206. Humane Borders describes itself as an organization “motivated by faith.” See HUMANE BORDERS, <https://humaneborders.org/> (last visited Mar. 5, 2021).

cross the US-Mexico border since 2014,²⁰⁷ and they are moved by their faith to save lives. Presumably most, if not all, of the people who died were crossing illegally into the United States.²⁰⁸

A recent prominent case brought potential conflicts between the Harboring Statute and other similar statutes and religious freedom into sharp focus. This case involved Scott Warren, who was arrested in January 2018 by federal agents and charged with harboring immigrants. The federal government charged that Warren had been at “The Barn,” an aid station set up by humanitarian groups, and had assisted two migrants from Central America by providing them with food, water, and a place to sleep. Warren’s arrest came shortly after No More Deaths had published a report accusing border patrol agents of destroying water supplies that the groups had left for migrants in the desert. The report noted that “[t]hese actions condemn border crossers to suffering, death, and disappearance.”²⁰⁹ Warren was charged with two counts of harboring and one count of conspiracy for allegedly working with another person who had driven the migrants to “The Barn” and allegedly arranged for Warren to meet them there and provide them with basic medical care. Warren met the two individuals and provided them with food and water and basic medical supplies. He further allegedly provided the two migrants with “harm reduction kits.”²¹⁰ After his first trial ended in a mistrial with eight of the twelve jurors voting to acquit, the government decided to retry Warren but dropped the conspiracy charge. In the second trial, after only two hours of deliberation, the jury voted to acquit him.

207. 2019: *A deadly year for migrants crossing the Americas*, UN NEWS (Jan. 28, 2020), <https://news.un.org/en/story/2020/01/1056202>; see also Ryan Devereauz, *Humanitarian Volunteer Reflects on Two Years of Government Persecution*, INTERCEPT (Nov. 23, 2019), <https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/>.

208. See OFF. OF THE MED. EXAM’R, PIMA CNTY., ANNUAL REPORT 30 (2017), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Medical%20Examiner/Resources/Annual-Report-2017.pdf (“The [Pima County Office of the Medical Examiner] has recovered 2,816 remains of suspected [Undocumented Border Crossers] since 2000.”).

209. 2 THE DISAPPEARED REPORT: INTERFERENCE WITH HUMANITARIAN AID 1, http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared_report_part_2.pdf.

210. See Ryan Devereauz, *Criminalizing Compassion*, INTERCEPT (Aug. 10, 2019), <https://theintercept.com/2019/08/10/scott-warren-trial/>. See generally Complaint, *United States v. Hoffman*, 436 F. Supp. 3d 1272 (D. Ariz. 2020) (No. 4:17-mj-00339-BPV).

Warren was not the only humanitarian worker charged in respect of assisting migrants. Eight other members of No More Deaths were also charged with federal crimes and misdemeanors which included unauthorized use of a motor vehicle in a federally designated wildlife area and abandoning property (namely water jugs and blankets) on federally protected land.²¹¹ The government secured a conviction on all counts after a three-day bench trial against four of the defendants, Natalie Hoffman, Oona Holcomb, Madeline Huse, and Zaachila Orozco-McCormick. The federal magistrate sentenced them all to fines and probation.²¹² They appealed the convictions in federal district court, arguing that their actions were done in pursuit of their religious and humanitarian beliefs and their convictions thus violated the Religious Freedom Restoration Act (RFRA) by substantially burdening the free exercise of those beliefs.²¹³ The federal court reversed their convictions and found in their favor.²¹⁴

The Ninth Circuit had also recognized that a RFRA claim may be brought as an affirmative defense to criminal charges.²¹⁵ To succeed on a RFRA defense, a claimant must prove two things: (1) governmental action burdens a sincere “exercise of religion” and (2) the burden is “substantial.”²¹⁶ To prevail on their RFRA defense, a Defendant must first demonstrate that he or she is being prosecuted for actions that constitute a sincere “exercise of religion.” Although the defendants in *Hoffman* did not claim to be members of mainstream or traditional churches, they argued that their volunteer activities constituted exercises of sincerely held religious and spiritual beliefs.²¹⁷ The court in *Hoffman* found that it could not question the sincerity of the defendants’ convictions or beliefs regarding their moral duty to assist

211. These charges were “entering the CPNWR without a permit in violation of 50 C.F.R. § 26.22(b) and abandoning property in violation of 50 C.F.R. § 27.93.” *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1278 (D. Ariz. 2020).

212. *Id.*

213. See *id.* at 1277. The Supreme Court upheld this interpretation of RFRA in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

214. *Hoffman*, 436 F. Supp. 3d at 1273.

215. *United States v. Christie*, 825 F.3d 1048, 1065 (9th Cir. 2016).

216. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008).

217. *Hoffman*, 436 F. Supp. 3d at 1280.

migrants and refugees.²¹⁸ It therefore reversed the convictions of the four defendants.²¹⁹

Other circuit courts have been inconsistent in their definitions of what constitutes “harboring” under the Harboring Statute, even in situations where individuals were not smuggling migrants or refugees for profit. The Seventh Circuit declined to find a woman guilty of “harboring” her Mexican boyfriend who was in the country illegally.²²⁰ She allowed him to live with her after he returned to the United States from Mexico without authorization, but the Court found there was no evidence she concealed her boyfriend from authorities or shielded him from detection.²²¹ The Third Circuit similarly found that a defendant, who, as an apartment complex manager, merely rented apartments to individuals who lacked formal immigration documents, did not commit the crime of harboring.²²²

Prosecutions of individuals for assistance provided to refugees and immigrants out of a sincere belief violates religious expression and international human rights law. Moreover, even in cases in which the individual who provides assistance is motivated by humanitarian rather than religious beliefs, such motivations should provide a defense against any form of prosecution. This exemption has been recognized by statute in some EU countries but as seen above, in too many cases prosecutors still try to criminalize those who aid migrants.

CONCLUSION

There is no question that mass migration of peoples is an overwhelming problem. Nevertheless, it is one that can only be solved through international cooperation, appropriate responses to climate change, a concerted international effort to create economic opportunity for people in their home countries, and by engaging non-governmental organizations in the efforts to treat migrants and refugees with dignity and in accordance with international and

218. *Id.* at 1284 (“The record lacks the type of evidence that has caused other courts to doubt a claimant’s sincerity.”).

219. *Id.* at 1273.

220. *United States v. Costello*, 666 F.3d 1040, 1040 (7th Cir. 2012).

221. *Id.* at 1042.

222. *Del Rio-Mocci v. Connolly Props. Inc.*, 672 F.3d 241, 246–47 (3d Cir. 2012).

state laws. The criminalization of those who supply humanitarian aid must cease. The right to provide such aid is a legitimate expression of religious and humanitarian belief and is protected under international human rights law. Prosecuting religious organizations and individuals for fulfilling their religious duty violates the First Amendment and RFRA. Additionally, prosecuting these individuals is a misuse of government resources; such resources would be better directed at properly processing refugees and providing them with appropriate services, such as access to medical care, shelter, food, and education.

If governments are sincerely concerned that organizations which engage with migrants are smuggling them for profit, they could maintain a database of approved organizations that have been vetted. Many religious organizations have been doing this kind of work for decades. Moreover, the UNHCR currently maintains such a database, so governments would not have to begin the process from scratch, and would only have to vet those who are not in partnership with the UN's Refugee Agency.²²³ This would help to ensure that NGOs and religious organizations are appropriately assisting refugees as the United Nations requires them to sign onto the Principles of Partnership, which endorse a commitment to Equality, Transparency, Results Oriented Approach, Responsibility and Complementarity.²²⁴ It is only by working *with* organizations and agencies instead of against them, that states will be able to adequately respond to the refugee crisis.

223. See *Non-Governmental Organizations*, U.N. HIGH COMM'R FOR REFUGEES USA, <https://www.unhcr.org/en-us/non-governmental-organizations.html> (last visited Mar. 5, 2021).

224. See *Principles of Partnership*, U.N. HIGH COMM'R FOR REFUGEES USA (May 2008), <https://www.unhcr.org/en-us/5735bd464.html>.