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The Lawyer and the Refugee

Guy S. Goodwin-Gill*

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INTRODUCTION

Today's refugee regime owes more to US international lawyers than is often understood. Oscar Schacter, for example, was in the United Nations (UN) Secretariat when the UN High Commissioner for Refugees (UNHCR) and the 1951 Convention were on the agenda; Louis Henkin was the US representative on the 1950 UN Ad Hoc Committee which prepared the draft convention adopted the following year in Geneva; and it was he who said at the time that *non-refoulement*—the principle that prohibits States from sending a refugee back to the risk of persecution—was so fundamentally important that it should admit of no exception.[1]

Although it would be several decades before the United States formally signed on to the 1967 Protocol and adopted the Refugee Act in 1980, US decision makers soon started to make important contributions to refugee law doctrine—

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1. *See* Statement of Louis Henkin, U.N. Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, ¶¶ 54-56, U.N. Doc. E/AC.32.SR.20 (Feb. 10, 1950).

decisions that were noted by other courts in other countries and helped the development, for example, of a principled approach to the *particular social group* category of refugees. . . But that was *then*, and I will have to come back to *now* in a moment or two.

First, however, I want to look at where it all came from, at the origins of what we like to call, perhaps too complacently, the international refugee regime. International lawyers have an inclination to dig into the historical, but it's for the good cause of showing how deeply rooted certain rules, principles, and practices are. The history is important, and no international lawyer can avoid being an historian, for this gives us the long view essential to understanding law in the relations of States, enables us to counter misinformation dressed up as advocacy, and even to move forward.

I will also highlight a few of the well-founded criticisms of the early days, before leaping ahead to the more recent history, and thinking about some of the ways in which the law and lawyers can work with the refugee in finding protection, solutions and, we hope, a future in which the necessity for flight in search of refuge may be less frequent, but the prospect of protection more secure.

However, one caveat is needed. International refugee law is often accused of *not* providing protection where it is due, of *not* providing solutions, of *not* keeping refugees away from our shores, tied down in some other remote land, with no livelihood, no education, and no opportunity. But that is not how international law works. Even though it may set specific rules—*non-refoulement*, for example—it remains an incomplete system with many a grey area, often doing little more than providing a framework of principle within which States enjoy choice of means in fulfilling their obligations; this is why different countries have different procedures for deciding who is a refugee, and why there can be so much disparity in the results. Grey areas, as we know only too well, can be exploited negatively, but also offer scope for progressive development. The yardstick is still international law, however, and a State will be judged in the light of just how effectively it implements its obligations; and in the present context, the primary question is whether refugees as defined in international law are protected and not sent back to persecution.

I have taken the title "The Lawyer and the Refugee" not because the law provides all the answers, but because, like it or not, the law has become the standard of accountability in so much of daily life; because the refugee and the asylum seeker are so often targeted by the loose legal rhetoric of politicians and bureaucrats; and because it needs constantly to be repeated that, underlying the scheme of international protection, there is a range of fundamental principles with significant normative force.

I.
THE LEAGUE OF NATIONS

It is now 100 years since the League of Nations came into being and held its first sessions in Paris, London, and Rome.

These were early days, and exactly what the League could do had still to be worked out.[2] The Covenant recognized its competence and responsibilities with regard to mandates, certainly, and to the "sacred trust of civilization",[3] but sovereignty and the reserved domain of domestic jurisdiction were very much a part of the scheme.[4] For sure, the Covenant referred to fair and humane conditions of labor; to traffic in women and children; to supervision of the arms trade; to freedom of communication; to "matters of international concern for the prevention and control of disease,"[5] and a special place was reserved for national Red Cross societies in mitigating suffering throughout the world.[6] Overall, the organization's international "reach" seemed fairly limited, but as it turned out, it was the Red Cross which activated the League on the refugee issue, no less than on related questions of famine relief and measures to combat epidemic disease in Poland and eastern Europe.

Even if not yet on the international agenda, refugees were certainly around. In the mid-1920s, the British had had their first encounter with refugees in Mesopotamia—various Christian minorities displaced by conflict, and for whom, in one case, the chosen solution was to arm them with rifles and a few mountain guns, that they might go where they wanted and be able to defend themselves; and so they did.[7]

Later the same year the Russian Civil War drew to a close, and the British and the French were soon busy evacuating from the Crimea their own erstwhile allies in the White Russian resistance, including both military and civilians. Each acted independently, though with some cooperation between the respective militaries.[8]

2. League of Nations Covenant art. 1, Treaty of Versailles, U.K.T.S. 4, Cmd. 153 (1919). The original members who ratified the Peace Treaty were Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), France, Guatemala, Italy, Japan, Poland, Peru, Siam, Czecho-Slovakia, and Uruguay. The Argentine Republic, Chile, Paraguay, Persia, and Spain had also acceded by the end of 1919. 1 LEAGUE OF NATIONS OFF. J. 12–13 (1920).

3. League of Nations Covenant art. 22.

4. *Id.*

5. *Id.* art 23.

6. *Id.* art. 25.

7. *See* Secretary of State for India, Memorandum on The Assyrian and Armenian Refugees in Mesopotamia, CAB 24/108/72 (July 5, 1920); Secretary of State for India, Memorandum, CAB 24/114/74 (1920) (including Appendix and Enclosure B352, *Note on the Christian Communities in and around Mesopotamia* (Oct. 27, 1920)); Secretary of State for War, Memorandum, CAB 24/114/83 (Nov. 9, 1920).

8. On the evacuation, see Telegram No. 588z from Commander in Chief, Mediterranean Afloat, to Admiralty, London, CAB 24/115/5 (Nov. 15, 1920); Telegram No.598z from Commander

For the refugee issue was not then seen as a matter of *international* interest; rather, each State looked to deal on their own with such problems as might emerge. That was all to change, however, particularly as a consequence of the Bolshevik revolution, its radical nature, and policy and practice of denationalization. The political dimension was important then, as it was to be again in the 1930s and later during the Cold War. Many States refused to recognize or deal with the Soviet Government, which they considered both illegitimate and unprincipled.

There is no doubt that Russian refugees scattered around Europe at the time were a "problem", or at least raised issues, for States in the early 1920s. Their passports expired, for example, and either could not be renewed or, if renewed by diplomatic representatives of the old regime, might not be accepted for travel and related purposes. Private law issues had to also be resolved and the applicable law identified, while access by refugees to opportunities, such as work or education, or to the courts, or to services, such as welfare (if it existed), was often conditional on what was then called "reciprocity": the foreign national would benefit only to the same extent that you or I would if present in their country, and that required effective treaty relations, all of which had gone by the board.

A population without protection, with no State apparently responsible for those displaced or made stateless, was an anomaly for which the League of Nations was unprepared. It was not clear, however, that international law could provide any answers, particularly where one player had elected *not* to play by the rules.

A. Russian refugees

Although it can be insidious to single out anyone in what was a collective effort, four names in particular stand for their very special contribution to international cooperation. These were heady days, days of hope, of vision, and at least initially, of purposeful action, and those four were Fridtjof Nansen, Gustave Ador, Herbert Hoover, and Ludwik Rajchman.

Nansen, of course, is remembered for the refugee passport which carries his name; Gustave Ador was President of the International Committee of the Red Cross, and the Red Cross was a major relief organization in the post-war world; Herbert Hoover ran the American Relief Association, which supplied the bulk of assistance; and Ludwik Rajchman was instrumental in setting up the League's International Health Office which did so much to combat the spread of epidemic disease in Poland and famine-stricken Russia; he went on to become the first chairman of the UN Children's Fund (UNICEF).

in Chief, Mediterranean Afloat, to Admiralty, London, CAB 24/115/26 (Nov. 18, 1920). *See also* Letter from C. H. Harrington, Lieut. General, General Officer Commanding-in-Chief, Army of the Black Sea, to the Secretary, the War Office, CAB 24/117/25 (Dec. 18, 1920) (reporting on worsening conditions and of action taken to assist French operations, "in the name of humanity").

Despite their considerable individual achievements, each of these four was also quite typical of their time—idealists, yes, but pragmatists, too; they were probably also the sort of "damn internationalists" whom David Caron mentioned when the Riesenfeld award was given to Louis Henkin.[9]

Nansen, for example, was a well-known scientist and explorer and a Norwegian delegate to the Assembly when, in April 1920, the League entrusted him with the repatriation of prisoners of war who remained in exile notwithstanding the end of hostilities. Working with the Red Cross and with the governments of Poland, Germany, Estonia, Lithuania, and the Soviet Union, he successfully organized the two-way repatriation of over 400,000 former POWs in two years.[10] His knowledge and experience of Russia would stand him in good stead, as he took up the cause of famine relief in addition to his work for refugees.

And this work came about because, in 1921, Gustave Ador wrote to the President of the Council of the League of Nations, and brought up the urgent problem of several hundred thousand Russian refugees then in Europe and elsewhere; he mentioned 800,000, but the number in fact was a least one and a half million.[11] Although individual circumstances differed, many were adrift and without protection, written off by their country of origin, with no prospect of settling locally, of finding employment, let alone of moving on to other countries. The International Committee of the Red Cross (ICRC) and the League of Red Cross Societies had taken up the challenge of relief, with considerable assistance from the American Red Cross and the International "Save the Children" Union. But relief was not enough, the resources of voluntary organizations were rapidly diminishing, and something had to be done. The ICRC argued that there was no better organization than the League to look into the issues, and only the League was in a position to surmount the political and social difficulties and come up with solutions.[12]

Governments agreed that something had to be done, and many supported the idea of some sort of organization under the League, and of a High Commissioner—someone with personal authority, able to secure the necessary political support, to influence non-governmental organizations and gain their respect. Such a High Commissioner would define the legal status of the refugees, organize their repatriation or allocation to other States, find them productive employment (a recurring theme) and, together with philanthropic organizations,

9. David D. Caron, *Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award: Louis Henkin and the Felicitous Expression of Reason*, 22 BERKELEY J. INT'L L. 1, 6 (2004).

10. *Fridtjof Nansen Facts*, NOBEL FOUND., https://www.nobelprize.org/prizes/peace/1922/nansen/facts/.

11. Letter from Gustave Ador to the President of the Council of the League of Nations, 2 LEAGUE OF NATIONS OFF. J. 225, 227–29 (Feb. 20, 1921) (confirming an earlier telegram, and attaching a memorandum).

12. Id.

undertake relief work.[13] This would cost money of course, and although it was briefly considered that "funds belonging to former Russian Governments, . . . at present deposited in various countries" might be used, nothing came of the idea.[14]

Even though law and anything resembling individual rights were not as such immediately part of the solution, already a number of principles were emerging: the idea that refugees needed to be able to identify themselves and, if possible, to travel between States; freedom of movement was understood as essential, if refugees were to be able to move to where work was available; ideally, national labor markets would be open to refugees, and equality of treatment would be the norm. Finally, and remarkably, it was taken for granted that there could be no question of anyone being sent back to their country, in the absence of sufficient guarantees of security.[15]

In September 1921, Nansen accepted the post of High Commissioner for Russian Refugees,[16] but it would take time for these general principles to be translated into law. In the meantime, one of the earliest successes was the certificate of identity, which came to be known as the Nansen passport.

B. Certificates of identity/travel documents

Early in the crisis, the Government of Czecho-Slovakia had emphasized that the legal status of the refugees, including "international protection in connection with. . . passports, certificates of identity, and all other documents bearing on legal status,"[17] could not be settled by isolated action, lest further complications arise. The papers issued to Russian refugees needed to be recognized internationally, and that required agreement between States.

Nansen took this up immediately and repeatedly stressed the importance of passports and papers for travel as part of the strategy to move refugees to where work was available. He proposed two ways forward: either the necessary papers should be issued by the countries in which the refugees had found temporary abode, or they might be issued by the High Commissioner on behalf of the

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13. M. Hanotaux, Report on The Question of the Russian Refugees June 27, 1921), 2 LEAGUE OF NATIONS OFF. J. 755, 756 (1921).

14. *Id.* at 757. The British Government concluded that this would not be lawful, the resources in question belonging to the successor government; Id. at 1014; *see also* Guy S. Goodwin-Gill & Selim Can Sazak, *Footing the Bill: Refugee-Creating States' Responsibility to Pay*, FOREIGN AFFS. (July 29, 2015), https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill.

15. Conference on the Question of the Russian Refugees, Resolutions Adopted by the Conference on August 24, 1921, 2 LEAGUE OF NATIONS OFF. J. 899 (1921).

16. On the last day of the Conference, Fridtjof Nansen was invited by telegram to take up the post of High Commissioner for Russian Refugees, which he accepted on September 1, 1921: 2 LEAGUE OF NATIONS OFF. J. 1006, 1027 (1921).

17. The Question of the Russian Refugees. Summary of the Documents received by the Secretariat, 2 LEAGUE OF NATIONS OFF. J. 485, 491, Annex 6 (1921).

League.[18] These proposals provided the agenda for the conference convened by Nansen in Geneva in July 1922, at which participating States unanimously agreed on the form of a certificate which they would issue to Russian refugees, and recommended its adoption by other States, both members and non-members of the League.[19] Very soon, over 50 States had signed on.[20]

One deficiency, however, would have to be remedied, for initially States insisted that a certificate should not imply the right for the refugee to return to the issuing State, and that special authorization was required. And the absence of a return clause significantly reduced the value of a certificate for the purposes of international travel.

That would eventually change, but there are insights here which are no less relevant today—one of the reasons why front-line States were inclined *against* the return clause, was that being host to the great majority of refugees, they hoped that a certificate of identity would speed onward movement to other countries, that it would facilitate self-resettlement as an element of international solidarity.[21] Those concerns have not gone away, but documentation nevertheless was also seen as essential to personal security and identity, to gaining access to employment, which is so important both for personal dignity and to relieve the public purse, and for the opportunities that freedom of movement can bring, particularly where the refugee is able to move to where he or she may find work.

C. The principle of no compulsory return

Perhaps the most significant achievement, if that's the right word, was the acceptance among States of the principle of no compulsory return; in fact, I see it not so much as an achievement, as a reflection of something innate. Even before the High Commissioner had actually been appointed, the 1921 Conference stressed, on the one hand, that no Russian refugee should be compelled to return, but that, on the other hand, information should be gathered with regard to those who might want to go back.[22]

This fundamental position of principle, lacking the force of international law, was nevertheless translated into practice, long before the word *non-refoulement*

18. Special Report by the High Commissioner, requesting the assistance of the Governments and Members of the League in the Accomplishment of his Work (Mar. 24, 1922), 3 LEAGUE OF NATIONS OFF. J. 385, 396, Annex 321a (1922). Nansen included a model certificate and reported also that refugees were in favor of papers issued by governments, provided always that they were free not to take up the option. *Id*. at 396–97.

19. Arrangement with respect to the issue of certificates of identity to Russian Refugees, July 5, 1922, 13 L.N.T.S. 355 (1922).

20. *Id.*

21. *See* Tytus Filipowicz, Memorandum on Russian Refugees in Poland (July 7, 1922), League of Nations Doc. C.483.M.305.1922 (1922) (circulated under cover of the Secretary-General's note of July 14, 1922).

22. Conference on the Question of the Russian Refugees, Resolutions Adopted by the Conference on August 24, 1921, 2 LEAGUE OF NATIONS OFF. J. 899, 901 (1921).

entered the vocabulary of protection. In 1923, for example, Nansen intervened to protect Russian refugees in China, many of whom had been engaged in military activities against the Soviet government and were a source of concern to the Chinese government. He intervened also with regard to a particular group of Russian refugees, "whose previous political associations were such as to render dangerous their presence in Constantinople," and saw that they were evacuated to Serbia. He then managed to avert the threatened expulsion, "for military reasons," of refugees from Romania; and of refugees in Poland, who were alleged to have left their country, not on political grounds, but for economic and other reasons. Nansen pointed out that many refugees had lost their nationality and would not be allowed to enter Russia, and he took steps to ensure their relocation in other countries.[23]

Then, as today, repatriation often seemed to be the only possible solution, particularly where large numbers of refugees were involved. The American Relief Association and the American Red Cross, major philanthropic partners in assisting Russian refugees, were of the view that there could be "no final satisfactory solution" other than return, and they requested that, "the matter of the protection in and repatriation to Russia of several thousands of these refugees be taken up with the Soviet Government by the League through Doctor Nansen or such other agency as they may elect."[24]

Approaches were made, some did repatriate, but the political situation changed again, and the question became academic; does this story provide lessons for today?

D. Defining refugees

One obvious curiosity of the League's involvement with refugees was its initial limitation to *Russian* refugees, and the fact that no definition was considered necessary; everyone knew who a Russian refugee was, and politics clearly drove the perception. Other refugees were known to be out there, but somehow they were not immediately thought to be of international concern, or to require the same attention. That was to change over time, but piecemeal and not in any systematic way.

The first extension of the Nansen passport scheme was to Armenians in 1926.[25] Again, it was driven by politics, but also by recognition of the urgent need for solutions. The arrangement of that year was the first occasion on which the refugee was defined. Still limited to just two national groups, Russians and

23. Russian Refugees, Report by Dr Nansen (July 7, 1923), 4 LEAGUE OF NATIONS OFF. J. 1040–44 (1923). *See also* George Ginsburgs, *The Soviet Union and the Problem of Refugees and Displaced Persons 1917-1956*, 51 AM. J. INT'L L. 325, 336–38 (1957).

24. Russian Refugees, Report by Dr. Nansen (Sept. 1, 1922), 3 LEAGUE OF NATIONS OFF. J. 1125–26 (1922).

25. Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 89 L.N.T.S. 47 No. 2004 (1926).

Armenians, the defining characteristics were that they no longer enjoyed the protection of their former government and had not acquired another nationality.

Two years later, the 1928 Arrangement added yet more groups, namely, certain "Turkish, Assyrian, Assyro-Chaldean and assimilated refugees,"[26] but there was no desire on the part of States, either to deal with the issues more generally, or to adopt a treaty-based approach under which they would accept formal, legal obligations.

To be sure, the 1928 Arrangement had indicated a variety of political and legal protection activities which the High Commissioner might undertake, but everything was framed in the language of recommendations, not that of law or obligation,[27] and recommendations were becoming less and less effective in achieving results. Freedom of movement remained discretionary, as did the issue of a return clause; in the case of expulsion, States were simply entreated to avoid or suspend such measures, "where the person concerned is not in a position to enter a neighboring country in a regular manner;"[28] and even that did not apply in the case of a refugee who entered in violation of national law.

After reviewing the frequently difficult and deteriorating situation of refugees in Europe and the increasing ineffectiveness of recommendations, the Inter-Governmental Advisory Commission attached to the Nansen International Refugee Office (Nansen died in 1930), strongly urged the adoption of a formal convention, as the best way of assuring refugees of stability, whether as regards their legal status, their settlement and work, access to the professions, to schools and universities, and to the courts.[29] The Commission was encouraged to undertake the drafting, and in October 1933, after a short conference in Geneva, the Convention relating to the International Status of Refugees was adopted.[30] Not the most auspicious time you may think, for that was the same year in which the Nazis came to power in Germany, and new challenges were close at hand.

From one perspective, the Convention did little more than translate the status quo—the 1922, 1924, 1926, and 1928 arrangements—into treaty language, but it

26. Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees: 89 L.N.T.S. 63 No. 2006 (1928).

27. Arrangement relating to the Legal Status of Russian and Armenian Refugees: 89 L.N.T.S. 53 No. 2005 (1928).

28. *Id.*

29. See Annex 1313, Russian Armenian Assyrian Assyro-Chaldean and Turkish Refugees (1931) 12 LEAGUE OF NATIONS OFF. J. 2118.

30. 159 L.N.T.S. 199 No. 3663 (1933). For a detailed account of the Convention and of British practice, *see* Robert J. Beck, *Britain and the 1933 Refugee Convention: National or State Sovereignty?* 11 INT'L J. REFUGEE L. 597 (1999); *see also*, Claudena Skran, *The Historical Development of International Refugee Law, in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 19–35 (Andreas Zimmerman ed., 2011); CLAUDENA SKRAN, REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME (1995); Peter Fitzmaurice, *Between the wars – the Refugee Convention of 1933: A contemporary analysis*, *in* THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE 236 (David Keane & Yvonne McDermott, eds., 2012).

is most often cited today as being the first occasion on which the principle of *non-refoulement* appeared in a binding legal instrument. That is so, but the rule as stated was apparently limited to refugees residing regularly in the contracting States, even if an ambiguously worded provision did bind them not to send back or *refoule* a refugee to the frontiers of their country of origin.[31] As we have already seen, the practice that would consolidate *non-refoulement* over time as a rule of customary international law had already begun in the 1920s, but its expression in a binding treaty was helpful in the process of crystallization, even if few States finally ratified it.

The suggestion for a more open approach to the refugee definition, incorporating all those who did not enjoy or no longer enjoyed the protection of their country of origin and had not acquired another nationality, was rejected by those working on a draft, for fear it would raise objections from governments.[32] Even at the time, it was well understood that many refugees—Italians, Hungarians, Austrians and Germans—continued to have no protection, and the following years would necessitate further *ad hoc* measures as Nazism took hold and the Spanish Civil War came to an end.

E. Preliminary conclusions

As we can see, up until 1933, the law had not yet formally entered the picture, although principles of protection and cooperation can be discerned—the germ of what would come to be called *non-refoulement*; the provision of relief in face of humanitarian necessity (with special attention to women and children and those with disabilities); the practical yet inexorable link between solutions and refugee self-reliance and employment; the agency of those displaced, who needed a voice; the practical protection that goes with documents certifying identity and status; the repeated hope that repatriation would be the answer.

At the inter-governmental, institutional level, cooperation is beginning to emerge, though falteringly, even as the particular national interests of individual States also made themselves felt. Still, the limited and circumscribed nature of these first steps cannot be ignored; the focus was exclusively on just a few refugees, defined by reference to national origin and lack of protection. The "international" response was heavily dependent on non-governmental private agencies; the politics of recognition and confrontation with the Bolshevik government played a part in the 1920s, and were to come up again in the 1930s; and individual rights were just not there.

31. Article 3 (in the official French text): 'Chacune des Parties contractantes s'engage à ne pas éloigner de son territoire par application de mesures de police, telles que l'expulsion ou le refoulement, les réfugiés ayant été autorisés à y séjourner régulièrement, à moins que lesdites mesures ne soient dictées par des raisons de sécurité nationale ou d'ordre public. Elle s'engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d'origine. . .'

32. Member of the Social Section, Memo to M. Ekstrand, League of Nations Doc. 6786 (1933); M Gentili, Memo to M Ekstrand, League of Nations Doc. 20A/6786/3948 (1933).

II.
CONTEMPORARY CRITICISM

Many of the shortcomings of the emerging regime were noticed at the time, of course. Not only did millions of refugees fall outside the safety net, but it was increasingly difficult for refugees to find employment in a time of economic depression: borders were tightening up, and the League itself was entering its period of decline. Totalitarianism was gaining ground, League members were engaging in aggressive war, and the early idealism was slipping away.

Writing in 1951, and looking back over near history, Hannah Arendt didn't think much of what the League had done for refugees. She evidently had little time for those she called "well-meaning idealists" wedded to the notion of inalienable rights and yet so distant from "the situation of the rightless themselves," among whom might be found "a few international jurists without political experience. . . or political philanthropists supported by the uncertain sentiments of professional idealists." [33] She was certainly right to pinpoint the League's failure to deal with totalitarianism, particularly in the crisis decade of the 1930s. She paints a bleak picture—"not the loss of a home, but the impossibility of finding a new one"—language that echoes today in the protracted refugee situations around the world.[34]

That picture is a telling corrective to what we might otherwise infer from the work of Fridtjof Nansen, or from the various arrangements and, ultimately, conventions adopted for refugees. And yet it is incomplete and, for the international lawyer, somewhat ahistorical, so far as it ignores the legal and international political context of the day.

After all, these were early days in a coalescing international community of States as yet unprepared, legally and institutionally, for the shock of unprotected populations—people for whom no one appeared to be "responsible." At great human cost, individual States were concerned with protecting, or at least asserting, the primacy of national interest and to wash their hands of responsibility for the displaced and the persecuted.

III.
MODERN TIMES

Let me now leap ahead, leaving aside the Second World War, skipping over the International Refugee Organization and the political divisions of the Cold War, and just glancing back to note the creation of the Office of the United Nations High Commissioner for Refugees in 1950, the signing and entry into force of the 1951 Convention relating to the Status of Refugees and its "amending"

33. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM: INTRODUCTION BY SAMANTHA POWER 371–75 (2004).

34. *Id*.

1967 Protocol, as well as significant developments at the regional level, both with regard to refugees and more generally in the protection of human rights.[35] Let me pause there for a moment, for the post-war arrival of human rights changed the scene in a significant way, putting the individual, no matter who she or he was, front and center in the scheme of protection.

Already in 1948, the Universal Declaration had begun to sketch out the legal limits, confining and structuring the power of the State to deal with the migrant, the asylum seeker, the refugee, and, indeed, the citizen.[36] It makes clear that *everyone* has the right to non-discriminatory treatment;[37] "to life, liberty and security of the person";[38] not to be subject to torture, or to cruel, inhuman or degrading treatment or punishment;[39] "to equal protection of the law";[40] "to an effective remedy" where rights are violated,[41] and, of course, "to seek and to enjoy … asylum from persecution".[42]

That original list is longer now, rights have been given greater substance and clearer content in treaties and practice, and the obligation to protect human rights has moved much closer to the center. The principle of *non-refoulement*, for example, has slipped the bounds of the 1951 Refugee Convention, requiring States at large not to return people to face the risk of persecution, torture, or other serious violations of fundamental rights, thus going some way towards bridging the gap to a right to asylum that was left undeveloped in later treaties.[43]

Today, the principle of non-discrimination on the basis of race is firmly established in international law, with non-discrimination as a *general* principle standing alongside. This fact alone raises the question, whether we should not closely re-examine judgments of the past that were premised on, if not rooted in, practices of racial discrimination considered abhorrent and impermissible today. Here, I am thinking in particular of the decision of the US Supreme Court in *Nishimura Ekiu* and of the Privy Council in *Musgrove v Chun Teeong Toy*.[44]

35. G.A. Res. 428 (V), (Dec. 14, 1950); Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

36. G.A. Res. 217 (III), (Dec. 10, 1948).

37. *Id.* art. 2.

38. *Id.* art. 3.

39. *Id.* art. 5.

40. *Id.* art. 7.

41. *Id.* art. 8.

42. *Id.* art. 14.

43. *See* Guy S. Goodwin-Gill & Jane McAdam, *Protection under human rights and general international law*, *in* THE REFUGEE IN INTERNATIONAL LAW 350–99 (4th ed. 2021); Guy S. Goodwin-Gill, INTRODUCTORY NOTE, DECLARATION ON TERRITORIAL ASYLUM, 1967: https://legal.un.org/avl/ha/dta/dta.html.

44. For the background on racial discrimination in immigration, Eve Lester, MAKING MIGRATION LAW: THE FOREIGNER, SOVEREIGNTY AND THE CASE OF AUSTRALIA (2018); also, Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *Musgrove v. Chun Teeong Toy*, [1892] AC 272.

The persistent illusion of an absolute, exclusionary competence is nevertheless still a matter of concern, because it tends to frame and direct national legislation and policies in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights. Some things have changed, but some of what has changed for the better protection of those in flight is now under threat in many jurisdictions.

On the plus side, the international legal status of the refugee, the stateless person, and the individual at large, is beyond dispute, as are the obligations that States owe generally to all and specifically to the refugee and the stateless. It is not, and probably cannot be, a perfect picture. Neither international law nor international organizations yet provide that "community," which some see as the necessary condition precedent to the protection of rights. On the contrary, compliance, effectiveness, enforcement—however we want to call it—still falls (mostly) within the competence of States. After all, States are the only ones possessed of territory on which to provide refuge.

That is the challenge and the opportunity. That is the terrain on which the refugee and the lawyer must seek out the promise of protection, wherever the rule of law can be found. A "new" approach being unlikely, the progressive development of international refugee law—the dynamic approach—is needed, employing the instruments and principles which have their origins and their solid foundation in the practice of the League and its members and in the consolidation of practice ever since.

What is exciting and potentially so progressive is the fact that different legal systems and cultures are involved in the interpretation and application of a common agenda. Challenges lie in responding to new factual situations, to novel interventions in controlling the movement of people in search of refuge, and to circumstances which, from a humanitarian and commonsense perspective, seem to cry out for protection in one form or another.

The grass-roots dynamic is of fundamental importance, for progress in protection has long been driven by practitioners, refugee advocates, teachers and professors, legal clinics, pro bono groups, students and non-governmental organizations presenting claims and fighting cases in first instance tribunals, appeal and supreme courts, and before regional and universal oversight mechanisms. The record of success here—in the better protection of women in flight, of LGBTQI and others similarly situated, of those in fear of FGM, of drug-related violence or youth targeting—that is what counts.

A. Lawyers and the law

The origins of international refugee law and organization lie in a "groups and categories" approach, in which the displaced were the objects of attention and neither rights nor agency played a significant role. Today, the individual is very much at the center.

The growth in national refugee status determination procedures and the judicialization of process have led the 1951 Convention to be one of the most litigated treaties at the domestic level, with courts and tribunals around the world engaged almost daily in a common purpose—elucidating the meaning of and applying the refugee definition and other Convention provisions relevant to admission, non-penalization by reason of irregular entry or presence, residence, non-removal, and protection at large.

This immediately broadens the picture, showing the potential of domestic courts as "agents of development," where both customary law and treaty interpretation are concerned. Indeed, the very absence of a centralized authority or treaty supervisory body in the traditional sense, means that domestic courts have particular responsibilities in compliance and development; and we have to learn how to make the very best use of them.

And here lawyers, as advocates, *amici*, or in NGOs or working with other providers of front-line legal advice and assistance, can play a critical role by, among other things, bringing to the attention of domestic courts the rulings of other courts in other jurisdictions, as they interpret and apply the very same treaty terms and obligations shared in common.

Precisely because the decisions of national courts, as organs of the State, can amount or contribute to practice for customary international law purposes, we need to ensure that our own courts are provided with the best evidence of what is the applicable international law, and what is the commonly accepted interpretation.

B. . . . and in the United States

As all of us here know, US lawyers are actively litigating every aspect of the assault on asylum and refugee protection which seems central to the policy of the present government. I would like to suggest that the counter-attack can be strengthened by more focused and more consistent recourse to international law and, in particular, to the work being done by other courts in other countries.

I was recently in correspondence with a US lawyer on precisely this issue, which provoked the following reply: "[f]rom an advocacy perspective in the US, our courts are, unfortunately, generally not very interested in the UNHCR or rulings of other jurisdictions…" Kate Jastram confirmed this a few years back, with an empirical study noting that UNHCR's *Handbook* is hardly ever referenced in the United States, and that its Guidelines on exclusion were not mentioned, even in passing, in over 100 US exclusion cases.[45]

To me, the lawyer's conclusion smacks of defeatism. What we need is a more assertive and coherent strategy, one which identifies clearly the international legal issues involved—for example, interpretation of the refugee definition—and then

45. Kate Jastram, *Left Out of Exclusion: International Criminal Law and the "Persecutor Bar" in US Refugee Law*, 12 J. INT'L CRIM. JUST. 1183, 1194–96 (2014).

determines where the international legal consensus lies, and what the customary international law position is. Little if anything will be gained by bandying academic commentary back and forth, mine included; this is sterile, and what we need to do is dig out the law and the practice.

In this, UNHCR can be a helpful ally. After all, it has a supervisory role where application of the Convention is concerned, which is expressly accepted by States, and its guidelines on protection, issued since 2000 and supplementing its 1979 *Handbook*, tend to be very soundly based in the jurisprudence and doctrine of the courts across multiple jurisdictions (with a dash of principle, of course. . .).[46] Judicial dialogue across jurisdictions can become an important dynamic, especially in the evolution of the terms of the refugee definition, such as persecution, protection, social group, or political opinion.

The use of comparative case law when interpreting the US Constitution may be controversial, but when treaties are involved, the jurisprudence of Justice Scalia is now our ally. In *Olympic Airways*, for example, he regretted in dissent the majority's,

> . . . failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us. . . One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they may have an actual role in applying, would be (to put it mildly) all the more relevant.[47]

The door is ajar; we need to push it wide open.

IV.
FUTURES

There may still be no internationally recognized right to be "granted asylum" in the narrow sense of formal permission to enter and to remain in State territory, to work, to have one's children educated, and not to be returned to the risk of persecution. The individual in flight *is* protected, however, and how States respond is now a matter of international law, not just a matter of international concern.

Put simply, at the point of contact between the agents of the State and individuals claiming protection, for example, during rescue or interception operations and in what follows next, the State must ensure that its international obligations are implemented effectively and consistently with the rule of law.

Within the international refugee regime at large, the bases for discourse and cooperation have been strengthened over the past seventy years, but the politics remain resistant to such fundamental changes as are needed, either to deal

46. Guy S. Goodwin-Gill, *The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law*, 69 INT'L & COMP. L.Q. 1 (2020).

47. Olympic Airways v. Husain, 540 U.S. 644, 658 (2004).

effectively with causes, or to bring about prompt and equitable solutions consistently with the demands of international justice.

Overall, "international refugee law" has nevertheless demonstrated its dynamic character. Within the *legal* framework, such as the refugee definition, it has shown itself capable of responding positively to the emerging protection needs of groups and individuals at risk, while the normative background provided by human rights has strengthened its capacity to provide a principled approach to larger groups and categories of the displaced. The law alone, however, does not provide solutions, and much remains to be done in the face of bureaucratic ineptitude and the bankruptcy of policies premised, for example, on the illusion of deterrence and the "value" of cruel and inhuman practices.

Still, one should not underestimate the range of rules and principles that can be called in aid. So concerned was one independent Australian senator with the impact of his country's offshore interception policies that he referred the issue to the Office of the Prosecutor of the International Criminal Court. The reply arrived in mid-February 2020. Rather than dismissing it summarily, as the prosecutor might have done—no attack as such on civilians, so no jurisdiction—the Office undertook a serious and reasoned analysis of policy and practice, noted the extensive body of evidence, and considered the whole against the elements of relevant prohibited conduct, including crimes against humanity and cruel, inhuman, and degrading treatment. And it found that some of that practice did indeed cross the threshold and appear to constitute one or more offenses under Article 7 of the Statute of the Court. It appeared to be unlawful, and although it might not engage the jurisdiction of the Court for now, it could be looked at again.[48]

If a first principle is needed, international refugee law starts with recognition of the inherent dignity and worth of every human being. Although many things can be deduced from first principles, a legal system is also about accountability for what is done to others. International criminal law, in time and in part, may address the liability of those whose policies and practices are at the root of displacement, while international refugee law is about the architecture of response, and the accountability of systems in which decisions and actions have impact on individuals in search of refuge.

The history of international refugee law is being written now, of course, daily, from the ground up, in the work of civil society, of NGOs, of advocates, whether lawyers or not, of students in legal clinics, in international organizations such as UNHCR and the ICRC, and in the practice of States, both good and bad.

There is now and probably always has been a tension between the claim of the refugee in search of protection, and the State anxious about its "sovereign

48. Ben Doherty, *Australia's offshore detention is unlawful, says international criminal court prosecutor*, GUARDIAN (Feb. 15, 2020), https://www.theguardian.com/australia-news/2020/feb/15/australias-offshore-detention-is-unlawful-says-international-criminal-court-prosecutor.

borders," or concerned about other States potentially ridding themselves of unwanted population, or ideologically opposed to refugees, or those refugees, or that refugee. And that control over borders is now rapidly moving beyond the physical – the line in the land, the sea between, the wire and the wall—and into all the possibilities of surveillance and monitoring that technology has to offer. This is an aspect of the new terrain in which lawyers must repeatedly carve out their role, seeking to resolve or mediate that tension and that conflict, but always with a bias towards international protection—a vision, which, despite its ups and downs, continues to place value on human dignity, agency, identity, equality before the law, and security from harm.

This is surely the place to be, for the lawyer and the refugee . . .

Reimagining Global Migration Governance: From Insufficient Ideas to South-South Solutions

Christopher Szabla*

The disarray produced by the "global migration crisis" has resulted in a number of ongoing and proposed reforms of global migration governance, defined as the international law and institutions concerned with all migration. Yet these reforms or proposals appear insufficient or ineffectual—especially to the extent that they often ignore political realities. Fulfilling the promise of global migration governance requires an architecture that instead materially addresses political difficulties. This Article reviews problems with the current and proposed models of global migration governance and proposes to ground reform in consideration of those realities, using a successful model that promoted and protected European emigration in the Twentieth Century. Today, a similar system could help achieve ambitions within the Global South to promote South-South migration among disadvantaged States. Such a model could shift the material incentives (and hence, politics) holding back openness toward migrants, help fulfill migrants' rights or needs, and promote the fair distribution of migrants toward existing migrant destinations. It could also redress the historical injustices of earlier migration governance systems that advantaged Europeans.

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INTRODUCTION

For over the last half-decade, world politics and policy debates have been suffused by questions about both the movement and treatment of refugees and migrants. These have ranged from the rise of populism in Europe and the United States and the United Kingdom's vote to leave the European Union ("EU") to struggles with the consequences of armed conflict in Libya and Syria to concerns about displacement from islands submerged by rising seas to less often-noticed

discussions about the needs of Venezuelan exiles.[1] They have also included ongoing issues as disparate as the capacities of cities in countries near war-wracked South Sudan and reckonings over how to sustain social services and an adequate labor force in aging Japan and Europe.[2] In short, there is no inhabited continent on which questions about how to protect migrants or ensure their fair or desirable intake have not become issues of foremost significance.

Scholars debate whether there has actually been a migration "crisis" in the sense that such a characterization might imply that there are more international migrants or refugees than ever.[3] Yet the existence of *consistently* large numbers of migrants prior to, during, and after the "crisis" and their effect on the political *discourse*—which, in turn, impacts migrants themselves—begs attention either way. To the extent there has been or is a global migration crisis, it has always been less a function of the size of global movement than the disarray with which legal and political institutions have responded to it. In the wake of the spread of

1. On populism and migration *see*, *e.g.*, Christian Joppke, *Immigration in the Populist Crucible: Comparing Brexit and Trump*, 8 COMP. MIGRATION STUD., art. 49 (Dec. 21, 2020) ("It is a truism that opposition to immigration [was] central to both Brexit and the rise of Trump, much as it has been central to the entire phenomenon of nationalist populism whose crest the two events represent"); on European populism and the role of migration *see*, *e.g.*, Albana Shehaj, Adrian J. Shin, & Ronald Inglehart, *Immigration and Right-Wing Populism: An Origin Story* 27 PARTY POL. 282 (2021). For examples of some of the policy struggles over migration from Middle East conflict zones in the EU alone *see*, *e.g.*, Peter Seeberg, *The Arab Uprisings and the EU's Migration Policies—The Cases of Egypt, Libya, and Syria*, 9 DEMOCRACY & SEC. 157 (2013); Andrew Geddes & Leila Hadj-Abdou, *Changing the Path? EU Migration Governance After the 'Arab Spring*,*'* 23 MEDITERRANEAN POL. 142 (2018). The literature on potential "climate refugees" is vast, but an overview is available in DENISE ROBBINS & JOHN R. WENNERSTEN, RISING TIDES: CLIMATE REFUGEES IN THE TWENTY-FIRST CENTURY (2017); Chapter 3 concerns "drowning countries" specifically. On concerns about the response to Venezuelans *see*, *e.g.*, Organization of American States, *New Report Warns Number of Venezuelan Refugees and Migrants Could Rise to 7 million in 2021* (Dec. 30, 2020), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-128/20.

2. On South Sudanese refugees *see*, *e.g.*, Chris Matthews, *South Sudanese Refugees Struggling to Survive in Uganda's Cities*, THE NEW HUMANITARIAN (Apr. 12, 2017), https://www.thenewhumanitarian.org/feature/2017/04/12/south-sudanese-refugees-struggling-survive-uganda-s-cities; on Japan *see*, *e.g.*, Naohiro Ogawa, *Population Aging and Immigration in Japan*, 20 ASIAN & PAC. MIGRATION J. 133 (2011); for a brief overview of demographic problems and the politics of migration in Europe *see*, *e.g.*, Paul Taylor, *Aging Europe needs the migrants it doesn't want*, REUTERS (Dec. 1, 2014), https://www.reuters.com/article/us-europe-demographics-idUSKCN0JF1KA20141201.

3. While the "crisis" has been called unprecedented or drawn comparisons to the number of displaced persons during the Second World War, scholars dispute these claims statistically and question whether the "crisis" is less material than perceptual. *See*, *e.g.*, Leo Lucassen and Felicita Tramontana, *Migration in Historical Perspective*, OPENDEMOCRACY (Aug. 11, 2017), https://www.opendemocracy.net/can-europe-make-it/leo-lucassen-felicita-tramontana/migration-in-historical-perspective. Hein de Haas has also demonstrated that the number of *de jure* refugees has remained at about a stable 0.3 percent of the world's population for decades. DE HAAS, *Refugees: A Small and Relatively Stable Proportion of World Migration* (Aug. 22, 2016), https://heindehaas.blogspot.com/2016/08/refugees-small-and-relatively-stable.html. This follows on earlier research demonstrating that migrant levels were relatively constant between 1960 and 2000, political "crises" aside. Mathias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?* 48 INT'L MIGRATION REV. 283 (2014).

the COVID-19 pandemic, widespread border closures interrupting migration flows have only added to the pressing importance of questions concerning the governance of migration and mobility.

Questions common to the law and governance applicable to all types of refugees and migrants have included: How can the global community keep migrants' movements safe and free from exploitation? What rights should or can migrants possess outside their countries of nationality or origin? How can migrants' movement to places in need of their labor and other contributions be reconciled with resistance to their presence? In essence, these concerns focus on two things: 1) how to fulfill the rights of migrants, or—in the absence of the clarity of what such rights are and when they need to be respected—ensure migrants' ethical treatment; and 2) how migration can be directed in a way that is most useful and equitable for both migrants themselves and for the economies, societies, and sovereign rights of destination States. Both the "migration crisis" of the last half-decade and the pandemic more recently have evidenced how poorly these issues are being addressed at an appropriate level for such cross-border concerns: that of international law and institutions, which, taken together, this Article defines as global migration governance.[4]

As Alexander Betts observes, "there is no formal or coherent multilateral institutional framework regulating States' responses to international migration."[5] At the same time, T. Alexander Aleinikoff writes that "there is no single, coherent body of norms that might be termed a regime of international migration law."[6] What political scientists call a "regime" of international law and institutional rules

4. International law is often characterized as part of global governance, despite arguments that they should be considered separate due to governance's greater flexibility. *See* Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 243, 251 (2004) (conceptualizing governance as a "mindset" of "thinking" about international law in a "deformalized" way). This Article follows Alexander Betts and Lena Kainz's definition of global migration governance as "the norms and organizational structures that regulate States' and other actors' responses to migration." Betts & Kainz, *The History of Global Migration Governance* (Oxford Refugee Studies Centre Working Paper Series No. 122 1, 2017), https://www.rsc.ox.ac.uk/publications/the-history-of-global-migration-governance. There are other, slightly different ways to understand the phenomenon that go beyond international legal and institutional activities. Antoine Pécoud, for example, adopts a definition at times of "global migration governance" that includes both formal international frameworks and the collective actions of individual States. His conception of a "[g]lobal forced immobility governance," for example, is not the product of a "UN-sponsored declaration," but "the multitude of ad hoc and often disconnected initiatives that, taken together, make for an implicit regime." *See* Pécoud, *Philosophies of Migration Governance in a Globalizing World*, 18 GLOBALIZATIONS 103, 106–07 (2021). To distinguish frameworks encompassing both international law and institutions from both international law in and of itself and from "global law" in the form of trends in domestic law and administration, however, this Article adopts a definition that focuses on laws and institutions at the international level.

5. Alexander Betts, *Introduction: Global Migration Governance*, *in* GLOBAL MIGRATION GOVERNANCE 1 (Betts ed. 2011).

6. T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 471 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds. 2007).

barely exists for migration. Such a regime may be understood, at best, as a less cohesive "regime *complex*": a series of overlapping rules and institutions.[7] Such "complexes" can possess some flexible features and even overcome political conflicts through such flexibility. But they come with the resultant pitfalls of a lack of clarity or the enforcement ability necessary to resolve large-scale global problems.[8] "Complexes" therefore evince even greater problems of State influence than those that some critics see in the "flexibility" of norm-based global governance institutions in general.[9] A "regime" does more clearly exist for providing rights to and resettling refugees—particularly those who fall under international legal definitions of a refugee ("statutory refugees").[10] Yet not only are refugee rights themselves often disregarded, but the distinction between migrant and refugee groups is frequently unclear in a way that makes the availability of protections to statutory refugees (as opposed to others) often relatively arbitrary.[11]

Many migrants consequently face difficulties not unlike those of statutory refugees but lack the legal ability to avail themselves of refugee protections. Yet refugee protections remain their best or clearest option.[12] When migrants cannot obtain, or do not know to seek refugee protections, remaining avenues of international law and institutional support offer them much weaker support. With few additional legitimate pathways under international law, or facilitated by international institutions, migration thus has the additional effect of placing enormous strain on the refugee system, or of increasing pressure on—and increasing the acrimony of—domestic debates over regular or illegal immigration. In South Africa, for example, these difficulties have led to the characterization of the country's asylum system as a "catch all" for all migration that has a tendency to be "abus[ed]," placing the rights of asylum-seekers in jeopardy.[13]

7. *See* Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURV. Q. 12 (2010).

8. *See*, *e.g.*, Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7 (2011); Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 THE ANN. REV. OF L. & SOC. SCI. 329 (2018); Karen J. Alter, *Comprehending Global Governance: International Regime Complexity vs. Global Constitutionalism*, 9 GLOB. CONSTITUTIONALISM 413 (2020).

9. *See* Koskenniemi, *supra* note 4, at 251.

10. Indeed, one scholar of migration governance goes so far as to say that "[w]hen it comes to human mobility, only refugees are the object of a regime." Pécoud, *supra* note 4, at 2.

11. On the lack of clarity between these categories *see*, *e.g.*, Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis,'* 44 J. ETHNIC & MIGRATION STUD. 48 (2018).

12. For a discussion of the relative paucity of "migrant rights" for non-statutory refugees and ways that migrants have claimed and can claim rights under refugee and asylum law *see infra* Part I(A).

13. JONATHAN CRUSH, CAROLINE SKINNER & MANAL STULGAITIS, RENDERING SOUTH AFRICA UNDESIRABLE: A CRITIQUE OF REFUGEE AND INFORMAL SECTOR POLICY 5 (2017), https://samponline.org/wp-content/uploads/2017/08/SAMP-79.pdf.

The lack of clear international migration rules and effective international migration institutions is perhaps most visible in the recent stress placed on alternative regional or bilateral frameworks for governing migration. These frameworks have produced tensions between States over balancing the management of migrant movement with respect for migrant rights. An example is the EU's Dublin III Regulation, which mandated that asylum-seekers remain in their country of first arrival in the European bloc. This rule has been criticized for crowding asylum-seekers in Mediterranean States, angering those States' populations, leading other migrants to seek dangerous routes around those States, and producing hostility among States that were asked to share the "burden" of hosting these newcomers.[14] Insufficiencies can also be seen in the recent EU-Turkey and EU-Libya "deals." In each, the EU—while still attempting to accommodate migrants' needs or desires to leave their home countries—nonetheless appeared to compromise those migrants' human rights by stationing them in the territories of rights-neglecting States rather than permit their entry onto EU soil.[15] Further afield, US and Australian refusals to admit refugees, and their externalized staging of migrants on the Mexican border and nearby Pacific islands, respectively—despite valid claims of asylum—have evidenced a similar disavowal of international legal responsibilities for migrant acceptance.[16]

The ongoing difficulty of addressing protection and distribution problems for *all* types of migrants has resulted in a number of new ideas for the legal and institutional reform of the *global* system governing migration. These have led to the adoption of a new international instrument, the Global Migration Compact, and the rebranding of the International Organization for Migration ("IOM") as part of the UN, which have gone some way toward improving global migration governance.[17] These ideas have also included more grandiose proposals, including advocacy for open borders or for development aid that is meant less to govern migration than to curtail it.[18] Yet this Article argues that neither existing reforms nor more expansive proposals address a fundamental *political* problem that has continued to plague the migration regime: how to balance the irrepressible desire to migrate (and economies' need for migrant labor) against anti-migrant sentiment.

Improving migration governance therefore demands a new approach. In order to tackle the problem of political will, improvement demands a structure that does not merely require States that are migrant destinations—both in the "Global North" and States where treatment has been an even greater concern, such

14. For an analysis of the troubles with the Dublin Regulation *see generally* SUSAN FRATZKE, NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM (2015), https://www.migrationpolicy.org/sites/default/files/publications/MPIe-Asylum-DublinReg.pdf.

15. *See infra* Part I(C).

16. *Id*.

17. *See infra* Part II(A) and (B).

18. *See infra* Part II(C).

as South Africa or the Persian Gulf—to agree to place legal requirements on themselves.[19] This structure must be reimagined in a way that helps shift destination States' politics in order to induce them to arrive at such an agreement or to comply with such requirements. Moving toward such an approach could begin by becoming conscious of the roots of migration governance's current struggles and of past achievements in both promoting migrant rights and directing movement, using history as a touchstone of the possible. As one option that takes this history as a relevant precedent, this Article proposes a system of global governance that appeals to destination States, but which ultimately creates *material* pressure on them to expand migrant admission and improve treatment in conformity with international law.

This proposal involves using international institutions to train and direct migrants to destinations within currently disadvantaged portions of the Global South, with the aim of rendering migration an attractive, enhanced tool of economic growth within these regions. Doing so would also allow this sponsored migration (and, consequently, its benefits) to be withheld if enforcement of improved migrant rights and treatment is not achieved. Such operations are neither unprecedented nor merely assume interest within the South. They build off aspects of the recent reforms of global migration governance, off examples of past successes in its history, and off existing Southern-led regional proposals.

Such a system could appeal to the interests of more recalcitrant destination States by initially redirecting some migration away from them. This redirection could ultimately increase migrant bargaining power relative to existing destinations as more States will need to improve their approach to, and treatment of, migrants to continue to compete for and attract what remains, for many countries, a critical labor force. Reframing immigration as "growth" or "development" for new destinations in the South could also contribute to a more positive image of migrants worldwide. In turning a historical precedent that

19. This Article defines "Global North" as principally long-wealthy economies in the North Atlantic, East Asia, and Australasia, with the "Global South" largely characterized by States with a postcolonial or quasi-colonial relationship with the North. For an overview of the origins, evolution of, and alternatives to, this terminology *see*, *e.g.*, Nour Dados & Raewyn Connell, *The Global South*, 11 CONTEXTS 12 (2012). While wealthy economies in, for example, the Gulf (*e.g.* Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates) have become major migrant destinations, they are rarely classified as being within the Global North. Nevertheless, while these States are not as averse to migrant workers as those in the North, their treatment of migrants has been even more fraught. To that end, they must be considered *akin* to Global North States in this analysis. Thus, for the sake of consistency, this Article maintains traditional definitions of "Global North" while noting where similarly-situated States must be considered alongside it, rather than including them in the North or fashioning a new terminology. This approach is not unprecedented in discussing migration and has been employed by, e.g., the World Bank. *See* World Bank Migration and Remittances Team, *Leveraging Migration for Economic Development: A Briefing for the World Bank Board*, 4–5 (2019), http://documents1.worldbank.org/curated/en/167041564497155991/pdf/Leveraging-Economic-Migration-for-Development-A-Briefing-for-the-World-Bank-Board.pdf (defining "Global North" as countries in the Organization for Economic Co-operation and Development, "OECD," alongside "other high income countries").

largely involved the sponsored migration of Europeans to the advantage of migrants from and within the Global South, moreover, this proposal would help reverse discriminatory injustices.

Of course, such an approach is not a panacea and invites numerous criticisms of its own. It presents its own risks, including, *inter alia*, Northern distrust of its ultimate aims and a possible increase in overall migration that could dilute improvements in migrant bargaining power. The proposed system might appear designed to promote South-South migration as another means to externalize migrants "offshore" in the South. It could stoke culturalist anti-migrant sentiment in the South and lead the system to break down. This Article, however, will present evidence to dispute such risks and counterarguments. Many such risks, moreover, would not be newly created, but are current problems with global migration governance that might continue.

This proposal is, moreover, merely one suggestion for a means to reform global migration governance in a way that addresses political opposition to its aims by using legal and administrative tools to reshape the contours of politics themselves. This Article's critiques of the present system of global migration governance and its reforms, as well as its description of the prehistory of contemporary migration governance, may suggest other options. Even beyond migration, reforming legal and institutional architectures to undermine the barrier of "political will" could present a broader model for reform applicable to other complex and contradictory global governance regimes, such as the regime for climate change.

The Article proceeds in four additional Parts. Part I reviews in greater detail the difficulties with the structures of contemporary international migration law and governance. Part II discusses ongoing and proposed attempts to reform this system, and their drawbacks—in particular, their failure to engage the material realities and politics of anti-migration. Part III introduces the forgotten history of global migration governance as a means to consider what models it offers for more effective reforms in the present, and what warnings it offers as well. Part IV distills the Article's normative suggestion from this historical background. It argues for the potential benefits of reemphasizing a system of assisted training, transportation, and placement for migrants, but by doing so among disadvantaged States in the Global South. This Part also explains how this system could provide a material basis for States worldwide to improve the overall condition of migrant rights and distribution. The Part, finally, defends this proposal against objections, concluding that reimagining global migration governance in such a way would represent a just historical re-appropriation of a discriminatory tool that could be wielded with anti-discriminatory intent.

I.
THE MESS OF MODERN INTERNATIONAL MIGRATION LAW AND GLOBAL MIGRATION GOVERNANCE

The greatest fundamental obstacle to any system governing migration at an international level is that the admission, or rejection, of new populations into an area within a State's borders has long been considered one of States' core sovereign prerogatives.[20] This conception of sovereignty not only impacts the problem of migrant distribution and motivates many of the dangerous actions migrants often take to circumvent border controls. States also claim broad rights to define citizenship, and the rights and privileges it entails, diminishing any ability to govern migrant treatment at a level beyond individual States.

While this notion of sovereignty presents difficulties from the perspective of international law's regulation of how States engage migrants, it may be mitigated by international *institutions*' ability to work cooperatively with States, providing managerial services and relief to migrants and refugees. Yet just as laws impacting all migrants remain more limited in both scope and application than laws concerned with statutory refugees, international institutions concerned with all migrants have hardly proven as capable as those performed by their refugee-oriented counterparts. This Part reviews the limitations of the legal and institutional systems that have constituted global migration governance up to the most recent drive for major reforms, which commenced with dawning awareness of the "global migration crisis" in 2015.

A. International Migration Law: Limitations and Contradictions

International law, as it concerns all migrants, is chiefly focused on their protection rather than their distribution. Yet measures that mandate the acceptance of migrants, permit their rejection or deportation, or incentivize or disincentivize migration inherently shape both distribution questions and problems as well. Despite challenges to its implementation, one of the strongest exceptions to States' assertions of sovereignty on migrant acceptance and treatment has been the 1951 Refugee Convention. Relatively few forced migrants clearly fall under the definition of "refugee" used by the Convention, which emphasizes the need not only for the putative refugee to have crossed an international border, but also for "a well-founded fear of persecution for reasons of race, religion, nationality,

20. Exemplary in the context of the US is *Nishimura Eiku v. United States*, 142 U.S. 651, 659 (1892), proclaiming that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *See also* in a European context *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. (1996), ¶ 73, noting a right "as a matter of well-established international law…to control the entry, residence and expulsion of aliens." For a general discussion of the centrality of border control to sovereignty, *see also* Catherine Dauvergne, *Sovereignty, Migration, and the Rule of Law in Global Times*, 67 MOD. L. REV. 588 (2004).

membership of a particular social group, or political opinion," in order to be gain the right to legal entry and be protected from return and other depredations.[21]

While there is room for this definition's interpretation, such room has also led to variance in national courts' understanding of who falls into these groups.[22] Moreover, the definition requires a fear of *persecution* connected to these categories, a concept that can be highly indeterminate.[23] Consequently, the definition has been criticized not only for omitting persons internally displaced within a State, but also potentially those fleeing common forced migration-inducing phenomena that do not amount to the overt discrimination that may seem implied in the Convention definition, including general violence, economic collapse, famine, or—the subject of an increasing number of critiques—disasters and long-term degradation of the habitability of territory associated with climate change.[24] According to one estimate, the Convention definition of "refugee" could exclude 80 percent of forced migrants, including those fleeing general violence, economic collapse, or environmental catastrophe.[25] Even the willingness to concede rights to the relatively small number of statutory refugees covered by the 1951 treaty appears so fragile that many refugee rights advocates fear proposing to expand the treaty's definition. They worry that doing so could open all of international refugee law for renegotiation, to the great disadvantage of statutory refugees.[26]

Migrants who cannot make out a case for inclusion under the refugee definition may be able to receive aid thanks to the "good offices" of the United Nations High Commission for Refugees ("UNHCR"), an organization which the next Section will discuss in more detail. Yet UNHCR provides such aid on the basis of cooperation with States; States have few direct obligations to other migrants at international law. States have been willing to concede rights at international law to *some* migrants who do not facially fall under this definition only on a more limited basis. The General Agreement on the Trade of Services

21. Convention Relating to the Status of Refugees, Art. 1, Jul. 28, 1951, 189 U.N.T.S. 153 [hereinafter 1951 Convention or Refugee Convention].

22. For example, "membership in a particular social group" has required an "immutable characteristic" in the US and Canada but being set off as distinct from the rest of society in Australia. *See* Joseph Rikhof & Ashley Geerts, *Protected Groups in Refugee Law and International Law*, 8 LAWS 25, 27-28 (2019).

23. *See*, *e.g.*, José H. Fischel de Andrade, *On the Development of the Concept of 'Persecution' in International Refugee Law*, 3 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 114, 123 (2008) ("since 'persecution' has not been defined in normative terms in International Refugee Law, its meaning has been developed by a substantial body of academic, administrative and judicial interpretations, there being no uniform scholarly definition or practice.").

24. For a look at the difficulties of applying the Refugee Convention definition to victims of climate change in particular *see*, *e.g.*, Jane McAdam, *Climate Change Displacement and International Law, Side Event to the High Commissioner's Dialogue on Protection Challenges, 8 December 2010, Palais des Nations, Geneva*, https://www.refworld.org/pdfid/4d95a1532.pdf.

25. STEPHAN HOBE, EINFÜHRUNG IN DAS VÖLKERRECHT 458 (2008).

26. *See*, *e.g.*, Luara Ferracioli, *The Appeal and Danger of a New Refugee Convention*, 40 SOC. THEORY & PRAC. 123 (2014).

("GATS"), for example, provides some guarantees to relatively elite economic migrants.[27] Treaties negotiated by the International Labor Organization ("ILO") also provide a number of migrant worker rights, although they are poorly ratified.[28] The Convention on the Rights of All Migrant Workers and their Families (the "Migrant Workers Convention") could provide protections to the largest number of migrants, providing migrants with rights to labor organization, equal standing with host State nationals, and equal rights to some welfare benefits.[29] Yet its focus remains limited to "workers" engaged in "remunerative activity" and those related to them, potentially excluding many forced migrants unable to locate such positions.[30] It is also rarely applicable. The instrument has lingered as the least ratified major human rights treaty, with only a small number of States, all in the Global South, acceding since its adoption in 1990.[31]

Of course, treaties and norms of International Human Rights Law ("IHRL") that are not specific to migrants nonetheless provide numerous rights applicable or relevant to migrants.[32] As such, the broad and (in theory) universally applicable provisions available in human rights treaties have led academics and practitioners alike to try to adopt existing instruments that are not necessarily focused on non-refugee migrants (or focused on limited subsets of them) as tools for the admission and protection of a wider range of migrant groups. Advocates have used IHRL to, for example, argue for the rights of asylum-seekers (individuals seeking refugee status who are not necessarily clearly covered by the Refugee Convention in all cases).[33] The Universal Declaration of Human Rights ("UDHR"), some of which is now considered to possess the status of binding customary international law, or even to exist as a general principle of international law, also provides a right to asylum independent of the Refugee Convention.[34] *Non-refoulement*, the norm of

27. Rey Koslowski, *Global Mobility and the Quest for an International Migration Regime*, 21 CTR. FOR MIGRATION STUD. SPECIAL ISSUES 114, 114–15 (2008).

28. On their ratification *see* Ryszard Cholewinski, *Human Rights of Migrants: The Dawn of a New Era?* 24 GEO. IMMIGR. L. J. 585, 585 (2010).

29. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Arts. 22, 25, 26, 27, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention].

30. *Id*. at Art. 2(1).

31. On its ratification status *see* Martin Ruhs, *Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a "Core Rights" Approach*, 111 AJIL UNBOUND 172, 173 (2017).

32. For a discussion of all the human rights treaties applicable to migrants, *see generally* Cholewinski, *supra* note 28.

33. For discussions of the rights of asylum seekers vis-à-vis the Refugee Convention *see, e.g.*, Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, INT'L J. REFUGEE L. 293, especially 303 (2005) (noting little overt application of the Refugee Convention to asylum-seekers); Ryszard Cholewinski, *Economic and Social Rights of Refugees and Asylum Seekers in Europe*, 14 GEO. IMMIGR. L.J. 709 (2000).

34. Universal Declaration of Human Rights, G.A. res. 217A (III), Art. 14(2) (10 Dec. 1948) [hereinafter Universal Declaration]. For a discussion of the Universal Declaration's consideration as

prohibition on return, is present in a number of more concretely binding human rights instruments as well, and can be (and has been) raised explicitly for similar purposes of protection.[35]

To some extent, the use of IHRL for migrant protection has been so successful that such protections have extended even beyond those formally seeking refuge. Not only has the European Court of Human Rights (ECtHR) found availing claims that asylum-seekers enjoyed rights until their status was determined; UN human rights bodies have found these rulings persuasive and have even surpassed the ECtHR in their protectiveness of asylum-seekers.[36] The ECtHR has also taken its logic beyond asylum-seekers whose status is pending, protecting even failed asylum-seekers from removal or even mandating prospective asylum seekers' entry.[37] In *Hirsi Jamaa v. Italy*, it held that because migrant vessels' passengers could *theoretically* seek asylum, they therefore enjoyed asylum-seekers' right of *non-refoulement*, or non-return, and could not be "pushed back" from Europe by authorities.[38]

Yet asylum-seekers' rights still have limitations as a tool for all migrants: they still often only extend to the point at which authorities determine whether the seeker can, or cannot, be considered a refugee.[39] To the extent they are applied

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a form of customary international law *see* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317–51 (1996). For its discussion of asylum specifically *see id*. at 346.

35. *See*, *e.g.*, the human rights treaties in which a right of *non-refoulement* is present listed in Off. of the High Comm'r for Hum. Rts., *The principle of non-refoulement under international human rights law* (2018), https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

36. For cases of the ECtHR applying rights to asylum seekers *see, e.g.*, *M.A. v. Cyprus*, app. no. 41872/10, 2013-IV Eur. Ct. H.R. 193 (right not to be detained while asylum status pending); *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 2011-I Eur. Ct. H.R. 255 (extreme deprivation of economic and social opportunities in a country could constitute grounds not to transfer an asylum-seeker there). On the application the treatment of such rights by UN bodies *see* Başak Çalı, Cathryn Costello, & Stewart Cunningham, *Hard Protection through Soft Courts?* Non-Refoulement *before the United Nations Treaty Bodies*, 21 GER. L.J. 355 (2020).

37. For an example of the former *see N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R. 227 (acknowledging the possibility of blocking a failed asylum-seeker's deportation for health reasons).

38. *Hirsi Jamaa & Others v. Italy*, App. No. 27765/09, 2012-II Eur. Ct. H.R. 37, ¶¶ 133, 157; *see also* Concurring Opinion of Judge Pinto du Albuquerque ("A person does not become a refugee because of recognition, but is recognised because he or she is a refugee. As the determination of refugee status is merely declaratory, the principle of non-refoulement applies to those who have not yet had their status declared [asylum-seekers] and even to those who have not expressed their wish to be protected. Consequently, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the non-refoulement obligation in regard to any alien in need of international protection").

39. *See*, *e.g.*, *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., ¶¶ 34, 42 (noting the extremely limited circumstances in which ill health would protect a failed asylum-seeker from return). Beyond Europe, pushbacks arguably have even more legal support. These include the

prospectively—such as in situations involving "pushbacks"—they can depend on a finding of at least "functional" jurisdiction or some form of a State's "effective control."[40] This requirement has led to unintended consequences like States de-territorializing portions of the sea, arguing that they have no obligation to welcome vessels filled with potential asylum-seekers on "territory" that is not their own.[41] One consequence of the *Hirsi Jamaa* ruling was States that previously engaged in "pushbacks" also increasingly cooperated with States of origin to restrain movement in the name of preventing smuggling instead.[42] One scholar asserts that for 99 percent of even those genuinely seeking refuge in the Global North, protection was unavailable without reaching a State's territory where they could make an asylum claim.[43]

Asylum-seekers' rights also tend to be rarely respected fully by many States even where those claims have been made.[44] One difficulty is that both definitions of *non-refoulement* and the right of asylum are grounded in "persecution," whether explicitly in the UDHR, or implicitly in the purpose of other human rights treaties, such as the Convention Against Torture ("CAT"), in which *non-refoulement* is also found.[45] As such, it can be difficult to apply these definitions to migrants with different motivations for their flight or movement, just as it is in applying the terms of the Refugee Convention to those who cannot show a "persecution" ground for refugee status, as discussed above.[46]

U.S. Supreme Court's ruling in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)—despite a different finding by the Inter-American Commission on Human Rights—and analogous Australian cases. *See* Annick Pijnenburg, *Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?* 20 HUM. RTS. L. REV. 306, 309, 317 (2020).

40. *See* Tom De Boer, *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*, 28 J. REFUGEE STUD. 118 (2015) (exploring how far extraterritorial jurisdiction can be taken in protecting migrants who are prospective asylum-seekers approaching by sea).

41. *See* Seline Trevisanut, *The Principle of* Non-Refoulement *And the De-Territorialization of Border Control at Sea*, 27 LEIDEN J. INT'L L. 661 (2014). The ability to de-territorialize was not necessarily superseded by the *Hirsi Jamaa* case, which neither necessarily applies outside the jurisdiction of the European Court of Human Rights, nor addresses situations not arising from the territorial disposition of vessels belonging to the State with a purported duty of *non-refoulement*. *Id*. at 673.

42. *See* Patrick Müller & Peter Slominski, *Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean*, J. EURO. PUB. POL. (published online, 2020).

43. DAVID FITZGERALD, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS 3 (2019).

44. For a relatively recent consideration of this lack of respect *see*, *e.g.*, Colin Harvey, *Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law*, 34 REFUGEE SURV. Q. 43 (2015).

45. Universal Declaration, *supra* note 34, at Art. 14(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

46. *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., ¶ 46 emphasized the need for a "risk of deliberate, politically motivated, ill-treatment" to compel *non-refoulement*. Concerns about the persecution standard have also been raised in scholarship concerning migrant

Interpretations of IHRL are also not guaranteed to stretch in migrants' favor when countervailing concerns appear to be at stake.[47] Already, the ECtHR appears to be limiting the kind of expansive approach it took to migrant rights in *Hirsi Jamaa*, indicating that the right against "mass expulsion" relied on by migrants facing deportation cannot apply where migrants did not avail themselves of legal pathways for entry. A 2020 decision, *N.D. & N.T. v. Spain*, concerned migrants rushing a border fence, resulting in the court limiting the right against expulsion due to its concerns about "managing and protecting borders" in such a situation.[48] In doing so, the ECtHR seemingly showed its own susceptibility to fears about what it termed "'new challenges' facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East."[49] These concerns appeared especially salient to the court when the migrants' actions looked like what one opinion in an earlier decision in the case characterized as an "invasion."[50] Even actors in the human rights space have motivations for *not* expanding interpretations of IHRL provisions. Like refugee advocates, human rights advocates may object to attempts to stretch standards like the CAT's to apply to many new situations involving a migrant's risk of return—since doing so diminishes support for the implementation of the treaty in even more extreme situations.[51]

In light of difficulties with IHRL, scholars have made proposals to advance migrant rights using additional areas of law, such as the doctrine of State responsibility.[52] Yet as the foregoing discussion suggests, one overarching

protection. *See* Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GERMAN L. J. 311, 331 (2020). Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 283, 291 (2015) notes that interpretations of the persecution standard as applied to refugees could also impact asylum-seekers, given asylum-seekers are prospective refugees. In the U.S., she goes on to demonstrate, prevention of deportation has tended to depend on making out a narrowly-construed claim about the risks of persecution.

47. For example, one critic of the decision in *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., alleges that its narrowly constructed understanding of "persecution" was premised on concerns about "resources," because of the idea that a more expansive standard for upholding *non-refoulement* involving "socio-economic" risks would open the "floodgates" to migrants. *See* Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy?* 72 MODERN L. REV. 815 (2009).

48. *N.D. & N.T. v. Spain*, App. Nos. 8675/15 and 8697/15, Judgment (Eur. Ct. Hum. Rts., Feb. 13, 2020).

49. *Id*. at ¶ 169.

50. *N.D. & N.T. v. Spain*, App. Nos. 8675/15 and 8697/15, Judgment (Eur. Ct. Hum. Rts., Oct. 3, 2017), Partly Dissenting Decision of Judge Dedov.

51. There is a broader concern about the "proliferation" of the expansion of human rights norms, as well as their expansive interpretation into which such worries fit, including the proliferation of human rights in the context of migration. *See*, *e.g.*, Rosa Freedman & Joseph Mchangama, *Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates*, 38 HUM. RTS. Q. 164 (2016).

52. *See*, *e.g.*, Pijnenburg, *supra* note 39, at 307.

problem to which the considerable amount of law with any potential application to migrants speaks is the tendency for redundancy and overlap. Attempting to expand the scope of any single area of this law, whether refugee law or IHRL, only exacerbates the issue. This is coupled with the fact that treaties such as the GATS, potentially applicable ILO agreements, and many IHRL conventions are hardly *lex specialis* concerning migrant treatment. As a consequence, the many instruments relevant to migration may be overlooked or ignored in considering the rights of migrants compared to more specific provisions offered to, for example, qualifying migrants under the Refugee Convention. The complexity of this legal corpus may also have a tendency to promote confusion about duties owed to migrants. Vincent Chetail consequently describes the totality of international migration law as a "deconstructionist design of complexity and contradiction," while Aleinikoff characterizes it as "substance without architecture."[53] In effect, international migration law is a severe victim of international law's overall fragmentation problem.[54]

This web of law cannot only be overly complex, but contradictory. An example of an instance in which laws relevant to migrants may work at cross-purposes concerns the treatment of migrant vessels at sea. The UN Convention on the Law of the Sea imposes a duty of rescue for such vessels. But if those vessels are potential smuggling operations, doing so could violate the requirements of the Protocol against the Smuggling of Migrants by Land, Sea and Air, which prohibits assistance of migration for profit.[55] Additionally, opponents of rescue operations claim such assistance *incentivizes* smuggling operations.[56]

This complex and contradictory body of international law applicable to migration can contribute to perverse incentives among States, as well. As Jaya Ramji-Nogales demonstrates, any provisions designed to protect migrants could also effectively result in harm; when the availability of protections seems dependent on migrants reaching certain destinations, migrants might feel compelled to reach those locations without States providing safe pathways to transit there.[57] In other words, broad interpretations of IHRL in favor of migrant rights upon their arrival in States may actually convince many to attempt to make

53. Vincent Chetail, *The Architecture of International Migration Law: A Deconstructionist Design of Complexity and Contradiction*, 111 AJIL UNBOUND 18 (2017); Aleinikoff, *supra* note 6, at 467.

54. For an overview of the phenomenon and attempts to reconcile conflicting specialty areas of law *see* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1–30 (2007).

55. *Compare* United Nations Convention on the Law of the Sea, Art. 98, Dec. 10, 1985, 1833 U.N.T.S. 3 *and generally* Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, Annex III (8 Jan. 2001).

56. For examples of such claims, *see* Eugenio Cusumano, *Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control*, 54 COOP. & CONFLICT 3 (2018).

57. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. 609 (2017).

dangerous maritime crossings or other forms of perilous journey. The former also puts migrants at greater risk because of the lack of clarity about the duty of rescue on the seas. The potential of rights to attract migrants has also led States to decline to extend such rights, because they might serve as "incentives" to movement.[58]

Recent academic initiatives have sought to address the problems of international migration law's complexities and contradictions through what is effectively a restatement approach. Scholars have compiled guides from amalgams of various migrant-relevant duties that States are said to owe to *all* individuals under their responsibility or control under treaties concerning human rights, labor law, the law of the sea, and other areas. They aim to present a more cohesive and coherent version of "international migration law" that States would, in theory, more readily respect.[59] This is a worthwhile effort. Yet sorting these bodies of law into an integrated narrative of what such a corpus "is" may still prove insufficient. Structural contradictions between these bodies of law in some cases continue to persist beyond the tidy phrasing of any restatement. They may also prove to have limited relevance in practice, given that many of the individual provisions that make up these restatements—particularly those derived from human rights law—face their own difficulties with ratification, adherence, and enforcement.[60]

B. International Organizations and Migration: Limited and Overlapping Applications

International institutions have, at times, proven to be a somewhat more successful means to provide the benefits of global migration governance. This success can come even without imposing feared infringements on sovereignty, which may be seen as inherent in international legal requirements. Of course, such institutions can serve as monitors of the implementation of extant treaties that, for example, protect migrant rights, in which case, they may be seen as *facilitating* such infringements on sovereignty. Yet international institutions also often have oversight, aid, and diplomatic functions that allow them to engage in problem-solving in ways that are quite distinct from the adversarial nature of legal

58. For examples from Europe, *see* Thomas Gammeltoft-Hansen & Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. MIGRATION & HUM. SEC. 28, 39–40 (2018). In the Americas, the Organization of American States' autonomous human rights body has documented the US engaged in detention as a deterrent. *See* INTER-AMERICAN COMM'N ON HUM. RTS., HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 37 (2015), https://www.oas.org/en/iachr/reports/pdfs/refugees-migrants-us.docx.

59. Betts & Kainz, *supra* note 4, at 4 (2017). This effort has included a number of academic publications trying to reframe relevant provisions from these areas of law as a cohesive whole. *See*, *e.g.*, VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW (2014); FOUNDATIONS OF INTERNATIONAL MIGRATION LAW (Brian Opeskin et al. eds. 2012).

60. On the general inadequacy of human rights as a tool for addressing labor migration, for example, *see* Yash Ghai, *Migrant Workers, Markets, and the Law*, *in* GLOBAL HISTORY AND MIGRATIONS 179 (Wang Gungwu ed. 1997).

commitments' enforcement. Such tools give these institutions means to skirt the problem of jealously guarded sovereignty in the service of global migration governance.[61] Still, they have not proven efficacious at doing so for all, or even most, migrants.

Through its mandate—which is an interpretation of its statutory authority, coupled with tasks conferred on the organization by the General Assembly—UNHCR has been able to provide oversight of the rights and treatment of many forced migrants not included in the Refugee Convention definition.[62] It has even been able to articulate more expensive definitions of refugee law.[63] The organization even engages in the distributary function of negotiating and facilitating refugee resettlement beyond countries of first refuge. The ILO also oversees some conditions of labor migration.[64] But for the vast majority of the world's migrants, there is no body comparable to UNHCR engaging in both aid and legal advocacy on a large scale.

The closest such body, the IOM, describes itself as the "leading inter-governmental organization in the field of migration."[65] It does ostensibly engage in some concern with migrant rights and conditions of migration.[66] The IOM can also "discipline" State officials into the acceptance of its professional "norms" of migration control.[67] It also, at times, smooths disagreements between States over migrant movement.[68]

But for the last several decades the IOM's operations have, like UNHCR's, focused on emergency humanitarian assistance—which can largely overlap with refugee aid—to the exclusion of migrants as a whole.[69] The IOM's interest in

61. *See* Antoine Pécoud, *Introduction: The International Organization for Migration as the New 'UN Migration Agency*, *in* THE INTERNATIONAL ORGANIZATION FOR MIGRATION: THE NEW 'UN MIGRATION AGENCY' IN CRITICAL PERSPECTIVE 7 (Martin Geiger & Antoine Pécoud eds. 2020).

62. For the "core" of the UNHCR's mandate see Statute of the Office of the United Nations High Commissioner for Refugees, G.A. res. 428 (V) (14 Dec. 1950); for the extent to which UNHCR regards its mandate as extending beyond this statute *see*, *e.g.*, UNHCR Division of International Protection, Note on the Mandate of the High Commission of Refugees and his Office (Oct. 2013), https://www.unhcr.org/en-us/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html.

63. *See* INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW 114–32 (2012).

64. Khalid Koser, *Introduction: International Migration and Global Governance*, 16 GLOB. GOVERNANCE 301, 308 (2010).

65. International Organization for Migration, *About IOM*, https://www.iom.int/about-iom.

66. *See* Pécoud, *supra* note 61, at 12, 14.

67. *Id*. at 8.

68. *Id*.

69. *See* Francesca Fauri, *European migrants after the Second World War*, *in* THE HISTORY OF MIGRATION IN EUROPE: PERSPECTIVES FROM ECONOMICS, POLITICS, AND SOCIOLOGY 120 (Fauri ed. 2014); Betts & Kainz, *supra* note 4, at 2 (demonstrating increasing attention to humanitarian crises in the IOM's predecessors). On the largely emergency character of IOM activity today *see* SUSAN MARTIN, INTERNATIONAL MIGRATION: EVOLVING TRENDS FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT 143 (2014) (noting that, in 2011, well over half of the IOM budget was devoted to

migrant rights is also not a formal mandate.[70] Unlike UNHCR, the IOM has historically been cut off from the UN system and its human rights mechanisms and guarantees. This division has led to tensions between the IOM and other multilateral bodies that have claimed responsibilities for migration—such as the UN and ILO—that focus more on such rights.[71] Such tensions have included, for example, the UN's Special Rapporteur for Migrant Rights expressing concern about the extent to which the IOM's operations do not conform with IHRL and human rights norms.[72]

One important reason for such concern is that the organization has sometimes served as a sort of "subcontractor" for its most financially influential member States' border and migration control activities, and even stands accused of doing their "dirty work" involving forced deportation and detention.[73] As Jan Klabbers has summarized, the organization provides "tailor made solutions" for members, rather than holding a "regulatory mandate" over them.[74] In other words, where it is most efficacious at managing migration—at least from the perspective of many individual States—the IOM has not only demonstrated a lack of concern for migrant rights, but also even stood in the way of the best or most just distribution of migrants. To this problem could be added the IOM's concern, when focused on regular migration rather than emergencies, with providing migrants in the service of labor needs over its concern with their rights.[75] These issues call into question the IOM's capability to balance core concerns of global migration governance that are at the heart of the "migration crisis."

Regional associations or supranational entities are often taken as models for what can be achieved at the larger international institutional level, or as means to provide a local form of international governance instead. Yet as the fate of the EU

emergency assistance, with funds for activities conceivably related to migration management being at most, one-third of the emergency budget, or one-sixth of the IOM budget as a whole). MEGAN BRADLEY, THE INTERNATIONAL ORGANIZATION FOR MIGRATION: CHALLENGES, COMMITMENTS, COMPLEXITIES 6, 9 (2020) (noting that many of the priorities the IOM adopted in 2007 related to "forced migration," specifically, that emergence assistance has grown "dramatically" since 2010, and that humanitarian work comprises the majority of its activity).

70. *Id*. at 2.

71. For more *see* Part II(B), *infra*.

72. *See* François Crépeau, *Rep. of the Special Rapporteur on the human rights of migrants* 18, U.N. Doc. A/68/283, (Aug. 5, 2013).

73. Kristy Siegfried, *How will joining the UN change IOM?* NEW HUMANITARIAN (Aug. 12, 2016), https://www.thenewhumanitarian.org/analysis/2016/08/12/how-will-joining-un-change-iom; on IOM border management *see* Rutvica Andrijasevic & William Walters, *The International Organization for Migration and the International Government of Borders*, 28 SOC'Y & SPACE 977 (2010); on "subcontracting" *see* Sandra Lavenex, *Multilevelling EU external governance: the role of international organizations in the diffusion of EU migration policies*, 42 J. ETHNIC & MIGRATION STUD. 554 (2016).

74. Jan Klabbers, *Notes on the ideology of international organizations law: The International Organization for Migration, state-making, and the market for migration*, 32 LEIDEN J. INT'L L. 383, 384 (2019).

75. Pécoud, *supra* note 61, at 11.

system illustrates all too well, these regional associations have had what scholars characterize as "ambiguous" success at best.[76] While it has relatively successfully implemented internal freedom of movement, the EU has remained riven with tensions over the distribution of migrants arriving from outside the bloc since the 2015 breakdown of the Dublin Regulation. Non-frontline States have viewed the EU's "burden-sharing" requirements to accept migrants as an affront to their sovereignty—a division borne out in legal disputes that erupted over the Dublin requirements.[77] These divisions have persisted in debates over the reform of the Dublin system more recently.[78]

The European Commission's September 2020 proposal for a new "EU Migration Pact" allowed States to avoid mandatory "burden-sharing" by participating only in shared migrant *removal* efforts.[79] This compromise proved dissatisfactory for lawmakers on either side of the "burden-sharing" debate and humanitarians alike.[80] The proposal also demonstrates that the EU plans to sidestep the debate over distribution by continuing to induce outside States to help it restrict migrants' arrival extraterritorially (as the next Section describes in more detail).[81] In effect, the EU reproduces many of the problems with the form of migration governance practiced by the IOM—with its deference to reluctant States on distribution and limited concern for migrant's rights—and thus hardly serves as an effective replacement for it even within its own region.

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76. *See*, *e.g.*, Sandra Lavenex, Terri E. Givens, Flavia Jurje & Ross Buchanan, *Regional Migration Governance*, *in* THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM (Tanja A. Börzel & Thomas Risse eds. 2016). On the EU as "most comprehensive regime" *see id*. at 461.

77. *See* Jason Mitchell, *The Dublin Regulation and its Systemic Flaws*, 18 SAN DIEGO L. J. 295 (2017).

78. *See*, *e.g.*, Bernardo de Miguel & María Martín, *Spain rejects EU migration plan for not including relocation quotas*, EL PAÍS (June 23, 2020), https://english.elpais.com/international/2020-06-23/spain-rejects-eu-migration-plan-for-not-including-relocation-quotas.html?ssm=TW_CC (discussing Spain helping to forge a bloc of southern European States to push for more "burden-sharing" of migrant hosting within the EU).

79. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, at 5-6, COM (2020) 609 (Sept. 23, 2020) [hereinafter 'EU Migration Pact proposal'].

80. Christopher Pitchers, *EU's new migration pact comes under the spotlight with ministers amid internal divisions*, EURONEWS (Oct. 8, 2020), https://www.euronews.com/2020/10/08/eu-s-new-migration-pact-comes-under-the-spotlight-with-ministers-amid-internal-divisions; Ana Lazaro, *European Union's proposed new migration pact generates dissatisfaction on all sides*, EURONEWS (Sept. 26, 2020), https://www.euronews.com/2020/09/26/eu-migration-pact-will-institutionalise-xenophobia-claims-mediterranean-rescue-group; *Member states to clash over the EU's new migration pact*, EURACTIV (Sept. 24, 2020), https://www.euractiv.com/section/politics/news/member-states-to-clash-over-the-eus-new-migration-pact/.

81. EU Migration Pact proposal, *supra* note 79, at 17–24. In addition to funding and training to third States that host migrants, the EU also plans to grant visas to their nationals as a "positive incentive" for cooperation. *Id*. at 23–24.

Beyond Europe, many regional initiatives hardly extend beyond paper commitments.[82] The Economic Community of West African States (ECOWAS) has been among the most acclaimed for successfully promoting free movement.[83] But its successes in influencing national-level legislation have mainly been in promoting short-term border crossings, rather than the rights of longer-term migrants.[84] Nor is it always clear how regional efforts would scale to tackle global problems. While regional agreements in Africa and Latin America had already pioneered expansive definitions of "refugee" in the 1970s and 80s, such definitions hardly spread outside of such initiatives, let alone be adopted in the Global North.[85]

It is also not always clear, moreover, how regional initiatives would function together to address transregional migration. The interregional dynamics of Africa-Europe migration, for example, have often been managed via *international* bodies, such as the IOM, with all the attendant problems described above.[86] Given European influence within the IOM, and the power dynamic between the EU and regional organizations in the Global South, cooperation often takes the form of representing Northern interests.[87] The EU has tended, for example, to prioritize its desire to restrict migration to the North and "securi[ng]" itself from migrants over promoting inter-regional cooperation to help further African attempts at integration through intra-continental migration.[88] The friction between these approaches has helped lead the EU to move away from partnerships with other

82. Lavenex et al., *supra* note 76, at 473.

83. Eva Dick & Benjamin Schraven, *Regional Cooperation on Migration and Mobility: Insights from two African regions*, *in* 2 PROCEEDINGS OF THE AFRICAN FUTURES CONFERENCE 102, 112 (2019).

84. *Id*. at 112, 115. *See also* ALEXANDRE DEVILLARD, ALESSIA BACCHI & MARION NOACK, A SURVEY ON MIGRATION POLICIES IN WEST AFRICA (2015), https://publications.iom.int/books/survey-migration-policies-west-africa.

85. *See*, *e.g.*, Cartagena Declaration on Refugees Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Art. 3, ¶ 3, Nov. 22, 1984 (including "aggression," "general violence," "internal conflicts," and "massive violations of human rights," as valid rationales for flight available to claim refugee status); Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 1, ¶ 2, Sept. 10, 1969, 1001 U.N.T.S. 45 (including "external aggression" and "events disturbing public order" as valid rationales).

86. Lavenex et al., *supra* note 76, at 468.

87. On power dynamics *see*, *e.g.*, Amanda Bisong, *Trans-regional institutional cooperation as multilevel governance: ECOWAS migration policy and the EU*, 45 J. ETHNIC & MIGRATION STUD. 1294 (2019); Dick & Schraven, *supra* note 83, at 110, 114 (noting the EU created Horn of Africa migration management initiatives "from scratch" and "pressure[d]" ECOWAS to adopt its policies).

88. These clashes have been the focus of numerous recent studies. *See*, *e.g.*, Franziska Zanker, *Managing or restricting movement? Diverging approaches of African and European migration governance*, 7 COMP. MIGRATION STUD. 1 (2019); Luca Barana, *EU Migration Policy and Regional Integration in Africa: A New Challenge for European Policy Coherence*, 18 INSTITUTO AFFARI INTERNAZIONALI COMMENTARIES 1 (2018); Clare Castillejo, *The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions* (German Development Institute Discussion Paper 11/2019, 2019), https://www.die-gdi.de/uploads/media/DP_11.2019.pdf.

regional associations toward direct engagement with States.[89] Regional organizations, in other words, have not, and likely cannot, address an issue that is fundamentally global in nature, especially in the absence of truly representative or effective international institutions.

C. Bilateral Managerialism and Increasing Externalization

The limitations of international or regional solutions have meant that difficult questions of migrant rights and distribution have fallen more on individual States. The displacement of these questions onto domestic politics has meant that individual States' concerns about their compromised sovereignties have become further inflamed by debates about the number of migrants and refugees each State should individually accept and the standards of treatment they must individually adopt.

In addition to issues described above, this pressure has resulted in alternative, bilateral solutions between States, or between regional blocs and States, that Peter Spiro characterizes as part of a "management" approach.[90] In contrast to approaches emphasizing migrants' equal or fair distribution, or their rights, managerialism often seeks to use international agreements to buttress State defenses against undesired movement.[91] In this respect, the approach often not only resembles the IOM's, but has involved the IOM's assistance with its implementation—in a demonstration of that organization's subordination to member States.[92]

"Managerial" solutions often include provisions meant to "externalize" the hosting of migrants and refugees.[93] Examples extend not just between States, but between regional organizations and States as well. They include such developments as the heavily critiqued 2016 EU-Turkey "deal." In this scheme, the European bloc funds Turkey's ability to maintain, or prevent from departure, asylum-seekers on its territory, with some provision for their processing and limited admission to Europe.[94] Similar cooperation now exists between the EU and Libya, although it is much more straightforwardly focused on preventing, rather than facilitating, migration.[95] Such cooperation has extended much more deeply into Africa, prompting one European ambassador in 2018 to declare,

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89. *See* Castillejo, *supra* note 88, at 8.

90. *See* Peter J. Spiro, *The Possibilities of Global Migration Law*, 111 AJIL UNBOUND 3, 4–5 (2017).

91. *Id*.

92. *See*, *e.g.*, Klabbers, *supra* note 74, at 387–88.

93. *See*, *e.g.*, Spiro, *supra* note 90, at 4.

94. *See* Roman Lehner, *The EU-Turkey-'deal': Legal Challenges and Pitfalls*, 57 INT'L MIGRATION 176–77 (2018).

95. For an overview of EU-Libya migration cooperation *see* Müller & Slominski, *supra* note 42.

infamously, that "Niger is now the southern border of Europe."[96] Similar agreements now reach to sub-Saharan African States as far south as Rwanda.[97] Under the Trump Administration's "migrant protection protocol," the United States revived externalization precedents in implementing a version of such interdiction agreements with Mexico, and also pioneered them with Central American States.[98] Similarly, Australia has continued to operate detention centers for migrants arriving by boat in offshore islands of foreign States as part of its "Pacific Solution."[99]

From an international legal perspective, externalization is often justified on the basis that the obligation of *non-refoulement* does not impede the hosting of potential asylum-seeker populations in "safe third countries," particularly countries of first asylum.[100] The EU-Turkey deal is premised on the theories that Turkey is a "safe" refuge for potential asylum-seekers, that those populations need not immediately reach Europe to escape persecution, and that they could, and should, be returned to Turkey if they attempt to enter the EU, and only be accepted into the EU on a limited basis after a determination of their status as statutory refugees.[101] Yet in practice, such agreements often ignore or fail to take into account abundant evidence of human rights and other violations committed against migrants in the third country. Critics have noted that Turkey is not committed to the Refugee Convention's protection guarantees in a way that would protect most current migrants there.[102] In Libya, returns of migrants have led to abusive detention and disappearances.[103] Even the status of the United States as

96. Daniel Howden & Giacomo Zandonini, *Niger: Europe's Migration Laboratory*, REFUGEES DEEPLY (May 22, 2018), https://www.newsdeeply.com/refugees/articles/2018/05/22/niger-europes-migration-laboratory.

97. Matina Stevis-Gridneff, *Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html.

98. *See* Geoffrey Heeren, *Distancing Refugees*, 97 DENVER L. REV. 761, 765, 779-81 (2020).

99. For a general overview of attempts by the EU, US, and Australia to pursue these strategies of "externalization" to third countries *see, e.g.*, *id*. (generally, and noting EU and Australian comparisons at 774-77); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190 (2016).

100. *See* María-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33 NETH. Q. HUM. RTS. 42 (2015).

101. These factors are evident from the statement establishing the deal. *See* European Council Press Release, EU-Turkey Statement (Mar. 18, 2016). *See also* Lehner, *supra* note 94, at 176–78.

102. Turkey retains a geographical limitation on the application of the Refugee Convention. *See id*. at 177. This limitation can be read as limiting the rights it provides to refugees—let alone recognized asylum-seekers—from outside Europe. *See* Arzu Güler, *Turkey's Geographical Limitation: The Legal Implications of an Eventual Lifting*, 58 INT'L MIGRATION 3 (2020).

103. *See*, *e.g.*, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*, HUM. RTS. WATCH (Jan. 21, 2019), https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya; Mat Nashed, *What happens to migrants forcibly returned in Libya?* NEW HUMANITARIAN (Aug. 5, 2020), https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean.

a "safe third country" to which refugees can be returned from Canada has been highly controversial.[104]

Despite often being justified on the basis of preventing smuggling or dangerous movement, such agreements also ignore the increasingly dangerous routes migrants have taken to avoid formally entering, or seeking asylum in, third countries in which they would be required to remain.[105] The implementation of the EU-Turkey deal, for example, changed only the means by which, but not the fact that, migrants engaged with smugglers on irregular routes.[106] It also resulted in an increase in migrant sea-crossings to Italy, which have proven more deadly than the journeys across the Aegean to Greece that the EU-Turkey deal principally aimed to prevent.[107] Given that these journeys in the Central Mediterranean spurred further EU-Libya cooperation and thus will likely see migrants develop more forms of precarious circumvention, externalization has effectively been producing problems it was meant to solve.[108]

II.
THE SEARCH FOR SOLUTIONS: PLANS AND PROPOSALS FOR MIGRATION GOVERNANCE REFORM

The weaknesses of the extant system of migration governance as a whole have been evident to policymakers, as well as scholars, for some time. Yet with the exception of brief discussions around the turn of the millennium, the evident difficulties with the system of *global* migration governance only prompted considerable rethinking and broader international action in the wake of heightened consciousness of the "migration crisis" in 2015.[109] The next year, President Obama led the effort to commit the UN to a rethinking of the architecture of

104. *See* Annie Hylton, *Canada Questions the Safety of Asylum Seekers in the U.S.*, NEW YORKER (May 1, 2019), https://www.newyorker.com/news/news-desk/canada-questions-the-safety-of-asylum-seekers-in-the-us.

105. For the focus on smuggling *see* EU-Turkey statement, *supra* note 101. On ignoring ways these agreements can promote dangerous migrant pathways *see*, *e.g.*, *Q&A: Why the EU-Turkey Deal is No Blueprint*, HUM. RTS. WATCH (Nov. 14, 2016), https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint.

106. *See generally* Ayselin Yıldız, *Impact of the EU–Turkey Statement on Smugglers' Operations in the Aegean and Migrants' Decisions to Engage with Smugglers*, INT'L MIGRATION (published online, 2020).

107. *See*, *e.g.*, Philip Connor, *The most common Mediterranean migration paths into Europe have changed since 2009*, PEW RSCH. CTR. (Sept. 18, 2018), https://www.pewresearch.org/fact-tank/2018/09/18/the-most-common-mediterranean-migration-paths-into-europe-have-changed-since-2009.

108. A key document establishing the EU-Libya cooperation was the Malta Declaration, which was premised on stopping smuggling. *See* European Council Press Release, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route (Feb. 3, 2017), ¶ 4.

109. Some of these turn-of-the-millennium discussions will be referenced further in Part IV, *infra*.

migration's international oversight, culminating in the 2016 New York Declaration for Refugees and Migrants: a pledge to forge new "Compacts" on refugee and migration governance.[110] States worldwide agreed to the two new "Global Compacts" in 2018. The Migration Compact was meant to help promote safer pathways for movement, enhance migrant rights, and more closely coordinate between nonprofits and international organizations and governments, among other goals.[111] At the same time, the IOM drew closer to the UN, recognizing a need to take advantage of the latter's broader scope and legitimacy. The UN, in turn, recognized the need for a dedicated institution that would oversee migrants who were beyond the mandate of UNHCR.

These initiatives have prompted debate over, and critique of, the potential efficacy of the new frameworks, alongside scholars' and activists' proposals for more expansive reforms. This Part reviews such reforms and other proposals. It concludes that critiques of the new Compacts are well-founded. Yet it also contends that many of the proposals to go beyond them are also insufficient because they lack bases in material and political reality to serve as foundations for the current and future needs of global migration governance.

A. The Global Compacts: A New Dawn for Global Migration Governance?

Of the two new instruments, the Migration Compact was particularly ambitious in seeking "enhanced cooperation on international migration in all its dimensions" through "recognition" of need for a "comprehensive approach."[112] The Compact sought, in particular, to use such cooperation to address many of the protection problems that have plagued migration governance, as reviewed above. For example, it pledged to seek multilateral approaches to ensure migrants had safe pathways and consider the difficulties of forced migrants whose plight resembled that of refugees through the creation of "reception" arrangements for those whose flight occurred as a consequence of an emergency.[113] It also represented a step beyond the legal academics' restatement approach to migration law in its enumerating and reconciling of migrant rights, incorporating a canonical list of these into the document.[114] In doing so, it was, quite possibly, the most significant international commitment to attempt to address the governance of all migrants beyond the remit of refugee institutions in decades.

110. New York Declaration for Refugees and Migrants, G.A. Res. 71/1, ¶¶ 21, 63 (Oct. 3, 2016). Annexes I-II provided that "Global Compacts" on Refugee and Migration Governance be decided by 2018.

111. *See*, *e.g.*, Global Compact for Safe, Orderly and Regular Migration, G.A. Res. 73/195, Annex, ¶ 16 (Dec. 19, 2018) [hereinafter Global Migration Compact] (list of objectives).

112. *Id.*, at 2: introduction to Annex and ¶ 11.

113. *Id*. at Annex, ¶¶ 5, 18(j).

114. *Id*. at Annex, Preamble ¶ 2.

Both Compacts were adopted only as non-binding soft law. Yet by taking the form, if not the formal nature, of a treaty, their recommendations still proved highly objectionable for States that were sensitive about guarding their sovereign right to govern migration. Australia, the Czech Republic, Hungary, Israel, Poland, and the United States were among those that voted against the Migration Compact.[115] Several other EU States abstained.[116] Brazil withdrew later.[117] By contrast, only the United States and Hungary voted against the Refugee Compact, underscoring how much more sensitive of an issue migration governance is than refugee governance alone.[118] Yet movements against *both* Compacts were also strong even in States that acceded to them.[119] Such opposition even led to the collapse of Belgium's coalition government.[120]

The Compacts also faced critiques from migrant advocates. Even champions conceded that that the instruments were really only a starting point for addressing the most serious challenges that the world confronts in overseeing global migration.[121] Many of the documents' laudable objectives still face enormous hurdles in implementation. Migrant advocates have also critiqued the dual Compact approach, because in attempting to preserve the distinctions that have made international refugee law more effective, the Compacts continue to reify the distinction between statutory refugees and migrants. These critics argue that such a distinction leaves migrants with fewer protections and the global migration governance system, as a whole, with a less comprehensive solution to the common problems of both populations, while retaining the problems inherent in the

115. *See* United Nations, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants (Dec. 19, 2018), https://www.un.org/press/en/2018/ga12113.doc.htm.

116. Georgi Gotev, *Nine EU members stay away from UN migration pact*, EURACTIV (Dec. 20, 2018), https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/.

117. Ernesto Londoño, *Bolsonaro Pulls Brazil From U.N. Migration Accord*, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/world/americas/bolsonaro-brazil-migration-accord.html.

118. Edith M. Lederer, *UN approves compact to support world's refugees; US objects*, ASSOCIATED PRESS (Dec. 18, 2018), https://apnews.com/article/4fd4c127e8da4801b6bb3f8d5f184404.

119. *See*, *e.g.*, Emily Schultheis & Krishnadev Calamur, *A Nonbinding Migration Pact Is Roiling Politics in Europe*, ATLANTIC (Dec. 11, 2018), https://www.theatlantic.com/international/archive/2018/12/un-global-migration-compact-germany-europe/577840.

120. *Belgian PM reshuffles cabinet after right-wing party quits over UN migration pact*, DEUTSCHE WELLE (Dec. 9, 2018), https://www.dw.com/en/belgian-pm-reshuffles-cabinet-after-right-wing-party-quits-over-un-migration-pact/a-46653730.

121. *See*, *e.g.*, Linda Bishai, *It's a Start – Why the Global Compacts on Refugees and Migration Matter*, JUST SEC. (Sept. 12, 2018), https://www.justsecurity.org/60649/its-start-global-compacts-refugees-migration-matter.

confusion between them.[122] Mirroring concerns about potential dilution that could take place if the Refugee Convention were to be reformed, moreover, some critics have been concerned that the Global Migration Compact's provisions are weaker or less specific than existing norms. While *broader* than previous tools, these critics argue that the Compact's "softness" actually undermines the applicability of the existing norms that it includes as a consequence.[123]

The Migration Compact, moreover, focuses relatively little on distribution, let alone on how to address political opposition to it.[124] Instead, the Compact places nearly equal emphasis on preventing migration and on returning migrants to their countries of origin.[125] The instrument's affirmation of sovereign rights over migration only diminishes its capacity to address migrant movement as well.[126] The Compact's provisions focusing on protection may even reproduce many current distribution problems. For example, the instrument's emphasis on improving "reception" in countries near to disasters could not only be criticized as a form of externalization; its calls for enhancements of rights have already been criticized by anti-immigrant voices as further inducements to migrant entry of their countries.[127]

B. Institutional Reform: The IOM and the UN Join Forces

Since public consciousness of the "global migration crisis" arose, actors in international organizations have acknowledged an increased need for *institutional* oversight of migration at an international level as well. Their concerns have

122. For one critique of the division between the Compacts *see*, *e.g.*, Cathryn Costello, *Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?* 30 INT'L J. REFUGEE L. 643 (2018).

123. *See* Alessandro Bufalini, *The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?* 58 QUESTIONS OF INT'L L. 5, 11–18 (2019).

124. Few of the Compact's 23 Objectives appear to have potential to address distribution rather than protection. Exceptions may be Objective 5, in which safe "pathways for regular migration" are linked to "facilitat[ing] labour mobility," which ties protection to "skills-matching" and other distribution mechanisms. Global Migration Compact, *supra* note 111, at Annex, ¶ 21. Objective 18 likewise promotes "[i]nvest[ing] in skills development" in a way that would induce States to accept migrants. *Id*. at Annex, ¶ 16. Objective 19 urges the creation of "conditions for migrants and diasporas to fully contribute to sustainable development in all countries." *Id*. Objective 11 calls for the need to "[m]anage borders in an integrated, secure and coordinated manner," which may or may not address distribution as opposed to exclusion depending on implementation. *Id*.

125. *See*, *e.g.*, Objective 2 to "[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin." *Id*. Yet not only is this objective an attempt to *reduce* migration rather than oversee the phenomenon as it exists, but it also falls afoul of objections on the basis of migration's complexity and even inevitability. *See* Part II(C), *infra*. Objective 21 urges "cooperation in facilitating safe and dignified return and readmission." Global Migration Compact, *supra* note 111, at Annex ¶ 16.

126. *Id*. at ¶ 15.

127. On the latter concern *see*, *e.g.*, Ben Knight, *German parliament rows over UN Migration Compact*, DEUTSCHE WELLE (Nov. 8, 2018), https://www.dw.com/en/german-parliament-rows-over-un-migration-compact/a-46213002.

resulted in attempts to more fully integrate the IOM into the UN system. In 2016, the UN formally rechristened the IOM as a "UN related agency," included it in several cooperative initiatives with other UN bodies, and permitted its rebranding as "IOM/UN Migration," or even "UN Migration" in some instances.[128] This has led some scholars to argue that the IOM "joined the UN," while others claim that it has at least become part of the "UN system."[129]

Yet the IOM has deliberately remained highly autonomous of the UN, despite its new label.[130] This is the very structural issue feeding much of the criticism that the IOM's border management work has overlooked migrant rights.[131] Previous efforts to coordinate between the IOM and UN agencies have also proven contentious at times, making it far from clear whether the current incremental adjustments to their relationship will bear any fruit.[132] Even scholars who argue that inclusion within a "UN system" has taken place cannot say with certainty that it will improve interoperability or compatibility between the IOM and UN organs, and it may even provide a means to defend existing IOM practices that do not comport with UN standards.[133] In 2018, the organization chose a non-US leader—a rarity in its history—when the United States' proposed candidate was revealed to be an anti-immigration hardliner.[134] Yet the debate over this choice exposed the extent to which the IOM in its current institutional form remains vulnerable to capture by forces more interested in applying its resources even further for managerial border policing.

Some voices propose, consequently, that the IOM needs to be further integrated into the UN in order to improve the latter's oversight of it and its respect for migrant rights. The UN's former Secretary General, Ban Ki-Moon, is among them.[135] Yet such an attempt at integration alone will still not exempt the IOM from the political stresses that threaten the reach and effectiveness of the Global

128. For the agreement on IOM association with the UN *see* Agreement Concerning the Relationship between the United Nations and the International Organization for Migration, G.A. Res. 79/296 (Aug. 5, 2016). On new cooperative initiatives and the organization's ongoing "relative autonomy" *see* Colleen Thouez, *Strengthening migration governance: the UN as 'wingman'*, 45 J. ETHNIC & MIGRATION STUD. 1242, 1249 (2019). On the IOM's inclusion in the new UN Network on Migration *see* Terms of Reference for the UN Network on Migration (Nov. 13, 2018), https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf. An example of the "UN Migration" branding without inclusion of the term "IOM" is the organization's Twitter handle, which is now simply "@UNMigration."

129. Pécoud, *supra* note 4, at 3; BRADLEY, *supra* note 69, at 99-100.

130. Martin Geiger, *supra* note 61, at 293.

131. Crépeau, *supra* note 72, at 22 ¶ 60.

132. On earlier fractiousness between IOM and UN agencies *see* Betts & Kainz, *supra* note 4, at 7; Pécoud, *supra* note 61, at 6. Even scholars who emphasize harmony in UN-IOM relations acknowledge their breakdown at points. *See* BRADLEY, *supra* note 69, at 100, 104-09.

133. *Id*. at 120.

134. Zachary Cohen & Elise Labott, *Trump's controversial pick for top UN migration job voted down in Geneva*, CNN (June 29, 2018), https://www.cnn.com/2018/06/29/politics/ken-isaacs-migration-united-nations/index.html.

135. Thouez, *supra* note 128, at 1249.

Compacts. It may, in fact, weaken the reach of the IOM or leave it even more vulnerable to a defensive takeover by States concerned that it is abandoning its concern with managing borders and migration in favor of one of promoting migrant rights. Given these difficulties, the ability of the IOM, as it is currently constituted, to engage the full spectrum of difficulties facing global migration comprehensively appears anything but resolved—without a change in the current political climate.

C. *Beyond the Borders of the Possible? New Proposals for Global Migration Governance*

Reactions of insufficiency, skepticism, and political tension to each of these reform projects has fostered continued debate over the future of global migration governance. Alternative proposals made either before or after the governance shifts in migration since 2015 have either explicitly or implicitly addressed limitations with each of the reform efforts or gone beyond the limited nature of the existing reforms in their scope. Yet many of these ideas either share the features that have prompted opposition to the Global Compacts and IOM reform, or appear likely to have little impact on the problems targeted by the reforms in the first place.

Many notable scholars' proposals for reforms related to migration governance have focused on refugees alone. These include James C. Hathaway and Alexander Neve's proposal for collaborative burden-sharing of refugee hosting, Joseph Blocher and Mitu Gulati's advocacy for charging refugee-generating States "debt;" and Peter Schuck's proposal for States to be able to sell parts of their refugee "burden."[136] Such proposals contain elements that may appear to offer solutions for migration governance as a whole, but are not necessarily models for it. There is a focus on the potentially short-term nature of refugee flows or refugees' flight from "persecution" in the first two plans, respectively—with the attendant limitations of a concentration on that term as discussed above.[137] While expanding the remit of refugee governance, therefore, they tend not to address directly broader humanitarian problems that have prompted other migrations, let alone difficulties with regular migration. The stresses placed by contemporary politics on migration governance reform are not absent from debate over refugee governance institutions, either. Neither these proposals, nor more recent variants have addressed directly these difficulties of

136. *See*, *e.g.*, Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

137. *See supra* Part I(A).

enforcement and political will, and their authors are sometimes even resigned to the vicissitudes of this will.[138]

The same is true for the more limited number of scholarly proposals centered on migrants beyond refugees. These tend to include proposals for new treaties, which seem unlikely to succeed in light of the difficulties faced by the Global Migration Compact and pushback against attempts to reform the Refugee Convention. One proposal for an "International Bill of Rights for Migrants"—meant to clarify existing provisions in migrants' favor—admits political difficulties in creating a new instrument of law and sees the project leading to more of a "rallying point" akin to the UDHR.[139] Attempts to create new law to fill the gaps between existing provisions, such as the recent effort to frame a broad "Model International Mobility Convention" that goes beyond even migration in addressing all "people on the move," face similar questions about the extent to which States will accept what could be seen as merely a clearer and more comprehensive imposition on their sovereignty.[140]

Another set of proposals has focused on ways *unilateral* migration governance could better prioritize migrants' rights. A move in this direction has been to promote attempts to extend States' protections to their emigrants. The Migrant Workers and Overseas Filipino Act of 1995, for example, was designed to increase the Philippines' capacity to protect its emigrants abroad.[141] The International Law Commission's Special Rapporteur on Diplomatic Protection, John Dugard, has even advocated for an international convention that would *require* States to use their consular authority to protect their citizens abroad in cases when they are not necessarily inclined to do so. In theory, this would increase the likelihood of migrants enjoying the protection of their countries of citizenship. Yet UN bodies have been unable to move this suggestion beyond a recommendation, and State practice does not suggest a willingness among countries to conform with it.[142]

A greater difficulty for many migrants is not their States' lack of willingness to assist them, but those States' incapacity to engage in protection on the

138. For a more recent example resigned to lack of changes in political will see, e.g., T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME 105–40 (2019) (proposing collaborative burden-sharing but resigned to a lack of political will for anything but changes at lower and less powerful levels of government).

139. *See* Aleinikoff, *supra* note 6, at 478.

140. *See* Model International Mobility Commission, *Model International Mobility Convention: International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter*, 56 COLUM. J. TRANSNAT'L L. 342.

141. An Act to Institute the Policies of Overseas Employment and Establish a Higher Standard of Protection and Promotion of the Welfare of Migrant Workers, their Families and Overseas Filipinos in Distress, and for Other Purposes, Rep. Act No. 8042, 91 O.G. 4994 (June 7, 1995) (Phil.)

142. Elizabeth Prochaska, *Testing the Limits of Diplomatic Protection: Khadr v The Prime Minister of Canada*, EJIL TALK! (Oct. 7, 2009), https://www.ejiltalk.org/testing-the-limits-of-diplomatic-protection-khadr-v-the-prime-minister-of-canada.

territories of other States. Consular access to detainees worldwide, for example, eroded after the September 11 terror attacks on the basis of detention on "security" grounds, although this is "in plain violation" of the Vienna Convention on Consular Relations.[143] U.S. courts have even cast doubt on the extent to which they acknowledge that the Vienna Convention allows the protection of foreign nationals from prosecution without timely notification of their consulate.[144]

A more efficacious form of unilateral protection may be regulating or restricting emigration. Yet regulatory bodies focused on emigration, such as India's or Bangladesh's, have failed to curb abuses.[145] One proposal to reform such regulations admits that even enhanced unilateral efforts would not be fully sufficient, and require broader international cooperation.[146] Even in instances when States attempt to restrict organized emigration to only rights-respecting States—such as the Philippines formally did with amendments to its Overseas Filipino Act in 2010—they must contend, in practice, with the fact that applying such criteria strictly might deprive their emigrants of important opportunities for earnings.[147] For example, Filipino migration to the Gulf continues despite the region's record of poor treatment of migrant workers, reflecting both difficulties with extraterritorial enforcement and the ongoing demand among prospective emigrants for employment abroad.[148] Unilaterally restricting emigration can also contribute to irregular migration that is even less protected, just as bilateral EU attempts to manage migration extraterritorially have. Nepali attempts to restrict emigration in order to protect rights are a recent illustration; they have contributed to risky migration channels via third countries.[149]

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143. *See* Mark Warren, *Rendered Meaningless? Security Detentions and The Erosion of Consular Access Rights*, 38 S. ILL. U. L. J. 27 (2013).

144. For example, evidence despite lack of consular notification was admissible in the United States. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). U.S. courts also famously disagreed with the ICJ with regard to the scope of the applicability of the Vienna Convention. This was the context in which the Supreme Court decided that ICJ decisions themselves were not binding on the U.S. *Medellín v. Texas*, 552 U.S. 491 (2008).

145. *See* Stephen Castles, *International migration at the beginning of the twenty-first century: global trends and issues*, 68 INT'L SOC. SCI. J. 151, 157–58 (2018).

146. Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7 ASIAN J. INT'L L. 152, 155 (2017) (conceding that "there are geopolitical and market-based structural forces that currently drive non-compliance and impede enforcement of protective laws, and that these require transnational reforms to transform migrant worker recruitment and employment business models in partnership with destination countries").

147. *See* An Act Amending Republic Act No. 8042, Otherwise Known as the Migrant Workers and Overseas Filipino Act of 1995, as Amended, Further Improving the Standard of Protection and Promotion of the Welfare of Migrant Workers, their Families and Overseas Filipinos in Distress, and for Other Purposes, Rep. Act No. 10022, §3, 106 O.G. 2729, 2731 (Mar. 8, 2010) (Phil.); Castles, *supra* note 145, at 158.

148. Siyu (Molly) Liu, *Exploitation of Overseas Migrant Labor: Analysis of Migration Policy in Nepal and the Philippines*, Social Impact Research Experience 9–13, 18–21 (on treatment), 26 (on the ongoing presence of Filipino workers in the Gulf States.), 36 (2015).

149. *Id*. at 15.

The increasingly restrictionist tone of domestic debates has led some activists and academics to counter with reinvigorated proposals to open borders partially or entirely.[150] Advocates of this idea have marshaled an array of ethical and economic arguments for more open borders.[151] Ethical arguments include the idea that migrant destinations in the Global North often owe "imperial debts" to countries that have been victims of their exploitation, and that migrants and their origin States in the Global South, alike, could benefit from increased access to wealthier labor markets.[152] According to related arguments, the sovereignty of settler colonial countries, like the United States or Australia, may be as "illegal" in some respects as today's "unauthorized" migrants, undermining their claims to authority over border control.[153] Economists in favor of similar proposals argue that fully open immigration could increase the net wages of all workers and even boost global GDP by 60 percent.[154] These assertions may function well as a strategy to move the parameters of debate on the desirability of migration in general. But ethical proposals for open borders appear unlikely to gain political traction any time soon.[155] Even fact-based appeals to the blessings of limited immigration have not resulted in a cessation of anti-immigration restrictionism.[156]

A final alternative approach has been an attempt to *avoid* questions of migrant protection and distribution by discouraging migration. One solution in this vein that has long been mooted is increasing development aid. This policy

150. For one scholar, this can be seen as a "philosophy of migration governance" itself, "the free (non-)governance of migration." Pécoud, *supra* note 4, at 8.

151. For a summary of some of these arguments *see* John Washington, *What Would an Open Borders World Actually Look Like?* NATION (Apr. 24, 2019), https://www.thenation.com/article/open-borders-immigration-asylum-refugees.

152. *See* Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

153. One analysis in this vein demonstrates ways that indigenous communities themselves have used such arguments to protest restrictive immigration. *See* Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L. J. 548, especially 569–74 (2019).

154. Washington, *supra* note 151.

155. Even proponents of ethical arguments realize they will have limited traction. The author of one recent book arguing for relatively open borders admits that he does not expect his readers to agree with all his arguments and that they merely "help [them] think more clearly about…immigration." JOSEPH CARENS, THE ETHICS OF IMMIGRATION 4 (2013). He even stated that his intended audience was limited to "Democrats," and that his arguments were not intended to have immediate impact on law or policy. Dylan Matthews, *What gives us a right to deport people? Joseph Carens on the ethics of immigration*, WASH. POST (Nov. 29, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/11/29/what-gives-us-a-right-to-deport-people-joseph-carens-on-the-ethics-of-immigration/.

156. *See*, *e.g.*, NATALIA BONULESCU-BOGDAN, WHEN FACTS DON'T MATTER: HOW TO COMMUNICATE MORE EFFECTIVELY ABOUT IMMIGRATION'S COSTS AND BENEFITS (2018), https://www.migrationpolicy.org/sites/default/files/publications/TCM-WhenFactsDontMatter_Final.pdf. Even the prescriptions for more effective communication in the report demonstrate the difficulty of overcoming resistance to proposals for increased migration because of identitarian and personal sensitivities. *See id.* at 17–18.

has, in fact, been promoted by the Global Migration Compact.[157] Yet further efforts in this direction continue to be pushed both at the international level and as an element of States' unilateral foreign policies. In contrast to the externalization policies discussed above, aid in these cases would not be linked to the hosting of foreign migrants or destined to improve transit States' border controls, but would seek to *prevent* migration by ameliorating what is, in theory, one of its root causes: poverty.[158]

Whether poverty has been a cause of migration has been fiercely debated by scholars, however; many have long claimed that migration tends to follow economic opportunities (being "pulled" toward them) rather than escape them (being "pushed" away).[159] In other words, emigration from aid-targeted countries might continue so long as opportunities were greater *anywhere*. Empirical research has hardly found such aid likely to prevent migration; on the contrary, it has often fueled it by providing beneficiaries with more funds to travel.[160] Scholars have also found that migration is not as driven by economic causes—whether poverty or opportunity—as many assume.[161] Motivations can revolve around such variables as environmental quality and the increasing availability of mass communication, or be mixed.[162] Likewise, development aid cannot prevent the many large-scale flows of refugees or forced migrants stemming from humanitarian challenges, such as wars or natural disasters.

Even if migration prevention through development aid were to succeed, moreover, this would hardly address challenges for which developed States *need* migrants—for example, those with aging populations and with shrinking

157. Global Migration Compact, *supra* note 111, ¶ 18, Objective 2.

158. For an overview of such efforts taken by the US and EU *see* Michael A. Clemens & Hannah M. Postel, *Deterring Emigration with Foreign Aid: An Overview of Evidence from Low-Income Countries* (Center for Global Development Policy Paper 119, 2018), https://www.cgdev.org/sites/default/files/deterring-emigration-foreign-aid-overview-evidence-low-income-countries.pdf, 2-3. The EU pledges development aid to tackle the "root causes" of migration, with the European Commissioner for International Cooperation and Development having stated explicitly that this policy is premised on the notion that poverty is a "root cause." *See* Lili Bayer, *Brussels defends development aid link to migration*, POLITICO (July 24, 2018), https://www.politico.eu/article/neven-mimica-migration-budget-commissioner-defends-development-aid-link/. The Trump Administration earmarked aid for Central America explicitly to "deter migration." *See* CONG. RSCH. SERV., IF10371, U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: AN OVERVIEW 2 (2020), https://fas.org/sgp/crs/row/IF10371.pdf.

159. This debate is briefly summarized in Fernando Devoto, *A History of Spanish and Italian Migration to the South Atlantic Regions of the Americas*, *in* MASS MIGRATION TO MODERN LATIN AMERICA 30 (Samuel L. Baily & Eduardo José Míguez eds. 2003).

160. Hein de Haas, *Turning the Tide? Why Development Will Not Stop Migration*, 38 DEV. & CHANGE 819 (2007).

161. *See*, *e.g.*, Castles, *supra* note 145, at 154.

162. *See*, *e.g.*, Francesco Castelli, *Drivers of migration: why do people move?* 25 J. TRAVEL MED. 1 (2018).

workforces that cannot support their social welfare systems alone.[163] States seeking to forestall migrant influxes have their own preferred alternatives to address such problems—attempting to preempt labor shortages through natalist policies or promoting automated labor.[164] Still, birth rates remain low in many of these States, and technology has not proven capable of replacing care workers needed in aging societies over the next decade.[165] Migration will need to continue, and ideas that cope with this fact—and that cope with the material and political realities that currently stand in the way of migrant rights and distribution—need to be found.

III.
A PRECEDENT FOR REIMAGINATION: THE RISE AND FALL OF GLOBAL MIGRATION GOVERNANCE

The chaotic state of international migration law, and the limited and ineffective scope of international migration institutions has not, in fact, been a historical constant. With a view toward attempting to propose a more effective reimagination of global migration governance, this Part reviews its history from the Nineteenth Century forward. Space in this Article would not allow for an exhaustive history of global migration governance with all its nuances or relative to broader contextual developments—for that, I have attempted a more comprehensive narrative elsewhere.[166] Yet the sketch below hopefully helps demonstrate some conditions in which more concerted and effective efforts at improving migrant rights and distribution were able to succeed. This abbreviated history will also show why these efforts have diminished in recent decades and how they led to the quandaries of the present day.

163. *See* Sarah Harper, *The Important Role of Migration for an Ageing Nation*, 9 J. POPULATION AGEING 183 (2016).

164. On natalism *see* Menno Fenger, *The social policy agendas of populist radical right parties in comparative perspective*, 34 J. INT'L & COMP. SOC. POL'Y 188, 198 (2018); on automation see Philip Oltermann, *Can Europe's new xenophobes reshape the continent?* GUARDIAN (Feb. 3, 2018), https://www.theguardian.com/world/2018/feb/03/europe-xenophobes-continent-poland-hungary-austria-nationalism-migrants (quoting Mária Schmidt, Hungary's "intellectual in chief," on the question).

165. MCKINSEY GLOB. INST., *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation* 6 (Nov. 28, 2017), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/Future%20of%20Organizations/What%20the%20future%20of%20work%20will%20mean%20for%20jobs%20skills%20and%20wages/MGI-Jobs-Lost-Jobs-Gained-Report-December-6-2017.ashx.

166. *See generally* Christopher Szabla, Governing Global Migration: Internationalism, Colonialism, and Mass Mobility, 1850-1980 (2020) (Ph.D. dissertation, Cornell University).

A. From the Nineteenth Century to the Second World War: Early Plans and Motivations

During the Nineteenth Century, societies faced difficulties guaranteeing the rights of migrants that would be familiar in the present. They were often concerned, in particular, with protecting migrants from the misrepresentations of recruiters who were often considered to be poorly-disguised smugglers or traffickers. At the same time, European societies faced demographic fears about overpopulation sparked by the Industrial Revolution and thinkers such as Thomas Robert Malthus.[167] Such worries prompted concerns about the need for emigration—concerns, effectively, over how populations were distributed.[168]

While the notion of some international mechanism to facilitate migrant distribution was not yet on the table during this period, the failure of private and municipal regulation of the inherently public, transnational problem of the rights of migrants was evident. In the absence of effective regulation, many States attempted to curb emigration to protect their citizens from dangers abroad—just as many have proposed today.[169] This led the most influential society of Nineteenth Century international lawyers, the Institute of International Law, to resolve in favor of a model universal migrant rights treaty as early as 1897.[170] But more comprehensive attempts to construct an international system for the governance of migration occurred only after the First World War provided the opportunity to reshape global order.

By the end of that war, concerns about both migrant rights and distribution had been exacerbated by the intensification of border controls, trapping crowded populations in some countries where they faced mass unemployment and excluding their entry into others.[171] These issues were compounded in many already "overcrowded" countries by the shock of arriving refugees and the return of mass-mobilized soldiers.[172] Migration problems could hardly escape attention during the negotiations that led to the Treaty of Versailles. Today, the treaty is primarily remembered for the harsh terms it imposed on Germany, which some

167. *See*, *e.g.*, TARA ZAHRA, THE GREAT DEPARTURE: MASS MIGRATION FROM EASTERN EUROPE AND THE MAKING OF THE FREE WORLD 10 (2016); JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE 83–84 (2000).

168. *Id*. at 10.

169. *Quatrième commission d'études – De l'émigration au point de vue juridique international*, 16 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 242, 243 (1897).

170. *See Emigration from the Point of View of International Law*, *in* RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS: WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES 137 (James Brown Scott ed., 1916).

171. On populations trapped between borders *see*, *e.g.*, CHRISTIANE REINECKE, GRENZEN DER FREIZÜGIGKEIT: MIGRATIONSKONTROLLE IN GROSSBRITANNIEN UND DEUTSCHLAND, 1880-1930 260 (2010).

172. On the problems associated with refugees *see* ANNEMARIE SAMMARTINO, THE IMPOSSIBLE BORDER: GERMANY AND THE EAST, 1914–1922 96-194 (2010); on demobilized soldiers *see* ADAM SEIPP, THE ORDEAL OF PEACE: DEMOBILIZATION AND THE URBAN EXPERIENCE IN BRITAIN AND GERMANY, 1917–1921 165–201, 233–60 (2009).

historians have interpreted as having set the stage for future conflict. Yet facing an influx of Germans from annexed territories and refugees from revolutionary Russia, as well as an oversupply of veterans seeking jobs during a transition to a peacetime economy, Germany was as eager as any of the other States negotiating the peace for an international solution to its population and unemployment problems.[173]

All parties, therefore, eagerly supported the creation of the ILO, anointed in the treaty with a mandate to fight unemployment and protect workers "in countries other than their own."[174] In the newly-formed Permanent Court of International Justice (PCIJ), the organization gained powers to intervene in States' affairs, successfully arguing that its treaty authority to seek "peace through social justice" granted it a broad jurisdiction and competences.[175] The more famous League of Nations led negotiations to make borders as open as they had been before the war. Yet the solutions that it was actually able to implement—attempting to standardize passport regulations, for example, and providing the famous "Nansen passports" to stateless refugees in order than they might rove in search of work—proved insufficient to the needs at hand.[176] Many refugees lacked the means to emigrate beyond Europe in order to find work, and many other prospective emigrants remained trapped in their own States where employment was often scarce.

During this period, the ILO began to think about employing its expansive powers to "seek…social justice" by regulating migratory rights and movement. The most ambitious proposals would have given the ILO full control over States' immigration policies. In 1927, for example, the organization's director, Albert Thomas, mooted the creation of a "supreme migration tribunal," a kind of international court to broker the movement of migrants to places needing their labor or settlement potential.[177] Such notions were bolstered by rising contemporary sentiment that sovereignty should be conferred on the party most likely to make effective use of territory.[178] Yet the powers that the ILO did possess rested on its assurances to the PCIJ that, in Thomas' words, the

173. *See*, *e.g.*, Ewald Kuttig, *Central Powers and the Labor Proposals*, *in* THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION, VOL. 1: HISTORY 229–31 (James T. Shotwell ed. 1934).

174. Treaty of Peace Between the Allied and Associated Powers and Germany, Part XIII (Labour), Preamble, June 28, 1919, 225 Consol. T.S. 188.

175. *See Competence of the Int'l Labour Org. in regard to Int'l Regulation of Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12); on the use of "peace through social justice" to expand the organization's activities *see* GUY FITI SINCLAIR, TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES 29–74 (2017).

176. BRUNO CABANES, THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918-1924 167 (2014).

177. *Albert Thomas on the International Control of Migration*, 9 POPULATION & DEV. REV. 703, 704, 708, 711 (1983) (reprinting Thomas' 1927 address).

178. *See*, *e.g.*, ALISON BASHFORD, GLOBAL POPULATION: HISTORY, GEOPOLITICS, AND LIFE ON EARTH 133–56 (2014).

organization was "not a super-state."[179] It would have to pursue the centralization of migration governance while keeping State sovereignty over border control intact.

Still, even more modest proposals for an international institution to coordinate and oversee movement between States represented breakthroughs, in and of themselves. They attracted widespread support largely because there was a community of interest between States in Europe hoping to promote emigration, on the one hand, and States desirous of immigrants, on the other. In the wake of the United States' disengagement from the League of Nations and the broader international community of institutions in Geneva (including the ILO), as well as the harsh immigration quotas the country enacted between 1921 and 1924, the most immigrant-hungry States were those in Latin America.[180]

Receiving States had various motivations for their desire to accept immigrants. Undoubtedly, the cultural advantage that these States perceived in accepting Europeans played a part; in Latin America, this coincided with notions of improving racial balance.[181] But, a considerable portion of the interest in European immigration was the perception that these immigrants would contribute to economic development through superior drive and skills Europeans were assumed to possess.[182] This belief itself dovetailed with extant racial hierarchies both in Latin America and the wider world, but it was also a product of the notion that Europe was one of the developed centers of the world economy and that its migrants brought with them desirable productivity. This focus on migrant groups' economic contributions could even overcome racial biases in some instances. For example, Brazil threw open its doors during most of the interwar period to trained and subsidized Japanese immigrants, viewed as highly-productive, with numerous voices in the country comparing their economic usefulness to Europeans, or seeing them even more favorably, even at a time when the world's borders were increasingly closed to them for racial reasons.[183]

So eager were States in that region to increase their European populations that some, like Venezuela, were willing to accept ILO-overseen domestic legal

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179. *See* Edward Phelan, *The Memoirs of Edward Phelan: The birth of the ILO*, *in* EDWARD PHELAN AND THE ILO: THE LIFE AND VIEWS OF AN INTERNATIONAL SOCIAL ACTOR 209 (2009).

180. TORPEY, *supra* note 167, at 145, 148.

181. *See*, *e.g.*, TANYA KATERÍ HERNÁNDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE 24-34 (2013).

182. A good example of the contempt of elites in these States for locals as development agents by comparison can be seen in the writing of Enrique Siewers, an Argentine ILO functionary, who spoke disparagingly about the local rural population in Venezuela. *See*, *e.g.*, Enrique Siewers, *The Organisation of Immigration and Land Settlement in Venezuela: I*, 39 INT'L LAB. REV. 764, 770-71 (1939).

183. On training and subsidization *see*, *e.g.*, Daniel M. Masterson & Sayaka Funada, *The Japanese in Peru and Brazil: A Comparative Perspective*, *in* MASS MIGRATION TO MODERN LATIN AMERICA, *supra* note 159; on cultural openness to the Japanese *see* HERNÁNDEZ, *supra* note 181, at 54–55, 210.

reforms designed to protect immigrant welfare.[184] Having taken over the effort from the League of Nations, the ILO also managed a small service resettling refugees, and sought to use it as a model for arranging the transit of other migrants on the same basis.[185] Even States more reluctant to participate in ILO distribution mechanisms welcomed its efforts to combat the fraud and misrepresentation of migration agents through new treaty arrangements, including what became the 1939 Convention on Migration for Employment.[186] Disagreements over what a larger service for all migrants would look like delayed implementation on a larger scale. Still, these disagreements were over details, rather than the question of whether an international institution could or should play a larger role governing migration. Even fascist Italy joined the debate rather than opting out of it.[187]

B. The Postwar Instantiation of Global Migration Governance: From ICEM to the IOM

The Second World War disrupted the movement toward consolidating migration governance under the ILO, but the notion that a single international infrastructure was necessary to oversee migration endured. Not only had the ILO, as a migration organization, been able to address material aid to refugees and their distribution in a way that the League of Nations could not, but later organizations that focused on refugee resettlement alone—like the Intergovernmental Committee on Refugees created at the 1938 Evian Conference on Refugees from Nazi Germany—also failed to implement resettlement successfully.[188] Post-Second World War institutions like the International Refugee Organization, however, successfully managed the movement of larger groups of "displaced persons."[189] The changed circumstances of the postwar world were one reason for this success. But a focus on economic migration in a way that assisted refugees in finding long-term "durable solutions" also appears to have been a factor.[190]

The events of the subsequent decade, however, sundered the connection between refugee and migration governance. By 1951, the UNHCR and Refugee

184. *See* Siewers, *supra* note 182, at 764.

185. CLAUDENA SKRAN, REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME 190 (1995).

186. ILO Convention CO66, Convention Concerning the Recruitment, Placing, and Conditions of Labour of Migrants for Employment, Jun. 28, 1939, https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:8752535302170::NO::P12100_SHOW_TEXT:Y: (the convention was never ratified).

187. MARTIN, *supra* note 69, at 43.

188. ZAHRA, *supra* note 167, at 154–71.

189. *See generally* MARK WYMAN, DP: EUROPE'S DISPLACED PERSONS, 1945-1951 (1989).

190. *See* Katy Long, *When refugees stopped being migrants: Movement, labour and humanitarian protection*, 1 MIGRATION STUD. 4 (2013).

Convention emerged as fully-fledged components of the UN system.[191] At the same time, the ILO proposed to revive a version of its large-scale interwar plans. Yet only the United States was able to provide the necessary funding, and its fear of Soviet involvement in a large-scale international migration governance scheme helped prevent the ILO plans from being realized.[192] Instead, an Intergovernmental Committee for European Migration (ICEM) was established as a largely Western club to handle not just lingering postwar displacement, but the ongoing belief that Europe suffered from "overpopulation."[193] Over the next decade, ICEM successfully moved over a million emigrants out of Europe and primarily to Australia and Latin America, while avoiding middlemen who often presented financial, and other, risks to emigrants.[194] Latin American States, especially, continued to welcome Europeans and still viewed them as contributing to their "development."[195] Even as notions that Europeans inherently brought with them heightened developmental benefits waned, ICEM provided them with large-scale skills training to make them attractive immigrants.[196]

Despite their divergence, the parallel refugee and migration regimes at first remained similar in their focal areas. The Refugee Convention's original limitation to problems that existed prior to 1951—which the Convention explicitly permitted parties to interpret as meaning "in Europe"—and UNHCR's limitation, in practice, to activities in Europe meant that they both focused on populations from that continent.[197] Yet the growing UN membership of postcolonial States opened the Refugee Convention (through its 1967 Protocol) and UNHCR practice to the whole world by the 1960s.[198]

ICEM member States, meanwhile, resisted non-Europeans. Despite urging from some United States politicians that it should become more inclusive, the organization refused even Japanese participation.[199] In subsequent decades,

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191. On UNHCR's emergence and functioning together with the Refugee Convention *see* PETER GATTRELL, THE MAKING OF THE MODERN REFUGEE 6 (2013); on UNHCR as part of the UN system *see* Leon Gordenker, *The United Nations and Refugees*, *in* POLITICS IN THE UNITED NATIONS SYSTEM 275 (Lawrence S. Finkelstein ed., 1988).

192. *See* Rieko Karatani, *How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins*, 17 INT'L J. REFUGEE L. 517 (2005).

193. MARIANNE DUCASSE-ROGIER, THE INTERNATIONAL ORGANIZATION FOR MIGRATION, 1951-2001 15 (2001)

194. *See id*. at 54.

195. *Id*. at 47.

196. *Id*. at 29–31.

197. Refugee Convention, *supra* note 21, Art. 1(B)(1)(a).

198. On the operation of the 1967 Protocol *see* Stefanie Schmahl, *Article I 1967 Protocol*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 619–20 (Andreas Zimmerman, Jonas Dörschner & Felix Machts eds., 2011). On the expansion of UNHCR operations *see* GIL LOESCHER, THE UNHCR AND WORLD POLITICS: A PERILOUS PATH 9–10 (2001).

199. *See* Christopher Szabla, *Contingent Movements? The Differential Decolonizations of Refugee and Migration Law and Governance*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES (Kevin Jon Heller & Ingo Venzke eds., 2021), 209-10.

interest in European emigration continued to wane, and ICEM (in search of a purpose) increasingly utilized provisions of its constitution that at least allowed it to assist non-European migrants in emergency situations.[200] By the 1990s, ICEM had become the IOM—no longer formally limited to European migrants, but path-dependent in concentrating on narrower, "emergency" missions, rather than the larger-scale, regular migration streams on which it had once focused.[201]

A second problem with ICEM also managed to afflict the IOM, and it continues to do so to this day. ICEM, a creature of its Western members and funders, lacked the international authority to take on the role ILO had in seriously monitoring and promoting States' observance of migrant rights, or that UNHCR continues to have as a sponsor of refugee rights. In 1949, the ILO had successfully updated its Convention on Migration for Employment, expanded the number of signatories to it, and succeeded in having it ratified.[202] Yet no migrant-focused institution existed thereafter to authoritatively negotiate the increasingly complex and fragmented world of international rights on migrants' behalf.

At first, this lack of focus on rights posed relatively few problems given States' eagerness for European emigrants. Yet Northern States' interest in migrant rights also stalled over the second half of the Twentieth Century. This shift was a product of demographic trends as much as institutional arrangements. European States became destinations for migrants from the Global South, who were increasingly unwelcome as a product both of cultural differences and economic competition.[203] Negotiations over the new UN-sponsored Migrant Workers Convention subsequently dragged on for over a decade due to the reluctance of Northern States.[204] UNHCR, however, was able to promote broader interpretations of refugee law even as more claimants trickled North.[205]

In effect, as this Part shows, international institutions strove throughout much of the Twentieth Century toward more integrated regimes of global migration governance than today, born in the visions of the ILO and borne out in

200. DUCASSE-ROGIER, *supra* note 193, at 45–69.

201. Richard Perruchoud, *From the Intergovernmental Committee for European Migration to the International Organization for Migration*, 1 INT'L J. REFUGEE L. 501, 512 (1989).

202. *See* ILO Convention CO97 – Convention Concerning Migration for Employment (Revised), Jul 1., 1949, 120 U.N.T.S. 71, with ratifications at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242.

203. On shifts in migrant demographics *see*, *e.g.*, STEPHEN SMITH, THE SCRAMBLE FOR EUROPE: YOUNG AFRICA ON ITS WAY TO THE OLD CONTINENT 97–98 (2019). Scholars debate how early widespread anti-immigrant sentiment arose in Europe depending on their country of focus but tend to agree that it had begun before, and spread across different States by, the early 1970s. *See*, *e.g.*, KLAUS BASE, MIGRATION IN EUROPEAN HISTORY 224–25 (2008); ANTHONY MESSINA, THE LOGICS AND POLITICS OF POST-WWII MIGRATION TO WESTERN EUROPE 56 (2007).

204. Juhani Lonnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT'L MIGRATION REV. 710, 718 (1991).

205. *See* VENZKE, *supra* note 63, at 117-22.

part in the large-scale distribution system managed by ICEM in the immediate postwar era. The shortcomings of the current system of international migration law and institutions, however, stem from a process of institutional fragmentation that began during the early Cold War, when they partly fragmented from the UN system. Without pressure from UN members, ICEM's distribution functions broke down because of an unwillingness to extend them to non-Europeans, who composed an increasing number of global migrants. The lack of a migrant-focused institution within the UN system led migrant rights to become deprioritized. ICEM, and later the IOM, shifted focus from facilitating regular migration to emergency services and border management, as the IOM continues to focus on today.[206]

IV.
A NEW WAY FORWARD? TOWARD A SOUTH-SOUTH ORIENTED GLOBAL MIGRATION GOVERNANCE

Some scholars who have proposed reforming global migration governance offer hints of directions that transcend the deficiencies of the plans offered so far. Spiro suggests the possibility that "managerial" forms of migration control could be seized by reformers more interested in the rights of migrants than in buttressing State defenses to them.[207] For Antoine Pécoud, a different managerial system would be the only means to break through the political difficulties with reform, achieving a "triple win" for migrant-sending States, migrant-receiving States, and migrants themselves—although he does not set out a road map for how to achieve such an objective.[208] Pécoud also suggests that balancing migrant rights and distribution in a managerial format would make such a system more "confusing…heterogeneous and less robust" than one with either sovereignty or rights as singular objectives.[209] But these problems hardly make encompassing these goals together in a single framework less of a worthwhile aim than allowing them to contradict one another in the disorganized model that persists today.[210] As the philosopher Étienne Balibar has written, furthermore, even an open borders world would require *global* governance institutions that stretched beyond previous borders to ensure that its benefits were not squandered by a lack of oversight.[211]

Yet the first question that a proposal encompassing these suggestions must answer is how to avoid what Spiro terms the "improbability" of a new or renewed

206. *See supra* Parts I(B); II(B).

207. Spiro, *supra* note 90, at 6–7.

208. Pécoud, *supra* note 4, at 109–10.

209. *Id*. at 112

210. For such a critique *see id*.

211. ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 117 (2009).

international migration organization.[212] This improbability has been illustrated by the silence attending the many proposals made at the turn of the millennium to create a "World Migration Organization."[213] This Part offers one potential solution that synthesizes these scholars' suggestions with ideas emanating from the precedents described in the previous Part, efforts being undertaken in the contemporary Global South, and the bedrock of existing reforms.

The Part proposes a system of global migration governance that would use the direction of migrant movement as a tool to improve observance of migrants' rights and, eventually, their equitable distribution. This system would promote movement between materially disadvantaged States in the Global South, paralleling the means by which ICEM effectuated the movements of Europeans to parts of the world eager to receive them for bolstered development. This Part argues there is reason to believe this system could be welcomed by those parts of the South because of States' potential perception of similar economic benefits. This redistribution of migration could also be a means to induce current migrant destination States to increase their acceptance of migrants' rights and mobility.

This proposal has the potential to address political opposition to migration and migration governance, but is far from radical. It would not impede migrants' existing mobility options—merely enhance them along South-South pathways, with the aim of eventually improving conditions for migrants worldwide. It would also not be as significant a departure from existing reforms as it may seem at first. Although it takes inspiration from distinctive examples of the past, much of it could be achieved by focusing on the implementation of existing objectives of the Migration Compact to better achieve the aims of others. It would require an enhanced IOM, but not one too divorced from its current functions. These ideas, and further counterarguments, are addressed in more detail below.

A. The Uses of History: Applying the Lessons of Global Migration Governance's Past

Historical examples can help illuminate both the potential of roads not taken and the reasons why they were not, allowing scholars to pinpoint the reasons for the failure of earlier systems and the necessary conditions for reviving them.[214] As Part III made clear, the idea of a more comprehensive "World Migration

212. Spiro, *supra* note 90, at 4.

213. For various proposals *see*, *e.g.*, Jagdish Bhagwati, *Borders Beyond Control*, 82 FOREIGN AFFS. 98 (2003); MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? (Bimal Ghosh ed. 2000); Arthur C. Helton, *Unpleasant Surprises Await*, 58 BULL. ATOMIC SCIENTISTS 94 (2002). Within the UN, the option of creating a new migration organization was offered by the 2002 "Doyle Report," but it was turned down by Secretary General Kofi Annan in favor of an expert committee that simply recommended further regional and global "consultation and discussion." Betts & Kainz, *supra* note 4, at 5.

214. The role of historical context, rather than pure contingency in international legal history has recently received increased attention. *See*, *e.g.*, Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1 (2009).

Organization" seemed significantly less far-fetched in the early-to-mid Twentieth Century. Reimagining global migration governance could benefit greatly from thinking through what rendered such expansive planning possible earlier in history, and what undermined its possibility later on.

One historical lesson is that reform does not necessarily require an international "crisis" akin to the geopolitical shocks of the Twentieth Century. As Part III showed, the First World War triggered a great burst of activity in imagining a global migration governance and the Second put the United States in the important position of a financial hegemon that could influence its instantiation.[215] Yet reform also began in the Nineteenth Century absent the aftermath of conflict.[216] Moreover, the current migration "crisis" has already provided an impetus for reform, and the discourse of such a "crisis" persisting, reappearing, or even worsening has continued since 2016.[217]

The previous Part also demonstrated that efforts to build a more comprehensive global migration governance were not *held back* by crises of international systems, either. These efforts transcended even the recalcitrance of States, such as Weimar Germany and fascist Italy, that were inclined to act out against the Versailles System that they believed had disfavored them.[218] Other recent international legal histories have similarly shown how internationalist projects managed to survive and thrive in rocky periods more than has been

215. *See supra* Part III(A) & (C).

216. *See supra* Part III(A).

217. Analyses and commentaries continue to reference the "migration crisis" as an ongoing or even worsening phenomenon. *See*, *e.g.*, Shada Islam, *Europe's migration 'crisis' isn't about numbers. It's about prejudice*, GUARDIAN (Oct. 8, 2020) (noting "the number of asylum seekers is now down, but for many EU governments the migration 'crisis' will never be over"); Emma Reynolds, *Europe's migrant crisis is worsening during the pandemic. The reaction has been brutal*, CNN (Sept. 1, 2020), https://edition.cnn.com/2020/08/28/europe/europe-migrants-coronavirus-intl/index.html; *US migrant crisis: Trump seeks to curb Central America asylum claims*, BBC NEWS (July 25, 2019), https://www.bbc.com/news/world-latin-america-48991301. Even analyses that regard the "crisis" as having past note that underlying factors mean it will likely reappear. *See*, *e.g.*, *Global Migration is Not Abating. Neither is the Backlash Against It*, WORLD POL. REV. (Nov. 4, 2020), https://www.worldpoliticsreview.com/insights/28008/to-ease-the-migration-crisis-europe-and-the-world-must-address-root-causes; Gareth Evans, *Europe's Migrant Crisis: The year that changed a continent*, BBC NEWS (Aug. 30, 2020), https://www.bbc.com/news/world-europe-53925209 (noting that "[t]he impact of this mass migration is still being felt today"); Demetrios G. Papademetriou, *The Migration Crisis Is Over: Long Live the Migration Crisis*, MIGRATION POL'Y INST. (Mar. 2017), https://www.migrationpolicy.org/news/migration-crisis-over-long-live-migration-crisis (referring to the "crisis" as "unresolved"); Stefan Lehne, T*he EU Remains Unprepared for the Next Migration Crisis*, CARNEGIE EUROPE (Apr. 3, 2018), https://carnegieeurope.eu/2018/04/03/eu-remains-unprepared-for-next-migration-crisis-pub-75965. The 2020 EU Migration Pact efforts referenced in Part I(B), *supra*, demonstrate the ongoing seriousness with which the issue is taken at the level of cross-border governance.

218. On Italian participation *see supra* Part III and MARTIN, *supra* note 69, at 183; Weimar German participation has not been well chronicled outside of my own research. *See* Szabla, *supra* note 166, at ch. 5.

assumed by the "realist" school of international relations theory.[219] The willingness of States during these periods of supposed international discord to come together to agree to a more substantial migration governance demonstrates that, for all the challenges that international cooperation on any subject faces today, the opportunity to build a more comprehensive system yet again is at least theoretically present.

Migration governance gained force even in periods of "crisis," in part, because it proceeded incrementally, building off existing structures and practices. For Albert Thomas, both precedents developed in the British Empire and intra-European "labor exchanges" were stepping stones toward a comprehensive oversight of migrant rights and distribution.[220] As Guy Fiti Sinclair shows, using the ILO's history, the growth of international organizations' power on the basis of accretions of existing competencies has proven possible to the same, or even greater, extent as by means of new or amended treaty instruments.[221] Present-day institutional reform, therefore, need not reach far to see benefits. As Thomas argued, international institutions facilitating migration hardly need to become "super-state[s]" with the power to violate State sovereignty.[222]

Such institutions could function because of another key to past successes: a relative consensus between States that produced and received migrants. This consensus existed contrary to present-day assumptions that interests of migrant sending and receiving States tend to be irreconcilable.[223] This consensus, Part III showed, arose because receiving States proved welcoming toward migrants if they believed that those migrants would enhance their development and, increasingly, many migrants were trained in ways that contributed to the impression that they would do so.[224] Of course, migrants' economic value will not improve migrant treatment or acceptance on its own. If it did, many States with declining populations would be more eager for immigration. But historical acceptance of immigrants that contribute to *development* indicates greater potential for

219. Such works are usually reacting to such "realist" accounts of international crisis in the interwar era as the classic E.H. CARR, THE TWENTY YEARS CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939). "Realist" accounts emphasize the concern of States for their own individual interests rather than their respect for international law, among other rules, ideas, or forces. For examples of the pushback *see*, *e.g.*, OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017) (on the Kellogg-Briand Pact outlawing war as a successful example of international cooperation); SUSAN PEDERSEN, THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE (2015) (on how the League of Nations regulated "mandate" territories, and how these were not entirely left to imperial whims).

220. *Albert Thomas on the International Control of Migration*, *supra* note 177, at 704, 706.

221. *See generally* SINCLAIR, *supra* note 175.

222. Phelan, *supra* note 179, at 209.

223. Betts & Kainz, *supra* note 4, at 3, observe that such seeming irreconcilability was an obstacle to the creation of a new migration regime in the 1990s.

224. *See* Part III, *supra*; DUCASSE-ROGIER, *supra* notes 193-194.

immigration among a different category of States than the wealthy, "developed" economies that primarily receive them today.[225]

Circumstances have also changed since the *decline* of previous instantiations of global migration governance in the mid to late Twentieth Century. Part III demonstrated that the current state of this system is a consequence of factors—including Cold War geopolitics and a much higher level of open ethnic and racial prejudice than exist today. These do not—or ought not, as many more actors would agree—guide international legal and institutional architectures in the present. Institutional arrangements that did not survive earlier conditions may therefore prove more capable of surviving today than when those conditions held weight. Historical precedent, therefore, can be reimagined for the benefit of those who did not benefit previously.

B. Rethinking "Migration as Development" Through a South-South Lens

Today, an unfulfilled need for organized and aided migration that appears to contribute to "development" may reside amid materially disadvantaged States in the Global South. Organization for Economic Cooperation and Development (OECD) research has shown South-South movement to be "an increasingly significant factor in the economic development … of many developing countries."[226] Organizations including the African, Caribbean, and Pacific (ACP) Group of States, the African Union, the ILO, and the OECD have recently released studies demonstrating its positive economic impacts on numerous States.[227] Existing South-South migrants' contributions range as high as 19 percent of Côte d'Ivoire's GDP, averaging 7 percent over a range of ten Southern countries surveyed, outpacing immigrants' share of the population in half those countries.[228]

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225. *See supra* Part III(B).

226. OECD, "South-South migration," http://www.oecd.org/dev/migration-development/south-south-migration.htm.

227. *See*, *e.g.*, ACP OBSERVATORY ON MIGRATION, MIGRATION AND DEVELOPMENT WITHIN THE SOUTH: NEW EVIDENCE FROM AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES 16 (2013), https://publications.iom.int/system/files/pdf/within_the_south.pdf (focusing on Angola, Cameroon, the Democratic Republic of the Congo, Haiti, Kenya, Lesotho, Nigeria, Papua New Guinea, Senegal, Timor-Leste, Trinidad and Tobago, and Tanzania); on development potential, see *id*. at 5; OECD & ILO, HOW IMMIGRANTS CONTRIBUTE TO DEVELOPING COUNTRIES' ECONOMIES 3 (2018) (chronicling the impact of such migrations in Argentina, Costa Rica, Côte d'Ivoire, the Dominican Republic, Ghana, Kyrgyzstan, Nepal, Rwanda, South Africa, and Thailand); AFRICAN UNION COMMISSION & IOM, STUDY ON THE BENEFITS OF AND CHALLENGES OF FREE MOVEMENT IN AFRICA 31–54 (2018), https://ethiopia.iom.int/sites/default/files/IOM%20free%20movement%20africa%20WEB_FINAL.pdf.

228. OECD & ILO, *supra* note 227, at 15.

Per the OECD, South-South migration currently comprises 36-50 percent of human movement.[229] Yet owing to slippages in categorization, much of the movement factored into upper-end estimates of South-South migration totals takes place toward more "developed" economies that are sometimes considered part of the South, such as those in the Gulf.[230] With only around a third of such movement taking place toward materially-disadvantaged States, migration appears to have a considerable capability to contribute further to those States' economies.[231] It has even greater potential considering that existing South-South migration takes place amid a larger area and population than the North, spreading its benefits thin.[232]

Such findings have, nonetheless, not yet led to advocacy for increased South-South migration as a development tool on a worldwide basis. Discussion has instead linked migration and development in other ways.[233] This activity has included discourse about developmental aid payments, detailed in Part II, that some policymakers hope will *prevent* migratory movement.[234] Studies and proposals in this area have also largely focused on the developmental impacts on Southern States of migration toward the Global North. These include the "brain drain" from the South, the sending of remittances by migrants who arrived in the North to the South, or the impact of return migration from the North to the South

229. *See* OECD, *supra* note 226 (noting South-South migration composed 36 percent of the world total); Jason Gagnon & David Khoudour-Castéras, *South-South Migration in West Africa: Addressing the Challenge of Immigrant Integration*, (OECD Dev. Ctr. Working Paper No. 312, 2012), http://www.oecd.org/dev/50251899.pdf, 5.

230. *See* World Bank Migration and Remittances Team, *supra* note 19, at 4–5 (defining "South-South migration" as between non-high-income countries and calculating that 14 percent of world migration, including refugees, encompasses non-OECD member high-income countries, which comprise "notably the G[ulf Cooperation Council] countries").

231. *Id*. at 4 (defining "South-South migration" as between lower-income countries and placing it at 34 percent of the total).

232. *See* Castles, *supra* note 145, at 156–57.

233. In fact, one attempt to categorize a means by which States in the Global South manage migration characterizes "the developmental migration state" as including only the forms listed in this paragraph. *See* Fiona B. Adamson & Gerasimos Tsourapas, *The Migration State in the Global South: Nationalizing, Developmental, and Neoliberal Modes of Migration Management*, 54 INT'L MIGRATION REV. 853, 866 (2020).

234. On the recent history of migration and development initiatives *see* Betts & Kainz, *supra* note 4, at 6-10.

through the bringing of skill or investment.[235] Critiques of "migration and development" have also focused on these issues.[236]

In contrast to the North-South focus of these schemes, regional migration-development initiatives in the South have focused increasingly on facilitating South-South movement. Organizations in Africa, Central Asia, Latin America, and Southeast Asia have pursued free movement initiatives as means to move toward local economic integration and development.[237] ECOWAS' Common Approach to Migration is one example of a development strategy focused on intra-regional movement.[238] It has included funding to promote skills training as well as attempts to harmonize migrant rights, including promoting the ratification of, and monitoring compliance with, the Migrant Workers' Convention.[239] As noted above, many regional initiatives in the South, including ECOWAS', have suffered from poor implementation at the level of long-term migration, as opposed to short-term movement.[240] They are also geographically fragmented, suffering from poor inter-regional cooperation, particularly with Northern organizations, such as the EU, that have a deeper interest in preventing or restricting migration than facilitating it within the South.[241]

A *global* architecture designed to facilitate further migration within the materially disadvantaged South could improve on existing regional South-South initiatives that seek to use migration as a means to facilitate those States' growth. A wider international initiative stands less risk of being sidelined by power asymmetries between regional organizations, as Southern groups have been by the EU.[242] At the same time, an international effort would help overcome such obstacles to regional initiatives as, for example, critiques that African States acting by themselves lack sufficient material "enablers" to "create" intra-regional

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235. For a very recent overview of links between migration and development (the so-called "migration-development nexus") being actively discussed in the policy community *see* Marta Latek, *Interlinks between migration and development*, EUROPEAN PARLIAMENTARY RSCH. SERV. 7–8 (2019), http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/630351/EPRS_BRI(2019)630351_EN.pdf. The World Bank has pushed migrant remittances as a development tool, specifically. *See* Immanuel Ness, *Forging a Migration Policy for Capital: Labor Shortages and Guest Workers*, 29 NEW POL. SCI. 429, 440 (2007).

236. *See*, *e.g.*, Hein de Haas, *Migration and Development: A Theoretical Perspective*, 44 INT'L MIGRATION REV. 227 (2010); de Haas, *The Migration and Development Pendulum: A Critical View on Research and Policy*, 50 INT'L MIGRATION 8 (2012).

237. *See* Zanker, *supra* note 88, at 1–2; Castillejo, *supra* note 88, at 3, 6 (initiatives have taken place at the African Union level and at the level of regional bodies in East and West Africa); OECD & ILO, *supra* note 227, at 35, 70 (noting Association of Southeast Asian Nations [ASEAN], Eurasian Economic Union [Central Asian] and MERCOSUR [Latin American] initiatives).

238. *See ECOWAS Common Approach on Migration*, ECOWAS Commission, 33rd Ordinary Session of the Head of State and Government (Jan. 18, 2008), at II.

239. On training *see id*. at II(2.2)(2). On the approach to the Migrant Workers Convention *see id*. at 2.1(1) and 2.5(1).

240. *See* Part I(B), *supra*.

241. *Id*.

242. *Id*.

movement.[243] Following the recommendations of the ILO and OECD on how to improve the contributions of South-South migrants, an improved international architecture could match migrants to labor market needs, build integration programs, and provide skills training and the monitoring of migrant rights—the latter of which, research from both organizations argues, helps improve productivity, among *sui generis* benefits.[244] In doing so, it could revive many of the powers the ILO once sought and that ICEM possessed, helping make immigration attractive for destination States as it had been made in the interwar and immediate post-Second World War periods.

Just as much as the current system of international migration law impacts distribution by inducing or deterring movement, patterns and geographies of distribution can impact law's observance. Improved observance can be achieved both by attaching conditions to the facilitated distribution of migrants where they are desired and through the changed material contexts that a redistribution of migrants can induce. By rendering South-South migration more attractive, such a system could lead Southern societies to welcome, and even compete for, migrants in ways that include greater adhesion to migrant rights. Northern States and other traditional migrant destinations in need of migrant labor, meanwhile, would need to rethink their priorities as Southern States transition into more attractive destinations for migrants and the relative number of individuals inclined toward migration to the North decreases, as the next Section argues.

C. Materially Remaking Global Governance: The Impact on Existing Migrant Destinations

Relatively wealthy current migrant destination States would likely need to agree to a system promoting South-South migration for it to be linked to other fully international initiatives and for it to receive sufficient funding. Yet a migration governance newly focused on South-South movement would, like Twentieth Century precedents, provide advantages for multiple groups of States—in this case, Northern States as well as Southern ones. Like approaches discussed in Parts II and III, this system would appear capable of deterring some movement to Northern countries by incentivizing migrants to remain in the South instead.[245] Northern lawmakers, therefore, would be able to point to arguments that they were controlling immigration into their own States as well as benefitting both migrants and Southern development. In doing so, they would help either satisfy or quiet populist reaction and sentiment against participation in global migration governance initiatives. Indeed, EU officials initially appeared willing to facilitate African intra-regional migration initiatives to this end but became focused on restriction instead.[246] Yet it is now clear that these restrictive policies

243. AFRICAN UNITY COMMISSION & IOM, *supra* note 227, at 70 ¶ 197.

244. *See* OECD & ILO, *supra* note 227, at 16, 37.

245. *See* Parts I(C) and II(C), *supra*.

246. *See* Castillejo, *supra* note 88, at 4–5.

have not, as noted above, prevented migration toward Europe so much as driven it underground or expensively and controversially externalized its management, reopening the case for Northern States to embrace boosting South-South movement.[247]

Embracing such a system could, however, have a longer-term impact: depriving Northern and other existing migrant destinations of a critical labor supply which, as Part II argued, cannot be easily replaced through such alternatives as automation or increased birthrates.[248] It may seem as if destination States would hardly agree to such a system knowing this potential result. Yet the avowed aim of restrictionism that many of these destinations embrace already effectively seeks the same end. To summarize the argument below, the often culturalist politics of migration hardly exist in perfect congruence with an economy's perceived labor requirements, which helps to produce existing shortages.[249] Cognitive biases may be likely to incline such politics toward short-term solutions, as well.[250] Yet even culturalist opposition may be forced to yield to the material consequences when such shortages grow more acute.[251]

Promoting migration within the South would increase the number of destinations available to migrants, and thus, force migrant destinations to compete. Their doing so could enhance migrants' bargaining power by increasing their destination options in a world in which they are in demand. It could also enhance the bargaining power of the international institution with the power to channel migrant movement and to condition the provision of labor on respect for rights.[252] Eventually, Northern States and other existing migrant destinations would likely need to compromise any recalcitrance toward migrant entry and rights, both to retain their popularity and even their viability as draws for immigrants. Their potential use of the services of the international institution involved in promoting migration within the South to direct migration back to them could further be conditioned on improved treatment.

Enhanced migrant treatment, meanwhile, might not only become a competitive advantage for States in the Global South seeking migrants to fuel their development, but become widespread as a consequence of the advantages those migrants appear to bring, and through wider adoption, grow into a customary norm among immigrant societies. Southern States are already serving as, what

247. *See* Parts I(A) and (C), *supra*.

248. *See* Part II(C) *supra*.

249. *See* Part IV(E)(2), *infra*.

250. *See id.*

251. *See id.*

252. Various scholars have argued that labor supply available to destination countries is a chief obstacle to them signing onto migrant protection and free movement regimes. For a summary of their arguments, *see* Koslowski, *supra* note 27, at 108.

scholars call, "norm entrepreneurs" for the rest of the world.[253] Their innovations are extending to migration. Brazil, for example, has been active in broadening migrant rights; its 2017 legal reform effectively expanded the category of refugee well beyond international legal requirements and decriminalized the status of undocumented migrants.[254] With only minor modifications, the law remains in force, despite the anti-migrant tone set by President Jair Bolsonaro. UNHCR's head has viewed Colombia's similar, recent regularization of the legal status of Venezuelan exiles as a model for the treatment of mixed exoduses of "displaced persons" worldwide.[255]

Of course, there are hardly any guarantees that such a norm diffusion would take place as a consequence of widespread acceptance in the South. The enhancement of migrant-respecting norms in the South might hardly be more persuasive than the earlier Southern initiatives that had sought to expand the international legal definition of refugee.[256] Yet such norm diffusion would only be one potential means by which norms shift under this proposal. Establishing migration governance on a firmer *material* basis—grounding protection in incentives that emerge from distribution—plays a greater role. The role of enhanced international institutional oversight also augments both these norms and the effects of distribution, avoiding the fate of trained migrants in 1990s South Korea, whose relative abundance, but lack of advocates, allowed them to fall into undocumented and exploited status.[257] In that case, not only more careful distribution, but enhanced oversight were required.

D. Retrofitting, Not Replacing, the Tools of Global Migration Governance

The above program requires an international architecture to oversee the promotion of South-South movement, as well as to serve as this additional guarantor of migrant rights. As another scholar recognizes, the IOM has "the strongest capabilities to take on the range of activities needed if an international

253. *See*, *e.g.*, Adriana Erthal Abdenur & Carlos Frederico Pereira da Silva Gama, *Triggering the norms cascade: Brazil's initiatives for curbing electronic espionage*, 21 GLOB. GOVERNANCE 455 (2015); Oliver Stuenkel, *Brazil and Responsibility to Protect: a case of agency and norm entrepreneurship in the Global South*, 30 INT'L REL. 375 (2016); Laura Allison-Reumann, *The Norm-Diffusion Capacity of ASEAN: Evidence and Challenges*, 32 PAC. FOCUS 5 (2017).

254. For an overview *see* Jayesh Rathod & Carolina de Abreu Batista Claro, *It's the law in Brazil – immigrants welcomed*, MIAMI HERALD (Jun. 8, 2017), https://www.miamiherald.com/opinion/op-ed/article155217949.html. On the law's approach to decriminalizing undocumented migrants s*ee* Rathod, *Criminalization and the Politics of Migration in Brazil*, 16 OHIO ST. J. CRIM. L. 147 (2018).

255. Filippo Grandi, *Colombia's treatment of Venezuelan refugees is a global model*, FIN. TIMES (Feb. 22, 2021), https://www.ft.com/content/3989e253-7d5b-41cc-bfd7-1d27c0178d7b. Although the headline of the article refers to "refugees," Grandi uses more inclusive terminology of "displaced persons" and "refugees and migrants" to recognize the potential that not all Venezuelans in flight may qualify for statutory refugee status.

256. *See* Part I(B), *supra*.

257. *See* Hye-Kyung Lee, *The Employment of Foreign Workers in Korea: Issues and Policy Suggestion*, 12 INT'L SOCIO. 353, 365–66 (1997).

migration regime were to be adopted."[258] In connection with the arguments above, the IOM could, as its predecessors the ILO and ICEM once did for European emigrants, place far greater focus than it does today on planning migratory movements, offering training, conditioning services on migrant-rights recognition, and directly overseeing migrants' safe transportation to destinations that would prove more welcoming to them, rendering migrants less likely to make dangerous journeys to circumvent controls.

Given its origins, retrofitting the IOM to carry out new distribution functions in particular would require a relatively small departure from its current activities, and could be viewed in part as a rebalancing. As the above history demonstrated, relatively *sub rosa* expansions of international institutions can achieve a great deal, while rendering the difficulties of relitigating debates among States less necessary.[259] Retrofitting, rather than replacing the IOM, would help avoid any political opposition to founding a global migration organization anew or to risking the renegotiation of existing institutions' responsibilities. As critics of any potential renegotiation of the Refugee Convention have pointed out, renegotiation could result in the diminution, rather than the enhancement, of international instruments' capabilities.[260]

Elaborating on existing tools presents a less risky option. Many strategies advocated above could find some basis in the Global Migration Compact. In particular, the Compact makes provision for "skills matching" to "facilitate labour mobility."[261] Migrant "skills development" and promoting migration as a development tool are already components.[262] As part of "enhancing…pathways for regular migration" the Compact also advocates for "facilitat[ing] regional and cross-regional labour mobility."[263] The now partially UN-integrated IOM already has some responsibility for implementing the Compact by serving as "coordinator" for a UN "network on migration."[264] But prioritizing these specific aspects of the Compact and giving them a South-South orientation could be a means to help bring about distributional changes that could help overcome political objections and eventually help achieve better recognition of the Compact's other objectives and, among reluctant States, the Compact itself.

Other IOM mechanisms could also be subordinated to the general direction of a South-South orientation. These include its Regional Consultative Processes—fora where States and regional organizations discuss common migration issues,

258. MARTIN, *supra* note 69, at 124.

259. As argued in Part IV(A), *supra*.

260. *See* Ferracioli, *supra* note 26.

261. Global Migration Compact, *supra* note 111, at Annex, ¶ 21, Objective 5.

262. *Id*. at Annex ¶¶ 34-35, Objectives 18-19.

263. *Id*. at Annex ¶ 21(b).

264. *Id*. at Annex ¶ 45(a).

such as those between the EU and ECOWAS.[265] They also include its Department of Migration Management, which exists for "the development of policy guidance in the field" and "the development of global strategies," including migrant training and protective oversight.[266] The organization could also influence processes now being undertaken by non-IOM bodies to the end of a South-South strategy. These include the Global Forum on Migration and Development and the International Migration Review Forum that has been created to "follow up and review" the Global Migration Compact.[267]

This is not to say that more formal changes to the IOM would not be helpful to carry out the agenda sketched above. As Balibar observes, a formal link to international *political* structures, with their representative function, is essential for the legitimacy of any form of migration governance.[268] Another lesson from global migration governance's past, moreover, is that integration between migration institutions and representative international bodies can ensure that those migration institutions are in touch with the most critical global needs. As Part III showed, UNHCR owes its greater responsiveness to the Global South to this integration, thanks to the advocacy of newly-independent States within the UN.[269]

More formal integration with the UN would allow IOM funding and activities to be removed from the direct, project-to-project control of wealthy member States that drives its participation in their controversial border management practices, while permitting the UN to exercise more globally representative supervision of IOM actions. Per the UN Special Rapporteur for Migrant Rights, formal integration to this extent is, in fact, essential for ensuring that a more powerful IOM would not let any focus on merely managing migration occlude a respect for migrant treatment.[270] The IOM's recent partnership with the UN demonstrates that these institutions do have the ability to move closer, despite previous misgivings. This increased closeness was made possible by fears that other organizations could otherwise encroach on IOM "turf," the fact that IOM membership had become congruent with UN membership, and by guarantees that

265. *See* INT'L ORG. FOR MIGRATION, *IOM Regional Consultative Processes*, https://www.iom.int/regional-consultative-processes-migration.

266. Text from IOM Department of Migration Management, https://www.iom.int/migration-management.

267. Global Migration Compact, *supra* note 111, at Annex, ¶ 49. Scholars have previously suggested that each of these programs are conducive to being scaled into a larger effort. *See The Global Forum on Migration and Development as a venue of state socialisation: a stepping stone for multi-level migration governance?* 45 J. ETHNIC & MIGRATION STUD. 1258 (2019); Marion Panizzon & Daniella Vitiello, *Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?* EJIL: TALK! (Mar. 4, 2019), https://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration.

268. BALIBAR, *supra* note 211, at 117.

269. *See supra* Part III(C) and Szabla, *supra* note 199, Part III(1).

270. Crépeau, *supra* note 72, at 21–22.

the IOM would retain features treasured by States.[271] Northern destination States with control over IOM activities could be persuaded to part with this control to the extent that it seemed that the IOM would help deliver them the initial benefits of the South-South system discussed above.

With firmer UN direction in place, a new IOM could be delegated a mandate similar to UNHCR's, enabling it to become a formal arbiter and monitor of migrant rights.[272] In doing so, the IOM could give formal institutional backing to the coherence that the restatement approach has striven to give to the complex and contradictory body of international migration law. Without need for the acrimony that negotiating a new treaty would generate, and without the risk of competing approaches, a single restatement with the backing of a truly official UN agency could create a much more likely basis for its uniform interpretation and observance. A reformed IOM could also provide the oversight power that the restatement movement lacks. It could, moreover, serve as an advocate for important migrant rights instruments, such as the Migrant Workers Convention—the previous lack of enforcement of which one scholar has blamed on the lack of a "supranational agency," and which could benefit from an advocate for ratification, as well.[273] Finally, it could gradually nudge States toward compliance even with nonbinding soft law provisions such as the rights and treatment objectives of the Global Migration Compact.[274] Distributional powers could allow it both to incentivize observance of rights and good treatment, as well as withhold necessary labor from noncompliant States. The IOM could therefore work as a backstop for violations of migrant rights that occur despite measures that enhance migrants' attractiveness.

E. Addressing Objections to Governance as Promotion of South-South Migration

The above proposal both carries risks and is likely to encounter a considerable number of objections. The Article addresses a number of potential counterarguments below.

1. Likelihood of Acceptance and Success in the Global South

Despite the evident interest in Southern regional organizations in South-South migration, there are, first, grounds for skepticism about Southern interest in such a project. One might ask, for example, why materially-disadvantaged

271. BRADLEY, *supra* note 69, at 113-16.

272. *See* Koser, *supra* note 64; International Organization for Migration, *supra* note 65.

273. *See* Nicola Piper, *Rights of Foreign Workers and the Politics of Migration in South-East and East Asia*, 42 INT'L MIGRATION 71, 81 (2004).

274. For a case that the IOM could carry out these goals, specifically, *see* Steffen Angenendt and Anne Koch, *Global Migration Governance and Mixed Flows: Implications for Development-centred Policies* (Stiftung Wissenschaft und Politik Research Paper 2017/RP 08 27, 2017).

Southern States would prefer de facto development aid in the form of migration, rather than direct financial assistance.[275] Yet such a question assumes that "migration or aid" is an either-or proposition, the existence of direct aid as an option, and Southern States' ability to decide between these options entirely on their own, despite Northern influence in international systems. Southern countries of emigration may also find migration aid beneficial as a source of remittances or returnee skills compared with aid focused entirely on their non-emigrant populations. There is research that even provides grounds to believe that driven migrants are more entrepreneurial than settled populations and may prove a unique economic boon for both sending and receiving States if aided.[276]

Second, there is a risk that furthering migration within the materially-deprived South could disrupt existing aspects of the migration-development nexus that benefit Southern States. Increasing South-South migration could theoretically reduce the transfer of skills and remittances from the Global North to the South at a time when these transfers have begun contributing to even more significant cash inflows to developing countries than foreign direct investment.[277] Yet remittances *between* Southern States have potential of their own. Remittances between sub-Saharan African States already "increasingly" make up a considerable share of their cashflow.[278] South-South skills transfers already prove beneficial as well, with greater potential arising from easier return migration.[279] Increased skills-matching of such migrations and training of migrants could help reduce differentials between South-South and North-South transfers.[280] And to the extent that the system helped open more of the Global North and other major destinations to more migrants in the future, it also represents a means for Global South States to tap into further skill or remittance flows.[281]

Third, it may seem misleading to draw an analogy between today's Global South and earlier migrant-receiving States. The former face their own "overpopulation" pressures so are arguably more like historical sending States in this respect than receiving ones.[282] Historical receiving States were also

275. Such questions may emanate especially from critics of the notion of migrants as "agents of development." *See*, *e.g.*, de Haas, *supra* note 236 (condemning the use of migrant transfers as "neoliberal").

276. *See*, *e.g.*, OECD & ILO, *supra* note 227, at 155 (noting that "in the most [studied] countries, immigrants are either equally or more entrepreneurial than native-born individuals").

277. *See* Federica Cocco et al., *Remittances: the hidden engine of globalization*, FIN. TIMES (Aug. 28, 2019), https://ig.ft.com/remittances-capital-flow-emerging-markets.

278. *Id*. *See also* ACP OBSERVATORY ON MIGRATION, *supra* note 227, at 39–40, 45–47.

279. ACP OBSERVATORY ON MIGRATION, *supra* note 227, at 27-28, 30, 33–44.

280. *Id*. at 34 suggests there is a possibility that North-South transfers could be more beneficial.

281. As emphasized in the existing migration-development framework discussed in Latek, *supra* note 235.

282. *See* Adamson & Tsourapas, *supra* note 233, at 862, 867. On the seeming "emptiness" of much of the global periphery to which European migrants could be sent *see* BASHFORD, *supra* note 178.

motivated by specific ethnic, racial, and cultural ideologies. "Development," for them, meant identitarian, and not just economic, improvement.[283] However, it oversimplifies reality to characterize the entire materially deprived South as "overcrowded". The outlook for the future is especially varied: fertility rates are dropping worldwide at different rates, with Africa likely to contribute to greater amount of future global population growth than other regions.[284]

Arguments about potential culturalist opposition to further migration within the materially-disadvantaged South require a more complicated response. Undoubtedly, xenophobia or ethnoreligious, other identitarian, or material animosity will be a challenge for any program promoting South-South migration as it is for South-North movement. After all, such antagonism has sprung up in existing major migrant destinations that have or had been included in the "South," such as South Africa.[285] Southern governments have also shown their own tendencies toward restrictionism (although these may, in part, reflect Northern-led trends and Northern assistance for externalized migration management purposes).[286]

Yet both historical and present-day evidence about how newcomers are perceived is more nuanced. Support for immigration has waxed and waned in countries of the South, and it varies between them.[287] There is a complex and often context-specific relationship between the material advantages of immigration and cultural opposition to it. The history of the Japanese in Brazil, for example, indicates that the perception of migrants' favorable economic contributions can help *overcome* prejudices against them.[288] Culturalist opposition to immigration may be more contested than narratives presuming widespread xenophobia assume, may compete with favorable economic assessments of immigrants, and may even exist alongside support for migrant

283. *See supra* Part III(B) on Latin American States' desire for European immigrants being part of a desire for racial and cultural "improvement."

284. For an indication of these trends *see*, *e.g.*, U.N. DEP'T OF ECON. AND SOC. AFFS, WORLD FERTILITY REP. 2015 HIGHLIGHTS, 2, 4 (2017), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Feb/un_2015_worldfertilityreport_highlights.pdf.

285. *See*, *e.g.*, Theresa Alfaro-Velcamp & Mark Shaw, *'Please GO HOME and BUILD Africa': Criminalising Immigrants in South Africa*, 42 J. SO. AFR. STUD. 983 (2016).

286. *See* Castillejo, *supra* note 88, at 7; for more on intra-South restrictionism *see* Hanno Brankamp & Patricia Daley, *Laborers, Migrants, Refugees: Managing Belonging, Bodies, and Mobility in (Post)Colonial Kenya and Tanzania*, 3 MIGRATION & SOC'Y 113, 116-23 (2020).

287. *See*, *e.g.*, ILO & OECD DEVELOPMENT CENTRE, HOW IMMIGRANTS CONTRIBUTE TO GHANA'S ECONOMY 43–45 (2018), https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-migrant/documents/publication/wcms_634506.pdf, (noting historical fluctuations in Ghana's relationship with immigrants but majority support for free movement into the country, and more support compared to the rest of Africa); Brankamp & Daley, *supra* note 286, at 114 (noting onetime "open door policies" in East Africa).

288. *See supra* Part III(B).

rights, as polling in Southeast Asia indicates.[289] Southern regional organizations' advocacy for increased movement does not lack for any popular support.

The cultural landscapes of States in the Global South do not, furthermore, always resemble those in the North. Migration is a longstanding feature of societies in places like West Africa, where precolonial patterns became international movements only after the imposition of colonial borders.[290] In East Africa, populations and especially borderland regions can be characterized by "conviviality" between precolonial ethnic and kinship groups that make migrants difficult to differentiate.[291] Postcolonial borders leaving diverse patchworks of ethnic groups have also produced conditions in many Southern States in which multiethnicity is a preexisting norm.[292] Preexisting multiethnicity can render international migration no more objectionable than intra-national rural-urban migration, and can often render them indistinguishable.[293] While such multiethnicity has hardly precluded intercommunal tensions in Southern States, it can also provide an easier basis on which to argue for foreign migrant inclusion than in more homogeneous national communities.

An international organization implementing a South-South migration strategy would need to proceed carefully on the basis of the complex distinctions between Southern States and societies recounted above. They may not find every State as receptive to migrants or may need to carefully evaluate where different migrants would adapt best. ILO and ICEM did the same, in fact, in the Twentieth Century. Yet even where States appear less well-adapted to immigration, international assistance may be able to play a role. OCED researchers have identified a lack of programs to aid or assist immigrants, including matching them to jobs or enhancing their rights, as factors more significant for migrants' marginalization than culturalist opposition.[294] Implementing these would be an improvement that enhanced international involvement could help support.

289. For example, while majorities in Thailand and Malaysia exhibited culturalist opposition to migrants, these figures were neither overwhelming nor constant across both countries. *See* ILO & UN WOMEN, PUBLIC ATTITUDES TOWARDS MIGRANT WORKERS IN JAPAN, MALAYSIA, SINGAPORE, AND THAILAND XI (2019), https://www.ilo.org/wcmsp5/groups/public/—-asia/—-ro-bangkok/documents/publication/wcms_732443.pdf. They competed with more favorable assessments of migrants from an economic perspective. *Id*. These responses were further colored by discussion of migrants as "low-skilled" and with a demonstrated perception that they did not contribute to the economy—issues a training program could address. Finally, majorities in both countries nonetheless supported improved migrant economic rights in some circumstances. *Id*. at XII-XIII.

290. DEVILLARD, BACCHI & NOACK, *supra* note 84, at 24.

291. Brankamp & Daley, *supra* note 286, at 123-25.

292. JASON GAGNON & DAVID KHOUDOUR-CASTÉRAS, TACKLING THE POLICY CHALLENGES OF MIGRATION: REGULATION, INTEGRATION, DEVELOPMENT 59–79 (2011); Gagnon & Khoudour-Castéras, *supra* note 229.

293. Brankamp & Daley, *supra* note 286, at 119.

294. *See*, *e.g.*, GAGNON & DAVID KHOUDOUR-CASTÉRAS, *supra* note 292; Gagnon & Khoudour-Castéras, *supra* note 229, at 29–31.

2. Likelihood of Acceptance in Northern and Other Migrant Destinations

Another set of objections to the above proposal concerns the likelihood of interest in this proposal in the Global North, of producing labor shortages in migrant destinations, and the likelihood of those shortages promoting political change. Would States in the North really sign onto a plan that would lead to future labor shortages within their own borders? Research demonstrating that popular opposition to immigration tends more to culturalism and can sideline special interests in democratic States indicates that these shortages may not be their greatest concern.[295] "Present bias" may also incline populations toward short-term solutions to migrant influxes without deep consideration for long-term consequences.[296]

A second potential contention about destination State behavior is that the number of migrants is not necessarily constant.[297] Incentivizing migration pathways within the South, or even facilitating development in the South, might merely induce more migration, reducing the scarcity effects that might lead to improved migrant treatment by Northern States in the future.[298] Yet new movement induced by incentives to migrate within the South—and planned and managed from above by the IOM—is not likely to stray to the North or other migrant destinations until those States can offer comparable draws.

It does not automatically follow, moreover, that material incentives produce more or less migration, as discussed above.[299] Research has demonstrated a relative stability in the total number of global migrants since the Second World War; despite changes in immigration law and policy over that period, only

295. More open democratic institutions will even tend States toward restriction as compared to States where special interests advocating in need of labor have more clout. *See* David Bearce & Andrew Hart, *International Labor Mobility and the Variety of Democratic Political Institutions*, 71 INT'L ORG. 1 (2016). One reason why is that cultural fears, especially, have played a larger role in determining support for right-wing populist anti-immigration parties in Europe than fears over wages, for example. David Oesch, *Explaining Workers' Support for Right-Wing Populist Parties in Western Europe: Evidence from Austria, Belgium, France, Norway, and Switzerland*, 29 INT'L POL. SCI. REV. 349, 369–70 (2008).

296. *See*, *e.g.*, David J. Hardisty, Kirsten C. Appel & Elke U. Weber, *Good or Bad, We Want it Now: Fixed-cost Present Bias for Gains* and *Losses Explains Magnitude Asymmetries in Intertemporal Choice* 26 J. BEHAV. DECISION MAKING 348, 348 (2012) (explaining the desire for immediate gains despite future consequences); Matthew O. Jackson & Leeat Yariv, *Present Bias and Collective Dynamic Choice in the Lab*, 104 AM. ECON. REV. 4184 (2014) (demonstrating the high percentage of individuals with present bias).

297. Such an argument could theoretically draw strength from the long debate over "push" and "pull" factors as contributors to the total number of migrants. *See* Devoto, *supra* note 159. It could also potentially cite large shifts in global migrant populations over long historical periods as a result of policy, economic, and other forces. *See*, *e.g.*, Adam McKeown, *Global Migration, 1846-1940*, 15 J. WORLD HIST. 155, 164–67 (2004).

298. *See*, *e.g.*, de Haas, *supra* note 160.

299. *See* Part II(C); Castelli, *supra* note 162.

changes in migration's direction have resulted.[300] Not only have attempts to *stem* migration using development aid failed or proven counterproductive, but evidence from Latin America and Africa demonstrate that policy initiatives have not *stimulated* higher migration numbers in those regions either.[301]

Another likely objection is that States can and have pursued immigration restrictions *despite* potential, or even existing, labor shortages.[302] This is, in fact, the basis for believing that political conditions in many migrant destination States will support promoting South-South migration. At the same time, the seeds of States' *eventual* likelihood of accepting more migrants are also clear: some of these societies have already begun facing labor supply crises and have needed to retreat, or at least consider retreating, from their recalcitrance—demonstrating their vulnerability to serious supply shocks. Japan's experience with extreme restriction in the context of declining birthrates and the failures of both natalism and automation illustrates the consequences of diminished labor abundance. The country "paid the costs in terms of sociodemographic, economic, and political challenges."[303] It has consequently been forced to admit an increasing number of immigrants against its policy preferences.[304] Similarly, in South Korea, pride in ethnic homogeneity, in theory, has to contend with the material reality of low birthrates, few potential marriage partners, and labor needs—this has opened the country to greater multiculturalism in practice.[305]

It could nonetheless be argued that discouragement of migration there might hand a political victory to those who would prefer to keep migrants away from their countries. Such a victory could have long-term consequences that might militate against improved migrant treatment or inclusion. Yet there are indications that fears over labor shortages would extend even to populistic governments known for their stances against immigration. Polish employment agents already fear competition for the workers they need from the Global South.[306] A Polish

300. *See* Hein de Haas et al., *International Migration: Trends, Determinants, and Policy Effects*, 45 POPULATION & DEV. REV. 885 (2019).

301. Lavenex et al., *supra* note 76, at 473.

302. *See*, *e.g.*, Stephen Castle, *U.K.'s New Immigration Rules Will Restrict Low-Skilled Workers*, N.Y. TIMES (Feb. 19, 2020) (noting business opposition on the basis of potential "labor shortages"), https://www.nytimes.com/2020/02/19/world/europe/uk-immigration-low-skilled-workers.html; Monika Pronczuk, *Poland's immigrant stance at odds with need for workers*, FIN. TIMES (Aug. 5, 2019), https://www.ft.com/content/2dd225a8-a498-11e9-974c-ad1c6ab5efd1. *See also* Bearce & Hart, *supra* note 295; Oesch, *supra* note 295, both demonstrating the influence of popular culturalist resistance to immigration.

303. James F. Hollifield & Michael Orlando Sharpe, *Japan as an 'Emerging Migration State'*, 17 INT'L REL. ASIA-PAC. 371, 371 (2017).

304. *See*, *e.g.*, Motoko Rich, *Bucking a Global Trend, Japan Seeks More Immigrants. Ambivalently.*, N.Y. TIMES (Dec. 7. 2018), https://www.nytimes.com/2018/12/07/world/asia/japan-parliament-foreign-workers.html.

305. *See* Andrew Eungi Kim, *Global migration and South Korea: foreign workers, foreign brides and the making of a multicultural society*, 32 ETHNIC & RACIAL STUD. (2009).

306. Pronczuk, *supra* note 302.

official recently raised the alarm that the number of immigrants it has admitted is insufficient for the country's economic requirements, even while it has quietly begun admitting more.[307] Hungary, facing a labor crunch, has done the same.[308] Elsewhere, policymakers in immigration-hostile political contexts feared that a restricted immigrant labor supply was on track to produce an economic crunch. The Trump Administration's restrictions also led to labor shortages.[309] "We are desperate—desperate—for more people," acting Trump White House Chief of Staff Mick Mulvaney consequently admitted. "We are running out of people to fuel the economic growth that we've had in our nation…We need more immigrants."[310]

Labor shortages more recently posed by the closed borders resulting from the COVID-19 pandemic further increased awareness of the importance of immigrant labor.[311] Italy debated regularizing the status of undocumented workers, suggesting a recognition of the need to maintain a critical workforce by means that touch on their treatment as well as their presence.[312] Its Agriculture Minister has noted that their critical place in the food supply chain has meant that the country could no longer act "as if migrants are our enemies."[313] The pandemic thus illustrates how Northern and other current migrant destinations forced to compete for immigrant workers with a newly attractive South may need to offer even more concessions.

Altering the material dynamics of global migration may be even more likely to shift political attitudes, given that much current resistance facing migrants is highly contested and vulnerable to changed circumstances. In many Northern democracies, only small shifts may be required to reduce hostility to migrant

307. *Poland is cocking up migration in a very European way*, ECONOMIST (Feb. 22, 2020), https://www.economist.com/europe/2020/02/22/poland-is-cocking-up-migration-in-a-very-european-way; Makana Eyre & Martin Goillandeau, *Poland's two-faced immigration strategy*, POLITICO (Jun. 13, 2019), https://www.politico.eu/article/poland-two-faced-immigration-strategy-ukraine-migrants.

308. Bojan Pancevski & Adam Bihari, *Hungary, Loudly Opposed to Immigration, Opens Doors to More Foreign Workers*, WALL ST. J. (Sept. 8, 2019), https://www.wsj.com/articles/hungary-loudly-opposed-to-immigration-opens-doors-to-more-foreign-workers-11567944008.

309. *See*, *e.g.*, Alfredo Corchado, *Even as Trump tightens immigration, the U.S. labor shortage is becoming a crisis*, DALL. MORNING NEWS (May 17, 2018), https://www.dallasnews.com/news/immigration/2018/05/17/even-as-trump-tightens-immigration-the-u-s-labor-shortage-is-becoming-a-crisis.

310. Nick Miroff & Josh Dawsey, *Mick Mulvaney says U.S. is 'desperate' for more legal immigrants*, WASH. POST (Feb. 20, 2020), https://www.washingtonpost.com/politics/mulvaney-says-us-is-desperate-for-more-legal-immigrants/2020/02/20/946292b2-5401-11ea-87b2-101dc5477dd7_story.html.

311. *See*, *e.g.*, Jen Skerritt & Millie Munshi, *Global Food Output Runs Into Migrant Worker Woes*, BLOOMBERG (Aug. 7, 2020), https://www.bloomberg.com/news/newsletters/2020-08-07/supply-chains-latest-migrant-worker-shortages-hit-food-output**.**

312. *See* Sylvia Poggioli, *Italy Considers Permits For Undocumented Migrants To Fill A Big Farmworker Gap*, NPR (Apr. 29, 2020), https://www.npr.org/2020/04/29/847483140/italy-considers-permits-for-undocumented-migrants-to-fill-a-big-farmworker-gap.

313. *Id*.

treatment and inclusion, and the material incentives the proposal brings about may tip the balance. Worldwide polling averages even in the pivotal year of the "migration crisis" of 2015, for example, demonstrated relatively close levels of support for increased (21 percent), status quo (22 percent), and decreased (34 percent) immigration.[314] Even in Europe, where attitudes are among the most hostile, demands to decrease immigration only comprise a majority of 52 percent.[315] Such bare majorities are vulnerable to pressures. Japan's 2018 policy shift on immigration came even after polls indicated similar levels of disapproval for opening its borders any further, demonstrating the power of material incentives.[316] In other important parts of the North, like the United States, anti-immigration sentiment is more limited and less of an obstacle.[317] While in many Northern societies, support for immigration has not concretized enough to fear the future consequences of increased South-South migration, such reticence is pliable in the face of material adversity and would likely be impacted by migration's shift South.

3. The Justness of Focusing on Materialism and Southern Migration

A final set of objections concern a program promoting South-South migration's justness as a means to help improve global migration governance. Promoting South-South migration could be viewed as an attempt to forcibly "offshore" migration to the South, as current development aid or externalization deals do.[318] This criticism holds particular weight at a time when some Southern countries serve as the chief hosts of refugees and other migrants fleeing from humanitarian emergencies, giving rise to potential arguments that a proposal that does not immediately require Global North countries to "burden-share" with them is fundamentally unjust.[319]

Promoting migration within the South does not mean migrants would be "trapped" in South-South movements, however; migratory pathways to the North and other existing destinations would continue to be available. The difference

314. NELI ESIPOVA, JULIE RAY, ANITA PUGLIESE & DATO TSABUTASHVILI, HOW THE WORLD VIEWS MIGRATION 2 (2015), https://publications.iom.int/system/files/how_the_world_gallup.pdf.

315. *Id*.

316. BRUCE STOKES & KAT DEVLIN, DESPITE RISING ECONOMIC CONFIDENCE, JAPANESE SEE BEST DAYS BEHIND THEM AND SAY CHILDREN FACE A BLEAK FUTURE 5 (Nov. 12, 2018), https://www.pewresearch.org/global/wp-content/uploads/sites/2/2018/11/Pew-Research-Center_Despite-Rising-Economic-Confidence-Japanese-See-Best-Days-Behind-Them-and-Say-Children-Face-Bleak-Future_2018-11-121.pdf.

317. Niraj Chokshi, *75 Percent of Americans Say Immigration Is Good for Country, Poll Finds*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/us/immigration-polls-donald-trump.html (noting hostility to the Trump Administration's family separation policy forced its abandonment).

318. *See supra* Parts I(C) and II(C) for examples of these approaches.

319. *See*, *e.g.*, Stephanie Nebehay, *Poor nations hosting most refugees worldwide, need more Western help: U.N.*, REUTERS (June 19, 2019), https://www.reuters.com/article/us-un-refugees/poor-nations-hosting-most-refugees-worldwide-need-more-western-help-u-n-idUSKCN1TK0CE.

would instead be that *additional* pathways to different parts of the Global South are opened to migrants with incentives provided for taking them. Moreover, characterizing the South as a zone simply overburdened by existing refugee hosting requirements misconstrues a vast and diverse part of the world and wrongfully assumes that it lacks the ability to employ migration to its advantage in the same way as destinations in the North. As the above and other evidence makes clear, immigrants are already exhibiting great potential in many of those States, to those States' benefit.[320]

The proposal could also be further critiqued for idealizing the potential of South-South migration relative to harsh realities of societies in which it is already taking place. Such societies could conceivably include those of the Gulf—notorious for harsh working conditions including death from overwork in hot weather and the confiscation of passports.[321] Yet the experiences of migrants traveling to these States do not necessarily imply similar treatment in other parts of the South under the proposed schema. Existing migration within the South also takes place without the benefit of governance designed to improve, implement, and monitor migrant rights. Linking international oversight to such functions, conditioning migrant placement on respect for rights, and increasing migrant bargaining power relative to existing migrant destinations can achieve beneficial impacts for the status of migrants in existing destinations everywhere.

The proposal's focus on North-South relations and on the Global South also means it could not address and could exacerbate some migration-related tensions *within* the Global North. For example, it would not dissipate discontent in the United Kingdom over the presence of Eastern European migrants that helped contribute to that country's vote to leave the EU.[322] That said, the EU could consider its own similar measures to promote more migration *between* eastern member States that might produce the same material benefits within the bloc and Europe more broadly.

Finally, the proposal's considerable focus on economic impacts could be criticized for its material orientation, the very element that sets its approach apart from other proposals for migration governance reform. This proposal may demonstrate what Arjun Appadurai, among others, has lamented as thinking about

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320. *See*, *e.g.*, ILO & OECD DEVELOPMENT CENTRE, *supra* note 287.

321. *See*, *e.g.*, Janae C. Cummings, *The Price is Rights: Getting the United Arab Emirates up to International Speed in the Labor Law Department*, 44 BROOK. J. INT'L. L. J. 410, 410, 437 (2018). Hélène Thiollet, furthermore, writes of a "hypothesis of a global convergence in illiberal migration governance" based on the similarities of the Gulf and OECD countries. *See* Thiollet, *Immigrants, Markets, Brokers, and States: The Politics of Illiberal Migration Governance in the Arab Gulf* (International Migration Institute Working Papers No. 155, 2019), https://hal.archives-ouvertes.fr/hal-02362910v2/document.

322. Immigration was a key driver of the Brexit vote. *See*, *e.g.*, Joppke, *supra* note 1. Although at times Brexit was vaguely associated with all immigration, it was the rapid increase in EU migration, specifically, that was linked to the vote, and its rapid increase that helped drive it. *See id.* and Matthew Goodwin & Caitlin Milazzo, *Taking back control? Investigating the role of immigration in the 2016 vote for Brexit*, 19 BRIT. J. POL. & INT'L. REL. 450 (2017).

migrants like interchangeable widgets in global labor markets.[323] *Recognition* of the economic logic sometimes driving migration and exclusion does not constitute *reduction* to it, however. This Article—and its proposal—have focused on material factors that include economic ones, but also account for political realities grounded in concerns about identity. They have also accounted for migrants' potential aspirations to move to places regardless of economic benefit, ensuring that migrant pathways are safe, and that migrant rights are respected. While they argue for using material factors to incentivize improved treatment of migrants, these material factors are hardly ends in and of themselves.

There is also another, non-economic sense in which such a proposal can be supported. It would be a historical *justice* to reengineer the machinery once enjoyed largely by European emigrants to the advantage both of materially disadvantaged States in the South and people from Southern regions who wish to improve their lives through mobility. Southern migrants were not just deprived access to the system that existed for the benefit of European migrants well into the postwar era. That system's breakdown, rather than its expansion, was responsible for global migration governance's current insufficiencies. Reconstituting that governance for the benefit of Southern migrants could help fulfill the "imperial debts" owed to them by societies that benefitted from the exploitation of the South.[324] Granting Southern migrants access to such a system would also help fulfill an understanding of justly-distributed opportunities in which no potential migrant must face a world in which benefits of such a program are not available to them.[325]

CONCLUSION

This Article has argued that global migration governance requires further reform, and that current efforts and plans to do so lack a sufficient accounting for political reality. It is necessary to embrace an approach which would address political barriers to its effectiveness at promoting the better acceptance, distribution, and treatment of migrants. The need to address political barriers should be considered in its own right. A global migration governance oriented around the promotion of South-South movement is one potential means to address this need to confront political obstacles. Yet promoting South-South movement need not be the approach to driving material changes that can break through the impasse of "political will" inhibiting the reimagination of global migration governance. It is merely one possible means to do so.

One scholar suggests that a migration governance that pays better attention to the needs of the South could ultimately emerge from shifts in international

323. *See* Arjun Appadurai, *Aspirational maps: On migrant narratives and imagined future citizenship*, EUROZINE (Feb. 19, 2016), https://www.eurozine.com/aspirational-maps.

324. *See* Achiume, *supra* note 152.

325. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

power relations, and in particular, greater Chinese influence in international institutions.[326] That said, the ends of this influence with respect to migration are not yet clear. China has recently used UN fora to critique existing approaches to migration, including both externalization and, in discussing the Global Refugee Compact, the use of international law toward "intervention [in] internal affairs."[327] It has instead stressed the role of development projects in stabilizing refugee movements.[328] China's Belt and Road Initiative has also promoted some movement between China and other "developing" States.[329] China's representative to the UN, in this vein, characterized migrants as "bridges and belts" between States and economies.[330] These moves suggest an interest in facilitating some planned economic migration and disincentivizing unplanned mobility. Yet China's interactions with the IOM have mostly focused on migration in and out of its territory.[331] Efforts to increase organized South-South movement generally could actually appeal to Chinese concerns, while serving as a basis for cooperation between China and other States. Scholars already suggest that movements within the Belt and Road are ripe for IOM involvement, while China's existing attempts to address refugees through development can be seen as forms of "South-South" assistance.[332]

Whatever form it takes, any proposal to reform migration governance to the end of overcoming political obstacles should, however, bear in mind the appeal of promoting a more positive and desirable image of migration as an engine of prosperity. This image would stand in contrast to migration's reputation as a "burden" to be "shared," a terminology that both proponents and detractors of migration often employ. The latter characterization has helped lead to sclerosis and discrimination. Fundamentally, migration governance will become less of a difficult question in any way that migration can become thought of less as a problem, and more as an opportunity, for destinations and migrants alike.

326. *See* Geiger, *supra* note 61, at 295, 300-01.

327. *China tells UN Australia's offshore detention centres violate human rights, don't have adequate conditions*, ABC NEWS AUSTL. (Mar. 13, 2021), https://www.abc.net.au/news/2021-03-13/china-urges-australia-to-close-offshore-detention-centres/13245174; Lili Song, *Strengthening Responsibility Sharing with South–South Cooperation: China's Role in the Global Compact on Refugees*, 30 INT'L J. REFUGEE L. 687, 688 (2018).

328. Song, *supra* note 327, at 689.

329. Yadi Zhang & Matin Geiger, *The IOM in Building and Supporting Migration Management in China*, in INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 61, at 162

330. *Id*.

331. *Id*. at 150-55

332. *Id*. at 162; Song, *supra* note 327, at 688.

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

Delphine Rodrik*

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

INTRODUCTION

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

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

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

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

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

3. *Id.*

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

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

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

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

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

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

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

11. *Id.*

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

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

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

13. *See* 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S 137, art. 33 (enshrining the principle of *non-refoulement*, under which "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"). This principle has been interpreted in human rights law to prohibit States from returning individuals to States where they would face torture or cruel, inhuman, or degrading treatment. *See generally* OFF. FOR THE HIGH COMM'R ON HUM RTS., *The principle of non-refoulement under international human rights law*, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.
PARALLEL TRAJECTORIES TARGETING MIGRANT SOLIDARITY

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

A. Surveilling Humanitarian Actors

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

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

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

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

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

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

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

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

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

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

46. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64. *Id.*

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

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

B. Scrutinizing Legal Aid

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

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

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

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

69. *Id.*

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

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

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

C. Targeting High-Profile Solidarity Activists

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

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

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

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

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

75. Devereaux, *supra* note 63.

76. Ferstman, *supra* note 71, ¶ 90.

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

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

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

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

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

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

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

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

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

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

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

84. Ferstman, *supra* note 71, ¶ 90.

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

86. *Id.*

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

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

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

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

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

D. Framing Narratives

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

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

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

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

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

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

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

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

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

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

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

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

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

II.
DOMESTIC AND INTERNATIONAL FRAMEWORKS IN TENSION

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

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

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

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

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

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

A. International Law

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

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

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

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

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

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

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

107. *Id.* art. 3.

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

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

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

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

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

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

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

113. *Id.*

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

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

2. *Other Applicable International Legal Regimes*

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

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

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

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

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

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

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

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

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

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

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

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

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

125. *See* ICCPR art. 18.

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

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

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

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

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

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

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

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

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

133. *Id*.

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

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

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

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

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

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

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

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

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

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

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

B. Regional and Domestic Legal Frameworks

1. EU Legal Framework: The Facilitator's Package

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

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

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

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

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

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

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

145. *Id.* art. 1, ¶ 2.

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

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

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

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

148. *Id*. at 11.

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

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

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

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

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

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

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

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

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

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

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

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

155. 8 U.S.C. § 1324(a)(1)(A)(i)-(v).

156. *Id.* § 1324(a)(1)(A)(i).

157. *Id.* § 1324(a)(1)(A)(iii).

158. *Id.* § 1324(a)(1)(A)(ii).

159. *Id.* § 1324(a)(1)(A)(iv).

160. *Id.* § 1324(a)(1)(B)(i).

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

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

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

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

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

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

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

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

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

III. DOMESTIC LEGAL CHALLENGES AND THEIR LIMITS

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

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

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

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

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

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

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

1. Cédric Herrou's Constitutional Challenge

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

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

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

172. Okafor, *supra* note 116, ¶ 20.

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

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

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

176. *Id*.

177. *Id.*

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

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

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

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

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

179. Boudou, *supra* note 93.

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

181. Boudou, *supra* note 93.

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

183. *Id*. ¶ 13.

184. *Id.*

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

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

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

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

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

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

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

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

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

2. The Prosecution of the "Briançon 7"

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

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

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

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

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

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

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

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

196*. Id.* at 42.

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

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

3. *Pierre Mumber's Uneasy Acquittal*

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

197. *Id.*

198. *Id.* at 42, 47.

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

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

201. *Id.*

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

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

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

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

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

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

204. *Id.* at 40.

205. *Id.*

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

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

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

1. No More Deaths Activists and RFRA

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

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

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

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

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

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

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

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

215. *Id*.

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

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

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

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

218. *Id*. at 1280.

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

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

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

222. *Id*. at 1277.

223. *Id*. at 1278.

224. *Id*. at 1284.

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

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

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

2. Kaji Dousa's Challenge to Operation Secure Line

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

225. *Id*. at 1289.

226. *Id.* at 1288–89.

227. *Id.* at 1289.

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

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

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

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

3. "Encouraging and Inducing" as Constitutionally Overbroad

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

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

232. *Id.* at 19.

233. *Id.* at 3.

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

235. *Id.* at 5.

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

237. *Id.* at 11.

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

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

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

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

240. *Id*. at 468.

241. *Id*. at 467.

242. *Id.* at 470.

243. *Id*. at 467.

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

245. *Id.* at 472.

246. *Id*. at 471.

247. *Id*. at 477.

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

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

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

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248. *Id*.

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

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

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

252. *Id.* at 5.

253. *Id.* at 6.

254. *Id.* at 13.

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

256. *Id.* at 32–33.

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

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

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

C. Implications of Cases in Both Contexts

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

258. *Id.* at 3–8.

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

260. *Id.*

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

265. Campbell, *supra* note 4.

Border Masquerades

Itamar Mann*

Starting from a discussion of false identities among asylum seekers, this Article aims to conceptualize a substitution effect between citizenship and human rights, the two sources for individual rights. As some citizenships offer no tangible protections, large numbers of people have chosen to migrate, demanding instead the protections from vulnerability that law grants to all humans. Tracing the trope of the mask in classical texts by Hannah Arendt and Karl Marx, this Article shows that such decisions—seemingly fraudulent negotiations on the margins of legality—have significant implications for legal theory. Under conditions of radical global inequality, protracted civil wars, and climate change, contradictions between citizenship and human rights have become observable; the so-called 'refugee crisis' has revealed a dialectic process by which each exerts pressure on the other. The choices migrants make to shed their citizenships and expose their bare humanity instead, illuminate the oppressive, as well as emancipatory, aspects of both statuses.

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INTRODUCTION

About a decade ago, several investigators for Human Rights Watch (HRW), myself included, rode in a rental car in the Northern Greek region of Evros. After landing in the small town of Alexandroupoli at the break of dawn, we drove through the green flatlands cutting through a thick layer of mist. Following reports about border guards abusing migrants and refugees entering the country from Turkey, we headed to conduct interviews in several detention centers close to the border.[1]

When a group of two Black men and one Black woman appeared on the roadside, Simone Troller, then a researcher for HRW, proposed that we stop and ask about their experiences. They told us they had fled from Somalia. The woman wore a hijab, which suggested they were Muslim. They looked exhausted, were filthy from the muddy river water, and were not keen to talk. Around noon, we encountered them again at a detention center in the village of Feres, located nearby. They had been arrested by a Greek border patrol. When they were questioned, it became clear that they were not from Somalia. We were told that their native language was Spanish and that they were citizens of the Dominican Republic.[2] This was hard to believe. What would a group of Dominicans be doing here, dressed up to be mistaken for Muslims, at the entry point often used by destitute migrants from closer regions?

Like many asylum seekers from around the world, migrants arriving in Greece often claimed false identities.[3] At the time, Black people would often say they were Somali; people from Central Asia often claimed to be Afghan; and Arabic speakers often said they were Palestinian. In a 2010 report, the European Union's border enforcement agency, Frontex, indicated that "Three nationalities constitute 80% of the detections along the Eastern Mediterranean route: Afghan, Palestinian and Somali nationals. Over the past two years, these nationalities have

1. HUMAN RIGHTS WATCH, *The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees* (2011), https://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf.

2. Email from a senior colleague in Washington DC referencing a press release following this visit to Greece "Migrants from the Dominican Republic?!?! Too strange." (on file with the author, received December 3, 2010). Online sources do, however, indicate that Dominican migrants did at the time seek asylum in Greece. *See, e.g.*, MARIANELLA BELLIARD & CARIBBEAN MIGRANTS, DEPORTEES: THE HUMAN FACE OF A SOCIAL REALITY 18 (2011), http://obmica.org/images/Publicaciones/MigrationPolicyBrief/Deportados_ingls_final_m%20pb.pdf; CTR. FOR EUR. CONST. L., EUROPEAN MIGRATION NETWORK 29 (2009), https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/11a._greece_national_report_non-eu_harmonised_forms_of_protection_final_version_4dec09_en.pdf.

3. *See, e.g.*, EUR. MIGRATION NETWORK, *Challenges and Practices for Establishing the Identity of Third-Country Nationals in Migration Procedures*, 4 (2017).), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_identity_study_final_en_v2.pdf.

consistently been the most often detected."[4] What were the conditions that made being Somali, Afghan, or Palestinian desirable nationalities to have at this particular moment? What were the conditions that made it plausible for an asylum seeker to wear such an implausible disguise?[5] While global disparities in wealth and multiple crises around the world are part of such conditions, these factors alone do not explain such a decision. Legal circumstances are part of what produces such identities, as is a certain political imagination of what it means to have rights. The ways that migrants assume false identities reveal critical insights about the law, and particularly about the relationship between citizenship (in the international law sense of nationality) and human rights. As novelist J.M. Coetzee writes, in an insight that goes back to Aristotle, "Our lies reveal as much about us as our truths."[6]

The Frontex report observes that "there would be a large number of false declarations of nationality among claimed Palestinian nationals, in particular by nationals from Maghreb (Algeria, Morocco) and Middle East countries (Iraq)."[7] While Frontex notes that "the reason for these false declarations is currently unclear" the agency also ventures to tentatively offer one: "Perhaps the most likely reason is that they wish to avoid return or at least to reduce the length of their stay in the detention centers, but these declarations are not linked with applications for international protection."[8] Somalia, Afghanistan, and Palestine were all countries to which Greece and its EU supporters were unable to deport their unauthorized migrants.[9] "Passing" as a member of one of these groups thus rendered unwanted migrants much more difficult to deport.

4. FRONTEX, *Extract from the Annual Risk Analysis 2010*, 15 (2010), https://data.europa.eu/euodp/en/data/storage/f/2016-03-07T141501/Annual%20Risk%20Analysis%202010.pdf.

5. As is the case today, we were living under the long and global shadow of the 9/11 attacks. Intuitively, it did not seem like an outfit associated with the Muslim religion would be the right choice for someone trying to enter clandestinely. On "plausibility"," *see* Allan Mackey and John Barnes, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards*, 33 INT'L ASS'N OF REFUGEE & MIGRATION JUDGES (2013), https://www.refworld.org/docid/557028564.html.

6. J.M. COETZEE, SLOW MAN: A NOVEL 189 (2006).

7. FRONTEX, *supra* note 4, at 16.

8. *Id.*

9. With regard to the Palestinian, Somali, and Afghan situation, *see generally* EUR. COMM'N, *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries* 110, 114 (Mar. 2013), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_annex_1_en.pdf; with regard to Somalia, *see* EUR. COMM'N, *Ad-Hoc Query on asylum proceeding and returns to Somalia*, (Dec. 7, 2012), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/434_emn_ad-hoc_query_on_asylum_proceeding_and_returns_to_somalia_30octob_widerd_.pdf, (evincing Greece's policy of not carrying out removals to Somalia); with regard to Afghanistan, *see* Ahmade v. Greece, App. No. 26494/09, (Jan. 24, 2012), https://www.refworld.org/cases,ECHR,4f4370af2.html

The narrative of an economic migrant assuming a false identity to game the asylum system is ubiquitous across the developed world,[10] and it has become closely linked to questions about migrant nationalities.[11] States sometimes invoke it spuriously to close their borders, even at the price of violating legal obligations.[12] For their own part, migrant advocates insist on an individual determination of protection needs, trying to stem the increasing tendency to short-cut legal niceties through collective procedures based on nationality.[13] Neither of those issues is the purpose of this Article. Through an examination of such border masquerades, in which migrants and States play different roles, this Article examines the contradictions between two bases for individual rights.[14] To do so, it revisits the trope of masking in politics, which Hannah Arendt famously developed but which appeared earlier in Karl Marx's essay, *On the Jewish Question*. Ultimately following Marx, this Article shows how tensions between two foundational legal constructs, citizenship and human rights, emerge from the ways both are severed from the economic relations they rest upon.[15] The latter have played a key role in the constant redrawing of boundaries between "legitimate" and "illegitimate" migration during the so-called "refugee crisis."[16]

Below, I further identify the phenomenon of false and concealed identities among asylum seekers and other unauthorized migrants. I rely on various materials—academic as well as artistic—including a work by anthropologist Didier Fassin on migration and health in France[17] and a scene from Nadine Labaki's award-winning film *Capernaum*, which poignantly depicts an attempt to

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and M.S.S. v. Belgium and Greece, App. No. 30696/09, (Jan. 21, 2011), https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609 (referring to the absence of removals to Afghanistan when not physically possible).

10. For a critique, *see* Heaven Crawley and Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism in Europe's "Migration Crisis,* 44 J. ETHNIC & MIGRATION STUD. 48 (2017).

11. Take, for example, Dutch Commissioner Frans Timmermans, who, in 2016, claimed that 60 percent of new arrivals are "not refugees"," but "economic migrants," citing the fact that they are "mainly Moroccans or Tunisians." Peter Clusky, *Most Fleeing to Europe are "not refugees", EU official says*, IRISH TIMES (Jan. 26, 2016), https://www.irishtimes.com/news/world/europe/most-fleeing-to-europe-are-not-refugees-eu-official-says-1.2511133.

12. Crawley & Skleparis, *supra* note 10, at 58–59.

13. *See, e.g.,* Elspeth Guild, *The Right to Dignity of Refugees: A Response to Fleur Johns*, 111 AJIL UNBOUND, 1933 (2017).

14. *Cf.* Bridget Hayden, *What's in a Name? The Nature of the Individual in Refugee Studies,* 19(4) J. REFUGEE STUD., 471 (2006).

15. *See generally* Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT'L L. 229 (2004); Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 76 (2011) (suggesting that "where abuses are currently explained with reference to bad policies, laws and interpretations, the concept of planned misery would urge enquiry into the material context of such harmful thinking.").

16. *See* Crawley & Skleparis, *supra* note 10; Estela Schindel, *Migrants and Refugees on the Frontiers of Europe. The Legitimacy of Suffering, Bare Life, and Paradoxical Agency*, 59 REV. DE ESTUDIOS SOCIALES 16 (2017).

17. DIDIER FASSIN, HUMANITARIAN REASON (2012).

claim false identity in order to obtain minimal legal protections.[18] I then characterize two ways in which law seeks to protect individuals: membership in a polity (citizenship, nationality) and membership in humanity (human rights).[19] I argue that these bases of legal status differ and even contradict each other in identifiable ways. I also discuss how the two have shaped the ways migrants and their advocates have fashioned migrant claims. Next, I engage Arendt's understanding of citizenship as a kind of mask. Through a metaphor drawing upon Roman theatre, Arendt conceived of citizenship as a mask, serving to equalize members of the political community and to allow them to participate.[20] Forms of disguise among migrants reveal how, today, humanity plays a similar role of masking (in a global context). I then return to Marx's understanding of the separation between citizen and human in order to conceptualize the contradiction between the two bases of individual legal protection. This agonistic relationship reflects how both categories occlude contemporary questions of global inequality, which invariably remain central to unauthorized migration, and shed light on the oppressive, as well as emancipatory, potentials of law for the large part of humanity that is constantly on the move.

I.
BORDER MASQUERADES

Anthropologist Didier Fassin contextualizes France's protection of vulnerable migrants in the political economy of migrant labor in the late 20th century.[21] Before the "closure of borders," announced in 1974,[22] migrants were integrated in the lower strata of France's workforce, primarily in industrial labor and agriculture: "Coming from Southern Europe or Africa, the immigrant helped create national wealth but endured an indefinitely renewed provisional legal status. The body of the immigrant at that time was a productive body, assumed to be in good health."[23] The rise of unemployment and a restructuring of French industry during the 1970s changed the situation and the cultural assumptions surrounding migrant bodies: "despite the fact that some sectors of the French

18. CAPERNAUM (Mooz Films 2018), https://www.capernaum.film/.

19. Though considerable scholarship has emphasized the capacious nature of the concept of citizenship, focusing on categories such as "social citizenship," "urban citizenship," or "transnational citizenship," this Article considers citizenship as synonymous with "nationality" and as a formal status. For a discussion of the variety of citizenships, *see, e.g.,* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2008); Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 THEORETICAL INQUIRIES IN L. 333, 334 (2007).

20. ARENDT, *see infra* note 114.

21. FASSIN, *supra* note 17, at 83.

22. *See also* Georges Tapinos, *The Dynamics of International Migration in Post-War Europe*, *in* MIGRATION POLICIES IN EUROPE AND THE UNITED STATES 133 (Giacomo Luciani ed., 1993) (tracing concomitant border-closing policies in the mid-1970s in several European States, including France, Germany and Belgium).

23. FASSIN, *supra* note 17, at 86.

economy continue to rely on it, either through temporary contracts (in agriculture and wine making) or in the form of illegal employment (in construction and the garment industry)," the immigration of unskilled labor has been rendered undesirable.[24]

Relying on Franco-Algerian anthropologist, Abdelmalek Sayad, Fassin observes that, even under such conditions, the body of the migrant remained at the center of migrant identity in the public sphere.[25] The disappearance of the need for large-scale immigrant labor "paved the way for a regime of solicitation on the part of foreigners."[26] This dynamic culminated in a government push for deportations.[27] In response, migrant advocates sought a humanitarian exception to deportation proceedings to stall deportations for migrants that suffered from serious illness, which could not be treated in their home countries.[28] While their bodies remained central to the cultural imagination of migrants, the struggle for humanitarian exceptions medicalized their presence and necessitated the expertise of doctors.[29]

In response, a conservative French government first drafted a statement, which a socialist Minister of Interior ultimately introduced on June 24, 1997, which said migrants could stay in France if they were in need of medical protection for an acute condition, for which there was no available treatment offered in their home country.[30] In the following decade, the number of undocumented migrants legalized under the measure swelled.[31] Fassin observes a change in the kind of claims migrants made. The 1951 Refugee Convention offers protection to those who suffer "well-founded fear" of persecution due to "race, religion, nationality, membership of a particular social group or political opinion."[32] Human rights law sometimes provides a basis for preventing

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24. *Id.*

25. ABDELMALEK SAYAD, THE SUFFERING OF THE IMMIGRANT (2004). While his analysis differs from my own, Sayad also argues that lying among migrant communities has a deeper significance, constitutive of migrant identity, than simply making false statements. *See Id.* at 18.

26. FASSIN, *supra* note 17, at 86.

27. *Id.*

28. *Id.*

29. In an earlier paper, Fassin observes that "for asylum seekers and lawyers, [medical certification] is an 'open sesame'; for officials and judges, it is a piece of evidence among others; and for both it is an innovation in governmentality." Didier Fassin, *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, 107 AM. ANTHROPOLOGIST 597, 600 (2005).); *See also* Roberto Beneduce, *The Moral Economy of Lying: Subjectcraft, Narrative Capital, and Uncertainty in the Politics of Asylum*, 34 MED. ANTHROPOLOGY 551, 554 (2015).

30. FASSIN, *supra* note 17, at 86.

31. *See* MACROTRENDS, *France Refugee Statistics 1960-2021*, https://www.macrotrends.net/countries/FRA/france/refugee-statistics (last visited Mar 21, 2021).

32. Convention Relating to the Status of Refugees, art. 1, ¶ 2, July 28, 1951, 189 U.N.T.S. 137, https://www.unhcr.org/3b66c2aa10.

deportation, anchored, for example, in the right to family life.[33] Yet, individuals who could otherwise have claimed family reunification—and even "genuine" refugees fearing persecution—preferred to focus their arguments against deportation on medical conditions.[34]

Many migrants hoping to secure residence in France either exaggerated or feigned illnesses.[35] This trend challenged French doctors, implicating, to some degree, both their professional ethics and their political views. While the material demands of a working body (wage, benefits) became illegitimate as a basis for legal status, the minimal needs of a living body (medicine, treatment) were constructed as a measure of legitimation.[36]

Fassin calls the process by which medical concessions replace legal rights, "humanitarian reason."[37] For lawyers, the word "humanitarian" sometimes suggests an opposition to "legal," a disanalogy that emphasizes that charity is not a matter of legal duty, but of personal choice. The process that Fassin notes was nevertheless grounded in law, primarily human rights law. The main legal framework for humanitarian reason was Article 3 of the European Convention off Human Rights, and a broad interpretation of its imperative: "No one shall be subjected to torture or inhuman or degrading treatment or punishment."[38] As Veelke Derckx observed, "The area of application of Article 3 [of the] ECHR by the European Court has gradually extended from the question whether the alien, if sent back to his country of origin was at risk of being intentionally subjected to torture or inhuman or degrading treatment … to include also considerations regarding an individual's physical or mental health."[39] Fassin's narrative is one in which the *material* demands of migrants who have long sought to work are transformed, through Article 3, into claims about *minimal protections* that all humans should enjoy.

Yet, the new Ministry of Interior's rule granting medical protection only lasted for a decade. As conservative observers identified the growing number of migrants avoiding deportation, they came to object to the measure and overturned it in 2008.[40] Here, too, legal institutions had an active role. The European Court

33. *See* COUNCIL OF EUR., COMM'R OF HUM. RTS., REALISING THE RIGHT TO FAMILY REUNIFICATION OF REFUGEES IN EUROPE (2017), https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0.

34. FASSIN, *supra* note 17, at 84.

35. *Id.* at 102.

36. *Id*. at 86.

37. *Id.* at 83.

38. *Id.* at 102. The landmark case starting this development was D v. United Kingdom, 24. Eur. H.R. Rep. 423 (1997).); *see also* B.B. v. France, App. No. 30930/96, (Sept. 7, 1998), https://www.hr-dp.org/contents/600, where the European Commission of Human Rights found a breach of the ECHR, but a settlement was achieved.

39. Veelke Derckx, *Expulsion of Illegal Residents (Aliens) with Medical Problems and Article 3 of the European Convention on Human Rights*, 13 EUR. J. HEALTH 313, 314 (2006).

40. FASSIN, *supra* note 17, at 106–08.

of Human Rights (ECtHR) rejected "humanitarian reason" once it was perceived as an avenue for global economic redistribution. As Fassin puts it, the ECtHR held that "European countries could not be required to redress the disparities in health care between nations."[41] Fassin refers to *N. v. The United Kingdom*, where Ms. N.—an HIV-positive Ugandan national—applied to the court to dispute her failed asylum request.[42] Though Ms. N. was ill, her condition was not considered sufficiently dire, and the majority thought the case was about disparities of wealth.[43] In the Grand Chamber's own words: "Article 3 does not place an obligation on the Contracting State to alleviate such disparities," including "[a]dvances in medical sciences, together with social and economic differences between countries."[44]

Since the Syrian civil war began in 2011, asylum seekers hoping to enter or stay in Europe have pursued similar strategies of concealment and misrepresentation.[45] During this time, a kind of "fast lane" for Syrians emerged at processing centers on the Greek Islands, and Greece limited the detention of Syrians.[46] Multiple European governments disallowed the deportation of Syrians under "temporary protection" or "humanitarian protection" statutes,[47] or by granting refugee status under the Refugee Convention.[48] Several countries also granted Syrians significant social benefits, with Germany notably leading the

41. *Id.* at 108.

42. N. v. United Kingdom, App. No. 26565/05, (May 27, 2008), https://www.refworld.org/cases,ECHR,483d0d542.html. For an illuminating analysis and critique, *see* Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy*?, 72(5) MOD. L. REV. 815 (2009).

43. *Id.*at 17 ("Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights")

44. *Id*. *But see* dissenting opinion at 23. ; *see also* Marlies Hesselman's useful analysis of the case law both, leading to, and following *N. v The United Kingdom* in Marlies Hesselman, *Sharing International Responsibility for Poor Migrants: An Analysis of Extra-Territorial Socio-Economic Human Rights Law*, 15 EUR. J. SOC. SEC. 187, 200–04 (2013).

45. *See generally* Krishnadev Calamur, *The Flourishing Black Market in Syrian Passports*, THE ATL. (Nov. 18, 2015), https://www.theatlantic.com/international/archive/2015/11/fake-syrian-passports/416445/; Souad Mekhennet & William Booth, *Migrants are Disguising Themselves as Syrians to Enter Europe*, WASH. POST (Sept. 23, 2015), https://www.washingtonpost.com/world/europe/migrants-are-disguising-themselves-as-syrians-to-gain-entry-to-europe/2015/09/22/827c6026-5bd8-11e5-8475-781cc9851652_story.html; Susannah George, *The Men Who Pretend to Be Syrian Refugees*, FOREIGN POL'Y (Oct. 7, 2015), https://foreignpolicy.com/2015/10/07/the-men-who-pretend-to-be-syrian-refugees-greece/.

46. Schindel, *supra* note 16, at 17 (this 'fast lane' ended with the 'EU-Turkey' deal, signed in 2016, in which Turkey took on expanded responsibilities over Syrian asylum seekers); CIRCULAR ORDER OF THE HELLENIC POLICE 71778/13/511278 of 9 April 2013; *see generally* S.Z. v. Greece, App. No. 66702/13, (Jun. 21, 2018), https://www.refworld.org/cases,ECHR,5b2cc52e4.html.

47. Also termed 'subsidiary protection' outside the UK.

48. Hélène Lambert, *Temporary Refuge from War: Customary International Law and the Syrian Conflict*, 66 INT'L COMP. L. Q. 723, 741–44 (2017); Cynthia Orchard & Arthur Miller, *Protection in Europe for Refugees from Syria* REFUGEE STUD. CTR. 21 (2014), https://www.rsc.ox.ac.uk/files/files-1/pb10-protection-europe-refugees-syria-2014.pdf.

way.[49] Unlike in Fassin's French account, health was not the central issue that prevented the deportation of Syrians. At stake was a bloody civil war, and what refugee lawyers sometimes call, "generalized violence."[50] In Germany and elsewhere, some migrants pretended they were Syrians to gain opportunities to request asylum, as well as benefits that would otherwise be saved only for Syrian refugees.[51] As Peter Bouckaert noted, "this has created a huge market for fake passports in Turkey. Many non-Syrians want to pass through [the Syrian camp,] so many Iraqis and Lebanese are buying fake passports to be processed [faster]."[52] Being able to present oneself as Syrian became a desirable commodity.[53]

In popular media, Nadine Labaki's award-winning film, *Capernaum*, highlights the significance of such border masquerades for destitute individuals from the Middle East with no legally cognizable asylum claims.[54] As a fictional portrait of the lives of stateless residents of Beirut, the film capturers remarkably the use of false identities. The twelve-year-old protagonist—a stateless, Lebanese child named Zain Al-Hajj—rehearses his Syrian accent in search of a way out of his infernal life and into Europe.[55] As critic Yasmine El-Rashidi explains, Zain has a torturous existence in Beirut, on "the margins where the undocumented live: refugees, domestic workers who have fled abusive sponsors, poverty-stricken locals." His parents were unable "to register their children's births for lack of the necessary fees," and so have fallen "into a no-man's-land and are no longer recognized by the [S]tate."[56] He practices Syrian Arabic after he discusses a trip

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49. *See* Orchard, *supra* note 48, at 7.

50. *See, e.g.,* U.N. HIGH COMM'R FOR REFUGEES (UNHCR), *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update V,* U.N. DOC. HCR/PC/SYR/17/01 (2017), https://www.refworld.org/type,COUNTRYPOS,UNHCR,SYR,59f365034,0.html.

51. Ghaith Abdul-Ahad & Patrick Kingsley, *Concern over burgeoning trade in fake and stolen Syrian passports*, THE GUARDIAN (Sept. 8, 2015), https://www.theguardian.com/world/2015/sep/08/growing-concern-over-trade-in-fake-and-stolen-syrian-passports.

52. John Domokos & Patrick Kingsley, *Chaos on Greek islands as refugee registration systems favours Syrians*, THE GUARDIAN (Nov. 21, 2015), https://www.theguardian.com/world/2015/nov/21/chaos-greek-islands-three-tier-refugee-registration-system-syria-lesbos. Compare to another well-known story, in which extreme right-wing soldier "Franco A," received benefits under the fabricated identity of a Syrian asylum seeker for a year before his story broke out and created a significant bang in the media: Andrea Grunau, *A German right-wing extremist soldier's double lif*e, DEUTSCHE WELLE (DW) (Apr. 26, 2018), https://www.dw.com/en/a-german-right-wing-extremist-soldiers-double-life/a-43540639.

53. Compare with Ayelet Shachar, who has explored an analogy between birthright citizenship and inherited property. As she explains, "This perspective creates a space in which to explore membership entitlement in the broader context of today's urgent debates about global justice and the distribution of opportunity." AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 3 (2009).

54. CAPERNAUM, *supra* note 18.

55. *Id.*

56. Yasmine El Rashidi, *Growing up in Hell*, N.Y. REV. OF BOOKS (Jun. 6, 2019), https://www.nybooks.com/articles/2019/06/06/capernaum-growing-up-in-hell/.

to Europe with a ruthless smuggler working from a stall in the local market.[57] The smuggler is supposed to coordinate his delivery to Greece by boat, where Zain is expected to confront a screening interview.[58]

Zain learned about the plans of a Syrian refugee girl to embark on a boat to Greece and became jealous of her hopes: to deliver herself from degrading squalor and obtain a comfortable bed.[59] He symbolizes a global underclass of humans, whose lack of legal status places them *beneath* bona fide asylum seekers from areas of large-scale, mediatized crisis.[60] Syrian asylum seekers' needs for international protection are, at least, presumed to be minimally recognized by the law.[61] But a stateless Lebanese child who lives off selling powdered pain killers on the streets does not necessarily have a legal protection claim under current asylum law.[62] If, at least, he had fled from the Syrian civil war, he would have been elevated to the status of this Syrian girl. Presumably, he would have a better chance of being granted asylum in Europe.

From Fassin's health imposters to Labaki's Zain—including countless men, women, and children—"false declarations" reveal important aspects of a political imagination of what it means to be an individual human being.

II.
THE DUALITY OF THE INDIVIDUAL

Recent decades have seen an increase in literature on the legal status of the individual under international law.[63] But how is this status established? Contemporary legal theory offers two basic answers to this question.[64]

57. European policymakers have mobilized the way in which language (and accent) move with the asylum seeker in order to determine his or her 'true' origin. *See* Elena Faddian-Qasmiyeh, *Representations of Displacement from the Middle East and North Africa*, 28 PUB. CULTURE 457, 462. (2016).

58. CAPERNAUM, *supra* note 18.

59. *Id*.

60. *See* Schindel, *supra* note 16, at 18.

61. *See* Lambert, *supra* note 48.

62. MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 1–3 (2007) (discussing the difficultly of granting legal protection to those who have fled economic death and whether the Refugee Convention framework can overcome it, through creative interpretation).

63. *See generally* Simone Gorski, *Individuals in International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., (2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e829; *see also* KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW (2011); Chiara Giorgetti, *Rethinking the Individual in International Law*, 22 LEWIS & CLARK L. REV. 1085 (2018).

64. *See* ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW 211 (2016).

One basis, conceptualized in political theory and often in domestic public law, is that the source of individual rights is citizenship.[65] Every citizen is granted individual rights. If all States are appropriately constituted, individual rights would be protected on the global sphere as well.[66] According to this understanding, rights are realized through institutionalized settings that have an implicit basis in a social contract. Members of a political community are assumed to have come together and made reciprocal promises in a social contract to uphold the law and receive fundamental political protections in return. The classical theorist of this view is Thomas Hobbes, who is sometimes also considered the earliest theorist of legal positivism.[67] For Hobbes, "natural rights" are founded on an extremely thin basis, namely "that *each man protect his life and limbs as much as he can"* (emphasis in the original).[68] I can only be truly protected by their membership in a "commonwealth."

This view is implicit in international legal positivism as well. International legal positivism is often thought to have dominated the field during the nineteenth century, but probably only reached its full articulation in the twentieth century.[69] With many introductory international law courses still starting with the famous *Lotus* case in 1927,[70] positivism remains with us today. In this tradition, State consent, as reflected by treaty or custom, is the sole basis for international law. Positivism, thus, constructed "a system set up for States as the sole subjects of international law, while individuals were the subjects of the State and its internal laws."[71] International law is the law of interstate agreements. As such, individuals do not have a status under international law and are protected only indirectly as citizens of their own States. An injury to a citizen of a State is conceived of as an injury to the State, with the latter expected to respond by protecting its citizens, wherever they may be.

65. *See* ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 67 (2012).

66. This follows from David Singh Grewal's reading of the 'realist-utopian' tradition, particularly as reflected by Thomas Hobbes and Immanuel Kant. As Grewal explains, "both claimed that political changes at the domestic level could produce a peaceful world […] Contemporary democratic peace theory is, in this respect, much more continuous with prior social-contract theory than is usually recognized." *See* David S. Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L. J. 619, 663–64 (2016).

67. For a useful critical account of this view, *see* James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383, 390–93 (1987).

68. THOMAS HOBBES, ON THE CITIZEN 27 (Richard Tuck & Michael Silverthorne eds., Cambridge Univ. Press 2008) (1642).

69. *See* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 109 (1997).

70. The Case of the S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 10).

71. Giorgetti, *supra* note 63, at 1087.

Hobbes is often regarded as a theorist of absolutist sovereignty.[72] But his view that individuals are only granted legal status within their own commonwealths, and that international law is simply the law of mutual promises or treaties between those commonwealths, is not necessarily an illiberal view.[73] David Singh Grewal's reading aligns Hobbes' positivism with later social contract theorists, including Jean-Jacques Rousseau, Immanuel Kant, and John Rawls.[74] For theorists within this tradition, ascribing a status to the individual outside a State is a useless, or perhaps even a *harmful* exercise.[75] As Hobbes puts it, "[o]utside the circumstances of a commonwealth [*statum civitatis*] each man does indeed have the most complete liberty, but it does him no good. And the reason is that he who does all things of his own free will because he has his liberty, also suffers all things at the will of others, because they have their liberty."[76]

As some have argued in the context of immigration, an independent status for the individual under international law may have detrimental implications for the possibility of realizing democratic self-government.[77] If States are to foster mutually peaceful relations and stability, they must maintain inseverable links to their citizen-members.[78] An equality among citizens across borders, it is hoped, will be realized incrementally through an enlightened foreign policy.[79] Since it is unlikely that States will agree on a legal status for all individuals, such a status is likely to become a way of dressing specific State interests as universally-binding.[80] That, in turn, further risks inviting conflict.[81] With such assumptions it is not difficult to see how the recognition of refugee rights remains subsidiary to citizenship, and how unauthorized migration is *not* an adequate channel for global redistribution.

72. *See, e.g.*, Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2020 ed.), https://plato.stanford.edu/archives/fall2020/entries/hobbes-moral/ (Hobbes argued that to avoid the horrible prospect of governmental collapse and return to the state of nature, people should treat their sovereign as having absolute authority.")

73. Grewal, *supra* note 66, at 632.

74. *Id.*

75. *Id.* at 74 (explaining that "Hobbesian commonwealths can afford to be less bellicose than Hobbesian individuals because they are less at risk from the anarchy of the international system").

76. HOBBES, *supra* note 68, at 115–16.

77. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); *see also* Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE INT'L L. J. 392, 421 (2013). The premise is also common to left supporters of Brexit, *see* Richard Tuck, *The Left Case for Brexit*, DISSENT MAG. (Jun. 6, 2016), https://www.dissentmagazine.org/online_articles/left-case-brexit.

78. Grewal, *supra* note 66, at 652.

79. *Id.*

80. I take this as a central point of Samuel Moyn's critique of my previous work in human rights, and specifically his emphasis for a need of "theoretical pluralism." *See* Samuel Moyn, *The Embarrassment of Human Rights*, 50 TEX. INT'L L. J. F. 1 (2015).

81. Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1545 (1996).

But the individual is not only legally protected as the citizen of a specific State. Another option, which diverges somewhat from the positivist tradition but is perhaps more accepted in contemporary international law, is that individuals also enjoy a protected status as *humans*.[82] The view has its roots in the natural rights tradition.[83] Sir Hersch Lauterpacht—who drafted an international bill of rights, which later formed the basis for the European Convention on Human Rights—is often credited for carving a place for the individual in modern international law.[84] Anne Peters has pointed out that in a variety of contexts beyond human rights law, the individual is directly recognized as a subject of international law, regardless of their citizenship.[85] However, the most familiar context in which the individual is recognized is indeed that of human rights law. Under international human rights law, citizenship or nationality is *not* the basis for legal protection; notions of territoriality and jurisdiction are cited instead.[86] As Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]."[87] Inasmuch as membership is upheld as a justification for this territorial-jurisdictional rule, it is membership in *civil society*, not formal citizenship.[88]

It is for this reason that in Fassin's account of France migrants present on French territory could raise human rights claims before the European Court of Human Rights.[89] Such claims are potentially thicker than simply refugee protection. Beyond the rights set out by refugee law, they include the entire gamut of human rights claims, including non-discrimination, the right to family, privacy, religious freedom, and more. Zain is in Beirut and is, of course, not within European jurisdiction, but his plan is to set foot on Greek soil (or otherwise within Greek jurisdiction).[90] He will thus be able to make claims upon the European State, even though he is not a citizen. He does not have to be a member in the

82. KESBY, *supra* note 65, at 92.

83. HOBBES, *supra* note 68.

84. *See* SIR HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (Oxford Univ. Press 2013) (1945).

85. ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (Jonathan Huston trans., Cambridge Univ. Press 2016).

86. *See* ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS 220, 285 (2013).

87. International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR]. *See generally* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to* 25 LEIDEN J. INT'L L. 857 (2012) (discussing the philosophical exploration of this important aspect of human rights law).

88. *See* Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy*, 72 MOD. L. REV. 815, 8 (2009).

89. European Convention on Human Rights, art. 1, Apr. 4, 1950, E.T.S. 5.

90. *See* Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (Feb. 23, 2012), https://www.refworld.org/cases,ECHR,4f4507942.html.

demos—or in its supranational extensions, such as the European Union or the Council of Europe—to speak in the name of humanity.

When it comes to unauthorized migrants, a partial list of the instruments that protect humans independently of their citizenship includes the 1951 Refugee Convention and its 1967 Protocol, the 1984 Convention Against Torture, and the entire subfield of international criminal law.[91] The European Convention on Human Rights joins this list as part of a host of regional instruments.[92] An interlocutor from the interstate tradition may, of course, point out that all of these instruments are essentially interstate agreements, wherein obligations are only *indirectly* owed to individuals. Yet such an objection is not entirely convincing. Supranational institutions, customary international law, and peremptory norms (*jus cogens)* all seem to have firmly established a grounding for individuals directly on the international sphere.[93] Whether articulated in quasi-positive or moral terms, the natural rights tradition has lasted even in cultural contexts in which its religious basis is no longer taken for granted.

In short, the law grants both views significant purchase. In a context where the individual has a dual legal status, the border masquerades described above reflect a generalizable insight. When the former form of protection for the individual as a citizen under sovereignty is rendered defunct, the law may enable and even *invite* a substitution effect where those who can no longer obtain legal protections as individual citizens may seek to secure the individual rights of humans provided directly by international law. They may do so, for example, by appealing to obligations under international human rights treaties. As I argue below, this substitution effect is central to the mutual pressure that citizenship and human rights have exerted upon each other in the context of a protracted global "refugee crisis."

Both citizenship and human rights are, of course, formal statuses. As the ECtHR remarked in *N. v. The United Kingdom*, human rights do not in and of themselves ensure specific distributive outcomes.[94] Generally, they purport to be silent on questions of distributive justice, as they are assumed to eschew partisan politics.[95] And yet, basic material interests are a major driving force of migrant claims, whether they are framed in terms of citizenship or in terms of humanity. As was the case for France's migrant labor force, a gap persists between the fundamental conceptions of rights under law and the actual interests of

91. *See* Martti Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, 2 J. INT'L CRIM. JUST. 810, 815 (discussing "the role of individuals in international law'").

92. Ruti Teitel aptly labeled this body of law "Humanity's Law." *See* RUTI TEITEL, HUMANITY'S LAW (2013).

93. *See generally* Jean Allain, *The* Jus Cogens *Nature of Non-Refoulement*, 13 INT'L J. REFUGEE L. 533 (2001) (referring to the context of refugees).

94. N. v. United Kingdom, *supra* note 42, ¶ 24.

95. For a critique, *see generally* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

migrants.[96] On the other hand, material interests can be presented through both categories—in different ways.

Global inequality, authoritarian governments, foreign military intervention, and the effects of climate change, have all rendered the citizenships of many around the world effectively useless. Such citizenships are either empty placeholders, with the corresponding States unable to ensure that their citizens can fulfill their most basic needs; or they are sometimes predatory toward their holders, such as, when the relevant States refuse to extend protections to members of specific groups.[97] Such conditions lead to consequences observable in cases of false or concealed identity: those holding citizenships with negative value may instead avail themselves of the second basis for individual protection; namely, their status as humans.

Masquerading as Somalis, the unauthorized migrants we encountered at the border seemed to be trying to substitute their citizenship in a specific State, the Dominican Republic, with that of *another specific State*, Somalia. But that is not exactly the case. Rather than retaining its institutional specificity as a State, "Somalia" functions here as a symbol of crisis: one that has become so awful as to concern international institutions and merit a protection for all humans coming from there. To follow Hilary Charlesworth, this is the kind of crisis that international lawyers savor—an opportunity to display their "universal humanism."[98] The substitution, in other words, is replacing Dominican citizenship with *the status of subjects of such universal humanism*. It is precisely being human—sans the added layer of citizenship.[99]

The migrant workers that Fassin writes about try to establish a protection granted to all humans within French territory, instead of returning to the State where they originated.[100] Zain, the young protagonist of *Capernaum*, found himself in a comparable condition.[101] He is stateless, and State authorities have failed to give him access to the domestic social contract. This does not however, in itself, mean that international human rights law provides him with an alternative grounding. His inchoate attempt to pose as Syrian is an attempt to disguise as a member of a group that is *recognized* as requiring direct international protection. The fact that he doesn't even end up pursuing this option in the film is less important. The film unmistakably captures the tragedy of what it means to rely on one's own humanity while making demands.

96. *See* FASSIN, *supra* note 17, at 87.

97. *See generally* DIMITRY KOCHENOV, CITIZENSHIP (2019) (discussing the majority of world citizenships as imposing liabilities upon their holders).

98. *See* Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 388 (2002).

99. *See generally* Peter J. Spiro, *Citizenship as Property, Not So Valuable* 7 LES ATELIERS DE L'ETHIQUE / THE ETHICS F., 63 (2012) (highlighting how different statuses may be preferred according to their material value in his review of Ayelet Shachar's *Birthright Lottery*).

100. FASSIN, *surpra* note 17, at 87–108.

101. CAPERNAUM, *supra* note 18.

All these people, whether real or fictional, determined they may gain from severing their ties to a specific nationality. If they choose another national identity, it is because that identity has come to be associated with the globalized image of a victim.[102] They seek inclusion in categories of people who enjoy the protections that are recognized as forms of membership in humanity, or rather, its historically and culturally specific imagination.[103] Far from being a natural category that simply includes all humans, "humanity" here should be understood as a construct of the political imagination.[104]

III. CITIZENSHIP AS MASK

In her 1943 essay, *We Refugees*, Hannah Arendt describes the personal experiences of her generation of Post-World War II German Jews who fled Nazi persecution and reached the United States.[105] She discusses how, before they reached America, these people often made fraught attempts to adopt the trappings of multiple European citizenships.[106] Arendt, thus, tells the story of Mr. Cohn from Berlin, who wandered from his hometown to Prague, and from there to Vienna and Paris—each time confronting new forms of persecution and social exclusion.[107] Mr. Cohn "had always been a 150 percent German, a superpatriot."[108] He tried to become an authentic citizen of these places and thereby gain legal protections granted to citizens of specific countries. Yet, time and time again, his attempts to gain citizenship in a nation-state failed.[109]

As Arendt later explains, these failures stemmed from the very structure of European citizenship.[110] In Europe, citizenship meant belonging in a nation-state. Such citizenship is not established by a social contract among equals, but rather underwritten with the pre-political blood, cultural, or religious ties between

102. *Compare* Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood* 76 L. & CONTEMP. PROBS. 235 (2013), *with* Christine Schwöbel-Patel, *The "Ideal" Victim of International Criminal Law* 29 EUR. J. OF INT'L L., 703 (2018), *and* Christine Schwöbel-Patel & Deger Ozkaramanli, *The Construction of the "Grateful" Refugee in Law and Design*, 4 QUEEN MARY HUM. RTS. REV. (2017).

103. *See generally* Bishupal Limbu, *Illegible Humanity: The Refugee, Human Rights, and the Question of Representation*, 22 J. REFUGEE STUDS., 257 (2009).

104. *See generally* JUDITH BUTLER, PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE 33 (2004).

105. *See* Hannah Arendt, *We Refugees*, *in* THE JEWISH WRITINGS 264–74 (Jerome Kohn & Ron H. Feldman, eds., 1st ed. 2007).

106. *Cf.* Shompa Lahiri, *Performing Identity: Colonial Migrants, Passing and Mimicry Between the Wars*, 10 CULTURAL GEOGRAPHIES 408 (2003).

107. Arendt, *supra* note 105.

108. *Id.* at 271.

109. *Id.*

110. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 165–67 (1973).

members of a *nation.*[111] Mr. Cohn's travails reflect how the very notion of a nation may result in discrimination. If they do not have a certain ethnic or cultural background, citizens will not be treated as equal members; they will not receive the protections granted by the law to individuals *as citizens*. Apprehending the discriminatory cultural underwriting of citizenship, they resort to disguise. Yet the United States, Arendt explained, was not a nation-state. It was "united neither by heritage, nor by memory, nor by soil, nor by language, nor by origin. . . . Only by one thing … simple consent to the Constitution."[112] Arendt and her generation of European refugees could gain access into the American social contract and truly become equal.[113]

Arendt's treatment of the subject in *We Refugees*, however, did not put an end to her interests in disguise.[114] The theme reappeared later in her work, in an argumentative form. Consider several passages from Arendt's *On Revolution*.[115] Here, Arendt proposed the outline of a theory of *citizenship as mask*.[116] Surprisingly, and perhaps unintuitively, there is a certain inversion in the text, when compared to the earlier *We Refugees*. Unlike citizenship in the European nation-state, which requires pre-political bonds and defies Mr. Cohn's hopeless resort to disguise, in *On Revolution* the mask is a condition *for* citizenship. Arendt's conception of citizenship harks back to Karl Marx's (very different) conceptualization in *On the Jewish Question*, which I return to below.[117]

Arendt's suggestion is that if citizenship is to provide an effective protection for individuals, as members of a political community of equals, they must somehow be masked.[118] Arendt's starting point in the relevant part of *On Revolution* is the etymology of the Latin word *persona*: "In its original meaning, it signified the mask ancient actors used to wear in a play . . . . The mask as such obviously had two functions: it had to hide, or rather replace, the actor's own face and countenance, but in a way that would make it possible for the voice to sound through."[119] Arendt explains the relationship between her theatrical observation, and the notion of a legal person:

> The distinction between a private individual in Rome and a Roman citizen was that the latter had a *persona*, a legal personality, as we would say; it was as though the

111. *Id.*

112. *See* HANNAH ARENDT, HANNAH ARENDT: THE LAST INTERVIEW AND OTHER CONVERSATIONS (2013).

113. To be sure, the American immigration system was, in fact, then, as it is now, rife with racism. *See* Sherally Munshi, *Race, Geography, and Mobility,* 30 GEO. IMMIGR. L.J. 245 (2015).

114. HANNAH ARENDT, ON REVOLUTION 97 (Viking Press 2006) (1963).

115. *Id.*

116. Paraphrasing Leora Bilsky, *Citizenship as Mask: Between the Imposter and the Refugee*, 15 CONSTELLATIONS 72 (2008).

117. Karl Marx, *On the Jewish Question, in* THE MARX-ENGELS READER 26 (Robert C. Tucker ed., 1978).

118. ARENDT, *supra* note 114.

119. *Id.*

> law had affixed to him the part he was expected to play on the public scene, with the provision, however, that his own voice would be able to sound through. The point was that 'it is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by law, which appears before the law.' Without his *persona*, there would be an individual without rights and duties, perhaps a 'natural man' – that is, a human being or *homo* in the original meaning of the word, indicating someone outside the range of law and the body politic of citizens, as for instance a slave – but certainly a politically irrelevant being.[120]

Arendt had a well-known ambivalence about the State, yet the metaphor of the masked person refers to the protection of a person *as a citizen*.[121] The individual covered by a mask is protected in a social contract of equals. Unlike the citizen in the nation-state, which purports to be based upon pre-political ties, this citizenship is artificial, a man-made outcome of agreement and institutional design. Citizenship resembles a mask precisely due to this artifice. And, because such equal citizenship establishes a political community, each citizen can meaningfully participate through discourse: by covering their faces, the true voices of citizens are revealed. As for the individual member of humanity, Arendt suggests that ultimately, there is no such thing. At best, such an individual is protected by natural law. But, as in Hobbes' political theory, natural law grants no meaningful protections whatsoever; the individual member of humanity might as well be "a slave".

To be equal, politically, is to equally enjoy the privilege and the protection of an artificial *façade*, covering our complexion but leaving us a hole for speech. This conception of citizenship as a mask is intimately related to Arendt's private-public distinction.[122] For Arendt, citizenship allows us to shed our contingent, and essentially *private*, characteristics.[123] The latter distinguish and differentiate among us. Private characteristics may tie us together in relationships of friendship or of love (and probably those of dislike and of animosity, as well). However, as much as these private characteristics define who we are to our friends, they have no place in politics. When we enter the public realm, we must be made equal *artificially*. This formal equalization is precisely what allows our voices to resound. We act politically through participation in a community of equals, and through membership in a social contract. It is membership in this social contract that secures our protections under the law.

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120. Arendt, *supra* note 105, at 97; *see also* Ayten Gündoğdu's masterful discussion of legal personhood and Arendt's understanding of the mask of citizenship in AYTEN GÜNDOĞDU, RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS 99–107 (2015).

121. KESBY, *supra* note 65, at 77–78.

122. HANNAH ARENDT, THE HUMAN CONDITION 22–78 (Univ. of Chi. Press, 1998) (1958).

123. ARENDT, *supra* note 114, at 96–98.

"Mere" humanity is removed from the law in this argument.[124] Humanity is private and associated with material existence.[125] It signals the loss of all forms of protection that are normally granted by citizenship. While public life is an artifice, private life is natural. While the life of a citizen allows one to speak in public, the life of humans renders one publicly mute and irrelevant.[126] Arendt did not write much about health, but it is safe to assume that within her typology, a medical condition belongs to the natural, private, and apolitical aspect of experience. But the border masquerades described above shed a different light on Arendt's conceptual distinctions. Just like citizenship, humanity, too, can function as a mask. In a world where the status of the individual is directly anchored in international law, humanity—regardless of citizenship—can become the great equalizer.[127]

Even if "all men are created equal" within the context of citizenship; within a global context, all citizenships are not equal.[128] Arendt did not consider that some of the world's citizenships do not grant those who hold them the minimal protections that make citizenship worth having.[129] This reverses Arendt's categorization, revealing a substitution effect between citizenship and human rights: when citizenship is defunct, exposing one's mere humanity becomes a way of participating in a global political community.[130] Fassin's migrants project political participation—for a certain period and under difficult circumstances—by transforming their own private medical condition into their public voice.[131] When one seeks to appear on the global public sphere as a member of humanity, one's true citizenship may become a quintessentially *private* matter.

IV.
HUMANITY AS MASK

What, then, are the conditions that made Somali, Afghan, or Palestinian nationalities desirable at a specific historical moment? To assume such identities

124. *See* HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 269 (Harcourt Inc., 1976) (1951); *see also* Kesby, *supra* note 65.

125. ARENDT, *supra* note 122.

126. On speech and muteness, *see* Arendt, *supra* note 88, at 26.

127. *See* GÜNDOĞDU, *supra* note 120 (discussing the implications of the international legal status of the individual for Arendt's theory).

128. KOCHENOV, *supra* note 97. Notwithstanding the principle of "sovereign equality," which is central to public international law.

129. *See* Macklin, *supra* note 19, at 349–50.

130. *Cf.* MANN, *supra* note 64.

131. Such action can be characterized, following Catherine Malabou, as a form of "biopolitical resistance." *See* Catherine Malabou, *One Life Only: Biological Resistance, Political Resistance*, trans. Carolyn Shread, 42 CRITICAL INQUIRY 429, 429–30 (2016); *see also* Schindel, *supra* note 16, at 23 (arguing that "[t]he paradox of this humanitarian operation is that those who qualify for admission do so precisely in virtue of their disqualification, since their status is being degraded to that of *a life to protect.*" [emphasis in the original]).

means, first and foremost, putting a spoke in the wheels of the deportation machine; ceasing for a moment its constant churn, and perhaps being released from detention.[132] After the immediate phase, it may also mean finding a job, earning some money, and participating in the realm Marx called "civil society."[133] But, it also means performing a historically-specific understanding of what it means to be human. It will, thus, affect who receives direct protection of their membership in humanity under international law. There are three observations worth considering in this example on how such an inability to be deported works.[134]

One aspect of this inability to be deported has to do with the existence of ungoverned spaces and stateless territories across the globe. There are certain people that cannot be returned to their countries simply because their countries are not functioning, and so do not exist as such (*de facto* or *de jure*). If effective control over territory is a condition for statehood,[135] then many populated territories around the world may not be States (even if from the perspective of international law, they are still formally recognized as States until another State is established.)[136] With regard to a significant percentage of the world, such definitions are purely fictitious.[137] Consider a few examples. Commentators who have written about Somalia express the view that it is not a sovereign State.[138] Currently, Libya may also be considered an ungoverned territory.[139] People who migrated from, or through, such countries cannot be returned to them because these States are purely nominal: there is no State to return them to.[140] This is also

132. *See* Macklin, *supra* note 19, at 345 (discussing the *de facto* stateless (the *apatride*) and analyzing relevant case law on detention, from Australia, the US, and the UK).

133. Marx, *supra* note 117, 34–36.

134. The analysis that follows is quite similar to that in MAAIKE VANDERBRUGEN ET AL., POINT OF NO RETURN: THE FUTILE DETENTION OF UNRETURNABLE MIGRANTS (2014), http://pointofnoreturn.eu/unreturnable/.

135. *See* Montevideo Convention on the Rights and Duties of States, art 1, Dec. 26, 1933, 49 Stat. 3097, 165 LNTS 19. For the purposes of legal responsibility, *see generally* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgement, 1986 I.C.J. 14 (June 27).

136. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 667–91 (2d ed. 2007).

137. *See* Brian Finuncane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT'L L. 35, ¶ 1 (2012) ("Fictitious states possess international legal personality but they lack effective control over their territories and populations. Examples of fictitious states include Pakistan, Yemen, and Somalia."); *see also* Nii Lante Wallace-Bruce, *Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law,* 53 NETH. INT'L L. REV. (2000); *see also* Dapo Akande, *Recognition of Libyan National Transitional Council as Government of Libya*, EJIL: TALK! (Jul. 23, 2011), https://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/.

138. *See, e.g.*, Yemi Osinbajo, *Legality in a Collapsed State: The Somali Experience*, 45 INT'L & COMP. L.Q., 910, 910–11 (1996).

139. *See, e.g.*, Tarek Megerisi, *Governing Ungoverned Spaces: The Case of Libya*, ATL. CMTY. (Mar. 7, 2019), https://atlantic-community.org/governing-ungoverned-spaces-the-case-of-libya/#.

140. *Cf.* Macklin, *supra* note 19, at 347–49.

true, in some sense, about Palestine. Though Palestine has in recent years been recognized as a State by many countries and international organizations, it has no *de facto* control over its occupied territory.[141] Israel is actively preventing it from functioning as an independent State.[142]

A second aspect of this non-deportability more directly relates with the status of the individual under international law. Human rights rules and standards come into play, specifically concerning the risk that one may face if deported.[143] Such a risk is part of the story in all three examples above–Afghanistan, Somalia, and Palestine. People coming from countries such as these may face a high probability of harm upon return, which they have a legal right to be protected from. Though anchored in interstate relations, the individual's right to be protected from harm is not understood merely as an interstate obligation.[144] Rather, it is a reflection of an individual's status as a member of humanity. The relevant rule is *non-refoulement*, enshrined in Article 33 of the 1951 Refugee Convention.[145] The rule's outer limits are constantly negotiated when it comes to human rights law, particularly in regards to the prohibition of torture and inhuman and degrading treatment.[146]

Today, anyone present in Europe who is at risk of suffering from torture or inhuman and degrading treatment may enjoy a protection from *refoulement.*[147] While its status as peremptory law (*jus cogens*) is not entirely clear,[148] the rule of *non-refoulement* is not ordinarily understood as an interstate obligation. Several catastrophic regions around the world stand out as necessitating *non-refoulement* protections for anyone who leaves them.[149] In such cases, presumptive protection is often collectively granted.[150] Following Charlesworth, these regions are crises

141. *See* Paul Eden, *Palestinian Statehood: Trapped Between Rhetoric and Realpolitik,* 62 INT'L & COMP. L.Q. 225 (2013).

142. *See, e.g.*, AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 253 (2017) (asking the pertinent question: "Can a state that has never been a state before emerge under occupation, when the ability to exercise control over the territory, one of the conditions of statehood, *is in fact denied because of the occupation*? [emphasis added]).

143. Due to the principle of *non-refoulement*, *see*, *e.g.*, Clare Frances Moran, *Strengthening the principle of non-refoulement*, INT'L J. OF HUM. RTS. 1–21 (2020).

144. Allain, *supra* note 93.

145. Convention Relating to the Status of Refugees, art. 33, Jul. 28, 1951, 189 U.N.T.S. 137.

146. *See* Cathryn Costello, *The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches*, *in* HUMAN RIGHTS AND THE REFUGEE DEFINITION 180 (Bruce Burson & David James Cantor, eds., 2016); Jari Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*, 19 INT'L L J. REFUGEE L. 639 (2007).

147. *See*, *e.g.*, Saadi v. Italy*,* App. No. 37201/06, (Feb. 28, 2008), https://hudoc.echr.coe.int.

148. Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT'L L., 273 (2016).

149. Under the doctrine of "complementary" or "subsidiary" protection. *See, e.g.*, JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007); Marjoleine Zieck, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status (UNHCR)*, 54 INT'L LEGAL MATERIALS 1115, 1129 (2015).

150. *Id.*

of the "public realm, of war and conflict and violence, while crises now occur under the glare of television lights."[151] Examples can be found in places like Somalia, Afghanistan, and perhaps, Palestine. Today Syria,[152] Libya,[153] and Myanmar[154] may join this list. International organizations, including the United Nations High Commissioner on Refugees (UNCHR), are highly influential in determining the applicable risk assessments.[155] But, of course, other less visible, yet equally catastrophic forms of structural violence are prevalent elsewhere.[156] The latter violence is "seen as part of the status quo, and not truly the business of international law."[157] While asylum seekers arriving from the former category have come to stand for the suffering of humanity, migrants from the latter category are prone to be labelled as "economic."[158]

A third aspect of non-deportability is more practical. It has to do with whether the State receiving migrants has the necessary level of cooperation with the "sending" or "transit" State to conclude deportation. It is not enough that one is illegally present, or that their State of origin exists as a functioning State, but there normally needs to be a State *willing* to accept that person back.[159] For example, it has often been the case that the Israeli government will not accept Palestinians back.[160]

In the last two decades, bilateral and multilateral "readmission agreements" and "safe third country agreements" have established an international legal

151. Charlesworth, *supra* note 98 at 388.

152. *See* UNHCR position papers quoted in S.Z. v. Greece ECtHR, *supra* note 46, ¶¶ 30–32, including *Position on Returns to the Syrian Arabic Republi*c and *International Protection Considerations with regard to people fleeing the Syrian Arab Republic*.

153. *See* U.N. HIGH COMM'R FOR REFUGEES (UNHCR), *Protection considerations with regard to people fleeing from Libya - UNHCR's recommendations* (Mar. 29, 2011), https://www.refworld.org/docid/4d959bf62.html.

154. U.N. NEWS SERV., *New identity cards deliver recognition and protection for Rohingya refugees in Bangladesh*, (Jul. 6, 2018), https://www.refworld.org/docid/5b83c73f4.html.

155. *See, e.g*,. U.N. HIGH COMM'R FOR REFUGEES (UNHCR), *Roundtable on Temporary Protection: 19-20 July 2012. International Institute of Humanitarian Law, San Remo, Italy: Discussion Paper*, (Jul. 20, 2012), https://www.refworld.org/docid/506d8ff02.html.

156. *See* Johan Galtung, *Violence, Peace, and Peace Research*, 6(3) J. OF PEACE RES. 167 (1969) (discussing structural violence).

157. Charlesworth, *supra* note 98 at 389.

158. *See generally* SCOTT VEITCH, LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING (2007) (regarding the separation between the political and the economic, and the legal production of suffering).

159. *See* Jama v. Immigr. and Customs Enf't, 543 U.S. 335 (2005), and the informative discussion of its aftermath in Macklin, *supra* note 19, at 350; *see also* Arjen Leerkes & Marieke Van Houte, *Beyond the deportation regime: differential state interests and capacities in dealing with (non-) deportability in Europe*, 24 CITIZENSHIP STUD. 319, 324 (2020) (emphasizing the "de-facto compliance of origin states with readmission agreements" as a condition for concluding deportation).

160. *See Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries, supra* note 9, at 110.

infrastructure for deportations.[161] Such agreements have, at times, allowed States to deport migrants to States that are not their own, where they may have only a few ties.[162] "Hosting" and detaining unauthorized migrants has consequently become a kind of global market for services.[163] Alexander Aleinikoff asked in 2016, "Is it possible to imagine a day where communities will compete for refugees, knowing that refugees bring labor, skills and access to significant public and private funding for development?"[164] Three years later, the answer seems clear: developing and poor States receive consideration in the form of aid money or other assistance for "cooperating" with wealthier States and holding their unwanted populations.[165] As was recently the case between the United States and Mexico, rarely does the diplomatic arm-twisting in such processes become publicly visible. More often it is kept under the table, or at some distance from the former US President's Twitter feed.[166]

The practice of some migrants who try to shed their citizenship is closely related to the way readmission agreements work. By becoming "merely human," rightless migrants can try to prevent their deportation through such agreements. Dominicans who dress up as Somalis strategically make that decision. They are implicitly saying: *we are not citizens* of a functioning State*, we are merely human*. They understand that the human does not fit as comfortably into bureaucracy as the citizen. Moreover, the specific costumes they choose are important. They are costumes of people who enjoy the individual protections granted to humans.[167] They are the disguises of humans that do not have the safety net of statehood to fall back on.

161. *See* Thomas Spijkerboer, *The Global Mobility Infrastructure* 20(4) EUR. J. OF MIGRATION L., 452 (2018); *see also* Leerkes and Van Houte, *supra* note 159, at 329.

162. *See* Shani Bar-Tuvia, *Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies*, 30 INT'L J. REFUGEE L. 474, 486 (2018) (stressing deportation agreements to countries where refugees did not "transit").

163. The clearest example is the so-called 'EU-Turkey Deal', *see* EUR. COUNCIL, *EU-Turkey Statement* (Mar. 18, 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/; *see also* Caitlin L. Chandler, *Inside the EU's Flawed $200 Million Migration Deal with Sudan*, NEW HUMANITARIAN (Jan. 30, 2018), https://www.thenewhumanitarian.org/special-report/2018/01/30/inside-eu-s-flawed-200-million-migration-deal-sudan.

164. T. Alexander Aleinikoff, *Rethinking the International Refugee Regime*, 41 YALE J. INT'L L., 1, 8 (2016).

165. JEAN-PIERRE CASSARINO, UNBALANCED RECIPROCITIES: COOPERATION ON READMISSION IN THE EURO-MEDITERRANEAN AREA (2010).

166. US President Donald Trump declared on Twitter: "Now with our new deal, Mexico is doing more for the USA on Illegal Immigration than the Democrats. In fact, the Democrats are doing NOTHING, they want Open Borders, which means Illegal Immigration, Drugs and Crime." Donald J. Trump (@realDonaldTrump), TWITTER (June 10, 2019, 3:00 AM).

167. Juxtapose this Muslim disguise to Giorgio Agamben's discussion of the *Muselmann* (literally "the Muslim"). GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 41 (Zone Books, 4th ed. 2008).

Contrary to Arendt's contention, the human is not constructed "outside the range of the law."[168] The legal construction of the human is surely one of a precarious entity. In many countries—maybe even all of them—the legal protections granted to humans are inferior to those granted to citizens.[169] Yet, some rules, such as those of international human rights law, seem to protect the human qua human, regardless of State consent.[170] Such rules grant real-life humans the opportunities to come close to the State's body politic and enjoy its shade. Other rules, such as those generated by readmission agreements, seek to exclude the human, keeping her at an arm's length from the body politic she wishes to access. However, they can typically do so only after determining that a given human is not only human, but a citizen of a State for which the readmission agreement applies.[171] In such cases, citizenship becomes predatory, and determining the nationality of migrants may become a way of dehumanizing them.

These rules, whether inclusive or exclusive, are interwoven in a thick legal tapestry, constructing a status for the individual human under international law. Legally, the results may differ considerably: the protection of *non-refoulement* is very different from recognition as a Convention refugee. The latter comes with a larger set of rights, including freedom of movement, a work permit, and greater access to health care and education.[172] More generally, a commitment to protect humans and the bureaucratic need to deport unwanted humans create legal ambiguities, gaps, and overlaps between contradictory rules. Those rules, in turn, generate a significant measure of uncertainty as to whether one will stay in, or leave, the country she chose to clandestinely enter, or where she will end up.

There are plenty of ways to shed one's citizenship and instead opt for the uncertain legal status of a human. On the most general level, crossing a border and placing oneself in the territory or control of another State may amount to such

168. GÜNDOĞDU, *supra* note 120.

169. But, consider the envy Eastern German racist protestors have expressed due to the so-called 'welcome culture,' mainly in West Germany. Jefferson Chase, *Lessons from Chemnitz: Eastern Germany's Right Wing Protestors Awash in Anxiety*, DEUTSCHE WELLE (DW) (Sept. 2, 2018), https://www.dw.com/en/lessons-from-chemnitz-eastern-germanys-right-wing-protesters-awash-in-anxiety/a-45326613.

170. *See* MANN, *supra* note 64,at 188; ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 99 (1st ed. 2017) (*see also* sources cited herein).

171. SERGIO CARRERA, IMPLEMENTATION OF EU READMISSION AGREEMENTS: IDENTITY DETERMINATION DILEMMAS AND THE BLURRING OF RIGHTS 13–18 (2016).

172. U.N. HIGH COMM'R FOR REFUGEES, *Protecting Refugees: questions and answers*, (Feb. 1, 2002), https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html ("A refugee has the right to safe asylum. However, international protection comprises more than physical safety. Refugees should receive at least the same rights and basic help as any other foreigner who is a legal resident, including freedom of thought, of movement, and freedom from torture and degrading treatment.

Economic and social rights are equally applicable. Refugees should have access to medical care, schooling and the right to work.").

action.[173] Another common way of doing so is by destroying one's travel documents[174] If I do not have a passport, I have at least temporarily severed my links to any specific citizenship. Because my citizenship is no longer immediately identifiable, I can now remove myself from the most effective legal infrastructures of deportation. I can present myself with a mask of humanity at the doorstep of another country. The hope is that the mask of humanity will allow my voice to be heard.[175] Contrary to the very fact of presence, which may grant access to an asylum application, and thus provide a way of making a claim, my true citizenship remains an utterly private matter. Some migrants have even reportedly tried to abrade their own fingertips.[176] As a result of border control increasingly relying on biometric data, the symbolic value of such a gesture may outlast its efficiency.[177]

Additionally, the practice of lip-sewing, which migrant detention centers around the world regularly employ, is a revealing case in point.[178] When she described citizenship as a kind of mask, Arendt referred to the ancient Roman design.[179] These terracotta masks concealed the face, but had a large opening for the mouth, so the actor's voice could be heard.[180] Imagining Athenian democracy, Arendt thought of speech as the paradigmatic medium for politics.[181] Diametrically opposed to Arendt's ancient Roman mask, sewing one's lips leaves one's face exposed. It is the mouth that must be shut, and speech is thus prevented.

173. MANN, *supra* note 64, at 101 (on migration as a self-help remedy).

174. Peter Hille, *Thousands of deportations fail due to lack of papers*, DEUTSCHE WELLE (Apr. 2, 2018), https://www.infomigrants.net/en/post/8404/thousands-of-deportations-fail-due-to-lack-of-papers.

175. Thus, broadening the basis for political participation beyond the *demos*. *See, e.g.*, Tamara Caraus, *Migrant Protests as Acts of Cosmopolitan Citizenship*, 22(8) CITIZENSHIP STUD. 791 (2018).

176. L. Sears, *Asylum Seekers Sanding off Fingerprints: Report*, THE LOCAL CH (Feb. 6, 2012), https://www.thelocal.ch/20120206/2485.

177. Steve Scherer, "*No Fingerprints!" Chant Migrants in Italy as EU Cracks Down,* REUTERS (Dec. 17, 2015), https://www.reuters.com/article/us-europe-migrants-lampedusa-fingerprint-idUSKBN0U02H720151217.

178. *See* Jenny Edkins & Véronique Pin-Fat, *Through the Wire: Relations of Power and Relations of Violence*, 34(1) MILLENNIUM: J. OF INT'L STUD., 1 (2005); Pierre Monforte & Pascal Durour, *Comparing the Protests of Undocumented Migrants Beyond Contexts: Collective Actions as Acts of Emancipation*, 5(1) EUR. POL. SCI. REV., 83, 85 (2013).

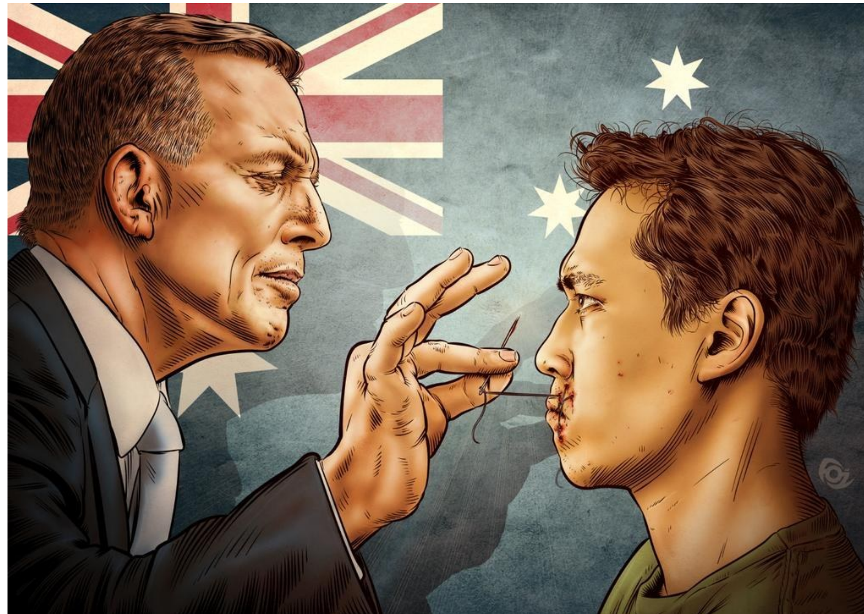
179. ARENDT, *supra* note 114.

180. *Id.*

181. *See* ARENDT, THE HUMAN CONDITION, *supra* note 122, at 25–27.

Whereas the voice was effective within a political community, presence under State jurisdiction triggers the protections of international human rights law.[182]

Former Australian Prime Minister Tony Abbott Sewing the Lips of an Asylum Speaker, by James Fosdike (2015).



Another related set of practices that migrants have engaged in—perhaps more familiar from prisoners' protest vocabularies—are hunger strikes and self-harm.[183] Posing as a refugee from a war-torn country and seeking collective protection appeals to the consciousness of humanity associated with the crisis. Hunger strikes and self-harm are appeals to humanity evocative of the presence of a suffering human body. They echo Fassin's examples discussed above;[184] as Virginia Mantouvalou comments, in *N v. United Kingdom*, the ill, HIV-positive applicant was not considered close enough to death to be able to stay her removal.[185] Hunger strikes and self-harm bring migrants and asylum seekers closer to dying.

182. *Cf.* Paulina Ochoa Espejo, *Taking Place Seriously: Territorial Presence and the Rights of Immigrants*, 24 J. POL. PHIL. 67, 68 (2016) (arguing that "Physical presence in specific places can confer political rights and obligations on individuals.")

183. *See* Richard Bailey, *Up Against the Wall: Bare Life and Resistance in Australian Immigration Detention* 20 L. & CRITIQUE 113, 130 (2009).

184. FASSIN, *supra* note 17.

185. *See* Mantouvalou, *supra* note 42, at 817.

Often, to be human means to be "vulnerable"; that is, vulnerable according to a specific set of priorities that reflect the proclivities and biases of international human rights law.[186] For example, a victim of torture is often able to substantiate a protection claim and become non-deportable. In the United Kingdom, a complex discussion has emerged on the forensics of torture and its relationship to deportability. Take the case of Mr. KV, an asylum seeker who said he had been active in the Tamil Tigers.[187] Mr. KV appealed to the UK Supreme Court. The issue was whether to rely on expert testimony that found Mr. KV's scars were "SIBP"–"self-inflicted by proxy."[188] A finding of SIBP means that an asylum seeker has intentionally been tortured by a service giver, in order to leave a mark that would help establish a protection claim.[189] Refugee advocates say such government allegations are "inherently unlikely," and perhaps they are right.[190] In Mr. KV's case, both the trial and appeals courts attempted to discern precisely how the striped hot iron burns on his back were imprinted, relying on their pattern and shape.[191] The Supreme Court finally remitted Mr. KV's appeal to the Upper Tribunal for fresh determination, while giving considerable weight to the fact that SIBP injuries are likely to be extremely rare.[192]

Evidence of torture is significant when demonstrating that one would be in danger if deported; hence the possible motivation to forge evidence.[193] At the same time, the fact that torture plays such a central role in immigration proceedings reflects the heightened status of the prohibition on torture in international law. Victims of torture are protected not only because their rights have been violated, but because they suffered a violation of enormous cultural magnitude.[194] While torture becomes a kind of "trump card" in the game of

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186. There is a large literature in law and the humanities on cultural biases reflected in human rights law. *See, e.g.,* José-Manuel Barreto, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto*, 3 TRANSNAT'L LEGAL THEORY 1–2 (2012) (addressing the need for "a radical reconceptualization of the human rights paradigm" due to its Eurocentric progeny); MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 10 (2002) (discussing the "demining metaphor" of human rights, "pitting savages, on the one hand, against victims and saviors, on the other").

187. *KV (Sri Lanka) v Sec'y of State for the Home Off.* [2019] UKSC 10, https://www.supremecourt.uk/cases/docs/uksc-2017-0124-judgment.pdf.

188. *Id*. at 2.

189. Bernard Robertson & Charles Berger, *Interpreting Evidence of Torture*, 27 MED. L. REV. 687, 688 (2019).

190. Michael Spencer, *Self-inflicted torture by proxy: inherently unlikely*, UK HUM. RTS. BLOG (Mar. 15, 2019), https://ukhumanrightsblog.com/2019/03/15/self-inflicted-torture-by-proxy-inherently-unlikely/.

191. *KV (Sri Lanka) v Sec'y of State for the Home Off., supra* note 187, at 4.

192. *Id*.

193. *See generally* U.N. HIGH COMM'R FOR REFUGEES (UNHCR)*, UNHCR and IDC (2016), Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems* (2016), https://www.refworld.org/docid/57f21f6b4.html.

194. PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2008) (asking the simple, yet provocative question, "if we are quite willing to kill, why not torture?").

evading deportation, evidence that one has suffered abject poverty, or a lack of access to health or education, means nothing. No asylum seeker ever forges evidence that they cannot possibly sustain themselves in their country. For a migrant who engages in SIBP to avoid being returned to abject poverty, it is apparent that in their view abject poverty is worse than being tortured.[195]

As I have emphasized, wearing humanity as a mask is not only about the law–refugee law, or international human rights law, more generally. Political imagination of what it means to protect "humanity" is also at stake. Whoever wants to avail herself of the protections granted to humanity must become human in a way that comports with a cultural imagination in which human rights are central. Karl Marx famously observed this when he commented, "it is not man as citizen but man as bourgeois who is taken to be the true and authentic."[196] For contemporary thinkers in the Global North, the relevant imagination of humanity is often consonant with a specifically liberal, Anglo-European understanding of human rights.[197] Being human then is associating oneself with one of various identities that liberalism champions: a member of the opposition in a non-democratic context or a member of a persecuted minority. Closely related are protections for a woman or a child (hence, the frequent reports about misrepresentations of age among migrants.)[198] And if those do not work, at the very least, one may cut one's links to a specific citizenship. This means not only interfering with the bureaucracy of deportation, but also fitting oneself into a conception of humanity as a stateless, peripatetic, and globally homeless community—which we all belong to on some level.

Of course, one may contend, that these methods of cutting the link between a person and their citizenship do not bring anyone "within the range of law"[199] for a simple reason: they are deceptive and sometimes illegal choices. No one enters the range of law by committing perjury. While such an argument may sound compelling, it is ultimately unconvincing. Even if one does have an obligation to tell the truth, it remains unclear whether that obligation necessarily overcomes other considerations. One such consideration is a person's claim that no matter what they say, they deserve to have a life worth living. It is inevitable that people misrepresent parts of their accounts, but their "half-truths are not thought to undermine the moral basis of the claim."[200]

195. *Cf.* Josh Rogin, *Cheney: We waterboarded U.S. soldiers, so it's not torture*, FOREIGN POL'Y (Sept. 9, 2011) https://foreignpolicy.com/2011/09/09/cheney-we-waterboarded-u-s-soldiers-so-its-not-torture/.

196. Marx, On the Jewish Question, *supra* note 117, at 38, 46.

197. *Cf.* Hayden, supra note 14, at 482.

198. EASO AGE ASSESSMENT PRACTICE IN EUROPE 12–14 (2013), https://www.easo.europa.eu/sites/default/files/public/EASO-Age-assessment-practice-in-Europe1.pdf,

199. Paraphrasing Arendt, *supra* note 105, at 97.

200. TOBIAS KELLY, THIS SIDE OF SILENCE: HUMAN RIGHTS, TORTURE, AND THE RECOGNITION OF CRUELTY 92 (2012); *see also* Beneduce, *supra* note 29, at 557.

Claims of membership in humanity may be more important, more pressing, and ultimately, have a stronger legal defense than any other factor. Membership in humanity arguably governs refugee protection under existing treaty law. Article 31 of the Refugee Convention provides, "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization …."[201] Legally recognized refugees do not normally lose their status just because they have lied, as long as they suffer a "well-founded" (i.e. true) fear of persecution.[202] Perhaps more importantly, all these lies reveal a fundamental truth: while a migrant may not be a member of the "humanity" that a Anglo-European culture champions, she is doubtlessly a human being.

To summarize, when migrants seek protection by crossing international borders, Arendt's categories are inverted. Arendt implies one's mask of citizenship is the very condition of public life within a political community.[203] This is not the case when one moves across borders, especially when one's citizenship has become useless or detrimental to oneself. When migrants wander without a reliable citizenship, their belonging through citizenship becomes a private aspect of their life. Humanity, rather than citizenship, becomes their public appearance. Movement and physical presence, rather than voice and speech, are their channels for political participation. In a world where all citizenships are not created equal, hope may emerge that humanity becomes the equalizer among otherwise vastly disparate statuses.

V.
DIALECTICS OF CITIZENSHIP AND HUMANITY

If humanity can be the mask providing one's measure of equality, what does this substitution effect mean for citizenship? Can citizenship still, at the same time, function as the basis for political community? With the liberal political imagination of "humanity" growing ever more controversial within Anglo/European societies, this is one of the most important questions of our time. To consider it, however, we must remember that membership through citizenship and membership through human rights are both formal statuses. They reflect

201. *See also* Immigration and Asylum Act 1999, c. 33, § 31 (UK); R v. Asfaw [2008] UKHL 31 (appeal taken from Eng.) (including interpretation of the *travaux préparatoires* and analysis of English case law on the matter).

202. UNHCR, NOTE ON THE CANCELLATION OF REFUGEE STATUS 9 (2004), https://www.refworld.org/pdfid/41a5dfd94.pdf (explaining that "A change in the credibility assessment will justify cancellation only if the initial finding on credibility regarding core aspects related to an applicant's eligibility for refugee status is clearly contradicted by elements contained in the record of the case at the time of the original determination, or inconsistent with new and reliable information that has come to light with regard to facts which were material to the credibility determination").

203. ARENDT, *supra* note 114.

neither the fully human experience, nor the conditions in which such experience appears. Importantly, neither represent the economic relations they rest upon. Yet, such relations surely matter from the perspectives of migrants. Today, for example, which citizenship one holds matters much more than the *de jure* status of citizenships. The latter question cannot be severed from global economic relations.

Some States may grant their citizens a 'political community' through political participation on formally equal footing, as well as a sufficient level of subsistence and welfare. In such conditions, citizenship may reflect a formal equality among otherwise different members, as Arendt imagined.[204] Citizenship is a kind of mask separating public from private life. Karl Marx, who wrote about citizenship as such an overlay on humanity in *On the Jewish Question*, characterizes it as citizenship in the secular State.[205] This does not coincidentally echo Arendt's critique of European citizenship—discussed above—and her preference for American citizenship; indeed, they both focus their analysis on this matter in the United States.[206] For both Marx and Arendt, the State establishes distinctions between the public and private realms. [207] For both, in such a State, not only faith, but also property can be held as private.[208] As Marx explains, only in such a State can the market perfect its separation in a sphere distinct from the State–one he calls "civil society."[209] In Marx's words: "The *droits de l'homme*, the rights of man, are, as such, distinct from the *droits du citoyen*, the rights of the citizen. Who is *homme* as distinct from *citoyen*? None other than the *member of civil society*."[210]

While the citizen is constituted by political participation through voting, the human (*homme*) proclaims the rights "of enjoying and of disposing at his discretion of his goods and income, of the fruits of his labor and industry."[211] Of course, Marx's analysis is not true across time or for all States, nor is it accurate for all countries' citizenships.[212] A crucial question in terms of how these distinctions work is whether one's citizenship provides one with a legal status preferable to that of a human. A would-be migrant may perceive that presenting

204. In her last interview, Arendt famously argued that "America is not a nation state." *See* https://www.youtube.com/watch?v=3OFKx3yqJvw&t=284s..

205. Marx, *supra* note 116. For an illuminating analysis of Marx's critique of rights in *On the Jewish Question*, see Paul O'Connell, *On the Human Rights Question,* 40 HUM. RTS Q. 962, 965–67 (2018).

206. *See* ARENDT, *supra* note 113, at 85–86, 97; Marx, *supra* note116, at 41–43 (in both cases the analysis appears in the context of a comparison between American and French revolutionary traditions).

207. *See* Arendt, *supra* note 121, at 50–67; Marx, *supra* note116, at 41–43.

208. Marx, *supra* note 116, at 34.

209. *Id.* at 34.

210. *Id.* at 41.

211. *Id.* at 42.

212. *See supra* note 96.

herself as a "mere human" in another country is more beneficial than expecting her citizenship rights to be realized at home. The hope would be to become a member of "civil society" through the exertion of labor and the earning of income, even if it is impossible to access citizenship.[213] Such an expectation, whether warranted or not, may make one decide to move and leave home. (The same holds true regardless of whether such a would-be migrant also happens to be a refugee. As one Afghan, a member of the Hazara minority and a legally recognized refugee residing in Greece, once told me: "if you are persecuted because of your political opinion, you can always change your mind; if you don't have food to put on the table, you have no choice but seeking asylum elsewhere."[214])

The substitution effect between citizenship and humanity, identified above, reflects an underlying contradiction between the two kinds of social membership. The most determinant factor—*their respective material value*—is not prescribed by either of their formal structures. While some citizenships function as a form of property, others are loads of debt. [215]

Unlike Arendt, Marx *criticizes* the masking aspect of citizenship and the way it has perfected a separation between the State and the market.[216] For Marx, "Legal, formal equality – the domain of rights – is but a guise that masks true relations within civil society. It is a veneer of public sameness beneath which lies a "real" structure of difference in the private sphere."[217] While for Arendt, such a separation is a condition for a political community of equals, for Marx, it demonstrates the limits of "political emancipation." He thus calls for "human emancipation" to supersede it.[218]

Following his cue, it is important to do away with any *a priori* distinction between political action to advance "public" interests and action intended to advance family or even personal interests.[219] If you are a citizen, you can participate in your own domestic realm: whether through voting or through participation in a capitalistic market. If you are a human, you carry with you a body against which certain forms of violence are, at least in theory, always prohibited under human rights law. This makes possible an option of action,

213. BOSNIAK, *supra* note 19, at 18 (developing the notion of "citizenship as membership").

214. Field notes from a visit to Izmir, Turkey.

215. *See* Spiro, *supra* note 85; SHACHAR, *supra* note 51.

216. Interestingly, this may bring him closer to the earlier Arendt of *We Refugees*, where she seems to marshal a critique of rights *as such*. *See* Lyndsey Stonebridge, *Refugee Style: Hannah Arendt and the Perplexities of Rights*, 25 TEXTUAL PRAC. 71, 76 (2011).

217. Raef Zreik, *Rights, Respect, and the Political: Notes from a Conflict Zone*, *in* LIVING TOGETHER: JACQUES DERRIDA'S COMMUNITIES OF VIOLENCE AND PEACE 107 (Elisabeth Weber ed., 2012).

218. Marx, *supra* note 116, at 40.

219. Indeed, in the context of migration and the need to provide documentation the very limits of the 'family' may be negotiated and re-defined. *See* Leslie Butt et al., *False Papers and Family Fictions: Household Reponses to "Gift Children" Born to Indonesian Women During Transnational Migration,* 20 CITIZENSHIP STUD. 795 (2016).

crossing borders, and claiming protection from such violence. Such action, in turn, opens possibilities of participation in informal markets abroad (and in a particular part of "civil society"). Distinctions between the 'private' and 'public' spheres of one's life will be *an outcome* of the decision on how to act, not a *precondition* for action.[220]

In a decision whether to express one's interests as a citizen of a State, one will consider how one's own State serves as an instrument to remove them from resources and opportunities abroad. Due to the thickening web of deportation agreements, some citizenships have become instruments of border policing. Rather than ensuring or protecting rights, participatory or other, citizenship in particular States has become a technology of fixing human bodies to specific territories in the Global South.[221] Such a reality may lead a person to shed her citizenship and wear the mask of humanity.

The thinner and scarcer the protections granted by citizenship, the more likely it is that the preferred mode of action will be crossing borders. The law makes a place for both options, but from between them an aspiration to advance a "human emancipation" emerges that neither option embodies: a kind of emancipation that is both political and economic at one and the same time.

State agencies often try to determine a migrant's citizenship, while migrants may try to conceal it. The allocation of nationality and its attachment to certain bodies is sometimes meant to enable deportation and to open certain possibilities of violence towards those bodies. Determining that one is from the Dominican Republic allows her deportation to the Dominican Republic. Determining that one is from Ghana allows her deportation to Ghana. For a State that seeks to deport migrants, sometimes discovering the truth of one's belonging becomes less important than making a determination. To reiterate, it is much more difficult to deport mere humans, or those coming from places that symbolize mass human catastrophes.

A contradictory relationship between citizenship and humanity is observable in a dynamic that is familiar to lawyers representing unauthorized migrants: in their motivation to enforce borders, States may resort to misrepresentation or lying to force migrants, with potentially genuine and legally recognized needs for protection, into deportable legal categories.[222] The border masquerade is a macabre dance between States and migrants in which both sides participate. Perhaps the most familiar example is the endless cat and mouse chase regarding

220. *Cf.* Simon Behrman, *Legal Subjectivity and the Refugee* 26 INT'L J. OF REFUGEE L. 1 (2014) (calling for a re-politicization of the refugee category).

221. Tendayi Achiume has thus described migration as an act of decolonization. E. Tendayi Achiume, *Migration as Decolonization* 71 STAN. L. REV. 1509 (2019).

222. *Cf.* Melanie Griffiths, *'Establishing Your True Identity': Immigration Detention and Contemporary Identification Debates*, *in* IDENTIFICATION AND REGISTRATION PRACTICES IN TRANSNATIONAL PERSPECTIVE: PEOPLE, PAPERS AND PRACTICES 281, 293 (James Brown & Gayle Lonegran, eds. 2013) (discussing the systematic pressure identification practices put on individuals to "invent" aspects of their identity including age, name, nationality).

the identity of Eritrean refugees. Since Eritrean nationals have long been recognized as deserving international protection, government lawyers often insist that asylum seekers are not truly Eritreans but Ethiopians.[223] The substitution effect between citizenship and humanity thus comes full circle: a migrant's humanity is in the final stage substituted with a citizenship that is not their own for the bureaucratic purposes of the State.

Among other measures, global inequality is a disparity in the quality of citizenship held by people around the world. Since the so-called "refugee crisis" hit the headlines in 2015, we have been witnessing an outcome that can be articulated in terms of a tension between citizenship and humanity.[224] Vast disparities in the quality of citizenship have resulted in the movement of enormous populations, with many migrants hoping to put the mask of humanity to beneficial use.

This increase puts pressure on domestic citizenship. It perhaps trite to comment that "sovereignty is back."[225] Attacks on human rights in multiple parts of the world demonstrate a fear that humanity will dilute citizenship and end up rendering both categories dysfunctional. But this is nothing new. Arendt describes such attacks in her writing on the interwar period.[226] Fassin documents them with the decline of "humanitarian reason" in France, about a decade ago.[227] "Populist" discourse against migrants, and its culmination during the Covid-19 pandemic,[228] are only the latest iteration. But as long as States survive, it is likely that human rights survive as well. Human rights' legal source is independent from States even if, discursively and dialectically, they are bound up with States.[229] Human rights will thus remain a vocabulary for action, the ultimate goals of which inevitably include the global redistribution of wealth.[230] Which vocabulary is more useful for "human emancipation," citizenship or human rights, is a judgment to be made in the context of specific struggles.

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223. *See, e.g.*, THE AFRICAN REFUGEES DEVELOPMENT CENTER (ARDC), "YOU ARE ETHIOPIAN UNTIL PROVEN OTHERWISE": CONTESTED NATIONALITY, ETHNIC ERITREANS AND STATELESS PERSONS IN ISRAEL (2013), https://www.issuelab.org/resources/21673/21673.pdf.

224. *Cf.* Anne McNevin, *The Liberal Paradox and the Politics of Asylum in Australia,* 42 AUSTL. J. OF POL. 611 (2007).

225. Roland Paris, *The Right to Dominate: How Old Ideas About Sovereignty Pose New Challenges for World Order*, 74 INT'L ORG. 453 (2020).

226. Arendt, *supra* note 123.

227. McNevin shows similar developments in Australia at the time, *supra* note223, at 622.

228. *See generally* E. Tendayi Achiume, Thomas Gammeltoft-Hansen & Thomas Spijkerboer, *Introduction to the Symposium on COVID-19, Global Mobility and International Law*, 114 AM. J. OF INT'L L. 312 (2020).

229. MANN, *supra* note 63 (conclusion).

230. *See* O'Connell, *supra* note 204, at 988.

CONCLUSION

Through an engagement with the widely observed phenomenon of false identities among unauthorized migrants, this Article aims to conceptualize a substitution effect between the two basic protections law provides: that of individuals as members of a citizenry, and that of individuals as members of humanity. By invoking false identities, migrants often aim to become "un-deportable."[231] I described this as an act of shedding one's citizenship and asserting the rights that presumptively belong to all humans. Such actions, which seem to be merely fraudulent negotiations on the outer margins of legality, nevertheless shed light on the fundamental structure of law. As I have shown, the two foundational statuses at the basis of law do not rest on consonant assumptions. In a dialectic process that occurs in conditions of radical inequality and multifarious protracted crises, they exert mutual pressure, and their internal contradictions become gradually more observable.

To conclude, let us return to language from a Frontex report, according to which unauthorized migrants engage in certain misrepresentations "*to reduce the length of their stay in the detention centres*."[232] The language captures the figure that is at the center of the "refugee crisis." Whether a genuine refugee or not, this person has lost belief that the protection mechanisms granted by international law can provide her with security. At best, she can strategically use certain rules of law protecting a specific notion of human life to free herself of detention and render herself un-deportable. The next phase will be an attempt to integrate as a worker into "civil society" and to send remittance money home. The price may be forgoing any functional form of citizenship in a political community of formally equal members. Yet, it may still be closer to *emancipation* than what her former State can grant domestically.

231. On what it means to be "non-deportable" (as they call it) see Arjen Leerkes and Marieke Van Houte, *supra* note 158.

232. FRONTEX, *supra* note 44, at 16.

Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals

Mary Hoopes*

While there is consensus among practitioners and scholars alike that immigration adjudication is in a state of crisis, very few studies have examined the role that federal courts play in reviewing this system. This Article focuses on asylum appeals at the federal appellate level and constructs an original database of cases across five circuits over seven years. It reveals that the Courts of Appeals have created a wide variety of court-fashioned rules that serve to either expand or constrict the scope of judicial review, with important implications for the likelihood of remand. In these data, having one's asylum appeal heard in the Seventh or Ninth Circuits was associated with a significantly higher likelihood of remand than in the First, Tenth, or Eleventh Circuits. This variation does not merely reflect a difference in the types of cases across circuits. Rather, a qualitative analysis reveals very different approaches to reviewing the agency's decision-making. Across these five circuits, the Seventh and Ninth Circuits have adopted a much more searching level of review that arguably reflects a distrust of the agency's competence.

As this analysis demonstrates, the elasticity of the appellate review model permits this wide variation, as courts applying a nearly identical standard of review are reaching starkly different results. I argue that the more expansive approach to review is normatively beneficial, as we ought to have an appellate review model that permits courts to be responsive to evidence of a compromised

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system of adjudication. This is particularly compelling in the context of asylum seekers, as their lack of political power has enabled both a long history of politicization of the adjudication process and a disregard for quality assurance initiatives within the agency. Since larger changes aimed at addressing the underlying flaws at the agency level are unlikely to be forthcoming soon, federal courts may be the only institutions equipped to meaningfully address problems within asylum adjudication.

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INTRODUCTION

Thousands of asylum seekers who enter the United States each year depend entirely upon a system of adjudication that both scholars and practitioners agree is severely compromised. A long line of scholarship has illuminated its many shortcomings, describing a system that is plagued by inadequate resources, far too little time for judges to adjudicate each case, and a lack of independence in decision-making. For asylum applicants, their last recourse lies with the federal courts. However, as one groundbreaking study, *Refugee Roulette*, demonstrated,

there are large disparities between an asylum applicant's likelihood of succeeding across every level of asylum adjudication, including the Courts of Appeals.[1] This finding invites further inquiry into which factors might be driving these differences across the appellate courts, and how we may situate the role of the federal courts in reviewing this agency in crisis. Given that the immigration adjudication system is widely perceived to be compromised and that structural changes are unlikely to be forthcoming soon, federal courts may be the only meaningful level of review for the few asylum seekers who reach them.

Using data collected over seven years in five different Courts of Appeals, this Article finds that the variation between remand rates cannot be explained by a difference in the types of claims heard across the circuit courts; in other words, the data do not simply reflect the fact that circuits with very low remand rates are hearing fundamentally different types of cases than circuits with higher remand rates. Rather, these disparities reflect very different approaches across circuits in reviewing the immigration agency. While the standard of review imposed by Congress appears to be very constraining, a qualitative analysis of this data reveals that circuit courts have fashioned rules that effectively narrow or broaden the scope of their review of the agency's factual findings.

The Article proceeds in five parts. Part I provides the relevant context, setting forth the process by which an asylum case reaches the federal circuit courts and the relevant standards of review. Part II presents the data and methods. As Part III demonstrates, the disparities in remand rates cannot be explained by differences in the composition of cases. Rather, even when controlling for a wide variety of characteristics across a range of logistic regression models, having one's case heard in the Seventh or Ninth Circuits was associated with a significantly higher likelihood of remand than those in the First, Tenth, or Eleventh Circuits. This analysis also reveals the need for a closer qualitative analysis of the doctrinal differences between courts, such as variation in how courts treat a prior adverse credibility finding by the agency. Accordingly, Part IV digs deeper into the data, exploring qualitatively the ways in which the courts vary in their application of the standard of review, and how those differing applications affect the likelihood of remand.

Finally, Part V turns to the implications, and begins by analyzing how the federal courts' role in asylum adjudication comports with existing theories of judicial review. In part, these data reflect the elasticity of the appellate review model: even as courts purport to apply an identical and constraining standard of review, they reach starkly different results. Recent work by Jonah Gelbach and David Marcus suggests that courts can play a previously unrecognized function when reviewing agencies with high volumes of adjudication, which they term

1. JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ & PHILLIP SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

"problem-oriented oversight."[2] This type of oversight arguably allows judges to identify agencies in crisis, as in this context, and permits them to recognize persistent problems that go unaddressed by the agency. It also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As scholars such as Adam Cox have recognized and the data in this project reinforce, some courts are not according the immigration agency the deference envisioned by the *Chevron* doctrine. Indeed, the analysis below reveals that this lack of deference extends far beyond those cases explicitly governed by *Chevron.* A distrust of the agency's competence has arguably seeped into every aspect of how some circuits interpret the standards in asylum law and has led them to read additional requirements into nearly every component of the substantial evidence standard. While Cox rightly argues that traditional deference doctrines do not contemplate courts assessing the competence of individual agencies, the notion of problem-oriented oversight suggests that courts might be quite capable of doing so in high volume adjudication contexts and of adjusting their level of scrutiny accordingly. As I argue below, not only are courts capable of this type of assessment in the asylum context, but this type of oversight also provides a basis for justifying resource-intensive judicial review.

This approach would be normatively desirable, as it would result in a deference doctrine that permits courts to be more responsive to agencies in crisis. The alternative affords the courts very little latitude to adjust their level of deference to major changes in the quality of adjudication, other than through the adoption of the court-fashioned rules examined here. As I explore, this has resulted in two very different approaches across circuits in reviewing asylum adjudication. In the more narrow approach that some circuits have taken, appellate review has remained invariant to clear signs that the quality of adjudication has been seriously compromised. By contrast, other circuits have engaged in closer scrutiny, but this has often resulted in strained interpretations. These courts struggle to demonstrate that their review comports with the narrow standard, rather than perhaps being more forthright that the repeated recognition of errors in the agency's adjudication has prompted closer scrutiny. The notion of what I term a more "responsive" doctrine of deference is particularly compelling in the asylum context, where the need for judicial review to legitimize the actions of the agency is at its most pressing. As I outline below, there is virtually no evidence that the immigration agency is politically responsive to asylum seekers. Rather, asylum seekers are politically powerless, and this status has arguably enabled a long history of politicization of the adjudication process and disregard for quality assurance initiatives within the agency. This history renders the typical political accountability justification much less forceful in this context. Moreover, as Michael Kagan contends, there are compelling reasons to question the expertise

2. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1100 (2018).

rationale in this context.[3] Accordingly, I argue that we ought to develop a doctrine of deference that permits courts to better respond to evidence of a compromised system.

I.
BACKGROUND AND CONTEXT

A. The Asylum Process in the United States

As many scholars have recognized, asylum law is distinctive as "one of the most thoroughly international areas of U.S. law."[4] Indeed, Congress passed the Refugee Act of 1980 with the explicit intention of bringing the United States into conformity with its obligations under the international Protocol Relating to the Status of Refugees.[5] To establish eligibility for asylum, an applicant must demonstrate that he or she is a "refugee," or a "person who is . . . unable or unwilling to return to . . . [her home] country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[6]

For the few asylum seekers who reach the federal courts, their claim first proceeds through up to three levels of review. If one applies for asylum affirmatively with the U.S. Citizenship and Immigration Services (USCIS), the applicant first receives an interview with an asylum officer, who may directly grant the application, or refer the case to an immigration judge, before whom the applicant may renew the application *de novo*.[7] Asylum officers refer approximately 65 percent of affirmative applications to the immigration courts.[8] Alternatively, if the Department of Homeland Security has initiated removal proceedings, one may apply for asylum defensively, and receive a merits hearing in an immigration court.[9] Immigration courts are housed within the Executive Office of Immigration Review (EOIR), a branch of the Department of Justice

3. Michael Kagan, *Chevron's Asylum: Re-Assessing Deference in Refugee Cases* 30 (Ctr. for the Study of the Administrative State, Antonin Scalia Law School, Working Paper No. 19-29, 2019), https://administrativestate.gmu.edu/research/working-papers/.

4. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1061 (2011).

5. *Id.* at 1061–62.

6. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A).

7. 8 C.F.R § 208.4(b)(3)(2012).

8. RAMJI-NOGALES ET AL., *supra* note 1, at 31.

9. Work by several scholars has confirmed that the disparities across immigration judges' rates of remand are also very large. *See id.* at 38; *see also* David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1187 (2016) (showing that the average standard deviation of judge relief rates within the nineteen largest immigration courts between 1998 and 2004 was approximately nine percentage points).

(DOJ).[10] Following an immigration judge's decision in either an affirmative or a defensive case, either the government or the applicant may appeal to the Board of Immigration Appeals ("the Board"),[11] which is located within the EOIR. From the Board's decision, the asylum applicant may appeal to the federal circuit courts.[12] While an applicant may then appeal from a circuit court to the Supreme Court, the Courts of Appeals effectively function as the "court of last resort" for the vast majority of asylum applicants, as the Supreme Court rarely hears asylum claims. As one Ninth Circuit judge explained, "That's why we are important. The U.S. Courts of Appeals is the end of the line."[13]

While asylum applicants have the right to obtain counsel, they do not have the right to government-provided counsel. Then Chief Judge Katzmann of the Second Circuit argued that the lack of representation for noncitizens in removal proceedings constitutes a "substantial threat to the fair and effective administration of justice."[14] Ingrid Eagly and Steven Shafer found that immigrants with representation were five-and-a-half times more likely to obtain relief from removal in immigration court.[15] David Hausman's work shows that the appeals process is almost exclusively used by immigrants who have representation.[16] Hausman further demonstrates that the appeals process for the immigration courts does not promote uniformity, as the removal orders of harsher immigration judges are no more likely to be reversed on appeal by the Board than by federal circuit courts.[17] As Hausman finds, this is because the circuit courts are reviewing an unrepresentative sample of cases, as immigration judges with lower grant rates more often order applicants deported earlier in their proceedings, before they have found a lawyer or filed an application for relief. Thus, the Board rarely reviews the case of a meritorious claim of an applicant who lacked

10. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., FISCAL YEAR 2016 STATISTICS YEARBOOK A1 (2017), https://www.justice.gov/eoir/page/file/fysb16/download [hereinafter EOIR FY 2016 Statistics Yearbook].

11. The percentage of cases appealed from the immigration courts to the Board tends to fluctuate, ranging from 35-58 percent of all cases since 1990. BANKS MILLER, LINDA CAMP KEITH, & JENNIFER HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 43 (2015).

12. *See* Anna Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 664 (2011).

13. *Id.*

14. Sam Dolnick, *Improving Immigrant Access to Lawyers*, N.Y. TIMES, May 4, 2011, at A24.

15. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015). In addition, the authors of *Refugee Roulette* note that applicants represented by Georgetown's Clinic, for example, are nearly twice as likely to be granted asylum as applicants represented by other counsel in immigration court. RAMJI-NOGALES ET AL., *supra* note 1, at 45.

16. Hausman, *supra* note 9, at 1194.

17. *Id.*

representation initially and was assigned an immigration judge with a very low grant rate.[18]

B. The History of Asylum Adjudication

The corps of immigration judges has expanded rapidly over the past decade. There are now approximately 460 immigration judges located in 67 immigration courts across the nation,[19] and they collectively hear roughly 300,000 cases per year.[20] The Board is also a component of EOIR, and currently has 23 members[21] who hear roughly 35,000 cases per year.[22] Asylum adjudication takes place within a larger context of a severe backlog in the immigration courts. From 1998 to 2018, the number of deportation cases increased eight-fold, while the number of immigration judges increased by a third.[23] At their current completion rate, it would take over three-and-a-half years to clear the immigration courts' backlog if they were to take no new cases.[24] Many immigrants wait more than 1,000 days for their cases to be resolved.[25] Several judges in the Courts of Appeals have testified that this vast under-resourcing inevitably affects immigration judges' ability to decide cases with the requisite care and thoroughness.[26] As Judge Bea noted in his 2007 speech to the Board of Immigration Appeals and Immigration Judges, many immigration judges' decisions reflect the reality that they do not have adequate time to review the entire record before rendering a decision.[27] It appears little has changed since Judge Bea's testimony in 2007; in a 2017 report to the Government Accountability Office (GAO), immigration judges reported that they do not have sufficient time to conduct essential tasks such as "case-

18. *Id.* at 1195.

19. U.S. DEP'T OF JUST., *Office of the Chief Immigration Judge* (2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios.

20. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICAL YEARBOOK, FISCAL YEAR 2018 7 (2019), https://www.justice.gov/eoir/file/1198896/download.

21. *See* U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV, *Board of Immigration Appeals,* https://www.justice.gov/eoir/board-of-immigration-appeals.

22. EOIR FY 2016 Statistics Yearbook, *supra* note 10, at Q2.

23. *Immigration Court Backlog Tool,* TRAC: IMMIGR. (July 2020), https://trac.syr.edu/phptools/immigration/court_backlog/.

24. *Immigration Court Backlog Surpasses One Million Cases,* TRAC: IMMIGR. (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/.

25. *Asylum in the United States*, AM. IMMIGR.COUNCIL (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

26. *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5, 6 (2006) (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf.

27. *Improving the Immigration Courts: Effort to Hire More Judges Falls Short*, TRAC: IMMIGR.(July 28, 2008), http://trac.syr.edu/immigration/reports/189.

related legal research or staying updated on changes to immigration law."[28] Further, immigration judges sorely lack adequate support staff; immigration judges average approximately one law clerk for every four judges.[29] As Andrew Kim argues, such shortages are acutely felt in a court in which many asylum seekers lack representation and do not speak English, and where the immigration judges have a duty to establish and develop the factual record.[30]

A variety of changes to the Board's decision-making process have rendered its review much less meaningful. Prior to 2002, the majority of appeals from immigration judges were decided by a three-member panel.[31] This changed in 2002 when then Attorney General John Ashcroft instituted significant changes in how the Board decides immigration cases. Chief among these changes was a new policy permitting a single-member panel of the Board to decide most appeals by an "affirmance without an opinion" (AWO). Between 2006 and 2015, more than 90 percent of appeals were reviewed by a single Board member.[32] These decisions often contained only a single line that had no reasoning or analysis.[33] A GAO report found that three-member panels ruled in favor of noncitizens in 52 percent of cases, whereas the single-member opinions did so in only 7 percent of cases.[34] These "streamlining" changes resulted in a dramatic increase in the number of immigration cases appealed to the federal courts.[35] At the peak of the resulting "surge" in 2004, immigration cases consisted of 88.2 percent of all administrative appeals and 17.2 percent of all federal appeals.[36] While the surge has leveled off to some degree, federal courts still now receive a steady rate of immigration appeals, often hovering at around 10-14 percent of all federal appeals.[37]

Scholars have long criticized this system for its failure to separate the enforcement and adjudicative functions, and the related overt efforts to politicize the process. In the most dramatic example of the politicization of immigration

28. U.S. GOV'T ACCOUNTABILITY OFF., GAO17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 31 (June 2017) [hereinafter GAO 17-438].

29. Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652–53 (2010).

30. Andrew Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 611 (2013).

31. Stacy Caplow, *After the Flood: The Legacy of the 'Surge' of Federal Immigration Adjudication*, 7 NW. J.L. & SOC. POL'Y 1, 4–5 (2012).

32. GAO 17-438, *supra* note 28, at 32.

33. Caplow, *supra* note 31, at 5.

34. GAO 17-438, *supra* note 28, at 10.

35. Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 102 (2012).

36. Caplow, *supra* note 31, at 2-3; LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR TABLE B-3 (2004).

37. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1100 (2018).

adjudication, John Ashcroft reduced the size of the Board from 23 members to 11 in 2002.[38] One study by former congressional counsel Peter Levinson demonstrated that the Board members whom Ashcroft "re-assigned" were those with decision rates most favorable to noncitizens.[39] Following these changes, the success rate of asylum applicants before the Board dropped from 37 percent in 2001, to about 11 percent in 2005.[40] These changes were felt acutely at the federal appellate level, as well; the Ninth and Second Circuits (that together hear approximately 70 percent of all asylum appeals) saw an "astounding 1,400% increase in appeals." The Second Circuit's docket became so overburdened that it eliminated oral arguments for asylum appeals in September 2005 and began a process of staff attorney review instead.[41] Based upon interviews with fifteen former immigration judges and supervisory officials, Amit Jain argues that immigration courts "exhibit core features of a tightly hierarchical bureaucracy" rather than adversarial courts.[42]

Scholars have proposed a number of means of improving these structural problems in the asylum system. Stephen Legomsky, for example, proposes giving more decisional independence to immigration judges by moving them from the DOJ into a new executive branch tribunal independent from the Attorney General's oversight.[43] He further recommends eliminating the Board entirely, and replacing the appellate phase with a single round of review by a new Article III immigration court, comprised of district and circuit judges serving two-year assignments.[44] Lindsay Vaala provides a number of ways to train immigration judges in order to decrease the likelihood of bias and increase the quality of decision-making.[45]

C. The Standard of Judicial Review

The scope of the courts' review depends upon the type of Board analysis. When the Board has not conducted its own review, such as when it issues an affirmance without an opinion, the circuit courts review the opinion of the

38. Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications,* 9 BENDER'S IMMIGR. BULL. 1154, 1155–56 (2004).

39. *Id.*

40. RAMJI-NOGALES ET AL., *supra* note 1, at 68.

41. John R.B. Palmer, *The Second Circuit's 'New Asylum Seekers': Responses to an Expanded Immigration Docket*, 55 CATH. UNIV. L. REV. 965, 971 (2006). In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket. Legomsky, *supra* note 29, at 1647.

42. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts*,*"* 33 GEO. IMMIGR. L. J. 261, 261 (2019).

43. Stephen Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1208 (1989).

44. Legomsky, *supra* note 29, at 1686.

45. Lindsay R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1036 (2017).

immigration judge. When the Board has conducted its own review, the courts limit their review to the Board's decision, unless it expressly adopts part or all of the immigration judge's opinion.[46] Thus, the courts are sometimes reviewing only the immigration judge's opinion, sometimes only the Board's opinion, and sometimes a combination of both. Several of the traditional standards applied in the review of agency actions also apply in the asylum context. Courts review questions of law *de novo* but defer to the agency's reasonable interpretations of the statutes and regulations it administers.[47] Constitutional challenges are also reviewed *de novo*.[48] For issues reliant upon the discretionary judgment of the agency, such as a motion to reopen, appellate courts review for an abuse of discretion.[49] Courts employ the substantial evidence standard in reviewing the factual findings of the agency, which includes a determination of whether the applicant is credible.[50] In this Article's dataset, courts all describe this standard in nearly identical language: the agency's factual findings are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,"[51] and the Board's decision must be "supported by reasonable, substantial, and probative evidence on the record, considered as a whole."[52] Under the Immigration and Nationality Act, "the administrative findings of facts are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[53] This requirement derives its origin from the Supreme Court's 1992 decision in *INS v. Elias-Zacarias*.[54] As the Ninth Circuit recently pointed out, the substantial evidence standard is stricter than the review of district courts in at least one way.[55] When appellate courts review a decision of a district court, they may "affirm on any ground supported by the record even if the district court did not consider the issue."[56] When the courts review an administrative decision, however, they "cannot deny a petition for review on a ground [in which] the [the Board] itself did not base its decision."[57]

Several scholars have proposed changing the standard of review in the asylum context. Michael Kagan suggests that it is long overdue for reconsideration, as the standard of review is based upon the presumption that

46. Seck v. U.S. Att'y Gen., 663 F.3d 1356, 1364 (11th Cir. 2011).

47. Baraket v. Holder, 632 F.3d 56, 58 (2d Cir. 2011).

48. Vicente-Elias v. Mukasey, 532 F.3d 1086, 1094 (10th Cir. 2008).

49. Singh v. Holder, 658 F.3d 879, 885 (9th Cir. 2011).

50. *See, e.g.*, Ismaiel v. Mukasey, 516 F.3d 1198, 1204 (10th Cir. 2008); Khup v. Ashcroft, 376 F.3d 898, 904 (9th Cir. 2004).

51. *Seck*, 663 F.3d at 1364 (internal citations omitted).

52. *Id.*

53. 8 U.S.C. § 1252(b)(4)(B).

54. 502 U.S. 478, 481 & n.1.

55. Dai v. Sessions, 884 F.3d 858, 869 (9th Cir. 2018).

56. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 794 (9th Cir. 2007).

57. Hernandez-Cruz v. Holder, 651 F.3d 1094, 1110 (9th Cir. 2011).

judges ought to leave in place a decision with which they disagree, overturning only if any reasonable adjudicator would be so compelled. As he argues, the standard of review is based upon largely discredited assumptions about immigration judges' ability to assess factors like an applicant's credibility, and he proposes that the standard of review shift to a balancing test akin to the one articulated in *Mathews v. Eldridge*.[58] Andrew Kim argues that the question of whether a noncitizen meets the statutory definition of refugee is truly a mixed question of law and fact, rather than purely one of fact.[59] Accordingly, he argues, it is not appropriate to assess refugee determinations under the deferential substantial evidence standard, and courts should provide less deference to these determinations in asylum cases.[60]

In addition, federal appellate review of agency decisions has long been guided by the Supreme Court's decision in *Chevron.*[61] *Chevron* expanded the sphere of mandatory judicial deference to agencies "through one simple shift in doctrine: it posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering."[62] In dictum, the Supreme Court stated that the Board should receive *Chevron* deference in interpreting the asylum and withholding of removal provisions of the Immigration and Nationality Act (INA).[63] Thus, in asylum cases, *Chevron* deference is given to precedential opinions of the Board that interpret governing legal standards, or non-precedential decisions that rely on applicable Board precedent.[64]

As in the case of the substantial evidence standard, several scholars have questioned whether *Chevron* deference is appropriate in the asylum context, as discussed *infra* in Part V. For example, Michael Kagan argues that Chevron deference is not appropriate in asylum law, as it does not involve the type of technical expertise that would make an agency better suited to address these cases.[65] He further argues that the politicization of immigration adjudication is at odds with the stability that Congress meant to formalize with the passage of the Refugee Act.[66] Similarly, Maureen Sweeney argues that there should be no *Chevron* deference in interpreting the Refugee Act of 1980, as the institutional

58. Kagan, *supra* note 35, at 106.
59. Kim, *supra* note 30, at 610–11.
60. *Id.*
61. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
62. Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001).
63. Immigr. Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).
64. *See also* Escobar v. Holder, 657 F.3d 537, 542 (7th Cir. 2011).
65. Kagan, *supra* note 3.
66. *Id.* at 40.

location of asylum adjudication within an enforcement branch makes it critical for the courts to serve as a check on agency power.[67]

D. Studies of Immigration Adjudication

For a long while, empirical work on immigration adjudication remained curiously absent from both the administrative law scholarship and the courts literature within the political science scholarship. Writing in 2007, Margaret Taylor lamented that immigration law was one of the only areas of administrative decision-making that had been left largely unexplored.[68] Recent scholarship has answered this call and has painted a much richer and nuanced portrait of how immigration cases are decided. Schoenholtz, Schrag, and Ramji-Nogales provide the most comprehensive treatment of asylum officer decision-making, analyzing more than 300,000 cases.[69] They find that the location where an applicant first seeks asylum has an enormous effect on the likelihood of success. Additionally, an applicant's level of success depends on several factors specific to the officer, such as the officer's educational background. They propose a number of reforms to mitigate these effects, such as requiring officers to have law degrees and increasing the level of engagement between individual officers and regional offices.[70]

Much of the empirical work on asylum has focused on decision-making at the immigration judge level. A vast body of work in international relations has examined the competing roles of human rights interests and geopolitical or material interests.[71] More recent work has shown that immigration judges are responsive to the humanitarian needs of applicants, but that they are often also influenced by national interests, including national security and economic concerns.[72] Analyzing a novel database of more than 400,000 immigration court cases, David Hausman finds that disparities across immigration judges are large and statistically significant, as the average standard deviation of the relief rates within the nineteen largest immigration courts was approximately nine percentage

67. Maureen Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 134–35 (2019).

68. Margaret Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

69. ANDREW SCHOENHOLTZ, PHILLIP SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

70. *Id.* at 230.

71. *See, e.g.*, GIL LOESCHER & JOHN SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986).

72. Marc Rosenblum & Idean Salehyan, *Norms and Interests in US Asylum Enforcement*, 41 J. PEACE

RES. 677 (2004); Jennifer Holmes & Linda Camp Keith, *Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post September 11 Era?*, 43 POL. SCI. & POLS. 431 (2010).

points between 1998 and 2004.[73] Most importantly, Hausman finds that the decisions of the harshest immigration judges are not more likely to be overturned through the appellate process, as these judges are more likely to refuse to grant a motion for continuance in order to allow litigants to find counsel. Banks Miller, Linda Camp Keith, and Jennifer Holmes examine more than half a million cases over two decades, and argue that the decisions of immigration judges are sensitive to their ideological beliefs as well as the local and demographic conditions where the courts are located.[74] Similarly, Daniel Chand and colleagues find that immigration judges in communities where citizens more often vote Republican grant asylum less often than states with Democratic governors and state legislative majorities.[75] Most recently, Catherine Kim demonstrates that immigration judges have been more likely to deny asylum claims during the Trump administration.[76] Taking a cross-national perspective, Rebecca Hamlin contrasts the process of refugee status determination in the United States, Canada, and Australia in rich detail, and finds that the level of insulation from political interference and judicial review are critical factors in explaining differences in outcomes across systems.[77]

Refugee Roulette was the seminal work that spurred much of the preceding literature, as it analyzed disparities in every level of asylum adjudication in the years 2004 and 2005.[78] In the most comprehensive study of asylum adjudication to date, they documented that asylum grant rates varied dramatically from one asylum officer to the next, and demonstrated that political changes in the composition of the Board had resulted in decreased remand rates.[79] Crucially, the authors of *Refugee Roulette* also uncovered the wide disparities between remand rates in asylum appeals across the Courts of Appeals, even when limiting their analysis to appeals from the fifteen countries from which the most asylum seekers originate.[80] With a few notable exceptions, [81] there has been very little further empirical work on asylum decision-making within the federal appellate courts. Given this paucity of scholarship, *Refugee Roulette* invites further inquiry into which factors may be driving these differences, as this was outside the scope of their already broad work. Accordingly, this Article answers this call, examining

73. Hausman, *supra* note 9, at 1187.

74. BANKS MILLER ET AL., *supra* note 11.

75. Daniel E. Chand, William D. Shrackhise & Marianne L. Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 27 J. PUB. ADMIN. RES. & THEORY 182 (2016).

76. Catherine Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1 (2018).

77. REBECCA HAMLIN, LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA 19–20 (2014).

78. RAMJI-NOGALES ET AL., *supra* note 1, at 31.

79. *Id.* at 56.

80. *Id.* at 365.

81. For example, David Law demonstrates that judges are more likely to vote according to their ideological preferences in published decisions, and less likely to do so in unpublished opinions. David Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit,* 73 U. OF CINN. L. REV. 817, 864 (2005).

the opinions in five circuits across seven years in order to better understand the differences in how the courts are reviewing asylum claims.

II. DATA AND METHODS

To better understand the role played by judicial review in the asylum context, this project selected a range of circuit courts to examine: the First, Seventh, Ninth, Tenth, and Eleventh, in order to maximize variation in size, remand rate, and the number of asylum appeals typically heard each year. In part, this choice was also based upon the nature of the opinions across circuits, as some circuits' opinions were so brief that many of the variables of interest could not be identified. Asylum appeals were coded over a seven-year period, 2007-2013, which was chosen in order to exclude several significant events that had happened on either side of this period. The inquiry begins in 2007, once the large surge in appeals that followed the streamlining measures had somewhat stabilized, and the Courts of Appeals had adapted to these cases becoming a steady part of the courts' docket.[82] The concluding year, 2013, was prior to when many of the asylum cases from the surge of unaccompanied children would have reached the Courts of Appeals, which also brought important changes to the adjudication environment that might have complicated this analysis.[83] These cases were collected from Lexis Nexis, and accordingly the data only include those cases that were available there.[84]

In every circuit but the Ninth, every opinion that constituted a merits opinion on an asylum claim was included in the dataset. In the Ninth Circuit, which hears far more asylum appeals than any other circuit in the country, a sample of 100 opinions per year was randomly chosen. Cases that may have mentioned the term "asylum," but were not in fact asylum cases decided on the merits, were eliminated from the dataset. This might include, for example, a mention that the petitioner had previously sought asylum but was now appealing a criminal conviction. Similarly, motions to reopen and motions for reconsideration were excluded, in order to compare the most similar claims. This process yielded approximately 2,111 cases, or observations.

The data were coded for 29 variables. In part, these variables focused on factors related to attributes of the applicant, such as the applicant's gender, whether the applicant had dependents, and whether the applicant had legal representation. Factors relating to the case were also coded, such as the basis of

82. Caplow, *supra* note 31, at 4.

83. Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 542, 553 (2018).

84. Prior scholarship has demonstrated that while Lexis includes more immigration cases than Westlaw, they do not include all cases. Many of these cases are available on PACER, but their contents are often unavailable to non-parties. Michael Kagan, Rebecca Gill, & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals,* 106 GEO. L. J. 683, 685 –86 (2018).

the claim (political opinion, membership in a social group, nationality, religion, or race), whether there was an adverse credibility finding below at either level, whether the court reviewed the immigration judges and/or the Board's opinion, and whether the case was published. Attributes relating to the court were also coded, including the identity of the judges deciding the case, and the party of each judge's nominating President. All of these factors were included in order to control for as many characteristics about the asylum seekers and panels as possible, and to generate a rich descriptive account of which asylum cases reach the Courts of Appeals.

III.
RESULTS

A. Summary Statistics and Regression Analysis

The figure below provides summary statistics in order to give a sense of the full range of cases appealed across the courts. Figure 1 first provides the percentage of claims brought under each of the five possible bases for asylum. It also provides the percentage of applicants who were represented before the Court of Appeals, the percentage of women who filed (alone) for asylum claims, and the percentage of cases that mentioned that the applicant had one or more children. An applicant may assert several bases for an asylum claim (membership in a social group, political opinion, nationality, religion, and/or race), so these claims total more than one hundred percent in each court. Additionally, in a small percentage of the opinions, particularly in the Ninth Circuit, the basis for the asylum claim was not explicitly stated and could not be coded.

As Figure 1 reveals, most of the asylum seekers before the Courts of Appeals had representation. This is partially due to the fact that only represented asylum seekers tend to avail themselves of the appeals process, and it also reflects the efforts of some judges to initiate programs in their circuits to provide such representation.[85] It shows that certain types of asylum claims are made more and less frequently across circuits: for example, claims based upon one's nationality were quite rare in all courts. Claims based upon one's ethnicity were similarly less common, though they were made more frequently in the Tenth Circuit. Unsurprisingly, claims based upon one's political opinion were the most common in all circuits, which likely reflects the origins of asylum law. Indeed, prior to the 1980s, the prototypical refugee was an Eastern European or Vietnamese refugee fleeing a Communist regime, and scholarship has probed the relative advantage of these types of claims.[86] It also reflects that men bring asylum appeals more often than women.

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85. *See, e.g.*, Dolnick, *supra* note 14, at A24; Hausman, *supra* note 9, at 1194.

86. *See* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582 (1998) (noting that such refugees "presented an opportunity to create powerful propaganda about the relative virtues" of Democratic governments).

Figure 1: Summary Case Statistics

Case Attribute	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Membership in a Social Group	23.9%	26.2%	12.8%	19.3%	25.1%	21.2%
Political Opinion	51.4%	41.2%	21.4%	40.7%	60.3%	44.9%
Nationality	0.8%	3.6%	0.2%	0.0%	1.3%	1.1%
Religion	30.5%	22.6%	17.7%	40%	15.8%	20.3%
Ethnicity	11.9%	10%	7.8%	18.6%	8%	9.3%
Representation	100.0%	92.3%	84.2%	88.6%	87.9%	88.7%
Female Applicants	28.8%	22.2%	22.3%	15%	29.5%	25.6%
Applicants with Children	43.0%	35.3%	10%	37.4%	29.8%	27.8%

In addition, Figure 2 divides applicants by country of origin using two different measures. The first measure shows the composition of applicants from each region of the world within each circuit: Africa, Europe, Asia, Latin America, Central America and the Caribbean, and Oceania. The second measure, labeled "Asylum-Producing Countries," uses a method employed by the authors of *Refugee Roulette,* and includes countries from which at least five hundred claims came before asylum offices or immigration courts over this period, and from which at least 30% of claims were granted.[87] This is one way of narrowing the cases in order to examine a roughly comparable set of claims across circuits.

87. RAMJI-NOGALES ET AL., *supra* note 1, at 18.

Figure 2: Summary Case Country of Origin Statistics

Region	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Europe	11.5%	16.3%	2.5%	1.4%	10.7%	8.4%
Africa	9.1%	15.8%	4.8%	11.4%	4.1%	6.6%
Asia	38.3%	33.0%	38.0%	61.4%	21.9%	32.2%
Oceania	5.3%	8.1%	1.3%	0.0%	0.1%	1.9%
Latin America	9.9%	3.2%	1.8%	7.1%	28.1%	14.5%
Central America & Caribbean	21.8%	5.9%	19.1%	15.7%	14.9%	16%
Asylum-Producing Country	34.6%	46.6%	27.4%	27.9%	51.4%	40.5%

As Figure 2 reveals, there are important differences in the regions from which asylum seekers originate across circuits. Asylum seekers may only file appeals in the circuit in which the immigration judge decided the underlying immigration case.[88] Thus, the origin of many asylum seekers in each circuit tends to track already well-established migration patterns. For example, the Eleventh Circuit receives a significant number of asylum seekers from Central and South America, whereas the Ninth Circuit receives many asylum seekers from Asia. These geographic differences might lead one to wonder if any difference in remand rates reflect differences in the composition of cases, at least in part. Accordingly, I control for these geographic differences in the regression analysis that follows, using two alternative measures: the region of the applicant's country of origin and whether the applicant was from an Asylum-Producing Country.

Figure 3 presents a summary of the characteristics of the judicial panels represented in the data. Of the 2,111 cases, two were decided *en banc*, and two were decided by two-judge panels. The remaining 2,107 cases were decided by a three-judge panel, and each of the three judges' race, ethnicity, and political

88. *Id.* at 77.

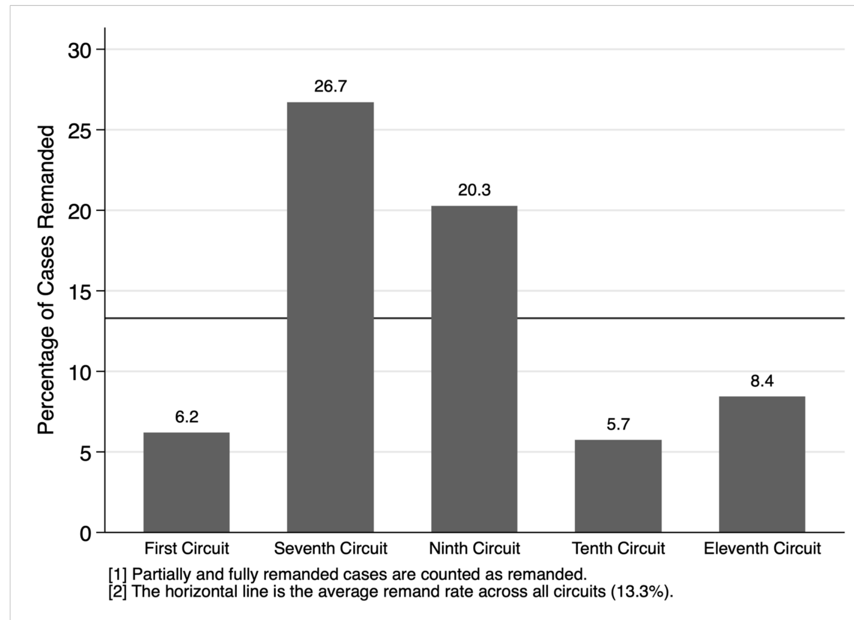
ideology were coded. The party of the appointing President was used as a proxy for each judge's political ideology, though this has been shown to be an imperfect measure, at best. As Figure 3 demonstrates, nearly half of the panels had at least one female judge on panel, and about one third of panels had at least one judge of color. More cases in the data were heard by a Republican majority panel (57.6%) than by a Democratic majority.

Figure 3: Panel Characteristics

Panel Characteristics	Overall Average
At least one female judge on panel	46.1%
At least two female judges on panel	15.4%
At least one judge of color on panel	33.4%
Two or more Republican appointed judges on panel	57.6%

As reflected in Figure 4, the data also show large differences in the remand rates across circuits, consistent with the findings in *Refugee Roulette*. The authors of *Refugee Roulette* found even more dramatic differences in 2004–2005, which likely reflects a number of factors. First, in 2004–2005, the courts were dealing with the effect of a "surge" of appeals following changes to the composition of the Board, discussed *supra*. In addition, the current project excluded motions to reopen and motions for reconsideration in order to limit comparison to cases reviewing the most similar types of claims. These results show that, from 2007–2013, the remand rates vary from as low as 5.7% in the Tenth Circuit, to as high as 26.7% in the Seventh Circuit.

Figure 4: Average Remand Rate by Circuit Court



A key finding of the regression analysis is that one factor remained significant, even when controlling for a wide range of case-specific variables: whether a case came from the Seventh or Ninth Circuit. This factor remained significant across all of the estimated models, and positively predicted remand. In other words, even when controlling for a wide variety of relevant variables, Figure 5 shows that an asylum case was more likely to be totally or partially remanded if it was heard by the Seventh or Ninth Circuits. Thus, it appears that the Seventh and Ninth Circuits' larger remand rates cannot be explained by the fact that they are hearing different types of claims than the other courts in this study. These effects were strong and stable across different logistic regression models that took into account whether an adverse credibility determination was made below. In Models 3-5, these effects remained significant when controlling for case-specific characteristics, such as the basis for the asylum petition, the applicant's gender, whether the applicant had representation, and two different means of controlling for the applicant's country of origin. Model 6 introduced judge and panel-level characteristics, such as whether the panel had a majority of judges appointed by a Republican president, whether the panel had one or more female judges, and whether the panel had one or more minority judges.[89] The circuit effects were robust to these characteristics as well, and remained significant in all models,

89. The purpose of this limited inquiry was to test whether the circuit effects were robust to judicial characteristics. Future work could fruitfully explore the relationship between the likelihood of remand and panel characteristics in much more detail.

including Model 9, which controlled for the widest variety of case and judicial characteristics.

Whether a case was heard by the Seventh or Ninth Circuits was not the only significant factor. At the conventional statistical significance threshold ($p<0.05$), the models also showed that an applicant from the Central American and Caribbean regions was significantly less likely to receive remand (Model 5). This result warrants further investigation in future research to determine whether any country-specific effects are strongly influencing the results.[90] Having one's case heard by a majority of Republican-appointed judges was significant only when considering the circuit and judicial characteristics, though this became less important ($p<.10$) when controlling for other case characteristics.

While representation was not significant in any of the models, this likely reflects the fact that the vast majority of applicants in the data had representation before the Courts of Appeals. The *quality* of representation is not measured here, and future work should explore this factor as well. As discussed *supra,* previous scholarship has found that representation plays an enormous role in one's likelihood of success in immigration court.[91] In addition, no scholarship has yet explored the effect of the quality of representation in asylum appeals in the federal courts.[92]

90. For example, further analysis should parse the effects of high-volume countries, such as El Salvador. Prior work has explored the effect of country of origin on asylum grant rates. *See, e.g.,* AJ Rottman, Christopher Fariss & Steven Poe, *The Path to Asylum in the U.S. and the Determinants For Who Gets In and Why*, 43 INT'L MIGRATION REV. 3 (2009) (finding that applicants from Spanish and Arabic speaking countries are significantly less likely to be successful at the immigration judge level); *cf.* Margaret S. Williams & Anna O. Law, *Understanding Judicial Decision Making in Immigration Cases at the U.S. Courts of Appeals*, 33 JUST. SYS. J. 97, 107 (2012) (finding that applicants from less democratic countries were not significantly more likely to be granted remand).

91. *See*, Eagly & Shafer, *supra* note 15, at 9.

92. Exploring the barriers that asylum seekers face in securing quality representation, Sabrina Ardalan develops a model for holistic representation. Sabrina Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM. 1001 (2016).

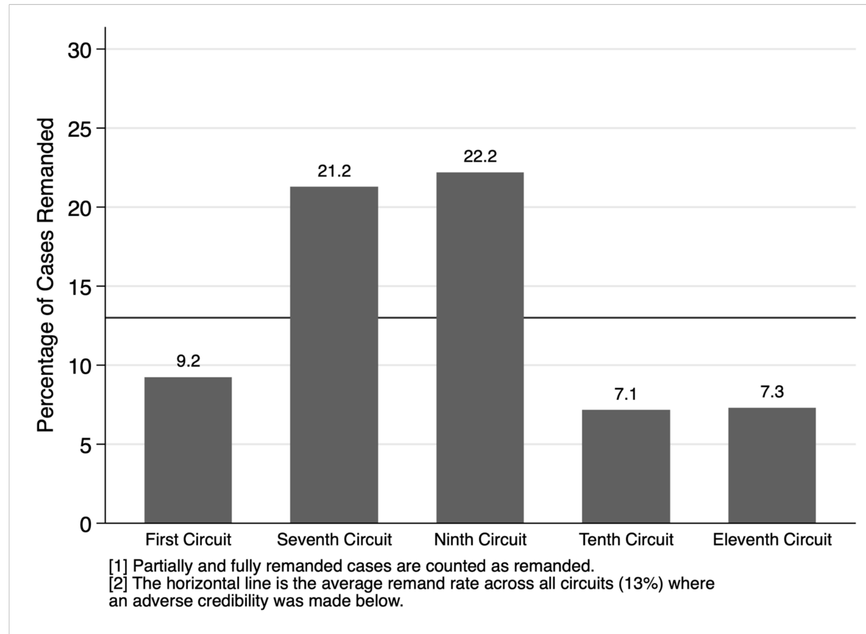
Figure 5: Logistic Regression Results

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Any adverse credibilty		-0.036	-0.077	0.108	-0.160		-0.051	-0.060	-0.183
determination below		(0.796)	(0.613)	(0.506)	(0.301)		(0.715)	(0.696)	(0.239)
Circuit-level variables									
First Circuit	-0.332	-0.336	-0.468	-0.254	-0.381	-0.327	-0.333	-0.521	-0.422
	(0.256)	(0.253)	(0.128)	(0.426)	(0.243)	(0.282)	(0.275)	(0.103)	(0.206)
Seventh Circuit	1.379 **	1.378 **	1.429 **	1.580 **	1.321 **	1.465 **	1.463 **	1.466 **	1.355 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Ninth Circuit	1.020 **	1.018 **	1.118 **	1.388 **	1.265 **	1.016 **	1.013 **	1.077 **	1.232 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Tenth Circuit	-0.414	-0.417	-0.318	-0.258	-0.229	-0.301	-0.306	-0.288	-0.165
	(0.280)	(0.278)	(0.425)	(0.532)	(0.566)	(0.443)	(0.437)	(0.488)	(0.686)
Individual effects									
Female applicant			0.309	0.417	0.333			0.310	0.325
			(0.289)	(0.254)	(0.264)			(0.288)	(0.276)
Male applicant			0.211	0.283	0.240			0.197	0.219
			(0.435)	(0.415)	(0.386)			(0.467)	(0.428)
Child			0.024	0.0646	-0.016			0.040	-0.009
			(0.888)	(0.717)	(0.927)			(0.811)	(0.956)
Basis of claim									
Membership in a			-0.225	-0.0181	-0.080			-0.283	-0.099
social group			(0.217)	(0.924)	(0.664)			(0.126)	(0.595)
Political opinion			0.191	0.301	0.185			0.212	0.189
			(0.234)	(0.076)	(0.271)			(0.190)	(0.261)
Nationality			-0.0984	-0.0908	-0.309			-0.114	-0.287
			(0.876)	(0.894)	(0.635)			(0.858)	(0.666)
Ethnicity			-0.101	-0.0336	-0.195			-0.188	-0.220
			(0.688)	(0.900)	(0.448)			(0.472)	(0.392)
Religion			0.216	0.309	0.148			0.230	0.154
			(0.239)	(0.102)	(0.430)			(0.210)	(0.409)
Representation by counsel			0.353	0.227	0.235			0.351	0.226
			(0.141)	(0.311)	(0.333)			(0.143)	(0.351)
Country-level characteristics									
Asylum-producing				-0.219				-0.219	
country				(0.155)				(0.158)	
Europe					0.089				0.057
					(0.745)				(0.836)
Africa					0.238				0.245
					(0.402)				(0.387)
Asia					-0.346				-0.345
					(0.104)				(0.106)
Oceania					-0.471				-0.464
					(0.345)				(0.350)
Latin America					-0.361				-0.408
					(0.175)				(0.129)
Central America					-1.400 **				-1.394 **
& Carribbean					(0.000)				(0.000)
Judge & panel-level variables									
Majority republican-						-0.363 *	-0.363 *	-0.270 †	-0.278 †
appointed						(0.012)	(0.012)	(0.077)	(0.071)
One or more female						0.0921	0.0942	0.079	0.052
judges						(0.526)	(0.517)	(0.604)	(0.736)
One or more minority						-0.0291	-0.0297	-0.074	-0.066
judges						(0.841)	(0.838)	(0.632)	(0.669)
Constant	-2.389 **	-2.375 **	-3.002 **	-2.925 **	-2.602 **	-2.265 **	-2.246 **	-2.775 **	-2.420 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Observations	2,111	2,111	1,947	1,947	1,947	2,109	2,109	1,945	1,945

Robust p-value in parentheses; † p<0.10, * p<0.05, ** p<0.01

As the figure below demonstrates, there was wide variation in the proportion of cases remanded where there had been a prior finding that the applicant was not credible (termed an "adverse credibility determination"). While this factor was not significant in the regression analysis, this is likely because many factors are driving differences across circuits. The Seventh and Ninth Circuits were nearly three times more likely to remand than the First, Tenth, or Eleventh Circuits. This deserves further exploration and indicates that a qualitative analysis of the doctrinal differences between the courts is warranted in order to better understand the differences in how these courts treat asylum appeals.

Figure 6: Remand with Adverse Credibility Determination Below



IV.
DIVERGENCE IN THE CASE LAW ACROSS CIRCUITS

As this section will discuss, a qualitative analysis of the opinions reveals that the circuits have developed a variety of court-fashioned rules that affect the likelihood of remand, even though all of these circuits are using the same legislatively imposed standard of review. These rules serve to either constrict or expand the scope of review. In the Seventh and Ninth Circuits, these rules permit courts to engage in a more searching review of the agency's decision-making. In the First, Tenth, and Eleventh Circuits, the courts have interpreted the standard in a way that restricts the scope of review, making remand much less likely.

A. Credibility Determinations

An asylum seeker's credibility has been aptly described as "the most crucial aspect of any asylum case and the single biggest substantive hurdle facing asylum applicants."[93] As Judge Easterbrook has explained, these determinations are so

93. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 186–87 (internal citations omitted).

challenging, in part, because "[m]ost claims of persecution can be neither confirmed nor refuted by documentary evidence."[94] Accordingly, much of the case hinges upon whether an immigration judge finds the asylum seeker to be credible, through a combination of factors such as the applicant's testimony and demeanor, any corroborating evidence, and the consistency of the claims. If an applicant appeals a credibility determination to the Board, the Board reviews the immigration judge's reasons, and determines whether the factual finding is clearly erroneous.[95] As discussed above, the circuit courts then review the Board's finding for substantial evidence.[96] If the Board adopts the immigration judge's opinion, the court then reviews the immigration judge's analysis [97]

A review of the cases suggests significant differences in the level of deference circuits accord to the agency's credibility determinations. The REAL ID Act, affecting applications for asylum made on or after May 11, 2005, plays an important role in understanding the courts' treatment of these determinations. In addition to a number of provisions that increased the burden of proof for asylum seekers,[98] and decreased judicial review of immigration decisions,[99] the REAL ID Act also gave specific guidance on how courts must treat the agency's assessment of an applicant's credibility. The Act prescribed that credibility determinations must be made on the "totality of the circumstances," and that the immigration judge may look beyond factors such as demeanor, responsiveness, and inconsistency, to "any other relevant factor" in assessing credibility.[100] The Act was based upon the notion that an "immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth."[101] For the most part, courts have agreed with the sentiment that the immigration judge possesses a unique advantage, noting that "[w]eight is given to the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify, while the Board and the reviewing court look

94. Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008).

95. 8 C.F.R. § 1003.1(d) (2009).

96. *See supra*, Part II.

97. Musollari v. Mukasey, 545 F.3d 505, 508 (7th Cir. 2008).

98. The Act instituted a requirement that there be a clear nexus between the applicant's alleged persecution and the protected ground (such as race or religion), and also placed a burden on applicants to provide evidence to corroborate otherwise credible testimony, if requested by the trier of fact, unless "the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. § 1158(b)(1)(B)(i)-(iii).

99. The Act also restricted habeas corpus review under 28 U.S.C. § 2241 of final orders of removal, deportation, and exclusion.

100. 8 U.S.C. § 1158(b)(1)(B)(iii).

101. H.R. Rep. No. 109-72, at 167 (quoting Sarvia-Quintanilla v. United States, 767 F.2d 1387, 1395 (9th Cir. 1985)).

only at cold [documentary] records."[102] The REAL ID Act implemented one important substantive change related to inconsistencies. Following its implementation, inconsistencies no longer need to "go to the heart" of the petitioner's claim in order to form the basis of an adverse credibility determination.[103] As described below, some circuits have interpreted the Act as narrowly circumscribing their review and vesting the agency with much more discretion in these determinations, while other courts have maintained a more searching level of review.

All of the courts purport to require the agency to provide specific reasons for an adverse determination, and all of them impose a reasonableness requirement on the determination.[104] However, as described below, the circuits have developed varying approaches in assessing the agency's credibility determination. Some circuits, such as the Ninth and Seventh in this sample, have taken pains to make the limitations of the Act explicit, and have developed tools of interpretation that limit the types of inconsistencies that could serve as a basis for an adverse determination. As the Ninth Circuit declares, "The REAL ID Act did not strip us of our ability to rely on the institutional tools that we have developed, such as the requirement that an agency provide specific and cogent reasons supporting an adverse credibility determination, to aid our review."[105] It further explained, "[d]espite our recognition that agency credibility determinations deserve substantial deference, the REAL ID Act does not give a blank check to the IJ [immigration judge] enabling him or her to insulate an adverse credibility determination from our review of the reasonableness of that determination."[106] In other words, the Ninth Circuit has imported "a rule of reason" into the assessment of the standard governing a credibility determination.[107] As the Ninth Circuit emphasized, the REAL ID Act does not permit the immigration judge to "rely on nothing more than a vague reference to the 'totality of the circumstances' or

102. Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003).

103. 8 U.S.C. § 1158(b)(1)(B)(iii); Malkandi v. Holder, 576 F.3d 906, 917 (9th Cir. 2009).

104. As the Ninth Circuit explains, "[w]e have consistently required that the IJ state explicitly the factors supporting his or her adverse credibility determination." Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010). The Seventh Circuit cautions that an "IJ cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole." Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006). The First Circuit has cautioned that credibility determinations under the REAL ID Act must be "reasonable" and must "take into consideration the individual circumstances of the applicant." Lin v. Mukasey, 521 F.3d 22, 28 n.3 (1st Cir. 2008). The Tenth Circuit states that "[w]e do not question credibility findings that are substantially reasonable." *Ismaiel*, 516 F.3d at 1205. However, "the IJ must give specific, cogent reasons for disbelieving" an applicant's testimony. *Id.*; *see also* Li Shan Chen v. U.S. Att'y Gen., 672 F.3d 961, 964 (11th Cir. 2011) (also requiring "specific, cogent reasons").

105. *Shrestha*, 590 F.3d at 1042.

106. *Id.*

107. *Id.* at 1041. *See also* Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 382 (2011).

recitation of naked conclusions that a petitioner's testimony was inconsistent or implausible, that the petitioner was unresponsive, or that the petitioner's demeanor undermined the petitioner's credibility."[108] Rather, the agency must enumerate the factors underlying the credibility determination, and the agency must explicitly make an adverse credibility finding in order for the Ninth Circuit to discredit the petitioner's claims. As one opinion explained, where the agency identifies an applicant's failure to disclose a fact and indicates that the agency did not believe the applicant's explanation for omitting it, this constitutes the sort of "passing statement" that "does not constitute an adverse credibility finding."[109] In addition, even a "statement that a petitioner is 'not entirely credible' is not enough" to be deemed an adverse credibility finding.[110] Rather, the finding must provide explicit reasoning, and in its absence, the Ninth Circuit will treat the petitioner's testimony as credible.[111]

The Seventh and Ninth Circuits have remanded cases in which the record revealed that the applicant had proffered an explanation for the inconsistency, and the agency did not explicitly consider the explanation in its decision.[112] As the court reasoned, to "ignore a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the REAL ID Act's text."[113] The Ninth Circuit has also concluded that credibility determinations may not be based upon trivial inconsistencies, and has further held that the immigration judge must weigh any relevant evidence that may contravene a conclusion that a given factor undermines credibility.[114] Inconsistencies may be deemed trivial where they are due to an "unscrupulous preparer" of the asylum application,[115] or lack a close nexus to the asserted grounds of persecution.[116] Similarly, the Seventh Circuit imposes a similar requirement that the determination may not be based upon trivial details or easily explained discrepancies; it emphasizes that while the immigration judge may consider inaccuracies that don't go to the heart of the

108. *Shrestha*, 590 F.3d at 1042.

109. Kaur v. Holder, 561 F.3d 957, 962–63 (9th Cir. 2009).

110. Aguilera-Cota v. Immigr. Nat. Serv., 914 F.2d 1375, 1383 (9th Cir. 1990).

111. Kalubi v. Ashcroft, 364 F.3d 1134, 1137 (9th Cir. 2004) (explaining that the REAL ID requires this, providing that where no adverse credibility determination is explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal).

112. *See, e.g.*, Solo-Olarte v. Holder, 555 F.3d 1089, 1091 (9th Cir. 2009) (explaining that the "lack of consideration given to [the applicant's] proffered explanation was error and prevents the underlying inconsistency from serving as substantial evidence to support the IJ's adverse credibility finding"); *cf.* Nan Ling Guo v. U.S. Att'y Gen., 380 Fed. App'x 826, 829 (11th Cir. 2010) ("Generally, tenable explanations for implausibilities in an applicant's testimony will not compel a reasonable fact finder to reverse a credibility determination, especially if corroborating evidence is absent").

113. *Shrestha*, 590 F.3d at 1044.

114. *Id.*

115. *Singh*, 406 Fed. App'x at 169.

116. Rizk v. Holder, 629 F.3d 1083, 1088 (9th Cir. 2011).

applicant's claim, "he can do so only as part of his consideration of the totality of the circumstances, and all relevant factors."[117]

In contrast, the three other circuits in this sample have interpreted the REAL ID Act to narrowly circumscribe their review of credibility determinations. In particular, the First Circuit treats the Act's language "as a revival of the doctrine of *falso in uno, falso in omnibus*[,]" meaning that if a petitioner is inconsistent with respect to one thing, he may be inconsistent (or untruthful) with respect to the entirety of his claim.[118] Similarly, the Tenth Circuit has interpreted this rule to mean that inconsistency with respect to matters that may be incidental to the applicant's claim may still serve as a basis for an adverse determination. Explicitly recognizing the contrary approach taken by the Seventh and Ninth Circuits in addressing the agency's treatment of inconsistencies, the Tenth Circuit reasoned: "Experienced litigators do not limit their challenges to adverse testimony to matters at the heart of the case. Cross-examination often seeks to undermine the witness's credibility by probing into inconsistencies and improbabilities regarding 'incidental' matters."[119] Thus, in the Tenth Circuit's view, an inconsistency about an incidental matter may well serve as the basis for an adverse credibility determination.

All five circuits distinguish between determinations based upon the applicant's testimony and those that are based upon the applicant's demeanor, in part because of the fact-finder's unique ability to assess the applicant's demeanor. As they explain, "credibility determinations that are based on the IJ's analysis of testimony, as opposed to demeanor, are granted less deference."[120] These courts reason that the fact-finder does not enjoy the distinct advantage in analyzing testimony, since the appellate court is similarly capable of analyzing testimony. By contrast, the fact-finder is in a unique position to assess demeanor, and the appellate courts are accordingly more deferential to these findings. In the years reviewed here, however, the First, Tenth, and Eleventh Circuits were much less likely to reverse an adverse credibility determination based upon either ground. This difference was most stark in cases in which the agency had made a demeanor-based credibility finding. As described below, despite the purported heightened deference that such a finding would receive, the Ninth and Seventh Circuits remanded many of these cases, whereas the First, Tenth, and Eleventh Circuits were extremely deferential to demeanor-based credibility findings over the seven-year period, and very rarely remanded in such a situation.

117. Kadia v. Gonzales, 501 F.3d 817, 822 (7th Cir. 2007).

118. *Id.* at 821 (explaining that the Seventh Circuit is "dubious" of this interpretation).

119. *Id.*

120. Gao v. Bd. of Immigr. Appeals 767 F.2d 1387, 127 (2d Cir. 2007); *Kadia*, 501 F.3d at 819; Arulampalam v. Ashcroft, 353 F.3d 679, 685–86 (9th Cir. 2003); Cordero-Trejo v. Immigr. Naturalization Serv., 40 F.3d 482, 487 (1st Cir. 1994).

While affording heightened deference to demeanor-based findings, the Ninth Circuit still scrutinizes the fact-finder's underlying reasons for an adverse, demeanor-based finding. The Ninth Circuit will reverse such findings where they appear to be "boilerplate," for example, and requires the immigration judge to "specifically point out the noncredible aspects of the petitioner's demeanor."[121] For example, where an immigration judge determines that the applicant was not credible because he was unresponsive, the Ninth Circuit requires the immigration judge to support this finding with "particular instances in the record where the petitioner refused to answer questions asked of him."[122] The Seventh Circuit has more boldly expressed concern about the immigration judges' ability to assess demeanor, which is reflected in its higher remand rates in these cases. It has explicitly questioned the competence of immigration judges to adequately assess demeanor, stating: "Immigration judges' insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American is a disturbing feature of many immigration cases, and immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor."[123] As Judge Easterbrook put it, "if you want to find a liar you should close your eyes and pay attention to what is said, not how it is said or what the witness looks like while saying it. And even then the error rate is high."[124] In the Tenth Circuit, on the other hand, the data revealed very few cases in which the court found that a demeanor-based determination was not supported by substantial evidence. In other words, the Tenth Circuit appeared to be extremely deferential to the immigration judge's assessment of the applicant's demeanor, and the Eleventh Circuit displayed a similar pattern. While it emphasized that credibility determinations must "rest on substantial evidence, rather than conjecture or speculation," it also stated that "[c]redibility determinations, so far as they involve demeanor, have thus been characterized as largely unreviewable."[125] In a context in which an assessment of demeanor is one of the largest substantive components of an applicant's case, this approach can have significant implications. Thus, in the few cases in which these circuits remanded a demeanor-based finding, the immigration judges' behavior was particularly egregious.[126] For example, both the Tenth and Eleventh Circuits made this finding when judges had blatantly introduced their own prejudices, basing the credibility determination on the judges' own conclusion that the

121. *Shrestha*, 590 F.3d at 1042 (noting that the REAL ID Act did not alter this rule).

122. *Id.*

123. *Kadia*, 501 F.3d at 819 (internal citations omitted).

124. *Mitondo*, 523 F.3d at 788 (internal citations omitted) (summarizing empirical research to conclude that the "major clue" in giving a liar away is the amount of detail, as truth-tellers have normal amounts of memory failure, while "liars" seem to "develop super-powered memories and often recall the smallest of details").

125. Todorovic v. U.S. Att'y Gen, 621 F.3d 1318, 1325 (11th Cir. 2010).

126. *Id.* at 1324; Lin Lin Tang v. U.S. Att'y Gen, 578 F.3d 1270 (11th Cir. 2009).

applicants did not appear "effeminate" in their dress or appearance, and therefore could not have been persecuted on account of their sexuality. [127]

The Ninth Circuit is the only circuit to go so far as directing the agency to consider the applicant credible on remand in certain cases. In cases in which it finds an adverse credibility decision is not supported by substantial evidence, the Ninth Circuit sometimes applies the "deemed credible" rule, where it directs the agency on remand to consider the petitioner credible.[128] While many of its opinions characterize its jurisprudence as lying well within the limits of the REAL ID Act's statutory language, it is worth noting that not every judge in the Ninth Circuit agrees with its approach, and some judges believe that the court has exceeded the bounds of its authority. In a strongly worded dissent, Judge Trott recently complained: "Over the years, our Circuit has manufactured a plethora of misguided rules regarding the credibility of political asylum seekers."[129] He recognized that these rules may stem from "humanitarian intentions," but argued that the Ninth Circuit "has pursued these intentions with untenable methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security ('DHS') and the BIA in the process."[130] A previous Ninth Circuit panel similarly characterized its jurisprudence as engaging in "sly subordination" by promulgating rules "that tend to obscure" the clear standard that governs the review of an adverse credibility finding, which has "flummox[ed] immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents."[131]

Taken as a whole, these rules of interpretation provide further explanation for the quantitative result described above, in which the Ninth and Seventh Circuits are up to three times more likely to remand when there was an adverse credibility finding than the First, Tenth, and Eleventh Circuits. A close reading of these cases suggests that the circuits have adopted differing approaches to the appropriate level of deference in assessing the agency's credibility finding. In addition, as described below, these cases reveal several other differing rules of interpretation that also affect the likelihood of remand across circuits.

127. *Todorovic*, 621 F.3d at 1325; Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009).

128. *Solo-Olarte*, 555 F.3d at 1095 (explaining that the "deemed credible" rule is fact dependent, and that there are cases in which it is appropriate to allow the Board to reexamine the credibility upon remand).

129. *Dai*, 884 F.3d at 877 (J. Trott, dissenting) ("These result-oriented ad hoc hurdles for the government stem from humanitarian intentions [.]").

130. *Id.*

131. Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005).

B. Review of the Record Below

A review of the cases reveals another important difference in the relevant facts and sources that a court is likely to rely upon in assessing the reasonableness of the agency's decision. Under the substantial evidence standard, a court assesses reasonableness by considering the agency's inferences against the record as a whole, rather than the particular facts cited by the agency. However, in the sample, courts differed in the extent to which they were inclined to review evidence that wasn't cited by the agency. The Seventh and Ninth Circuits routinely reviewed evidence that the agency did not cite in support of its decision, sometimes determining that this evidence undermined the reasonableness of the agency's inferences. In *Oiu Yun Chen v. Holder,* for example, the Seventh Circuit faulted the Board for its failure to explicitly address a document that the petitioner had presented from a Chinese government website on sterilization.[132] In cases where the agency's opinion did not mention a piece of evidence that the court viewed as outcome-determinative, these circuits also remanded, concluding that the record was too ambiguous to permit adequate review.[133] The Seventh Circuit has gone so far as to say that "ignoring even inconclusive corroborating evidence can undermine the decisions of an immigration court."[134] Significantly, it treats the question of whether the agency failed to consider evidence put forth by a petitioner as an allegation of legal error, and thus subject to the more stringent standard of *de novo* review.[135]

The Seventh and Ninth Circuits were also more likely to scrutinize the evidence relied upon by the agency in order to determine whether it supported the agency's conclusion. For example, the Ninth Circuit was unconvinced by cases in which an immigration judge merely cited State Department Reports for the proposition that the harm alleged by the petitioner was uncommon; as it emphasized, the question was not whether the harm was uncommon, but rather, whether the petitioner's "individual experiences are consistent with the country report."[136] In these types of decisions, the court cited parts of the State Department Report that the agency had not relied upon in its decision, and explained that these other statements "provide the context for evaluating [the petitioner's] credibility," and were "relevant to [the petitioner's] specific and individualized experiences."[137] Similarly, the Ninth Circuit remanded in situations in which the Board or immigration judge relied upon "broad statements" from the State

132. 715 F.3d 207, 212 (7th Cir. 2013). Of course, these courts also routinely reject the argument that the Board failed to consider all of the relevant evidence. *See, e.g.*, Singh v. Holder, 430 Fed. App'x. 641 (9th Cir. 2011). On the whole, however, they were more likely to closely scrutinize evidence not cited by the agency than the Tenth and Eleventh Circuits over the seven-year period.

133. *See, e.g.*, Escobar v. Holder, 657 F.3d 537 (7th Cir. 2011).

134. Terezov v. Gonzales, 480 F.3d 558, 565 (7th Cir. 2007).

135. *See, e.g.*, Cruz-Moyaho v. Holder, 703 F.3d 991, 997 (7th Cir. 2012).

136. Nosa v. Mukasey, 263 Fed. App'x 591, 593 (9th Cir. 2008) (citing Singh v. Gonzales, 439 F.3d 1100, 1110–11 (9th Cir. 2006)).

137. *Id.*

Department, rather than conducting the requisite individualized analysis of the petitioner's claims.[138] Occasionally, the Eleventh Circuit also scrutinized evidence not cited in the agency's decision, and in the rare case that the circuit did remand, it commonly did so on the basis of the agency's failure to consider such evidence.[139] In opinions where the Eleventh Circuit declined to issue a remand, it emphasized that "[w]here the BIA has given reasoned consideration to the petition, we will not require that it address specifically each claim the petitioner made or each piece of evidence the petitioner presented."[140] In the First and the Tenth Circuits, on the other hand, the courts very rarely remanded cases because the agency had not explicitly addressed evidence that was in the record.

Relatedly, there were also important differences in the extent to which the courts would scrutinize the agency's decision-making regarding record formation. Further, the Seventh and Ninth Circuits were also more inclined to criticize how the agency treated the question of whether proffered documents could form part of the record. These circuits emphasized that the standards should be less restrictive than the Federal Rules of Evidence, and they appeared to expect the agency to err on the side of inclusion. In one case, for example, the Seventh Circuit criticized the Board's dismissal of documents as improperly authenticated, saying that the "Board has a pinched conception of 'authentication[,]'" and noting that "documents may be authenticated in immigration proceedings through any recognized procedure."[141] Similarly, the Ninth Circuit emphasized that the immigration judge "may consider evidence if it is probative and its admission is fundamentally fair."[142] Thus, these differences in how likely the courts were to treat evidence that was not cited by the agency as warranting remand accounted for some of the differences in remand rates across circuits.

C. The Meaning of Persecution

A close reading of the cases also reveals differences in how circuits interpret whether the petitioner's alleged harm rises to the level of persecution, and how circuits interpret the question of nexus, which is the requirement that the persecutor target the petitioner "on account of" a protected ground.[143] From a review of the data, it is fair to say that all of the courts prefer a definition of

138. Dawwod v. Mukasey, 263 Fed. App'x 547, 549 (9th Cir. 2008).

139. *See, e.g.*, Bao Chai Lin v. U.S. Att'y Gen, 253 Fed. App'x 909 (11th Cir. 2007) (remanding based upon the immigration judge's failure to consider the petitioner's evidence of China's family law); Seck v. U.S. Att'y Gen, 663 F.3d 1356 (11th Cir. 2011) (remanding for the Board's failure to consider important evidence relating to the petitioner's daughter's risk of genital mutilation).

140. *Seck*, 663 F.3d at 1364.

141. Qiu Yun Chen v. Holder, 715 F.3d 207 (7th Cir. 2013) (internal citations omitted).

142. Singh v. Mukasey, 278 Fed. App'x 792, 793 (9th Cir. 2008) (internal citations omitted). Notably, this doctrine applies to evidence introduced by the government or the petitioner.

143. Li v. Holder, 559 F.3d 1096, 1102 (9th Cir. 2009).

persecution that involves physical harm.[144] However, in practice, the courts differ in the extent to which they appear to nearly require a credible allegation of severe physical harm in order to find that the evidence compelled a finding of persecution. For instance, the Tenth Circuit has emphasized that threats or harassment, without further incident, are very rarely sufficient to compel such a finding.[145] As one judge in the Tenth Circuit explained, "[o]ur cases do seem to require very violent, pervasive harassment and even injury."[146] A review of the Eleventh Circuit reveals a very similar pattern.[147] In the Ninth Circuit, however, while "[i]t is well established that physical violence is persecution[,]"[148] the court often emphasized that "evidence of physical harm is not required to establish persecution,"[149] and was generally more likely to find that a petitioner demonstrated persecution despite the absence of physical harm.[150]

In addition, there are differences in how courts analyze the question of whether the petitioner can satisfy the question of nexus, or whether the alleged persecutor targeted the petitioner *because of* a protected ground. In the sample reviewed, the Tenth and Eleventh Circuits appeared to interpret this standard very stringently, in a way that strains credulity. For example, the Eleventh Circuit held that "[e]ven if the evidence compels the conclusion that the petitioner refused to cooperate with the guerillas because of his political opinion, the petitioner still has to establish that the record also compels the conclusion that he has a well-founded fear that the guerillas will persecute him *because of* that political opinion, rather than because of his refusal to cooperate with them."[151] Similarly, in a Tenth Circuit case, *Tello v. Holder,* the petitioner argued that he feared persecution from

144. For a broader discussion of this issue, see Scott Rempell, *Defining Persecution*, 1 UT. L. REV. 283 (2013). *See also* Sheng En Liu v. Holder, 557 Fed. App'x 562, 565 (7th Cir. 2014) ("Persecution requires the application of 'significant physical force against a person's body, . . . the infliction of comparable physical harm without direct application of force,' or the infliction of 'nonphysical harm of equal gravity.'") (internal citations omitted).

145. Soewarsono v. Holder, 353 Fed. App'x 143, 145–46 (10th Cir. 2009).

146. Nalwamba v. Holder, 375 Fed. App'x 859, 865 (10th Cir. 2010) (Henry, C.J., concurring); Sidabutar v. Gonzales, 503 F.3d 1116, 1118, 1124 (10th Cir. 2007) (concluding that an Indonesian Christian man who had suffered repeated "beatings and robberies at the hands of Muslims" had not established past persecution); Jian Hui Li v. Keisler, 248 Fed. App'x 852, 854 (10th Cir. 2007) (affirming an immigration judge's ruling that, even if true, the deprivation of petitioner's right to education for three months and the broken arm he received during his fight with population control officials "constituted at most harassment and discrimination, but not past persecution within the meaning of the asylum statute").

147. *See, e.g.*, Ruiz v. U.S. Att'y Gen., 367 Fed. App'x 51, 54 (11th Cir. 2010) (noting that in the absence of physical harm, the "apprehension of imminent serious physical harm or death" was a prerequisite to finding persecution) (internal citations omitted).

148. *Li*, 559 F.3d at 1107.

149. Nguyen v. Holder, 339 Fed. App'x 773, 774 (9th Cir. 2009).

150. Of course, as Scott Rempell demonstrates, persecution assessments can be widely divergent even within the same circuit. Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 176 (2014).

151. Rivera v. U.S. Att'y Gen., 487 F.3d 815, 822 (11th Cir. 2007).

a Communist terrorist group, the Shining Path, based on his extensive past involvement with an opposing Peruvian political party.[152] He testified that after receiving death threats by phone, he was assaulted by men claiming to be Shining Path members.[153] After he was forced out of his car and beaten until he was unconscious, the alleged persecutors left Shining Path pamphlets and shouted "notorious statements" of the Shining Path to observers.[154] Here, the Tenth Circuit affirmed the Board's holding that "even if [his] attackers yelled platitudes about the Shining Path, that did not establish that they targeted *him* on account of *his past* political activity."[155] Thus, this analysis revealed differences in the level of harm sufficient to meet the definition of persecution, as well as variability in interpreting the nexus requirement.

D. Questions of Law and Fact

Finally, the Ninth Circuit has expanded the scope of its review by interpreting the REAL ID Act as permitting review of the question of whether an applicant can demonstrate changed circumstances to provide an exception to a one-year filing limit, when the underlying facts are not in dispute.[156] Other circuits, by contrast, have interpreted this issue as precluded, either concluding that it entails an unreviewable exercise of agency discretion, or that the statute's term, "questions of law," does not include mixed questions of law and fact.[157] This interpretative difference, of course, permitted the Ninth Circuit to review more cases than other circuits, though the Ninth Circuit rarely remanded on this basis in the seven years this Article reviewed.

152. Tello v. Holder, 404 Fed. App'x 260 (10th Cir. 2010).

153. *Id.* at 262.

154. *Id.*

155. *Id.* at 264.

156. *See, e.g.*, Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011); Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007) ("We now hold that our jurisdiction over 'questions of law' as defined in the REAL ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact."); *cf.* Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954 (11th Cir. 2005) (holding that the court lacks jurisdiction to consider the question of whether the applicant demonstrated changed circumstances, as it is purely a question of fact).

157. Al Ramahi v. Holder, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013) (collecting cases from sister circuits).

V.
IMPLICATIONS

A. The Value of Judicial Review in Asylum Law

As Justice Breyer has argued, the technical nature of modern society has brought laws that delegate enormous decision-making power and responsibility to administrators who are not themselves elected. This, in turn, imposes a challenge to ensure that related administrative decisions are fair and reasonable. In other words, "who will regulate the regulators?"[158] Judicial review is one critical way of addressing this concern and has been described as conferring "an imprimatur of legitimacy for administrative action."[159] As I argue in Section C *infra,* legitimacy plays an important normative role in justifying judicial review in this context because asylum seekers are politically powerless. This vulnerability renders the legitimizing function of judicial review all the more important.

Of course, legitimacy is just one of several justifications for judicial review that have been developed in a long line of scholarship. As I argue below, several of these functions are critical in the asylum context, including the newer function of "problem-oriented oversight" that Jonah Gelbach and David Marcus developed.[160] In 1978, Jerry Mashaw and his colleagues set forth the seminal account of judicial review.[161] In addition to the legitimizing function, they developed four additional, core functions. First, they argued, appellate courts provide a "corrective" function in reviewing agency action, as they are able to serve as a check by correcting erroneous agency decisions. Second, they perform a related, "critical" function by offering a steady stream of feedback to the agency. Third, they perform a "regulative" function by inducing the agency to decide cases more accurately out of either a fear of being reversed, or the mandate to follow judicial precedent. Finally, they perform an "information" function by drawing the agency's internal operations into the public eye.[162]

The broad range of court-fashioned rules identified above suggests that courts can play important corrective and critical functions in the asylum context. Indeed, the cases provide many examples of clear errors in the agency's decision-making that were remedied by the courts. In addition, these courts appear to be serving the information function of drawing the agency's operations into the public eye, as the strong language in the opinions has attracted the attention of the

158. Stephen Breyer*, The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–92 (2011).

159. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 942 (1988).

160. *See* Gelbach & Marcus, *supra* note 2.

161. JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978).

162. *Id.* at 136–37.

media, practitioners, and legal scholars.[163] However, this analysis also reveals that the appellate courts are performing these functions unevenly in the asylum context, and that the varying rules of interpretation adopted by different circuits affect how often they may correct an error by the agency. As I argue below, the approach taken by the Seventh and Ninth Circuits is normatively beneficial and more closely fulfills the aims of judicial review.

Mashaw and his colleagues were skeptical that courts were well-suited to perform these functions, concluding that the costs outweigh any benefits of judicial review, and that internal agency quality measures are better suited to achieve these aims.[164] In the asylum context, this debate is of less pragmatic value, as such internal measures are nearly non-existent within the immigration agency. Recent work has examined the history of the EOIR's efforts to ensure quality adjudication and has concluded that the agency has displayed a "near-total disregard for quality assurance initiatives."[165] Thus, given the constraints of this institutional history, judicial review is one of the only meaningful checks on agency action.

Furthermore, the skepticism of Mashaw and his colleagues stemmed, in part, from what they termed the "baseline" problem, or the fact that the appellate courts review a small fraction of cases adjudicated by the agency, and therefore have a skewed perspective that doesn't reflect the wide range of cases.[166] In the asylum context, this could make it difficult to assess whether an asylum seeker's testimony was coached, for example, if one is not accustomed to hearing such cases routinely. However, David Hausman's analysis provides evidence that the difference in their baselines may actually run in the opposite direction; as Hausman demonstrates, the Board and the Courts of Appeals are less likely to review the decisions of harsher immigration judges, and therefore review a skewed sample of more lenient immigration judges.[167]

In recent work, Jonah Gelbach and David Marcus argue that courts perform a previously unappreciated function when they review high volume agency adjudication, which they term "problem-oriented oversight."[168] They view Mashaw's skepticism as well-founded, but argue that this new function, when added to the existing justifications for judicial review, tips the balance in favor of the current system.[169] Their focus is on "high volume" agencies, or those whose

163. *See, e.g.*, Lynne Marek, *Posner Blasts Immigration Courts as "Inadequate" and Ill-trained*, NAT'L L.J., (Apr. 22, 2008).

164. *Id.*

165. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 41 (2019).

166. *Id.* at 139.

167. *See* Hausman, *supra* note 9, at 1207.

168. Gelbach & Marcus, *supra* note 2, at 1100.

169. *Id.* at 1102.

large caseloads and scarce resources mean that they are required to devote only a minimal amount of time to each case. As they argue, there is no doubt that these cases play an important role in federal courts; in 2013, immigration appeals increased the federal appellate docket by nearly 13%.[170] However, since the federal courts review a very small percentage of agency decisions, it is not as obvious that they are as important to immigration judges with crushing caseloads. As Gelbach and Marcus explain, "Whatever legitimacy the Article III courts promise must seem like a distant mirage for the vast majority of immigrants, claimants, and others as they litigate in obscure hearing rooms, far away from the grandeur of the federal courts."[171]

Nonetheless, Gelbach and Marcus argue federal courts do play an important and previously underappreciated role in reviewing high volume agencies.[172] Adding to the list developed by Mashaw and his colleagues, they contend that courts are able to recognize and address problems that go unaddressed by the agency through their review of fact-intensive, high volume adjudication. When an immigration judge persistently demonstrates bias, for example, a federal court may address this when the agency fails to correct it.[173] As they argue, judges occasionally break from the more day-to-day opinions to offer commentary on patterns or trends that they have observed.[174] Gelbach and Marcus contend that this commentary reflects a judicial attempt to "influence agency decision-making through means beyond the correction of discrete errors in individual cases or the issuance of binding precedent."[175] They view this as the judicial equivalent of legislators publicly criticizing an agency based upon information that they have assembled.[176] In performing this form of oversight, courts are able to spot problems that involve patterns of flaws, rather than more isolated errors.[177] This concept has not been without its critics, who question whether appellate judges are well-suited to a managerial function that requires them to aggregate and assess data.[178]

170. ADMIN OFF. OF THE U.S. COURTS, TABLE B-3: U.S. COURTS OF APPEALS - SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2009 THROUGH 2013 (2013), https://www.uscourts.gov/sites/default/files/statistics_import_dir/B03Sep13.pdf.

171. Gelbach & Marcus, *supra* note 2, at 1100.

172. *Id.* at 1129.

173. *Id.* at 1101. Of course, as Hausman's work demonstrates, judicial review is only effective when cases routinely reach the courts. As he demonstrates, immigration judges exercise some control over this through hasty denials of a motion for a continuance, for example, which terminate an immigrant's case before it ever reaches a federal court. Hausman, *supra* note 9, at 1198–200.

174. Gelbach & Marcus, *supra* note 2, at 1129.

175. *Id.*

176. *Id.* at 1129-30.

177. *Id.* at 1141.

178. Jennifer Nou, *Symposium: Commemorating the Career of Judge Richard A. Posner: Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1197 (2019).

In the data considered here, there is some evidence to suggest that the Seventh and Ninth Circuits are engaging in the type of oversight that Gelbach and Marcus envision. While these two circuits may not be systematically gathering data in the more technical way that Gelbach and Marcus suggest,[179] at times they explicitly mention that the problem they are addressing is a recurring one.[180] For example, these judges have often noted that an immigration judge's behavior forms part of a pattern, for example, or that features of the strapped adjudication system create persistent errors.[181] While these forms of oversight may not be as effective as direct changes within the agency, Gelbach and Marcus point to several tools that courts have at their disposal: courts may threaten sanctions, or write opinions that may result in the DOJ pressuring the EOIR to correct a problem so they do not to face reputational consequences in court.[182] As this analysis has revealed, some courts have also used the doctrinal tools at their disposal in order to spur agency action, and this has been enabled by the elastic nature of the appellate review system. This may be seen, for example, in the variety of additional rules of interpretation that the Ninth and Seventh Circuits have developed in assessing credibility determinations, as discussed *supra*.

While courts may already engage in this type of oversight as a descriptive matter, the notion of problem-oriented oversight also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As I explore below, scholars like Adam Cox have observed the decreased deference that some courts accord the immigration agency.[183] Cox has argued that one problem with this approach is that it departs from the *Chevron* doctrine in an important way, as courts appear to be assessing the competence of the immigration agency. As he contends, there is no doctrinal basis for this sort of assessment. Cox questions whether judges are in the best position to make such judgments, though he notes that these courts now review more than ten thousand immigration court decisions each year.[184] Gelbach and Marcus provide evidence that courts are capable of recognizing patterns of errors in immigration judge decision-making, for example, and this is in fact one of the primary *benefits* of judicial review in the context of high volume adjudication.[185] As I argue, this suggests that courts could make these broader assessments, and this type of

179. To be sure, Gelbach and Marcus acknowledge that this is a highly stylized example, and that no courts are yet engaging in the precise, more technical method that they set forth. Gelbach & Marcus, *supra* note 2, at 1144–46.

180. *Id.* at 1129; *see also* Legomsky, *supra* note 30, at 1645.

181. Gelbach & Marcus, *supra* note2, at 1129; *Shrestha*, 590 F.3d at 1044; *Terezov*, 480 F.3d at 565.

182. Gelbach & Marcus, *supra* note 2, at 1146.

183. Adam Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007).

184. *Id.* at 1683 (as discussed *supra,* these numbers have only increased over time).

185. Gelbach & Marcus, *supra* note 2, at 1129–30.

oversight provides a basis for justifying resource-intensive judicial review. One way of viewing the phenomenon that Cox observes is that courts are engaged in precisely the sort of problem-oriented oversight that Gelbach and Marcus envision. However, just as with the other core functions of judicial review, this analysis reveals that courts are engaging in this form of oversight very unevenly across circuits. As I argue below, the case for this oversight is particularly critical in the context of asylum adjudication, as the need for judicial review to "legitimize" the actions of the agency is at its most compelling.

B. Deference and Immigration Exceptionalism

Immigration law has long been considered a "maverick"[186] or a "constitutional oddity"[187] within American public law. As Peter Schuck writes, "No other area of American law has been so radically insulated and divergent from those fundamental norms of a constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[188] Hiroshi Motomura refers to immigration law as "an aberrational form of the typical relationship between statutory interpretation and constitutional law."[189] One of its defining features, as Adam Cox has recognized, is that its jurisprudence reflects an obsession with judicial deference.[190] The "plenary power" doctrine, which established the relationship between the three branches in immigration law, first allowed Congress to exclude nearly all Chinese immigrants in a decision where the Court declined to review the actions of the political branches.[191] In *Ekiu v. United States,* the Supreme Court expanded this doctrine in 1892, when it declared, "as to [aliens], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[192]

Courts continue to invoke this doctrine in present-day decisions of admission and exclusion, and it has arguably influenced every aspect of the level of scrutiny accorded to the immigration agency. As this Article's analysis reflects, deference to the agency remains an important component of asylum law, and the circuits appear to engage in very different levels of scrutiny when reviewing asylum adjudication. Following the streamlining measures and the subsequent surge of federal appeals, Judge Posner emerged as a particularly vocal critic of the

186. Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

187. Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

188. Schuck, *supra* note 186, at 1.

189. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

190. Cox, *supra* note 183, at 1671.

191. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).

192. *Ekiu*, 142 U.S. 651, 660 (1892). There, an arriving citizen of Japan had been excluded on the basis that she was likely to become a public charge and was not given the opportunity to demonstrate otherwise.

agency's decision-making, and his criticism has captured the attention of legal scholars and the media alike.[193] In examining the jurisprudence of Judge Posner, Cox argues that he may have afforded less deference to the agency because he judged it to be incompetent. As Cox explains, and I explore in more detail *infra*, *Chevron* deference has been defended upon the principle that administrative agencies have greater expertise and more political accountability than courts. However, as he points out, "Administrative law jurisprudence has generally made these judgments of institutional competence wholesale rather than retail."[194] In other words, the *Chevron* doctrine arguably did not envision a world in which courts decide whether deference is warranted by directly evaluating the competence of an individual agency's decision-making. And yet, as Cox suggests, this appears to be precisely what is happening in immigration cases. Scholars frequently invoke the term "immigration exceptionalism" to explain that immigration law is "littered with special immigration doctrines that depart from mainstream constitutional norms."[195] Looking solely at Judge Posner's opinions in the Seventh Circuit, Cox considers the possibility that courts have created an area of immigration exceptionalism within the deference doctrine.[196] Judge Posner famously stated:

> In recent years an avalanche of asylum claims has placed unbearable pressures on the grossly understaffed Immigration Court, and we and other courts have frequently reversed the credibility determinations made by immigration judges and affirmed by the also sorely overworked Board of Immigration Appeals. Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate."[197]

As Cox argues, Judge Posner "decided that deference is not due because the immigration agencies are failing to discharge this duty [to implement a statute over which they have primary responsibility] when they decide immigration cases."[198] This skepticism extends to the agency's handling of both factual and legal questions, and Judge Posner variously referred to its adjudication as "arbitrary, unreasoned, irrational, inconsistent, uninformed," and falling "below

193. Cox, *supra* note 183; Marek, supra note 163.

194. Cox, *supra* note 183, at 1682.

195. David Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. L. REV. 583, 584 (2017).

196. Cox, *supra* note 183, at 1684.

197. *Kadia*, 501 F.3d at 820–21.

198. Cox, *supra* note 183, at 1679. Cox also suggests an alternative explanation: that Judge Posner could be applying a variant of the nondelegation norm in immigration cases, which might reflect his belief that Congress ought to be forced to make certain choices themselves, rather than delegating them to an administrative agency. *Id.* at 1674–75.

the minimum standards of justice."[199] While Cox's analysis is limited only to Judge Posner, he notes that "a number of federal appellate judges have suggested that the immigration courts are fundamentally incompetent, biased, or both[,]" and that this "chorus has grown louder in recent years[.]"[200]

Both the data considered here and subsequent work by Anna Law indicate that this view may be more widespread than Judge Posner's jurisprudence, as it encompasses the Seventh Circuit more broadly, as well as the Ninth.[201] In Anna Law's interviews with Ninth Circuit judges, one judge stated anonymously that they would have no problem with according deference to the immigration agency, "if the IJs were well trained" and "not erratic."[202] The foregoing analysis also reveals that this is not merely limited to the application of *Chevron* deference. As this project has demonstrated, a perception of the agency's incompetence has arguably seeped into every aspect of how certain circuits interpret the standards in asylum law, not merely those governed by *Chevron*. These courts' mistrust of the agency has led them to read additional requirements into every component of the substantial evidence standard. In at least the Seventh and Ninth Circuits, this distrust of the agency's competence has arguably resulted in a much closer scrutiny of its adjudication.

Mila Sohoni provides an additional, compelling basis on which courts may be according less deference to agency decision-making in asylum cases. She suggests that some appellate courts perceive asylum as more akin to a private right than a public one.[203] Sohoni argues that Article III demands that the doctrine of deference be calibrated to the nature of the right involved, and that the courts' decreased deference to the agency likely reflects a judicial perception that asylum is something like a quasi-private right.[204] James Pfander and Theresa Wardon provide support for this, as they demonstrate that immigration did not historically fall squarely within the "public rights" category.[205] Bolstered by their historical

199. *Id.* at 1679–80.

200. *Id.* at 1682.

201. The higher remand rate of the Second Circuit suggests that it may also be among these courts, though the present study does not include the Second Circuit. See RAMJI-NOGALES ET AL., *supra* note 1, at 78.

202. ANNA LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 130 n.72 (2010) (anonymously citing an interview with a Ninth Circuit judge on July 26, 2007).

203. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. L. REV. 1569, 1623 (2013).

204. Traditionally, Article III review is viewed as necessary in cases involving private rights, or rights stemming from an individual's status as a person, such as his common law rights in property and bodily integrity. *Id.* at 1594. While the standards of review for agency action do not turn on whether the right at issue is public or private, Sohoni argues that courts ought to be guided by Article III jurisprudence when determining the extent of their deference in reviewing agency adjudication.

205. James Pfander and Theresa Wardon provide support for this by demonstrating that immigration did not historically fall squarely within the "public rights" category. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 433–40 (2010).

findings, Sohoni argues that the courts' refusal to accord the expected level of deference in asylum cases simply reflects their recognition of this quasi-private right, and they are thus "performing the robust review that Article III demands."[206]

Whatever the reason for this decreased level of deference, one thing is clear: the data in this Article illustrate the appellate review model's elasticity very starkly. In an area in which courts are applying the identical standard of review to decisions issued by the Board, some courts are consistently four times more likely to remand than others.[207] Thomas Merrill has pointed to the elasticity of the current model of judicial review as one reason for its endurance.[208] In an article exploring the origins of the appellate review model, Merrill explains that it was much less intentional than one might expect.[209] Rather, the appellate review model was improvised by the Supreme Court in response to a political crisis brought on by very searching judicial review of the Interstate Commerce Commission's decisions. As Merrill argues, this "jerry-built" system became entrenched by the 1920s and eventually spread to all of administrative law, even though the Court has never grappled with the Article III problems created by the use of administrative agencies to adjudicate cases.[210] However, one reason that the appellate review model has remained in place, he argues, is because of its elasticity, or "its flexibility at both the micro and macro levels."[211] At the micro, or individual case level, he argues that a court "can usually find a way to" overturn an agency's decision on an issue within the agency's competence that "suggests it is exercising its own competence."[212] For example, it may overturn a fact-based decision by framing the decision as "contrary to law."[213]

As the data here have demonstrated, this elasticity permits a wide range of approaches to reviewing the agency's adjudication of asylum cases. This variation

206. Sohoni, *supra* note 203, at 1623.

207. While *Refugee Roulette* laments this level of inconsistency, Legomsky reminds us that consistency can sometimes come at the expense of judicial independence. Stephen Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 474 (2007).

208. Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 997 (2011).

209. *Id.* at 963.

210. *Id.* at 939.

211. *Id.* at 997.

212. *Id.* at 998. Merrill also argues that the model has proven flexible at the macro levels, citing the creation of "hard look review" by the courts in response to concerns of agency capture. *Id.* Studies that have attempted to examine whether the standard of review makes a meaningful difference in the likelihood of remand, for example, have largely concluded that it does not, a point which further supports Merrill's argument that the review model is quite elastic. *See, e.g.*, Richard Pierce, *What Do the Studies of Judicial Review of Agency Action Mean?,* 63 ADMIN. L. REV. 77 (2011); Paul Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002).

213. Merrill, *supra* note 208, at 998.

in these approaches begs the question: which approach is normatively most beneficial, when federal courts are faced with the task of reviewing an agency in a state of crisis? Turning from the descriptive to the normative, I argue that the more expansive review employed by the Seventh and Ninth Circuits is the most sensible in this context. In addition to the core functions of judicial review discussed *supra*, I suggest, judicial review should also enable courts to be responsive to signs that the decision-making within an agency is compromised. This is particularly true in the asylum context, when there is good reason to depart from the traditional deference that courts afford administrative decision-making.

C. Justifications for Judicial Deference

Two primary theories are commonly invoked to justify judicial deference to agency action: political accountability and expertise. As Anne Joseph O'Connell explains, neither theory is sufficient on its own because agency decision-making can be based on both political and internal factors that rely upon the agency's expertise.[214] Courts have traditionally employed both theories in justifying deference, and this study provides an opportunity to assess the strength of each in justifying judicial deference to asylum adjudication. This Article builds upon the important work of Michael Kagan and Maureen Sweeney, both of whom have suggested that *Chevron* deference is not appropriate when reviewing asylum cases.[215] It also relies upon O'Connell's suggestion that courts ought to take factors such as the political responsiveness and the agency's track record into account in determining the appropriate level of deference to accord an agency.[216] As I argue below, a more responsive approach to deference law would permit federal courts to calibrate their scrutiny to signals of declining quality within agency adjudication, which would be normatively desirable.

1. Political Accountability

Under the political accountability theory of judicial review, courts defer to agency action because agencies are more accountable to the national electorate (through the President) than Article III courts.[217] The immigration context raises unique concerns, however, as many noncitizens are not part of the electorate, and there is no evidence that the immigration agency is responsive to those over whom it exercises power. Several prominent immigration scholars, including Stephen Legomsky, have emphasized that asylum applicants are politically powerless, and are particularly dependent upon the federal courts for the protection of their

214. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 980 (2008) (noting that courts cascade between the expertise and political accountability theories of judicial review).

215. Sweeney, *supra* note 67; Kagan, *supra* note 3, at 44.

216. O'Connell, *supra* note 214, at 979.

217. *See Chevron*, 467 U.S. at 865–66; O'Connell, *supra* note 214, at 980.

rights.[218] The system of asylum adjudication arguably reflects their vulnerability, as it has been marred by a history of politicization and attempts to politically insulate its decision-making from judicial review.[219] Moreover, the agency has consistently underfunded immigration adjudication, resulting in immigration judges shouldering an enormous caseload that makes high quality adjudication nearly impossible. As discussed supra, recent scholarship concluded that the agency has displayed a "near-total disregard for quality assurance initiatives.[220] Although the EOIR had one early evaluation program effort that involved peer evaluation, this ended in 2008.[221] Since then, the EOIR has focused on case completion goals as the primary metric by which immigration judges are assessed, and placed no emphasis on decisional accuracy.[222] As David Ames and his colleagues argue, this focus may reflect the political weakness of the litigants before the agency.[223] Thus far, theories of judicial review and deference have not adequately considered the political powerlessness of noncitizens. This vulnerability makes the "legitimizing" function developed by Mashaw all the more critical. Indeed, there is no evidence that the agency is in any way responsive to the asylum seekers over whom it exercises power. Rather, it suggests that the political powerlessness of noncitizens has led to the agency's history of politicization and its disregard for quality assurance initiatives.

This lack of political power arguably renders the agency's decision-making even more vulnerable to political pressures. In fact, recent scholarship has pointed to the structural design of the agency in order to call for less deference in asylum cases. In a trenchant analysis, Maureen Sweeney argues that the institutional location of asylum decision-making within the Department of Justice, a law enforcement agency deeply invested in enforcing border patrol, warrants a reconsideration of *Chevron* deference in asylum cases.[224] As she observes, the Supreme Court has never (outside of dictum in *Cardoza-Fonseca*) engaged in any robust analysis to justify the application of the *Chevron* doctrine in interpreting the Refugee Act.[225] Moreover, she contends that the Court's doctrine has arguably evolved in the three decades since this decision, and displayed an increasing willingness to scrutinize whether Congress intended for courts to exercise deference.[226]

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218. Legomsky, *supra* note 44, at 1208.

219. *Id.* (demonstrating that attempts to insulate the agency from judicial review have been ongoing since at least the 1980s); Legomsky, *supra* note 29, at 1676.

220. Ames et al.,, supra note 165, at 41.

221. *Id.*

222. *Id.* at 42.

223. *Id.* at 40.

224. Sweeney, *supra* note 67, at 134.

225. *Id.* at 133.

226. *Id.* at 150.

A well-developed body of scholarship has emphasized the lack of decisional independence within immigration courts and the related politicization of adjudication. These structural features are likely partially due to the lack of political power of immigrants. There have been egregious accounts of the system's politicization, such as Legomsky's recounting of a government prosecutor contacting the chief immigration judge ex parte to protest a ruling of an immigration judge, which caused the chief judge to instruct the immigration judge to reverse his ruling.[227] After Ashcroft reduced the size of the Board in 2002, Levinson demonstrated that the "re-assigned" Board members were those with decision rates most favorable to noncitizens.[228] Legomsky also showed that the percentage of favorable decisions for noncitizens by immigration judges and Board members negatively correlated with their job security.[229] In 2008, a former Justice Department official, under a grant of immunity before the U.S. House Judiciary Committee, testified that between 2004 and 2006, the White House and the Justice Department had bypassed the usual application procedures in order to appoint immigration judges based on either their Republican Party affiliations or their conservative ideological views.[230] The official's testimony revealed that more than half of them had no prior immigration experience.[231] In 2016, former Board Chair and immigration judge Paul Schmidt described the politicized environment of the agency, explaining, "You exist to implement the power of the Attorney General, you aren't 'real' independent Federal Judges."[232] Recent work by Catherine Kim supports this, as she demonstrates that, under the Trump Administration, immigration judges are more likely to order removal.[233] In short, as Shruti Rana argues, the "problems at the immigration agency read like a laundry list of all of the reasons a court should not defer to an agency[.]"[234] In many decisions, courts of appeals have called the independence of agency adjudicators into question, finding that the immigration judge showed "bias" and

227. Legomsky, *supra* note 29, at 1668.

228. Levinson, *supra* note 38, at 1155–56 .

229. Legomsky, *supra* note 29, at 1668; Kim, *supra* note 30, at 619; Levinson, *supra* note 38, at 1156–60.

230. U.S. DEP'T OF JUST., OFF. OF PRO. RESP. & OFF. OF INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 81–93 (2008).

231. *Id.*

232. Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (Part I)*, ASYLUMIST (Sept. 28, 2016), https://www.asylumist.com/2016/09/28/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-1/.

233. Kim, *supra* note 30.. In addition, Daniel Chand and William Schreckhise find that immigration judges give significantly greater deference to the positions of the public, their agency and President, and Congress in responding to a survey. Daniel E. Chand & William Dean Schreckhise, *Independence in Administrative Adjudications: When and Why Agency Judges Are Subject to Deference and Influence*, 52 ADMIN. & SOC'Y 171 (2018).

234. Shruti Rana, *Chevron Without the Courts? The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L J. 313, 325 (2012).

"prejudgment" against the noncitizen.[235] Thus, when an agency is particularly vulnerable to political manipulation and its litigants are politically powerless, a more searching level of review is warranted.

2. *Expertise*

The expertise theory is the second fundamental basis for judicial deference. According to this rationale, courts ought to defer to agency interpretations because they have more expertise in their areas of specialization than do courts. Several scholars have suggested that the traditional reasons for deferring to agency fact-finding do not apply as forcefully in the context of immigration, and that less deference is due as a result.[236] No scholar has more extensively developed the critique of the expertise rationale in this context than Michael Kagan. In Kagan's recent work, he relies upon the limitations of the expertise rationale to argue that *Chevron* deference is inappropriate in the context of asylum law.[237] As he argues, immigration cases rarely raise issues requiring scientific expertise, and instead raise "classic problems of fact and law, which would seem to dilute any claims that an executive body has a relative advantage compared to courts."[238] In his prior work, he has also shown that immigration judges enjoy very little advantage in assessing the credibility of asylum seekers, a factor on which many cases hinge. Deference to the fact-finder is traditionally justified on the basis of the relative advantage in making an accurate evaluation of the evidence, as the trial court has a unique opportunity to judge a witness's credibility. As Kagan demonstrates, social science research has soundly undermined the notion that truthfulness can be assessed from one's demeanor, and this criticism is particularly forceful in the asylum context.[239] At least one court has recognized this: the Seventh Circuit has voiced concern about immigration judges' insensitivity to the difficulty of judging a witness's demeanor when the witness is from a country that may have different cultural norms and may be testifying about very sensitive events.[240] It has further noted that the refusal of DHS and DOJ to provide proper training on making credibility determinations in the face of these challenges leaves immigration judges to "grasp[] at straws" and focus on "minor contradictions."[241] A second rationale, efficiency, is often used to justify deference to the fact-finder, as it

235. Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005).

236. *See, e.g.*, Kim, *supra* note 30, at 586.

237. Kagan, *supra* note 3, at 30.

238. *Id.*

239. Kagan, *supra* note 35, at 127.

240. *Kadia*, 501 F.3d at 819 (noting that "immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor.").

241. Djouma v. Gonzalez, 429 F.3d 685, 688 (7th Cir. 2005) ("The departments [DOJ and DHS] seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility").

would be inefficient to have the reviewer reach these same findings anew. As Kagan argues, efficiency alone is a difficult rationale when it comes at the expense of the correct substantive outcome, particularly when the stakes are as high as in an asylum claim.[242] While there is no doubt that the immigration judge is still in a relatively better position than an appellate court to be able to assess things like a witness's demeanor, there is reason to be skeptical of whether it justifies the extreme deference to the immigration judge in asylum adjudication.

An issue closely related to expertise concerns the conditions under which agencies adjudicate cases. Immigration judges operate in a climate where any relative expertise is nearly moot, as judges report not having time to do basic research on the relevant case law.[243] As Stephen Legomsky has demonstrated, the agency suffers from severe underfunding that has affected its reputation and the courts' perception of its decision-making.[244] In 2009, for example, the average immigration judge was required to complete 4.3 removal cases per day; this left each judge with approximately 72 minutes to consider each case, which would include hearing testimony, reviewing evidence, and rendering a decision.[245] As the Seventh Circuit noted in 2007, one Board member decided more than 50 cases a day, requiring a decision nearly every ten minutes if he were assumed to work a nine-hour day without a break.[246] The GAO's 2017 analysis showed that the EOIR's case backlog, or the cases pending from previous years that remain open at the start of a new fiscal year, more than doubled from 2006 through 2015.[247] As its analysis demonstrated, the median pending time for a case went from 198 days in 2006 to 404 days in 2015.[248] Many immigrants today routinely wait more than 1000 days for a hearing,[249] and it would take the immigration courts 3.6 years to clear their backlog if they were given no new cases.[250]

Given that immigration judges operate with inadequate resources and a crushing caseload, erroneous decisions are simply inevitable. Moreover, as Gelbach and Marcus point out, federal judges are able to spend much more time on each case.[251] Federal courts also confer the advantage of being generalists, which plays a particularly important role in this context. As Legomsky has argued,

242. Kagan, *supra* note 35, at 117.

243. In 2017, immigration judges reported to the GAO that they do not have sufficient time to conduct essential tasks such as "case-related legal research or staying updated on changes to immigration law." GAO-17-438, *supra* note 28, at 31.

244. Legomsky, *supra* note 29, at 1639.

245. *Maximum Average Minutes Available Per Matter Reviewed*, TRAC: IMMIGR. *http://trac.syr.edu/immigration/reports/208/include/minutes.html*; *see also* Kim, *supra* note 30, at 610–11.

246. *Kadia*, 501 F.3d at 820.

247. GAO-17-438, *supra* note 28, at 23.

248. *Id.* at 22.

249. TRAC, *supra* note 245.

250. *Id.*

251. Gelbach & Marcus, *supra* note2, at 1111.

asylum officers and immigration judges are bombarded every day with tales of unimaginable human tragedy and may begin to think in relative terms.[252] One advantage of a generalist federal appellate court is that judges may be less likely to develop a level of institutional callousness, or undue sympathy for agency officials.[253] With adequate scrutiny of the agency's decision-making, the appellate process permits some of the most egregious errors to be fixed.

The doctrines that the Seventh and Ninth Circuit have developed are most appropriately tailored to the limitations of the expertise rationale in the asylum context. These courts closely scrutinize the agency's factual findings to be certain that they are well-supported by the entire factual record, as well as to ensure that the agency has provided specific and reasonable support for any adverse determinations. While this inquiry has grown increasingly searching as the reputation of the agency has been called into question and the quality of its decision-making has arguably grown poorer, one could argue that this approach more fully permits courts to fulfill the aims of judicial review. In fact, the Ninth Circuit has argued that its searching review is entirely consistent with the legislative history of the REAL ID Act.[254] However, even if this scrutiny lies outside the bounds contemplated by *Chevron,* I argue that this more searching inquiry is normatively beneficial and is justified by the current state of immigration adjudication.

3. Judicial Deference as Responsive to Agency Crisis

A consideration of all of these factors warrants a reexamination of the deference doctrine in asylum law. Anne Joseph O'Connell has argued that judicial doctrine could be better attuned to the reality of agency decision-making, and that courts could assess several factors when deciding how much to defer to an agency's decision-making, such as the level of presidential and congressional control over the agency, the agency's track record, and the type of agency.[255] She suggests, for example, that if an agency receives substantial oversight from Congress and the White House, then perhaps courts should simply defer to their reasonable decisions.[256] Immigration cases are different from nearly every other type of agency action, however, as they are virtually non-responsive to the people upon whom they act. Thus, immigration cases might dictate precisely the opposite result: the more oversight the agency receives from Congress and the White House, the more closely courts should scrutinize their actions. As Maureen Sweeney argues, majoritarian political accountability is a "distinct *dis*advantage

252. Legomsky, *supra* note 43, at 1210.

253. *Id.*

254. *Shrestha*, 590 F.3d at 1043.

255. O'Connell, *supra* note214, at 980.

256. *Id.* at 981.

in any attempt to protect the fundamental rights of politically vulnerable minorities."[257]

To be sure, this theory of deference would require a revision to the theory encapsulated by *Chevron*.[258] Indeed, part of the point of *Chevron,* as Cox explains, was to create a "general, trans-substantive doctrine of administrative deference" to replace the prior, more "ad hoc" approach.[259] Accordingly, *Chevron* does not authorize courts to calibrate the level of deference to their assessment of an individual agency's competence.[260] Thus, it begs the question of how well-suited courts are to assess this competence.[261] As discussed *supra,* the recent work of Gelbach and Marcus suggests that courts can serve this role, at least in areas of the law in which they receive large numbers of appeals.[262] As they point out, the federal courts now feed on a sizable diet of immigration cases, and are accordingly well-situated to observe trends within the agency's decision-making.[263] In a crisis as severe as the immigration agency's, with performance measured by the number of cases completed and little time to decide each case, such shortcomings are nearly impossible to ignore. Facing this reality, some courts have arguably adjusted their scrutiny of the agency accordingly, which is normatively beneficial.

As I argue here, it would not be desirable to have a theory of judicial review that is simply invariant to major crises within an agency. Certain circuits, such as the First, Tenth, and Eleventh in these data, have simply continued to employ the same approach to reviewing the agency's decision-making, even as the agency increasingly employed measures that incontrovertibly reduced the quality of its adjudication. Others, such as the Seventh and Ninth Circuits, have engaged in closer scrutiny in response to repeated signals that the quality of adjudication was compromised. This latter approach better fulfills the legitimizing function of judicial review, and this is particularly true in the context of an agency that is not politically responsive to its litigants. In this context, judicial review becomes all the more important, and an approach to deference that is calibrated to the quality of decision-making is both normatively justifiable and desirable. This is all the more compelling in a substantive area of law in which the stakes could not be

257. Sweeney, *supra* note 67, at 191 (emphasis in original).

258. *Cf. id.* While Sweeney argues that a removal of *Chevron* deference is wholly consistent with both congressional intent and more recent Supreme Court jurisprudence, I conclude that the more expansive approach to deference in the asylum context would likely require revisions to existing jurisprudence. As I argue *infra,* a theory of judicial review that permits a court to calibrate its deference to changing conditions within the agency that affect the quality of its adjudication is normatively beneficial.

259. Cox, *supra* note 183, at 1682.

260. *Id.* at 1682–83.

261. *Id.* at 1683.

262. Gelbach & Marcus, *supra* note 2, at 1129–30.

263. *Id.* at 1099-1100.

higher,[264] and the right at stake is arguably more akin to a private one that demands robust review by Article III judges.[265]

CONCLUSION

The most promising potential to meaningfully reform asylum adjudication likely lies in proposals to improve the quality of decision-making within the agency more directly. Thus, calls to separate the enforcement and adjudicative arms of the agency, for example, are critically important, as are those that would provide more resources and independence to immigration judges and the Board. However, while many of these proposals could bring substantial improvement to the quality of asylum adjudication, they are unlikely to manifest soon. Rather, recent changes move the agency in the opposite direction. The imposition of quotas will likely further compromise the immigration judges' independence and the quality of their decision-making, as job performance is now dependent upon how quickly they close cases.[266] As a result, federal courts may be the only institutions equipped to meaningfully address flaws in the immigration agency's system of adjudication.

A close review of five circuit courts has revealed important differences in how courts approach judicial review of asylum adjudication. Circuits like the First, Tenth, and Eleventh engage in very little scrutiny of asylum cases; instead they adhere to an approach grounded in extreme deference to the agency. Other circuits, like the Seventh and Ninth, have calibrated their approach in response to signals that the quality of agency adjudication is extremely compromised in asylum cases. Accordingly, they have used the elasticity of the appellate review model, and the flexibility in the substantial evidence standard, to develop rules of interpretation that expand the seemingly narrow standard of review in asylum cases.

As I outline here, this more expansive approach is normatively desirable. Federal courts ought to use the elasticity of the appellate review model in order to expand the scope of their review in the asylum context, as the Seventh and Ninth circuits have already done. While it is not necessarily the approach envisioned by *Chevron,* a theory of deference that permits courts to respond to signs of crisis within an agency more closely fulfills the purpose of judicial review. This is particularly true in the asylum context. In stark contrast to other agencies, the

264. Kim, *supra* note 30, at 615; *see also* Kagan, *supra* note 3, at 2 ("*Chevron* deference seems to be at the height of its powers in refugee and asylum cases, with the highest possible human consequences.").

265. Sohoni, *supra* note203.

266. EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES, SECTION 3: ACCOUNTABILITY FOR ORGANIZATIONAL RESULTS (Mar. 30, 2018). In order to achieve "satisfactory performance," each judge must complete 700 cases per year (more than two per working day) and must achieve a remand rate of less than 15% total from both the Board and Courts of Appeals.

immigration agency is not responsive to the people over whom it exercises power. Rather, it is structured in a way that permits adjudication to be directly influenced by the political whims of the executive, even though asylum arguably implicates a more quasi-private right.[267] Moreover, as a long line of scholarship has recognized, there are reasons to doubt the purported expertise advantage of the agency in this context. The more expansive standard adopted by at least two circuits is thus preferable and more closely fulfills the aims of judicial review, and more courts should follow suit.

267. Sohoni, *supra* note 203, at 1621.