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## Saving Lives

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SHALINI BHARGAVA RAY

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# SAVING LIVES

SHALINI BHARGAVA RAY\*

**Abstract:** When Alan Kurdi, a Syrian toddler, drowned in the Mediterranean while fleeing civil war in his home country, the world's attention turned to the Syrian refugee crisis. Offers to transport and house refugees surged. Private boats set out on the Mediterranean Sea to rescue refugees dying in the water. A billionaire offered to purchase an island on which the refugees could live out their lives. This Article analyzes private humanitarian aid to asylum seekers, a subset of migrants whose claims for refugee protection have not yet been filed or adjudicated, and who typically travel without authorization. This Article determines that much of this aid is currently illegal or operates under a cloud of legal uncertainty, principally due to criminal laws prohibiting the smuggling, transport, and harboring of unauthorized migrants. In light of the compelling humanitarian interests at stake, as well as asylum states' concern for national security, this Article argues for law reform to decriminalize private humanitarian aid to asylum seekers.

## INTRODUCTION

*Activists often speak as though the solutions we need have not yet been launched or invented, as though we are starting from scratch, when often the real goal is to amplify the power and reach of existing alternatives. What we dream of is already present in the world.*

—Rebecca Solnit<sup>1</sup>

On the day of his death, Syrian toddler Alan Kurdi wore a bright red shirt, blue shorts, and sneakers. His family fled the violence in Syria and planned to

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<sup>1</sup> REBECCA SOLNIT, *HOPE IN THE DARK: UNTOLD HISTORIES, WILD POSSIBILITIES*, at xvii (3d ed., 2016).

travel to the Greek island of Kos to apply for asylum, and then reunite with family in Canada.<sup>2</sup> He and his brother, Galip, together with their parents, Rihanna and Abdullah, boarded a dinghy boat from Bodrum, Turkey. Only Abdullah survived.<sup>3</sup>

Abdullah Kurdi was a barber from Damascus.<sup>4</sup> The family found Damascus a “cosmopolitan” oasis in an otherwise fractured region.<sup>5</sup> Abdullah and his family, however, increasingly found themselves in peril as the conflict in Syria continued. In response to protests against Syrian president Bashar al-Assad, the family relocated to Kobani, a small town along the Turkish border with a large Kurdish community.<sup>6</sup> Despite not provoking either side, the family inhabited a world of daily violence. In September of 2014, the violence worsened, as the Islamic State (“Daesh”) shelled Kobani, sending families running for their lives. After younger extended family members witnessed a suicide bombing, the police sought out the male elders for questioning.<sup>7</sup> At that point, the family decided to flee.

Abdullah went first. He fled to Turkey, found work, and sent money home.<sup>8</sup> He eventually called for his own family to join him. Life in Turkey, however, proved impossible financially, as Abdullah was unable to support the four of them. He devised a plan to reunite with family in Canada. He borrowed money for a dinghy boat to carry his family from Bodrum to Kos, where they would apply for asylum.<sup>9</sup> Once they received refugee status, they could travel to Canada. Abdullah’s sister had already raised \$20,000 to sponsor them.<sup>10</sup>

Abdullah approached the journey with caution. Many had died on similar voyages; but some had lived, and those who had survived were thriving in their new homelands.<sup>11</sup> A smuggler made the arrangements, and on September 2, 2015, along with another raft of refugees, they set out on one of the safest routes to Europe.<sup>12</sup> The sea, however, was wild, and the journey quickly turned perilous. The smuggler abandoned the boat, leaving Abdullah to take the boat’s tiller, “swerv[ing] over the waves.”<sup>13</sup> The boat capsized. The family held on to Abdullah, who clung to the boat, kissed one of his sons, and implored them

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<sup>2</sup> Anne Barnard, *Syrian Family’s Tragedy Goes Beyond Image of Boy on Beach*, N.Y. TIMES (Dec. 27, 2015), <https://nyti.ms/2jKtUqA> [<https://perma.cc/2WTW-GEQM>]. Alan Kurdi is also referred to as “Aylan,” which is closer to the Turkish pronunciation of his name. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

both not to let go. Despite his efforts, the waves washed his family away: Rihanna, Galip, and Alan, “one by one.”<sup>14</sup> A day later, Alan’s body washed up on to the beach, face down, a lifeless doll. He was still wearing his clothes and sneakers.<sup>15</sup>

The media widely reported the Kurdi family’s horror, and the story galvanized private citizens across the world.<sup>16</sup> Donations to nongovernmental organizations (NGOs) helping refugees spiked in the days following the discovery of Alan’s body.<sup>17</sup> NGOs sponsoring private boats, which had been conducting search and rescue for over a year in some instances, saw increased donations and news coverage of their work.<sup>18</sup> A billionaire businessman from Egypt publicly announced a plan to purchase a Greek Island and name it after Alan.<sup>19</sup>

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Anne Barnard & Kareem Shoumali, *Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/world/europe/syria-boy-drowning.html?mcubz=0> [<https://perma.cc/TNW7-K77S>]; Gordon Rayner, *Aylan and Galip Kurdi: Everything We Know About Drowned Syrian Refugee Boys*, TELEGRAPH (Sept. 3, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/11841802/eu-migrant-crisis-refugee-boys-aylan-galip-kurdi.html> [<https://perma.cc/AUE2-2LY6>]; Yaron Steinbuch, *Photo of Drowned Toddler Causes Outcry Over Migrant Crisis*, N.Y. POST (Sept. 2, 2015), <http://nypost.com/2015/09/02/photo-of-drowned-toddler-causes-outcry-over-migrant-crisis/> [<https://perma.cc/PN4G-YJ67>]; Ishaan Tharoor, *Death of Drowned Syrian Toddler Aylan Kurdi Jolts World Leaders*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/image-of-drowned-syrian-toddler-aylan-kurdi-jolts-world-leaders/?utm\\_term=.bc1e1eb1336e](https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/image-of-drowned-syrian-toddler-aylan-kurdi-jolts-world-leaders/?utm_term=.bc1e1eb1336e) [<https://perma.cc/MZ5G-Q442>]; Griff Witte, *European Rail Service Hit Hard by Surge of Migrants*, WASH. POST, Sept. 3, 2015, at A12.

<sup>17</sup> Rick Gladstone & Karen Zraick, *Donations for Refugees Surging, American Charities Report*, N.Y. TIMES (Sept. 11, 2015), <https://nyti.ms/2suT9Bg> [<https://perma.cc/9P2F-ZCVW>]; Lisa O’Carroll, *Donate Cash if You Want to Help Syrian Refugees, Aid Groups Say*, THE GUARDIAN (Sept. 8, 2015), <https://www.theguardian.com/world/2015/sep/08/donate-cash-help-syrian-refugees-aid-groups-unicef-wfp-say> [<https://perma.cc/B5TB-S47V>] (reporting that charities experienced a significant donation increase after the photograph of Alan Kurdi’s body was released, with Save the Children receiving £1.2 million in just a few days); Megan O’Neil, *Photo of Drowned Syrian Child Spurs Spike in Donations*, CHRON. PHILANTHROPY (Sept. 9, 2015), <https://www.philanthropy.com/article/Photo-of-Drowned-Syrian-Child/232957> [<https://perma.cc/BV67-GKCX>].

<sup>18</sup> See Jessica Elgot, *Charity Behind Migrant-Rescue Boats Sees 15-Fold Rise in Donations in 24 Hours*, THE GUARDIAN (Sept. 3, 2015), <https://www.theguardian.com/world/2015/sep/03/charity-behind-migrant-rescue-boats-sees-15-fold-rise-in-donations-in-24-hours> [<https://perma.cc/B4RW-PSRD>] (Migrant Offshore Aid Station (MOAS) reported €150,000 in individual donations in a twenty-four hour period, with a previous high of only €10,000); Jon Henley et al., *Britons Rally to Help People Fleeing War and Terror in Middle East*, THE GUARDIAN (Sept. 3, 2015), <https://www.theguardian.com/uk-news/2015/sep/03/britons-rally-to-help-people-fleeing-war-and-terror-in-middle-east> [<https://perma.cc/58L8-P35B>] (Caroline Anning, of Save the Children, reported a seventy percent increase in calls and e-mails in a twenty-four hour period).

<sup>19</sup> Keren Blankfeld, *Africa’s 10th Richest Man Still Waiting to Buy a Greek Island to House Refugees*, FORBES (Nov. 18, 2015), <https://www.forbes.com/sites/kerenblankfeld/2015/11/18/africas-10th-richest-man-still-waiting-to-buy-a-greek-island-to-house-refugees/#3b01ed672fde> [<https://perma.cc/6Z9B-2LH8>] (noting that Naguib Sawaris, the Egyptian billionaire who proposed buying and naming a Greek island after Alan Kurdi, is still waiting for Greece’s approval); Amanda Gomez, *Egyptian Billionaire Wants to Buy Island for Refugees*, PBS NEWSHOUR: THE RUNDOWN (Sept. 4, 2015),

Private humanitarian aid to asylum seekers,<sup>20</sup> however, occurs amid legal uncertainty—and in some instances, outright prohibition. The United Nations Migrant Smuggling Protocol defines smuggling as occurring for “material benefit, direct or indirect,” but states are not required to adopt that restricted definition.<sup>21</sup> As a result, states have remained free to criminalize private acts of aid as part of standard border control policy.<sup>22</sup> The major Western asylum states, the United States, Canada, and the European Union, have overbroad statutes criminalizing all instances of alien smuggling and related offenses, regardless of whether done for financial gain. In the United States, the relevant statute prohibits a range of actions, including “bringing in,” transporting, “conceal[ing], harbor[ing], or shield[ing] from detection” unauthorized migrants.<sup>23</sup> In Canada, prior to 2015, the anti-smuggling statute criminalized all acts of aiding and abetting anyone “coming into Canada” without authorization.<sup>24</sup> Finally, in the EU, member states generally criminalize acts that facilitate unauthorized migration without any exception for humanitarian actors.<sup>25</sup> Thus, for example, acts of rescue, when coupled with transport of refugees and migrants to the frontiers of an asylum state, are susceptible to prosecution if the receiving state does not consent to receiving those refugees and migrants.<sup>26</sup> In 2004, Italy prosecuted an NGO carrying rescued African migrants from Ghana and Nigeria. The NGO, faced with no alternative, docked at an Italian port despite Italy’s express denial of permission to do so.<sup>27</sup> Although a judge ultimately acquitted the NGO, the NGO’s prosecution has become a cautionary tale that private humanitarian actors tell to distinguish and protect their own work.<sup>28</sup> Similarly, in the United States, providing housing, food, clothing, and so forth,

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<http://www.pbs.org/newshour/rundown/egyptian-billionaire-wants-buy-island-refugees/> [https://perma.cc/5NPK-NNWF].

<sup>20</sup> This Article uses the term “asylum seekers” to refer both to internally-displaced persons who intend to flee to seek humanitarian protection, as well as migrants who have fled their country of origin for the purpose of seeking humanitarian protection. See *infra* note 76.

<sup>21</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air arts. 3, 6, Nov. 15, 2000, 2241 U.N.T.S. 480 [hereinafter Migrant Smuggling Protocol]. Article 6.1 criminalizes smuggling and related offenses, such as “enabling” an unauthorized migrant to “remain” in the destination state without complying with the destination state’s requirements for lawful presence.

<sup>22</sup> Combatting Migrant Smuggling into the EU: Main Instruments, PARL. EUR. DOC. (PE 581.391) 7 (2016) (noting that most member states do *not* “decriminaliz[e] humanitarian assistance to smuggled migrants”).

<sup>23</sup> 8 U.S.C. § 1324(a) (2012).

<sup>24</sup> *Regina v. Appulonappa*, [2015] 3 S.C.R. 754, ¶ 19 (Can.). The current statute prohibits organizing, instigating, aiding or abetting entry into Canada that “is or would be in contravention of” the statute. Immigration & Refugee Protection Act, S.C. 2001, c. 27, § 117 (Can.) [hereinafter IRPA]. Generally, this includes acts such as trafficking, smuggling and hiding migrants for profit, but no longer applies to humanitarian assistance. *Id.* §§ 117–119.

<sup>25</sup> See *infra* notes 243–245 and accompanying text.

<sup>26</sup> See *infra* notes 247–258 and accompanying text.

<sup>27</sup> See *infra* notes 247–258 and accompanying text.

<sup>28</sup> See *infra* notes 110–114 and accompanying text.

has constituted illegal “harboring”<sup>29</sup> because providing such aid facilitates asylum seekers’ “unlawful presence.”<sup>30</sup> Such legal doctrine has led to the prosecution of humanitarian actors, including individuals assisting Central American migrants in Arizona and Texas as part of the Sanctuary Movement of the 1980s.<sup>31</sup>

Since its inception, international law has avoided any explicit protection for private humanitarian aid to refugees.<sup>32</sup> Although international law does not offer clear authorization for private humanitarian aid to refugees, some argue that such aid finds *indirect* support in international law.<sup>33</sup> First, evidence suggests that the drafters of the Refugee Convention believed that certain aid to refugees should not be criminalized, but the treaty stopped short of explicitly authorizing such aid (or forbidding its criminalization under a party state’s domestic law).<sup>34</sup> Some scholars have drawn on international humanitarian law for support, suggesting that customary international law requires private individuals to provide temporary refuge to those fleeing war zones.<sup>35</sup> The status of temporary refuge as a customary norm, however, is unsettled.<sup>36</sup> Accordingly, international humanitarian law offers at best indirect support for the legality of private humanitarian aid to refugees.

This Article argues that private humanitarian aid takes a variety of forms that benefit both asylum seekers and civil society. To realize the full potential of private humanitarian aid, the major Western asylum states—specifically, the United States, Canada, and the European Union—should decriminalize private humanitarian aid to asylum seekers by redefining smuggling-related offenses to require financial or material benefit of any kind, consistent with international law, or by adopting an exception for humanitarian assistance.<sup>37</sup>

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<sup>29</sup> See *infra* notes 182–190 and accompanying text.

<sup>30</sup> See *infra* notes 182–190 and accompanying text; see also Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 159–60 (2010).

<sup>31</sup> See *infra* notes 182–190 and accompanying text.

<sup>32</sup> See Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. REV. 493, 511 (1986) (discussing absence of explicit authorization for private aid to refugees in various international instruments).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*; see also U.N. ECOSOC, 2d sess., 40th mtg. at 8–9, U.N. Doc. E/AC.32/SR.40 (Sept. 27, 1950) (comments of Mr. Juvigny, French delegate). But see Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 (noting that recourse to the “preparatory work” of a treaty is permitted only as a “supplementary means of interpretation,” which suggests that a delegate’s comments have limited interpretive value).

<sup>35</sup> See Helton, *supra* note 32, at 516 (noting that the United States recognizes “the international humanitarian norms of temporary refuge and *nonrefoulement*”).

<sup>36</sup> See *id.*; see also Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1168 (1990) (discussing a federal court’s ruling that Congress preempted the temporary refuge norm with the passage of the Refugee Act of 1980).

<sup>37</sup> The U.S. Senate considered such an amendment as part of a package of immigration law reforms, but these reforms ultimately failed to become law. See Emily Breslin, Note, *The Road to Liability Is Paved with Humanitarian Intentions: Criminal Liability for Housing Undocumented People*

Although other scholars have discussed U.S. state and federal laws that essentially criminalize private charity to undocumented immigrants, including asylum seekers,<sup>38</sup> this Article is the first to offer a comparative analysis of the laws governing private humanitarian aid to asylum seekers with reference to the worlds' richest asylum states and regions—namely, the United States, Canada, and the European Union. This comparative approach is essential because the problem of how to treat those who assist irregular migrants is a global one. Unlike the narrower question of U.S. law, on which judges might disagree about the relevance of foreign states' laws and practices, the question of how to treat private humanitarian actors assisting asylum seekers calls for a global response informed by international and comparative law.

Apart from offering a unique comparative approach, this Article is also the first to propose a major statutory revision to refine the smuggling statute to limit liability to profit-seeking actors rather than on those who conceal asylum seekers from immigration authorities. Ultimately, this Article argues that under current legal regimes, too much private humanitarian aid is criminalized or potentially subject to prosecution, and thus, deterred. For this reason, citizens should insist that governments reform their smuggling laws.

This Article proceeds in three Parts. Part I describes various manifestations of private humanitarian assistance to asylum seekers, and the legal framework within which they operate.<sup>39</sup> Part II discusses national security and economic interests as primary motivations for criminalizing private humanitarian assistance, both nationally and internationally.<sup>40</sup> Part III proposes a legal compromise by criminalizing unauthorized migration activities that provide some monetary or material benefit to smugglers, but de-criminalizing not-for-profit private humanitarian assistance.<sup>41</sup>

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*Under 8 U.S.C. 1324(A)(1)(A)(III)*, 11 RUT. J.L. & RELIGION 214, 241 (2009) (describing proposed humanitarian exception); Sean Higgins, *Why Immigration Reform Didn't Happen in 2007*, WASH. EXAMINER (Nov. 20, 2012), <http://www.washingtonexaminer.com/why-immigration-reform-didnt-happen-in-2007/article/2513987> [<https://perma.cc/BKK7-EN7D>].

<sup>38</sup> This analysis has related primarily to the Sanctuary and New Sanctuary Movements of the United States. See Breslin, *supra* note 37, at 226; Kristina M. Campbell, *Humanitarian Aid Is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 100–01 (2012); Helton, *supra* note 32, at 511; Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 123–24 (1993). Notably, criminal statutes prohibiting aid do not apply to individuals assisting in preparing asylum applications or aiding asylum seekers who have filed an application but have not yet received a decision. I thank Peter Margulies for raising this point.

<sup>39</sup> See *infra* notes 42–193 and accompanying text.

<sup>40</sup> See *infra* notes 194–314 and accompanying text.

<sup>41</sup> See *infra* notes 315–374 and accompanying text.



## I. DANGEROUS JOURNEY AND THE MANY PLACES OF PRIVATE HUMANITARIAN AID

This Part defines and describes “private humanitarian aid” in its many forms and explains its value to both asylum seekers and citizens of the states receiving them. Private humanitarian aid refers to assistance designed to preserve life and human dignity, and ease suffering associated with “man-made crises” and natural disasters,<sup>42</sup> provided by non-state actors for altruistic or non-material reasons.<sup>43</sup> Humanitarian aid further connotes immediacy—immediate relief from an imminent threat.<sup>44</sup> Aid can also extend beyond such relief to longer-term provision of food, housing, medical care, and education, all informed by broad humanitarian, protective interests.<sup>45</sup>

A discussion of private humanitarian aid to asylum seekers requires some analysis of the legal regime that produces asylum seekers’ dangerous journeys in the first place.<sup>46</sup> Asylum seekers principally undertake unauthorized travel because states offer them no travel authorization options.<sup>47</sup> No country currently offers an “asylum visa” to migrants who intend to apply for refugee status upon arrival in the asylum state.<sup>48</sup> Thus, when driven from their homes, asylum seekers *must* use false papers or seek the services of a smuggler.<sup>49</sup> These avenues of travel subject asylum seekers to tremendous danger, which some private humanitarian actors work to alleviate.

Private humanitarian aid takes many forms, beginning in an asylum seekers’ country of origin and ending in the asylum state. The most visible form of

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<sup>42</sup> *Defining Humanitarian Assistance*, DEV. INITIATIVES, <http://devinit.org/defining-humanitarian-assistance/> [<https://perma.cc/ASZ2-VC3A>].

<sup>43</sup> Not all donations constitute “humanitarian assistance.” For example, if the nonprofit arm of a Silicon Valley company decided to donate coding lessons to asylum seekers to assist with job training in the asylum state, few would regard this as humanitarian aid, although it certainly would constitute a nonprofit donation. See, e.g., *Coding Skills for Over 430,000 Young Africans and Refugees in the Middle East*, SAP NEWS (Nov. 30, 2016), <http://news.sap.com/coding-skills-for-over-430000-young-africans-and-refugees-in-the-middle-east/> [<https://perma.cc/BBG5-NY6A>].

<sup>44</sup> See RELIEFWEB, GLOSSARY OF HUMANITARIAN TERMS 29 (2008), [http://reliefweb.int/sites/reliefweb.int/files/resources/4F99A3C28EC37D0EC12574A4002E89B4-reliefweb\\_aug2008.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/4F99A3C28EC37D0EC12574A4002E89B4-reliefweb_aug2008.pdf) [<https://perma.cc/9RHB-8FMH>] (defining Humanitarian Assistance as aid that aims to preserve life and “alleviate suffering of a crisis affected population,” and which must align “with the basic humanitarian principles of humanity, impartiality and neutrality”).

<sup>45</sup> See *id.* at 8, 39.

<sup>46</sup> See Hugh Eakin, *The Terrible Flight from the Killing*, N.Y. REV. BOOKS (Oct. 22, 2015), <http://www.nybooks.com/articles/2015/10/22/terrible-flight-killing/> [<https://web.archive.org/web/20170422124739/http://www.nybooks.com/articles/2015/10/22/terrible-flight-killing/>] (describing the human toll of the lack of any legal course of travel for asylum seekers).

<sup>47</sup> See, e.g., Slobodan Djajić, *Asylum Seeking and Irregular Migration*, 39 INT’L REV. L. & ECON. 83, 84 (2014) (describing asylum seekers’ necessary resort to human smuggling due to lack of availability of any kind of entry visa to an asylum state).

<sup>48</sup> Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT’L L. 1215, 1219 (2013).

<sup>49</sup> *Id.* at 1231 (“Thus, the asylum system expects and relies upon illegal or deceptive entry.”).

humanitarian assistance is rescue. Chris and Regina Catrambone, a wealthy couple, run a fully equipped yacht in the Mediterranean to rescue asylum seekers and migrants from unseaworthy vessels.<sup>50</sup> Their project, called Migrant Offshore Assistant Station (“MOAS”), has thus far rescued more than 30,000 people.<sup>51</sup> A group of German friends from Brandenburg similarly responded to “the devastating loss of life at sea” by buying a boat and setting out on the Mediterranean to provide “a civil sea rescue service” for asylum seekers and migrants in distress.<sup>52</sup> An Eritrean Catholic priest in Switzerland facilitates rescue less directly by receiving calls from desperate asylum seekers and migrants in the Mediterranean and then informing the Italian authorities of the boats’ location.<sup>53</sup>

Rescue, though highly visible, is not the only form of private humanitarian aid offered in the wake of recent war-born migrations. The Pope has urged parishes in Europe to accept refugees into their homes.<sup>54</sup> Individuals in Germany have signed up to read to refugee children, teach asylum seekers German, and offer job training, pending approval of the their asylum petitions.<sup>55</sup> Private individuals also rejected stingy government policy in Iceland. After Iceland’s minister offered to resettle a mere fifty Syrians, Icelanders created a Facebook page welcoming refugees, and in some instances, offering to house them; this page garnered 10,000 “likes.”<sup>56</sup> A U.S. mother launched Carry the Future, an NGO that delivers baby carriers to refugee parents carrying their

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<sup>50</sup> See, e.g., Jessica Elgot, *Migrant Crisis: Good Samaritans Set Sail in Daring Mediterranean Rescue Mission*, THE GUARDIAN (Apr. 20, 2015), <http://www.theguardian.com/world/2015/apr/20/migrant-crisis-good-samaritans-mediterranean-rescue-mission> [<https://perma.cc/G4J5-X7XV>]; Sheena McKenzie, *Meet the Wealthy Couple on a Mission to Save Drowning Migrants*, CNN (Apr. 20, 2015), <http://edition.cnn.com/2015/04/20/sport/boat-migrants-mediterranean-drown-moas/> [<https://perma.cc/RD23-VUM4>].

<sup>51</sup> *About MOAS*, MOAS, <https://www.moas.eu/about/> [<https://perma.cc/36XY-F4FC>].

<sup>52</sup> *Sea-Watch Rescue Blog*, HUM. RTS. AT SEA (May 1, 2015), <https://www.humanrightsatsea.org/news/sea-watch-migrant-rescue-blog/> [<https://perma.cc/Y68P-VFDH>].

<sup>53</sup> Mattathias Schwartz, *The Anchor*, NEW YORKER (Apr. 21, 2014), <http://www.newyorker.com/magazine/2014/04/21/the-anchor> [<https://perma.cc/YGY5-SMG4>].

<sup>54</sup> See Anthony Faiola & Michael Birnbaum, *Pope Calls on Europe’s Catholics to Take in Refugees*, WASH. POST (Sept. 6, 2015), [https://www.washingtonpost.com/world/refugees-keep-streaming-into-europe-as-crisis-continues-unabated/2015/09/06/8a330572-5345-11e5-b225-90edb49f362\\_story.html](https://www.washingtonpost.com/world/refugees-keep-streaming-into-europe-as-crisis-continues-unabated/2015/09/06/8a330572-5345-11e5-b225-90edb49f362_story.html) [<https://perma.cc/9FBM-36HL>] (noting Pope Francis appealed to all religious communities and institutions to “take in” a refugee family, which could provide “shelter to tens of thousands”).

<sup>55</sup> Martin Knobbe et al., *Welcome to Germany: Locals Step in to Help Refugees in Need*, DER SPIEGEL (Aug. 18, 2015), <http://www.spiegel.de/international/germany/refugees-encounter-willing-helpers-in-germany-a-1048536.html> [<https://perma.cc/9RLE-LSF3>].

<sup>56</sup> Elliot Hannon, *Iceland Caps Syrian Refugees at 50; More Than 10,000 People Respond with Support for Syrian Refugees*, THE SLATIST (Aug. 31, 2015), [http://www.slate.com/blogs/the\\_slatest/2015/08/31/\\_10\\_000\\_icelanders\\_offer\\_to\\_house\\_syrian\\_refugees.html](http://www.slate.com/blogs/the_slatest/2015/08/31/_10_000_icelanders_offer_to_house_syrian_refugees.html) [<https://perma.cc/H52N-XAVA>].

toddlers for hundreds of miles across Europe.<sup>57</sup> An Egyptian billionaire sought to purchase a Greek island on which refugees could live out their lives.<sup>58</sup> Private humanitarian aid emerges where governments fail to meet the needs of asylum seekers and migrants. Fully understanding the impact of asylum states' policies, and where they fall short, requires analyzing these diverse forms of aid together as a unified phenomenon.

This Part describes private humanitarian aid to asylum seekers at each point along the geographic continuum: while asylum seekers reside in their country of origin, seek exit from their country of origin, travel to the asylum state, seek entry into the asylum state, and reside in the asylum state. By illustrating examples of private humanitarian aid administered in each place, this Part provides a foundation for subsequent analysis of barriers to private humanitarian aid and the rationales for legal restrictions.

### *A. In-Country Aid*

The first place where individuals and private organizations provide aid to asylum seekers is the asylum seekers' home country. Such aid often takes the form of donations to NGOs such as the International Committee for the Red Cross ("ICRC") or Doctors Without Borders (also known as Médecins Sans Frontières, or "MSF"). These NGOs provide basic provisions for daily life in war-torn places. For example, the Syrian Civil Defense, known as the "White Helmets," has saved over 95,024 people from barrel bomb attacks in Syria.<sup>59</sup> This corps of unarmed and neutral rescue workers saves lives, secures buildings, and performs other public services to assist "people on all sides of the conflict."<sup>60</sup>

Even though international relief organizations assist a broader population than just refugees, donations to such NGOs may still reflect the public's interest in helping refugees specifically. For example, after the New York Times published an image of Syrian toddler Alan Kurdi's lifeless body, drowned in the Mediterranean, NGOs like MSF saw donations increase sevenfold.<sup>61</sup> Although MSF typically receives donations of \$30,000 a day, donations spiked to \$200,000 the first day after Kurdi's photograph appeared in the papers and then decreased to around \$80,000 four days later.<sup>62</sup> Thus, members of the public are ready to donate money to NGOs that help asylum seekers. Private aid

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<sup>57</sup> See FAQ, CARRY THE FUTURE, <http://www.carrythefuture.org/faq/> [<https://perma.cc/4D4V-YJ8C>].

<sup>58</sup> Gomez, *supra* note 19.

<sup>59</sup> *Support the White Helmets*, WHITE HELMETS, <https://www.whitehelmets.org/en> [<https://perma.cc/MQX7-Y6NW>].

<sup>60</sup> *Id.*

<sup>61</sup> See O'Neil, *supra* note 17.

<sup>62</sup> *Id.*

often takes the form of donations to NGOs working on the ground in asylum seekers' home countries—even if those NGOs focus on issues beyond asylum.

International relief organizations, however, often face political or practical restrictions to administering aid inside a conflict zone.<sup>63</sup> Aid workers may face violence or death, bandits may steal supplies, and the home country's government may severely restrict the operation of NGOs.<sup>64</sup> In 2015, the United States inadvertently bombed an MSF clinic in Kunduz, Afghanistan, killing thirty patients and staff.<sup>65</sup> MSF contends that it had supplied its GPS coordinates to the U.S. military prior to the bombing, but the U.S. military nonetheless mistakenly thought the hospital to be “a Taliban-seized government building.”<sup>66</sup> In another example, insurgents attacked humanitarian aid providers in Iraq during and after the Iraq war, because they mistakenly believed that aid workers were mere instruments of the U.S. military.<sup>67</sup> These incidents illustrate the inherent dangers of operating in a conflict zone, which often make it impossible to work within refugees' countries of origin.

Apart from political or practical impediments, some NGOs face concerns about their legitimacy. For example, the NGO Hand in Hand for Syria (“Hand in Hand”) was created in 2011 shortly after the Syrian crisis began, and it provides aid *solely* within Syria.<sup>68</sup> The organization seeks to stabilize conditions so that Syrians do not feel compelled to flee.<sup>69</sup> Hand in Hand claims to use funds raised from European donors to purchase food and medical supplies in Turkey, one of the places where it is officially registered, and in Syria to boost the local economy.<sup>70</sup> The organization states that it then quickly provides aid in places that other NGOs fail to reach, such as locations behind front lines and in remote areas.<sup>71</sup> Due to the scope of the conflict, Hand in Hand now operates in ninety percent of the country.<sup>72</sup>

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<sup>63</sup> See *About Us*, HAND IN HAND FOR SYRIA, <https://hihfad.org/about> [<https://perma.cc/TTM7-9HAG>].

<sup>64</sup> See *id.*

<sup>65</sup> Adam Chandler, *The Human Error Behind the Kunduz Hospital Strike*, THE ATLANTIC (Nov. 25, 2015), <http://www.theatlantic.com/international/archive/2015/11/doctors-without-borders-kunduz-human-error/417750/> [<https://perma.cc/YLA9-3A2J>].

<sup>66</sup> *Id.*

<sup>67</sup> Government rhetoric conflating military action and humanitarian aid also increases the danger to humanitarian aid providers. In the Iraq War, the United States government represented the military objective as one and the same as the humanitarian one—liberating the unfree and providing the basics that Saddam Hussein had failed to provide, namely adequate electricity, medical facilities, and water. This, in turn, made aid workers more vulnerable. See Nicolas de Torrente, *Humanitarian Action Under Attack: Reflections on the Iraq War*, 17 HARV. HUM. RTS. J. 1, 22–23 (2004).

<sup>68</sup> See *About Us*, HAND IN HAND FOR SYRIA, *supra* note 63.

<sup>69</sup> See *id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Where We Work*, HAND IN HAND FOR SYRIA, <https://hihfad.org/where-we-work> [<https://perma.cc/CH8F-863W>].

<sup>72</sup> See *id.*

A Canadian research group, however, has suggested that the organization actually supports political militants opposed to Assad.<sup>73</sup> British authorities have also critiqued Hand in Hand for essentially serving as a cover for the Syrian opposition.<sup>74</sup> Even if this critique were inaccurate, and legitimate charities do disburse funds in Syria, funds are notoriously difficult to track once they arrive in the conflict zone. Authorities note that they cannot guarantee that funds *do not* support militants.<sup>75</sup> Given the lack of clarity over the legitimacy of various relief organizations, donors often lack sufficient information when donating funds to assist displaced persons while such persons remain in their war-torn home country. These are the potential hazards of private aid in the country of origin. As a result, much of the private aid provided to asylum seekers is provided in some other place.

### B. Exit

Private actors also administer aid at the next place in the geographic continuum by facilitating asylum seekers' travel out of their country of origin, often using unofficial channels.<sup>76</sup> Human smugglers are private actors who facilitate exit, primarily by using fraudulent documents or arranging travel in vessels not designed for humans.<sup>77</sup> If such work is done for material benefit, it

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<sup>73</sup> Robert Stuart, *UK Charity Which Shares Syrian Opposition "Aims and Objectives" Benefits from Alan Kurdi Tragedy*, GLOB. RES. (Sept. 10, 2015), <http://www.globalresearch.ca/uk-charity-which-shares-syrian-opposition-aims-and-objectives-benefits-from-alan-kurdi-tragedy/5475090> [<https://perma.cc/7T6L-GRYE>].

<sup>74</sup> *Id.*

<sup>75</sup> Christopher Hope, *Charity Cash 'Going to Syrian Terror Groups'*, TELEGRAPH (Oct. 4, 2013), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10357537/Charity-cash-going-to-Syrian-terror-groups.html> [<http://perma.cc/VLC6-ZC43>].

<sup>76</sup> Technically, refugees are people who have already fled their country of origin; persons who remain within their country of origin are more typically referred to as "internally displaced persons." *Questions and Answers About IDPs*, U.N. HUM. RTS., OFF. HIGH COMM'R, <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Issues.aspx> [<https://perma.cc/J2DG-GAZV>] (explaining that, "[a] crucial requirement to be considered a 'refugee' is crossing an international border"). "Asylum seekers" are people whose claim for "sanctuary" has not yet been adjudicated. See *Asylum-Seekers*, U.N. HIGH COMM'N REFUGEES, <http://www.unhcr.org/en-us/asylum-seekers.html> [<https://perma.cc/VDU8-2DZL>]. But to simplify matters, this Article uses "asylum seekers" to refer both to internally displaced persons and refugees in this context.

<sup>77</sup> See Adam Lidgett, *Syrian Refugee Smugglers Arrested: Human Trafficking Charges in Netherlands Alleged After Hundreds Illegally Taken to Holland, Police Say*, INT'L BUS. TIMES (Sept. 18, 2015), <http://www.ibtimes.com/syrian-refugee-smugglers-arrested-human-trafficking-charges-netherlands-alleged-after-2103559> [<https://web.archive.org/web/20160122133028/http://www.ibtimes.com/syrian-refugee-smugglers-arrested-human-trafficking-charges-netherlands-alleged-after-2103559>] (describing smugglers in Netherlands with partners who coordinated exit of refugees from various Syrian cities to destinations such as Athens, Budapest, Milan, and Vienna).

cannot be considered “humanitarian.”<sup>78</sup> Local smugglers in Syria, for example, oversee asylum seekers’ clearance “through all Syrian checkpoints on the way to Turkey” in exchange for bribes.<sup>79</sup> As of September 2015, Europol estimated 30,000 smugglers are transporting asylum seekers out of their countries of origin and into potential asylum states.<sup>80</sup>

Private individuals often aid asylum seekers in exiting their home countries in more benign ways as well. For example, a family member might drive an asylum seeker across a border into a third country, where a smuggler might then provide a fake passport.<sup>81</sup> The family member has privately aided the asylum seeker in crossing the border, but then it falls upon a smuggler to provide papers and a plan to circumvent border controls.<sup>82</sup> Ultimately, informal smuggling out of the country of origin remains a significant element of most asylum seekers’ journeys.<sup>83</sup>

### *C. Rescue*

Once an asylum seeker crosses the border out of their home country and into a new territory, the journey to an asylum state begins in earnest. Private actors play an important role in preventing death along the way.<sup>84</sup> For asylum seekers at sea or otherwise in transit to the asylum state, the risk of distress or death is real. At least 22,000 migrants have died “trying to reach Europe” since 2000.<sup>85</sup> In 2013, a group of 360 migrants, consisting of mostly Eritreans, drowned off the coast of the Italian island of Lampedusa.<sup>86</sup> In just one month in 2014, 700 migrants and refugees drowned in two different shipwrecks.<sup>87</sup> As a result, governments in recent years have conducted search and rescue operations to limit the humanitarian costs of traveling to Europe. In particular, Italy

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<sup>78</sup> Boštjan Videmšek, *In the Human Smugglers’ Den*, POLITICO (Oct. 22, 2015), <http://www.politico.eu/article/refugee-crisis-smugglers-syria-turkey-migrants-the-worlds-largest-human-bazaar-migration-refugees-smugglers-greece-turkey/> [<https://perma.cc/AXL8-8FDU>].

<sup>79</sup> *See id.*

<sup>80</sup> Lidgett, *supra* note 77.

<sup>81</sup> *See* Nicholas Schmidle, *Ten Borders*, NEW YORKER (Oct. 26, 2015), <http://www.newyorker.com/magazine/2015/10/26/ten-borders> [<https://perma.cc/PCE4-2H97>].

<sup>82</sup> *See id.*

<sup>83</sup> *See* Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233, 233 (1995).

<sup>84</sup> ANNE T. GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* 446 (2014) (“It is privately owned and operated vessels, not designated SAR vessels, which are playing the frontline role in SAR efforts.”).

<sup>85</sup> Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POL’Y INST. (Oct. 16, 2014), <http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing> [<https://perma.cc/K7LY-VX9J>].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

conducted an operation called Mare Nostrum, which rescued at least 140,000 people in 2014.<sup>88</sup> Italy eventually suspended the program due to high costs.<sup>89</sup>

The suspension of Mare Nostrum was part of the European Union's deliberate effort to scale back rescue efforts in order to deter refugees and migrants from making the journey in the first place.<sup>90</sup> After suspending the program, Italy transferred responsibility to Frontex, the European Union's border agency.<sup>91</sup> Frontex, for its part, conducted a much more limited operation on a fraction of the budget and without any of its own search and rescue vessels.<sup>92</sup> In fact, Frontex does not officially perform search and rescue or provide access to humanitarian protection.<sup>93</sup> Limiting rescue efforts, however, failed to deter refugees and migrants.<sup>94</sup>

In the face of government retrenchment, private humanitarian actors have entered the search and rescue arena. For example, MSF has been doing rescue work for over fifteen years.<sup>95</sup> In 2015, MSF teams directly rescued over 20,000 people in the Mediterranean and safely disembarked passengers in Italy more than eighty times.<sup>96</sup> In addition, organizations such as MOAS<sup>97</sup> and Sea-Watch<sup>98</sup> expressly focus on rescuing refugees and migrants in unseaworthy boats to prevent deaths on the way to Europe from Africa and the Middle East. These organizations serve to substitute, in part, government search and rescue programs, but they are only effective to the extent that governments cooperate.

MOAS launched its first mission in 2014, a year after nearly 400 refugees and migrants died off the coast of Lampedusa, an Italian island where many asylum seekers find themselves before the government deports or processes them.<sup>99</sup> The founders of MOAS, Regina and Chris Catrambone, were inspired to act by the Pope's sermon condemning global indifference to the plight of

<sup>88</sup> *Id.*

<sup>89</sup> The operation cost was nine million euros per month. *Id.*

<sup>90</sup> *Sea-Watch Rescue Blog*, *supra* note 52 ("The general opinion in Brussels was that the greater the rescue capability . . . the greater the likelihood more migrants would attempt to enter Europe via these means.").

<sup>91</sup> *Id.*

<sup>92</sup> McKenzie, *supra* note 50.

<sup>93</sup> *See Mission and Tasks*, FRONTEX, <http://frontex.europa.eu/about-frontex/mission-and-tasks/> [<https://perma.cc/H2AW-ASSU>].

<sup>94</sup> McKenzie, *supra* note 50.

<sup>95</sup> *MSF Expands Mediterranean Search and Rescue Operations*, DRS. WITHOUT BORDERS (May 9, 2015), <http://www.doctorswithoutborders.org/article/msf-expands-mediterranean-search-and-rescue-operations> [<https://perma.cc/A6VR-DJ9E>].

<sup>96</sup> *MSF Ends Search and Rescue Operations in Central Mediterranean*, DRS. WITHOUT BORDERS (Jan. 5, 2016), <http://www.doctorswithoutborders.org/article/msf-ends-search-and-rescue-operations-central-mediterranean> [<https://perma.cc/6LD8-DJJW>].

<sup>97</sup> *About MOAS*, *supra* note 51.

<sup>98</sup> *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>99</sup> McKenzie, *supra* note 50.

refugees and migrants.<sup>100</sup> In response, the couple purchased a vessel for rescuing refugees and migrants in distress at sea and named it the “M.Y. Phoenix.”<sup>101</sup>

MOAS has saved nearly 12,000 lives since the project began.<sup>102</sup> Using high-tech drones and thermal night imaging to monitor major migrant shipping lanes, MOAS can detect the presence of distressed boats and quickly render aid.<sup>103</sup> When it encounters a vessel in distress, the MOAS crew rescues the individuals at risk and provides water, food, and basic medical care until government authorities arrive.<sup>104</sup> The crew typically consists of 20 people, and in 2015, MOAS partnered with MSF to add two doctors to the crew.<sup>105</sup> MOAS claims that, as an NGO, it is uniquely capable of approaching waters near a country’s coast, which means it can respond more quickly to distressed boats than vessels affiliated with a particular government.<sup>106</sup> Thus, a lack of government affiliation is an important characteristic of MOAS’s approach.

Central to MOAS’s work is its collaboration with Maritime Rescue Coordination Centers (“MRCCs”), facilities that states must provide to perform “search and rescue services round their coasts” under international law.<sup>107</sup> The International Convention on Maritime Search and Rescue establishes the requirement of a system of MRCCs, consisting of centers and sub-centers, equipped to receive “distress communications” and to communicate with adjacent MRCCs.<sup>108</sup> The International Maritime Organization set up a network in 1979, known as Inmarsat, to enable ships to call for help “no matter how far out to sea.”<sup>109</sup> In this way, international law has required states to create infrastructure to promote rescue at sea, and MOAS’s work complements existing search and rescue practice.

The Sea-Watch project is a similar private rescue operation run by a crew from Hamburg. Sea-Watch both reacts to distress calls and actively searches for distressed vessels, as many of these vessels lack satellite phone technology

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *About MOAS*, *supra* note 51.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*

<sup>106</sup> Claire Ward, *For First Time Ever, a Private Rescue Ship Transfers Migrants to UK Warship*, VICE NEWS (May 13, 2015), <https://news.vice.com/article/private-humanitarian-rescue-ship-transfers-migrants-to-uk-warship> [<https://perma.cc/V27X-24KS>] (explaining that because MOAS is neutral and “not affiliated with any government,” representatives assert MOAS can enter Libyan waters to respond more rapidly to migrants’ distress calls).

<sup>107</sup> United Nations Convention on the Law of the Sea art. 98(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; International Convention on Maritime Search and Rescue preamble, annex §§ 2.1, 2.2.1, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 97 [hereinafter ICMSR].

<sup>108</sup> ICMSR, *supra* note 107, at annex § 2.3.3.

<sup>109</sup> *About Us*, INMARSAT, <http://www.inmarsat.com/about-us/> [<https://perma.cc/F895-ARXT>].



and cannot make distress calls.<sup>110</sup> Sea-Watch operates primarily in the summer months when refugees and migrants are most likely to undertake the journey across the Mediterranean, but its search and rescue operations continue into the fall.<sup>111</sup> The organization undertakes “missions” that last about six days each, with a different crew each time.<sup>112</sup> One of their main tasks is to locate distressed vessels accurately and then to rescue refugees and migrants from sinking ships.<sup>113</sup> Sea-Watch harbors refugees and migrants on board its boats temporarily and provides life vests until Coast Guard ships arrive.<sup>114</sup>

Like MOAS, Sea-Watch operates in an uncertain legal environment, at the intersection of the duty to rescue under international maritime law, rights under the Refugee Convention, and prohibitions contained in EU anti-smuggling legislation.<sup>115</sup> Under customary international law and the United Nations Convention on the Law of the Sea (“UNCLOS”), states should rescue those in distress at sea.<sup>116</sup> UNCLOS specifically establishes that “masters of vessels sailing under the flag of signatory States” in international waters have an affirmative duty to rescue individuals in distress.<sup>117</sup> Additional legal support for rescue comes from both the International Convention for the Safety of Life at Sea (“SOLAS”) and the International Convention on Maritime Search and Rescue.<sup>118</sup> Under these instruments, states are obligated “to cooperate and co-

<sup>110</sup> *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* (noting that in accordance with international law, no migrants will be taken on board a Sea-Watch vessel or ferried to shore). *But see* Elgot, *supra* note 50.

<sup>115</sup> *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>116</sup> Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, 36 SYRACUSE J. INT’L L. & COM. 145, 203–04 (2009).

<sup>117</sup> UNCLOS states:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to 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; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose.

UNCLOS, *supra* note 107, art. 98(1); *see* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 626–27 (2009).

<sup>118</sup> GALLAGHER & DAVID, *supra* note 84, at 84 (“The obligation to render assistance to those lost or in peril at sea is part of customary international law and has been codified in many international agreements, including UNCLOS and two widely ratified treaties: the 1974 International Convention

ordinate” rescue.<sup>119</sup> The act of “rescue” is not complete until those in distress reach a “place of safety,”<sup>120</sup> and courts have ruled that this “place of safety” must be a place other than the rescuing ship.<sup>121</sup> Scholars have noted, however, that governments are not necessarily obligated to “disembark the survivors in [their] own area[s].”<sup>122</sup> Thus, although governments must complete the rescue of those in distress, rescue is not tantamount to a right of admission to the rescuing state.<sup>123</sup>

The tension evident in rescue work, however, originates outside of maritime law, for international refugee law itself places refugees in limbo on their journey to an asylum state. International refugee law guarantees neither a right to be granted asylum, nor a right to admission into an asylum state.<sup>124</sup> The Universal Declaration of Human Rights (“UDHR”) guarantees “the right to seek and to enjoy . . . asylum from persecution,”<sup>125</sup> but scholars have suggested that states understood this to secure the *asylum* state’s right to grant asylum without interference from the refugee’s country of origin.<sup>126</sup> Article 33 of the UN Convention Relating to the Status of Refugees, however, prohibits asylum states from returning refugees to places where they would face persecution.<sup>127</sup> This raises the question: when does this obligation not to return arise? At the

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for the Safety of Life at Sea (SOLAS Convention), and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).”); *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>119</sup> GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 283–84 (3d ed., 2007) (discussing amendments to the SAR and SOLAS Conventions to impose this obligation “with minimal disruption to the ship’s planned itinerary (implying that disembarkation should occur at the nearest coastal State—UNHCR’s favoured approach)”; Papastavridis, *supra* note 116, at 206 (citing GOODWIN-GILL & MCADAM, *supra*, at 283).

<sup>120</sup> Legal Brief, U.N. High Commissioner on Refugees, *Int’l Law and Rescue at Sea* ¶ 6 (May 19, 2008), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=487b47f12&query=Refugee%20Protection%20in%20International%20Law> [https://perma.cc/U5CS-HB6S] (citing ICMSR, *supra* note 101, at annex § 1.3.2); INT’L MARITIME ORG. & U.N. HIGH COMM’R REFUGEES, *RESCUE AT SEA: A GUIDE TO PRINCIPLES AND PRACTICE AS APPLIED TO MIGRANTS AND REFUGEES* 5–7, <http://www.unhcr.org/450037d34.pdf> [https://perma.cc/M9QW-ZQKR].

<sup>121</sup> GALLAGHER & DAVID, *supra* note 84, at 457.

<sup>122</sup> Papastavridis, *supra* note 116, at 206.

<sup>123</sup> NGOs rely on these international agreements to justify their work. Sea-Watch sails under the German flag, and Germany is a signatory to UNCLOS and related instruments. *Sea-Watch Rescue Blog*, *supra* note 52. In light of the full range of relevant authorities, Sea-Watch regards its activities as fulfilling international legal obligations, although these rescue obligations apply because Sea-Watch desires to patrol the Mediterranean looking for distressed vessels.

<sup>124</sup> GOODWIN-GILL & MCADAM, *supra* note 119, at 358–60.

<sup>125</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14(1) (Dec. 10, 1948) [hereinafter UDHR]; see Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT’LL. 1215, 1242 (2013) (citing GOODWIN-GILL & MCADAM, *supra* note 119, at 358, 383).

<sup>126</sup> 2 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 101 (1972).

<sup>127</sup> Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

border of an asylum state's territory?<sup>128</sup> On the high seas?<sup>129</sup> At a pre-clearance point in an airport within the refugee's country of origin?<sup>130</sup> Or should the test be based on the asylum state's exercise of jurisdiction, understood as "effective control"?<sup>131</sup>

The European Court of Human Rights in *Hirsi Jamaa & Others v. Italy* ruled that states must "guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection."<sup>132</sup> In *Hirsi*, the court evaluated Italy's responsibility toward refugees interdicted on the high seas.<sup>133</sup> The court held that Italy was exercising jurisdiction extra-territorially through its interdiction efforts.<sup>134</sup> In a concurring opinion, Judge Pinto de Albuquerque opined that the European Convention on Human Rights ban on "collective expulsion" required Italy to provide some screening process to asylum seekers to determine if they qualified for humanitarian protection before turning them back.<sup>135</sup> Thus, on this reasoning, states party to the Refugee Convention, which prohibits *refoulement*, generally have an obligation to extend some asylum procedure to migrants outside of the migrants' country of origin to determine whether they are in fact "refugees."<sup>136</sup>

<sup>128</sup> See THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM 232–33 (Cambridge Stud. Int'l & Comp. L., Series No. 77, 2011).

<sup>129</sup> See *id.* at 63.

<sup>130</sup> See *id.* at 131–32 (discussing the *Roma Rights* case in which the British Court of Appeal ruled that *non-refoulement* did not apply to pre-clearance checks by British immigration officers at the Prague airport, in part because the refugees had not yet left their home country).

<sup>131</sup> *Id.* at 46.

<sup>132</sup> *Hirsi-Jamaa v. Italy*, App. No. 27765/09, 2012 Eur. Ct. H.R. ¶ 27; *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>133</sup> GALLAGHER & DAVID, *supra* note 84, at 477.

<sup>134</sup> *Hirsi-Jamaa*, 2012 Eur. Ct. H.R. ¶ 78; see also Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, AM. SOC'Y INT'L L. (Jan. 4, 2016), <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights> [https://perma.cc/F6C6-ZS2N].

<sup>135</sup> *Hirsi-Jamaa*, 2012 Eur. Ct. H.R. (concurring opinion of J. Pinto Albuquerque); see also Ramji-Nogales, *supra* note 134.

<sup>136</sup> GAMMELTOFT-HANSEN, *supra* note 128, at 232–33 ("[S]tates do not rid themselves of international obligations simply by offshoring and outsourcing migration control. . . . Even if it was not the case fifty years ago, it is today clear that the *non-refoulement* principle must be interpreted to apply everywhere a state exercises jurisdiction."); see also David A. Martin, *Human Rights and Migration Management: Of Complexity, Balance, and Nuance*, 106 AM. SOC'Y INT'L L. PROC. 69, 71–72 (2012) (interpreting *Hirsi-Jamaa* to require "shipboard screening of potential claims. . . and [to suggest] that such screening may necessitate the provision of lawyers."); The United States Supreme Court has interpreted *non-refoulement* far more narrowly, as applying only to refugees at the border or refugees who have effectuated an entry. See *Sale v. Haitian Centers Council*, 509 U.S. 155, 180–81 (1993) (ruling that the word "return" in article 33 of the Refugee Convention has a narrower meaning than the common meaning of the word); see also GAMMELTOFT-HANSEN, *supra* note 128, at 45; GALLAGHER & DAVID, *supra* note 84, at 472 (describing competing interpretations of article 33's *non-refoulement* obligation).

Such a right to an asylum procedure and the duty to rescue under maritime law, however, have clashed with anti-smuggling laws that criminalize the transport of unauthorized migrants to an asylum state.<sup>137</sup> These anti-smuggling laws potentially render illegal some aspects of rescue,<sup>138</sup> and the work of these NGOs reflects this ambiguity. Although these humanitarian actors publicly focus on preventing death at sea rather than obtaining legal entry or status for asylum seekers, such rescue efforts are difficult to divorce from the asylum seekers' ultimate objective of effectuating an entry into the asylum state. Officially, MOAS states that its ultimate goal is to mitigate "loss of life."<sup>139</sup> MOAS will not act as "a migrant ferry," and it will not rescue refugees and migrants exclusively, but it will use all "its resources to assist appropriate official Rescue Coordination Centers to locate and help suffering human beings and save lives where possible."<sup>140</sup> Although MOAS casts its efforts as merely supplementing existing government search and rescue operations, such efforts do much more. They necessarily present governments with decisions to make regarding the fate of refugees and migrants. For example, after rescuing refugees and migrants on a sinking boat in the Mediterranean and supplying them with water and groceries, what does MOAS do? In light of legal (and perhaps moral) restrictions on transporting bona fide refugees back to their country of origin,<sup>141</sup> the organization must eventually transfer rescued refugees and migrants to a governmental authority, such as the Italian Coast Guard. But what if the Coast Guard refuses to accept them? What would MOAS do in such a situation? Although the law governing disembarkation of smuggled refugees and migrants is unclear, scholars indicate "there remains abundant State practice"

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<sup>137</sup> See, e.g., *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)*, COM (2015) 285 final (May 27, 2015), [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu\\_action\\_plan\\_against\\_migrant\\_smuggling\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/asylum/general/docs/eu_action_plan_against_migrant_smuggling_en.pdf) [<https://perma.cc/5DZ6-LZK8>] (proposing an "Action Plan" to reduce migrant smuggling through enhanced prosecution of smugglers).

<sup>138</sup> Tugba Basaran, *Saving Lives at Sea: Security, Law and Adverse Effects*, 16 EUR. J. MIGRATION & L. 365, 377 ("Anti-smuggling legislation can be used to sanction rescue, even though rescue is firmly anchored in national and international legislation.").

<sup>139</sup> *Current Mission—Central Mediterranean*, MOAS, <http://www.moas.eu/central-mediterranean/> [<https://perma.cc/FCW8-NGAB>].

<sup>140</sup> Elizabeth Mavropoulou, *The Success of the Migrant Offshore Aid Station (MOAS)*, HUM. RTS. AT SEA (Dec. 10, 2014), <https://www.humanrightsatsea.org/the-success-of-the-migrant-offshore-aid-station-moas/> [<https://perma.cc/DA97-UJH7>]. The Rescue Coordination Centers are government-operated search and rescue facilities created as a result of the ICMSR. Parties to the ICMSR committed to establish rescue coordination centers and sub-centers. Each center is required to have "adequate means for the receipt of distress communications via a coast radio station or otherwise." ICMSR, *supra* note 107, at annex § 2.3.3.

<sup>141</sup> Refugee Convention art. 33, *supra* note 127 (prohibiting the *refoulement* of refugees to places where their lives or freedom would be threatened).

refusing to allow disembarkation in such situations.<sup>142</sup> The organization does not indicate what it would do, or whether it has ever faced a dilemma of this kind.<sup>143</sup> Ultimately, the clash of deeply held goals, “manageable migration system[s]”, and human rights<sup>144</sup> creates legal uncertainty for private humanitarian actors.

Individuals and NGOs play an important role in saving the lives of asylum seekers travelling in international lands and waters, but their work inherently depends on government cooperation and remains vulnerable to legal scrutiny. NGOs operate with greater clarity when they emphasize the limited goal of saving lives rather than advocating for the broader rights of refugees and migrants or any particular durable solution.<sup>145</sup> The ultimate question of the rights of refugees and migrants, however, cannot be avoided completely, and private humanitarian aid in the absence of government cooperation is incomplete or ineffective. Thus, even a seemingly benign form of aid—like saving lives in the ocean—carries risks for private humanitarian actors.<sup>146</sup>

#### D. Entry

Smugglers have a pivotal role at the point of entry into an asylum state. Anecdotes abound of Syrians who have hired smugglers to procure fake passports to facilitate travel to northern EU asylum states.<sup>147</sup> In one harrowing instance, a smuggler hid seventy-one refugees and migrants in a truck to transport them through Hungary to Austria, but all seventy-one refugees and migrants suffocated, their bodies discovered in Austria too late.<sup>148</sup> Smugglers also routinely pack sixty people in a boat designed to carry a dozen.<sup>149</sup>

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<sup>142</sup> GALLAGHER & DAVID, *supra* note 84, at 460.

<sup>143</sup> These are not theoretical dilemmas. In 2001, the M/V Tampa, a Norwegian commercial vessel, sought to land at an Australian port after rescuing 438 asylum seekers. The Australian government refused to permit entry to Australian waters and a crisis ensued. In August 2001, at the request of Australian authorities, the Tampa saved 433 people from a sinking vessel off the coast of Indonesia. Initially headed to Indonesia, the captain was forced to change course for Christmas Island after several migrants threatened to commit suicide if the ship continued on to Indonesia. Despite their knowledge of the urgent medical situation on board, Australian authorities denied the Tampa's entry into Australian territorial waters. After two days, during which Australian authorities threatened the Tampa's captain with people-smuggling charges upon unauthorized entrance, the ship entered Australian territorial waters without permission. The Australian military boarded the vessel and provided medical supplies, but denied disembarkation. Five days later, the migrants were moved to an Australian military vessel and the crew of the Tampa was charged with people-smuggling. *Id.* at 6.

<sup>144</sup> See Martin, *supra* note 136, at 72.

<sup>145</sup> See Solutions, U.N. HIGH COMM'R REFUGEES, <http://www.unhcr.org/pages/49c3646cf8.html> [<https://perma.cc/WGA9-8U95>].

<sup>146</sup> See Basaran, *supra* note 138, at 384 (discussing “blurr[ed] boundaries between criminal and humanitarian conduct” under international agreements).

<sup>147</sup> See *infra* notes 148–151 and accompanying text.

<sup>148</sup> See David D. Kirkpatrick, *Migrant Suffocations in Truck Near Hungary Reveal Tactics of Smugglers*, N.Y. TIMES (Oct. 19, 2015), <http://www.nytimes.com/2015/10/20/world/europe/migrant->

Some of these private actors seek profits. With refugees and migrants willing to pay \$1,200 for transport of an adult and \$600 for each child, smugglers can collectively amass millions of dollars a day, unmonitored.<sup>150</sup> Syrian refugees and migrants reputedly are more selective with respect to smugglers, as they have more money and are willing to pay higher prices for more acceptable conditions.<sup>151</sup> Thus, the huge flight out of Syria has proved particularly profitable for smugglers.

In contrast, some private actors serve refugees and migrants purely out of humanitarian concern, or even out of a sense of solidarity. For example, Hungarians have volunteered to drive refugees and migrants to the Austrian border from locations in southern Hungary bordering Serbia and Croatia, despite new laws that criminalize such aid.<sup>152</sup> Unlike smugglers or traffickers, these individuals offer to transport refugees and migrants for free, even though free assistance is often illegal.<sup>153</sup> At least one such volunteer indicated that his own family members were Jewish refugees, and he felt he could not ignore the plight of Syrians escaping both Daesh and Assad.<sup>154</sup> The law, however, restricts many forms of private aid at this juncture without regard to humanitarian motives.

### *E. Aid in the Asylum State*

The final place of aid in the continuum is the asylum state itself, where private actors administer aid to asylum seekers who have effectuated an (often surreptitious) entry.<sup>155</sup> For example, private individuals might house refugee families, in keeping with the Pope's exhortation.<sup>156</sup> Or they might provide food, language training, or other services to refugee families.<sup>157</sup> In Germany,

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suffocations-in-truck-near-hungary-reveal-tactics-of-smugglers.html?\_r=0 [https://perma.cc/K4R5-L49J]. Recently, and in a similar vein, nine migrants died from severe heat exposure and asphyxiation after being left in a locked tractor-trailer for twelve hours in Texas. David Montgomery et al., *Journey Fatal for 9 Migrants Found in Truck in a San Antonio Parking Lot*, N.Y. TIMES (July 23, 2017), <https://www.nytimes.com/2017/07/23/us/san-antonio-truck-walmart-trafficking.html?mcubz=0> [https://perma.cc/4ZAT-3BHR].

<sup>149</sup> Videmšek, *supra* note 78.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> Lauren Frayer, *Risking Arrest, Thousands of Hungarians Offer Help to Refugees*, NPR (Sept. 29, 2015), <http://www.npr.org/sections/parallels/2015/09/29/444447532/risking-arrest-thousands-of-hungarians-offer-help-to-refugees/> [https://perma.cc/YY5D-RH87].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Typically, asylum seekers must enter an asylum state “irregularly” because no country currently has an asylum visa. *See Ray, supra* note 48, at 1246.

<sup>156</sup> *See Faiola & Birnbaum, supra* note 54.

<sup>157</sup> Lucy Westcott, *Iceland, U.S. Facebook Groups See Outpouring of Humanity for Syrian Refugees*, NEWSWEEK (Sept. 5, 2015), <http://www.newsweek.com/iceland-and-us-facebook-groups-see-outpouring-humanity-syrian-refugees-368934> [https://perma.cc/NQ2S-WKJ4] (describing outpouring

private individuals seek to assist refugees in a variety of ways. An elderly woman wished to read to refugee children, others donated toys at the church, and students at the University of Siegen organized daily language classes for asylum seekers staying in the university gymnasium pending the processing of their applications.<sup>158</sup> In the United States, private humanitarian aid within the asylum state has occurred primarily in the Southwest, where asylum seekers enter from Mexico. For example, a humanitarian group, Humane Borders, left water jugs out along migrant trails in an effort to stem the tide of border-crossing deaths in the southern Arizona desert.<sup>159</sup> U.S. NGOs, however, have also taken the lead in finding novel approaches to linking “ordinary individuals” to asylum seekers in need outside of U.S. borders. For example, a U.S. mother, seeing footage of Syrian parents holding their toddlers on long treks from Greece to northern Europe, concluded that these parents could benefit from baby carriers to lessen their load and free their hands.<sup>160</sup> Within the first month of operation, her organization received over 3,000 baby carriers to donate.<sup>161</sup>

Private humanitarian aid may also take the form of assisting asylum seekers on a journey *within* the asylum state, and this may violate laws regarding the transport of unauthorized migrants within the jurisdiction.<sup>162</sup> Groups like Samaritans and No More Deaths transported migrants to medical clinics when necessary, such as when migrants had fainted or had bloody limbs and were unable to walk.<sup>163</sup> The NGOs contend these individuals would have died in the desert absent aid.<sup>164</sup> The federal government responded, however, by prosecuting these NGO volunteers for transporting unlawful migrants in violation of federal anti-smuggling law.<sup>165</sup>

The American Sanctuary Movement (“Sanctuary Movement”) is the quintessential example of private aid in the asylum state that the government considered illegal.<sup>166</sup> In the 1980s and 1990s, countless religious humanitarian

of goodwill toward refugees). An Icelandic politics professor acknowledges, however, that “support on Facebook doesn’t amount to much.” *Id.*

<sup>158</sup> Martin Knobbe et al., *supra* note 55.

<sup>159</sup> Maria Lorena Cook, “Humanitarian Aid Is Never a Crime”: Humanitarianism and Illegality in Migrant Advocacy, 45 L. & SOC’Y REV. 561, 561–62 (2011). U.S. Fish & Wildlife fined them for littering. *Id. But see* United States v. Millis, 621 F.3d 914, 918 (9th Cir. 2010) (reversing conviction after finding “the term ‘garbage’ within the context of the regulation . . . sufficiently ambiguous” to apply the rule of lenity).

<sup>160</sup> CARRY THE FUTURE, <http://www.carrythefuture.org/> [<https://perma.cc/KPL4-7TQV>].

<sup>161</sup> *Who We Are*, CARRY THE FUTURE, <http://www.carrythefuture.org/whoweare/> [<https://perma.cc/YA2F-3JY4>].

<sup>162</sup> See 8 U.S.C. § 1324(a)(1)(A)(ii) (2012) (prohibiting transport of aliens insofar as transport furthers their smuggling).

<sup>163</sup> Cook, *supra* note 159, at 574.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.* at 562.

<sup>166</sup> Loken & Babino, *supra* note 38, at 123.

workers assisted Central Americans fleeing violence in their home countries.<sup>167</sup> Sanctuary workers believed they had a moral responsibility to aid asylum seekers because many sanctuary workers subscribed to religious traditions, such as liberation theology, that require adherents to actively combat social injustice.<sup>168</sup> Some sanctuary workers provided aid in transporting refugees to other places in the United States or Canada. Others merely provided a place to stay so that the particular asylum seekers they encountered would not become homeless.<sup>169</sup>

Founded by Jim Corbett, a Quaker rancher in Arizona, the Sanctuary Movement arose out of a belief that U.S. policies of funding and training brutal regimes in Central America contributed to the instability and violence that drove asylum seekers to U.S. territory in the first place.<sup>170</sup> Sanctuary workers believed not only that U.S. policy drove mass migrations, but that the U.S. government's treatment of asylum seekers who had arrived in the U.S. violated international human rights law.<sup>171</sup> Specifically, many Central Americans sought asylum, but U.S. asylum law recognized only a small proportion of claims filed.<sup>172</sup> This followed principally from U.S. asylum law's requirement that persecution occur on account of the asylum seeker's political opinion or other protected characteristics rather than as a result of generalized violence.<sup>173</sup> Cor-

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<sup>167</sup> MARÍA CRISTINA GARCÍA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* 98 (2006) (describing origins of the Sanctuary Movement in America).

<sup>168</sup> IGNATIUS BAU, *THIS GROUND IS HOLY* 14 (1985) (noting the impact of liberation theology on the world's churches); Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 L. & SOC. INQUIRY 63, 67 (2001).

<sup>169</sup> See Loken & Babino, *supra* note 38, at 129.

<sup>170</sup> *Id.* at 130; see also Coutin, *supra* note 168, at 68 (noting "solidarity workers" believed Salvadoran and Guatemalan migrants were "political refugees" because of the repressive governments in their home countries).

<sup>171</sup> GARCÍA, *supra* note 167, at 98 (describing the Sanctuary Movement as a "grassroots resistance movement that protested US foreign policy through the harboring and transporting of refugees, in violation of immigration law"); see also *id.* at 100 (noting that some "sanctuary workers" aimed to conceal refugees in anticipation of a shift in U.S. foreign policy, or until the situation in the refugees' home countries improved and they could return safely).

<sup>172</sup> *Id.* at 85 (describing "small fraction" of successful asylum applicants among Central Americans who fled their home countries to Mexico or the United States); *id.* at 87 (noting that most Central American migrants were not eligible for asylum in the United States after the 1980 Refugee Act was passed).

<sup>173</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2012) (defining "refugee"); see also Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569, 573 (2011) (discussing asylum law's purpose of addressing exceptional cases in which a person flees their country of citizenship because the country failed to provide and protect basic human rights, and noting that these "exceptional" cases have "become all too common"). Corbett and others, however, maintained that Central American asylum seekers were refugees under the 1949 Geneva Convention because they were driven from their homes due to war. See Jim Corbett, *Sanctuary, Basic Rights, and Humanity's Fault Lines: A Personal Essay*, 5 WEBER



bett and others believed that Central American refugees may not have been individually targeted in all instances, but that they were entitled to protection under the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War.<sup>174</sup> Although the U.S. government dismissed Central American asylum seekers as “economic migrants,” sanctuary workers regarded them as Geneva Convention “refugees.”<sup>175</sup>

According to sanctuary workers, U.S. government officials were the ones violating international human rights law. The sanctuary workers’ decision to follow international human rights law and violate U.S. government policy was the *truly* legal path forward.<sup>176</sup> Many sanctuary workers sought to transport Central American migrants to Canada, where the migrants would be more likely to win asylum.<sup>177</sup> Although individuals and NGOs openly defied federal law in the name of a higher law—international human rights law, or “God’s law”—they also sought to change the law, or the prevailing interpretation of it, to make their actions legal.<sup>178</sup> Although some participants in the Sanctuary Movement believed they were opposing unjust laws as a form of “civil disobedience,” others believed their humanitarian work was a form of “civil initiative,” or more foundational social justice work.<sup>179</sup> Corbett, in particular, disavowed the label “civil disobedience,” noting that sanctuary was premised on “civil initiative.”<sup>180</sup> The concept connotes the preservation of civil society, not the pursuit of revolution; the use and adherence to law, not the resort to violence; direct humanitarian service, not political agitation and reform.<sup>181</sup>

The federal government, however, dismissed the Sanctuary Movement as the work of individuals and organizations that believed they were above the

STUD. 1 (1988), <https://weberstudies.weber.edu/archive/archive%20A%20%20Vol.%201-10.3/Vol.%205.1/5.1Corbet.htm> [<https://perma.cc/FA29-393B>].

<sup>174</sup> Corbett, *supra* note 173; *see also Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.*, INT’L COMM. RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/380> [<https://perma.cc/7ZPD-4H6F>].

<sup>175</sup> Corbett, *supra* note 173.

<sup>176</sup> *See id.*

<sup>177</sup> *See id.*

<sup>178</sup> Cook, *supra* note 159, at 575–76.

<sup>179</sup> GARCÍA, *supra* note 167, at 102. One scholar has described civil disobedience as “public violation of a bad law” and civil initiative as centering around “the structural processes that condone and prolong injustice by attempting to protect the victims of governmental violations of fundamental rights.” ILSUP AHN, RELIGIOUS ETHICS AND MIGRATION: DOING JUSTICE TO UNDOCUMENTED WORKERS 55 (2014). This scholar further noted that civil disobedience is understood within a liability framework, while civil initiative occurs within a “social connectedness” framework. *Id.*

<sup>180</sup> *See* Corbett, *supra* note 173.

<sup>181</sup> Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 970–73 (1995) (describing characteristics of civil initiative and contrasting them to civil disobedience).

law.<sup>182</sup> It responded by prosecuting sanctuary workers for “harboring” or “transporting” unauthorized migrants.<sup>183</sup> The first prosecutions of sanctuary workers in the early 1980s resulted from undercover work by the former Immigration and Naturalization Service in what was known as “Operation Sojourner.”<sup>184</sup> The operation deployed investigators and paid informants who posed as church volunteers.<sup>185</sup> The informants gathered one hundred tape recordings over ten months, culminating in the Justice Department decision to charge sixteen sanctuary workers,<sup>186</sup> including Corbett and Pastor John Fife, often regarded as another founder of the movement.<sup>187</sup>

As these prosecutions progressed in federal court, the government and defenders of the sanctuary workers contested the legality of the movement’s work. Defenders claimed that the Refugee Convention, incorporated into U.S. law via the 1980 Refugee Act, implicitly authorized private humanitarian aid to refugees, regardless of their unauthorized entry into the United States.<sup>188</sup> They further argued that sanctuary workers had First Amendment rights to Free Exercise of Religion that authorized their humanitarian acts toward refugees.<sup>189</sup> These defenses largely failed, and courts concluded that providing food, shelter, and comfort to unauthorized migrants, including individuals whom the government might ultimately recognize as refugees, violated the anti-smuggling statute.<sup>190</sup>

A final and more fantastical example of aid in the asylum state is the proposal to create a new country to house refugees. Naguib Sawiris, an Egyptian billionaire, was so moved by Alan Kurdi’s death that he contacted the owners of two private islands near Greece with the plan to purchase one of the islands to house refugees.<sup>191</sup> Committing \$200 million to the project, Sawiris proposed buying an island to avoid creating competition between refugees and “lo-

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<sup>182</sup> See GARCÍA, *supra* note 167, at 103, 106 (describing the Reagan administration’s Justice Department memorandum warning “clergy and church workers [that they] were not exempt from prosecution,” and Operation Sojourner, through which the FBI infiltrated church sanctuary sites, leading to the arrest of over eighty individuals, “including refugees and church workers who had transported them,” for “conspiracy and transporting/harboring illegal aliens”).

<sup>183</sup> See Loken & Babino, *supra* note 38, at 129–30.

<sup>184</sup> Helton, *supra* note 32, at 556–57.

<sup>185</sup> *Id.*

<sup>186</sup> GARCÍA, *supra* note 167, at 106.

<sup>187</sup> *Id.*

<sup>188</sup> Helton, *supra* note 32, at 561. Article 31 of the Convention Relating to the Status of Refugees also prohibits parties from penalizing refugees for their irregular entry. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137.

<sup>189</sup> Helton, *supra* note 32, at 576–78.

<sup>190</sup> See *id.*; see also *infra* notes 246–258 and accompanying text.

<sup>191</sup> Nolan Feeney, *Egyptian Billionaire Contacts Owners to Buy an Island for Refugees*, TIME (Sept. 16, 2015), <http://time.com/4036044/egyptian-billionaire-refugees-greek-island/> [<http://perma.cc/NC4N-RT65>].

cal.”<sup>192</sup> Similarly, businessman Jason Buzi proposed creating a “refugee nation,” and experts have taken the idea seriously.<sup>193</sup>

All of these examples of private aid are voluntary, charitable projects that advance humanitarian ends. As discussed above, however, the law frequently outlaws private humanitarian aid, especially at points of rescue, entry into the asylum state, and assistance therein, because powerful asylum states’ interests in sovereignty peak at these points in an asylum seeker’s journey.

## II. STATES’ INTERESTS IN CRIMINALIZING PRIVATE HUMANITARIAN AID TO ASYLUM SEEKERS

All of the instances of private humanitarian aid described in Part I illustrate the groundswell of goodwill toward asylum seekers,<sup>194</sup> but the law frequently frustrates this intense desire to provide humanitarian assistance. For example, U.S. law criminalizes the transport of smuggled aliens, which might encompass acts as innocuous as giving a ride within the country to anyone without a valid visa.<sup>195</sup> Even acts of rescue on the high seas, mandated under international maritime law, might result in prosecution if coupled with transport to an asylum state’s territory.<sup>196</sup> What interests motivate laws criminalizing private humanitarian acts to aid asylum seekers? This Part analyzes the principal interests underlying legal restrictions on private humanitarian aid. It identifies three principal interests: national security, crime control, and economic preservation.<sup>197</sup> It further

<sup>192</sup> Hannah Roberts, *Will One of These Be ‘Aylan’s Island’? As Egyptian Billionaire Refuses to Name Greek Isle He Plans to Turn into Home for 200,000 Refugees, Experts Reveal Most Likely Ones*, DAILY MAIL (Sept. 25, 2015), <http://www.dailymail.co.uk/news/article-3247948/Will-one-Aylan-s-Island-Egyptian-billionaire-refuses-Greek-island-plans-turn-home-200-000-refugees-experts-reveal-likely-ones.html> [<http://perma.cc/8AL3-5H3B>].

<sup>193</sup> Alexander Betts, *Is Creating a New Nation for the World’s Refugees a Good Idea?*, THE GUARDIAN (Aug. 4, 2015), <http://www.theguardian.com/global-development-professionals-network/2015/aug/04/refugee-nation-migration-jason-buzi> [<https://perma.cc/S8GB-TJRT>] (describing advantages and disadvantages of Buzi’s proposal).

<sup>194</sup> Animus toward refugees also rose following the Paris attacks, but analyzing its role in migration policy is beyond the scope of this Article.

<sup>195</sup> 8 U.S.C. § 1324 (2012); *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289 (10th Cir., 1999); Frayer, *supra* note 152.

<sup>196</sup> See Stefan Steinberg, *Prosecuted for Saving the Lives of Refugees*, WORLD SOCIALIST WEBSITE (Oct. 9, 2009), <https://www.wsws.org/en/articles/2009/10/cape-o09.html> [<https://perma.cc/45E2-HM4M>].

<sup>197</sup> See Alexander Betts, *The Normative Terrain of the Global Refugee Regime*, ETHICS & INT’L AFF. (Oct. 7, 2015), <http://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/> [<https://perma.cc/4BTN-YXVJ>] (describing states’ perception of “economic, social, and political costs” of accepting refugees). Interests such as social cohesion and political stability also influence a state’s desire to restrict migration, but they are not specifically interests that lead to restrictions on private aid to refugees. For example, smuggling is not outlawed because the government fears that people will import refugees of a minority culture who will then have trouble integrating into mainstream culture. It is, however, outlawed due to fears of terrorism, crime, and economic consequences.

considers whether private humanitarian aid serves to “pull” more refugees and migrants into embarking on perilous journeys by creating a hope or expectation of rescue, and whether private humanitarian aid crowds out government resources devoted to humanitarian assistance.

### *A. Security- and Money-Based Interests*

Criminal laws in the United States, Canada, and the European Union, applicable to private humanitarian actors assisting asylum seekers, reveal concerns about terrorism, crime, and economic preservation, both in terms of jobs and public spending. These considerations underlie government policies to exclude unauthorized migrants. These laws typically prohibit any person from assisting an unauthorized migrant in entering the territory of the asylum state. These laws also prohibit individuals from transporting, harboring, concealing, or shielding from detection any unauthorized migrant who has already entered the territory.<sup>198</sup> These are essentially the same considerations that drive the criminal prohibitions on unauthorized entry into these states.

#### 1. Asylum Seekers as Threats to National Security and Sources of Crime

The first and most significant interest in justifying limits on private aid to asylum seekers is national security.<sup>199</sup> U.S. Presidents and Congress have used the term “national security” to refer to a range of concepts, such as the American constitutional system of government, U.S. economic interests, and the American “way of life.”<sup>200</sup> Immigration law defines the term as “the national defense, foreign relations, or economic interests of the United States.”<sup>201</sup> One of the principal functions of government under U.S. immigration law today is to screen incoming refugees and migrants for preferred characteristics.<sup>202</sup> With this premise, accepting open borders or migration based on the private choice of current citizens or residents would render a nation vulnerable to security threats because such scenarios bypass the government screening process.<sup>203</sup>

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<sup>198</sup> See *infra* notes 215–262 and accompanying text.

<sup>199</sup> See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1830 (2007).

<sup>200</sup> Arthur Rizer & Sheri R. Glaser, *Breach: The National Security Implications of Human Trafficking*, 17 WIDENER L. REV. 69, 73–75 (2011).

<sup>201</sup> *Id.* at 74.

<sup>202</sup> See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824–25 (2007).

<sup>203</sup> See *id.*

Unscreened refugees and migrants entering a host state might commit an act of terrorism that harms people or the asylum state's interests.<sup>204</sup>

Refugees are often the lightning rod for these national security concerns. For example, Paris suffered three heinous terrorist attacks in one evening, all perpetrated by Daesh.<sup>205</sup> Although none of the attackers was a refugee, politicians characterized the attack as the product of an overly generous refugee policy.<sup>206</sup> This, in turn, caused dozens of American governors to call for curtailing the United States' refugee resettlement program, at least with respect to Syrians.<sup>207</sup> The governor of Texas even directed NGOs doing resettlement work to cease all aid to Syrian refugees.<sup>208</sup> Although these state-level restrictions raise unique legal issues and are likely unconstitutional,<sup>209</sup> they reflect the general approach of banning private humanitarian aid to refugees in the name of national security.

Crime control is a related concern, and scholars have noted the frequent conflation of immigration enforcement, national security, and crime control.<sup>210</sup> Politicians and public figures have frequently linked higher rates of unauthorized immigration with higher rates of crime, and an individual's unauthorized migration with a greater propensity for law breaking generally. These assertions lack empirical support.<sup>211</sup> Border control agents, however, have reported significant rates of illegal entry by gang members, thus stoking fears of the "common criminal who enter[s] the United States illegally," regarding the United States "as fertile ground for violence."<sup>212</sup> Politicians have singled out refugees specifically as security threats.<sup>213</sup> To the extent that private humani-

<sup>204</sup> See, e.g., Andrea Shalal, *Syrian Refugee in Germany Arrested After Killing Woman in Macheke Attack*, REUTERS (July 25, 2016), <http://www.reuters.com/article/us-europe-attacks-germany-migrant-idUSKCN1040SF> [<https://perma.cc/3VR9-4N7T>].

<sup>205</sup> *Paris Attacks: What Happened on the Night*, BBC (Dec. 9, 2015), <http://www.bbc.com/news/world-europe-34818994> [<https://perma.cc/X5MS-6L7J>].

<sup>206</sup> Anton Troianovski & Marcus Walker, *Paris Terror Attacks Transform Debate over Europe's Migration Crisis*, WALL ST. J., Nov. 16, 2015, at A10.

<sup>207</sup> See Armie Seipel, *More Than 30 Governors Call for Halt to U.S. Resettlement of Syrian Refugees*, NPR (Nov. 17, 2015), <http://www.npr.org/2015/11/17/456336432/more-governors-oppose-u-s-resettlement-of-syrian-refugees> [<https://perma.cc/6ET9-4ZZ>].

<sup>208</sup> Lauren Talarico, *Nonprofits Told Not to Help Syrian Refugees*, KHOU (Nov. 20, 2015), <http://www.khou.com/story/news/local/2015/11/20/nonprofits-asked-not-to-help-syrian-refugees/76134346/> [<https://perma.cc/Y5PJ-YCR3>].

<sup>209</sup> Andre Segura & Cody Wofsy, *Governors' Threats to Exclude Syrian Refugees Are Not Only Fear Mongering—They're Unconstitutional*, AM. CIVIL LIBERTIES UNION (Nov. 18, 2015), <https://www.aclu.org/blog/speak-freely/governors-threats-exclude-syrian-refugees-are-not-only-fear-mongering-theyre> [<https://perma.cc/DP9R-R5LJ>].

<sup>210</sup> Chacón, *supra* note 199, at 1831.

<sup>211</sup> *Id.* at 1839–40.

<sup>212</sup> Rizer & Glaser, *supra* note 200, at 83.

<sup>213</sup> Jenna Johnson & Sean Sullivan, *Why Trump Warned About Somali Refugees—And Why It Could Backfire* (Nov. 7, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/11/07/>

tarian aid to asylum seekers bypasses the government screening process prior to their arrival, it stands to frustrate security-related objectives.<sup>214</sup>

*a. U.S. Law*

Security-related concerns drive some legal restrictions on private humanitarian aid. For example, federal law proscribes the knowing provision of “material support or resources to designated foreign terrorist organizations.”<sup>215</sup> Donors have been prosecuted for supporting nonprofits that are designated Foreign Terrorist Organizations (“FTOs”).<sup>216</sup> Thus, even aid in the country of origin, which does not implicate irregular migration and has the goal of keeping displaced persons at home, may violate criminal prohibitions, in addition to incurring the inherent safety risks discussed in Part I.

Federal criminal law reflects concerns for national security and crime control, as well as protection from “economic migrants.” Federal law prohibits human trafficking, which Congress has characterized as a “contemporary manifestation of slavery.”<sup>217</sup> The Trafficking Victims Protection Act of 2000 (“TVPA”) criminalizes human trafficking and seeks to protect victims of trafficking.<sup>218</sup> Specifically, the portion of the TVPA codified in 18 U.S.C. section 1590 criminalizes the harboring or transport of “any person for labor or services” in violation of the statute.<sup>219</sup> Victims and perpetrators of trafficking are often irregular migrants.<sup>220</sup> Commentators have posited that irregular migration itself threatens national security. Thus, to the extent that anti-trafficking laws attempt to curb irregular migration, they protect interests in national security and crime control.<sup>221</sup>

Scholars have argued that this conflation of irregular migration with criminality has imposed a variety of costs on migrants, including asylum seekers

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why-trump-warned-about-somali-refugees-and-why-it-could-backfire/?utm\_term=.b6d2ac19b24f [https://perma.cc/GV38-QVGN].

<sup>214</sup> See Cox & Posner, *supra* note 202, at 812 (discussing immigration law’s screening function).

<sup>215</sup> 18 U.S.C. § 2339B (2012); see also Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1281 (2016) (discussing constitutionality of section 2339B).

<sup>216</sup> See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010) (upholding federal law prohibiting material support to FTOs).

<sup>217</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101).

<sup>218</sup> See Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466; *Current Federal Laws*, POLARIS, https://polarisproject.org/current-federal-laws [https://perma.cc/7R4U-8U9M].

<sup>219</sup> 18 U.S.C. § 1590(a).

<sup>220</sup> Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1629 (2010).

<sup>221</sup> Rizer & Glaser, *supra* note 200, at 82–85 (discussing the premise that any illegal entry into the United States triggers national security concerns).

and other vulnerable migrants.<sup>222</sup> The view that irregular migration itself is a crime that threatens U.S. interests, for example, has led U.S. anti-trafficking law to emphasize the prosecution of “bad actors” at the expense of a more complete, accurate understanding of the causes of trafficking and the nature of markets that traffickers supply.<sup>223</sup> By constructing trafficking as a problem “that is the sole responsibility of noncitizens and outsiders,” U.S. anti-trafficking discourse further criminalizes trafficked migrants, who themselves are often undocumented.<sup>224</sup> Thus, although the law views unauthorized migration as a source of criminal behavior in the asylum state,<sup>225</sup> undocumented status itself drives this perception of criminality.<sup>226</sup>

Federal criminal law also prohibits “alien smuggling, domestic transportation of unauthorized aliens, [and] concealing or harboring unauthorized aliens,” among other offenses.<sup>227</sup> Commentators have indicated that the anti-smuggling statute was designed simply to exclude or remove unauthorized aliens from the United States.<sup>228</sup> The statute creating criminal penalties for these offenses was originally passed as part of the Immigration and Nationality Act<sup>229</sup> and was primarily concerned with regulating people who interacted with single Mexican men lacking familial ties to the United States.<sup>230</sup> Congress struggled to define the crime of “harboring” and assumed that, much like the lawmakers of other countries, decisionmakers would be able to evaluate each situation and “assign culpability based on [that] assessment.”<sup>231</sup> Congress passed the final version of the bill without defining “harboring,” and questions remained about whether and under what circumstances the knowing provision of assistance to an unlawful alien would be prohibited.<sup>232</sup> This failure to define “harboring” led federal courts to interpret the statute in different ways. Initial-

<sup>222</sup> See Chacón, *supra* note 199, at 1835–39.

<sup>223</sup> Chacón, *supra* note 220, at 1628, 1631–32.

<sup>224</sup> *Id.* at 1634.

<sup>225</sup> See Chacón, *supra* note 199, at 1839–40.

<sup>226</sup> Chacón, *supra* note 220, at 1627–28.

<sup>227</sup> 8 U.S.C. § 1324(a) (2012); U.S. DEP’T JUST., CRIMINAL RESOURCE MANUAL 1901–1999 § 1907, <http://www.justice.gov/usam/criminal-resource-manual-1907-title-8-usc-1324a-offenses> [https://perma.cc/B8HH-25NW].

<sup>228</sup> See Matthew F. Leitman & Paul D. Hudson, *Defending Employers When ICE Puts the Heat On*, CHAMPION MAG., Jan.–Feb. 2012, at 48 (citing *United States v. Acosta de Evans*, 531 F. 2d 428 (9th Cir. 1976)).

<sup>229</sup> Bau, *supra* note 168, at 93–94 (describing Congress’s decision to adopt criminal penalties for harboring and related offenses in 1952 after the Supreme Court found earlier penalties for those offenses ambiguous).

<sup>230</sup> Jain, *supra* note 30, at 160.

<sup>231</sup> *Id.* at 165.

<sup>232</sup> *Id.* Canada’s anti-smuggling law applied with similar breadth, leading the Canadian Supreme Court in 2015 to strike down the law due to its failure to exempt humanitarian actors. The court noted that Parliament never intended for the law to apply to such actors in the first place. See *Appulonappa*, 3 S.C.R. ¶¶ 39, 69.

ly, courts focused on defendants' intention to conceal aliens from immigration authorities, but later courts expanded the statute to cover any conduct "substantially facilitating" an alien's unlawful presence within the territory.<sup>233</sup>

This expansive interpretation effectively criminalizes many everyday interactions with unauthorized migrants, such as sharing meals or offering a place to stay, with no exception for humanitarian assistance.<sup>234</sup> For example, the statute has ensnared U.S. NGOs providing humanitarian aid near the border with Mexico. Volunteers with a group called No More Deaths were prosecuted for transporting migrants in need of medical care from the Arizona desert to hospitals or clinics in Tucson.<sup>235</sup> By performing medical evacuations, the volunteers had technically "transport[ed] aliens" in violation of federal law.<sup>236</sup> Although the charges were ultimately dropped, No More Deaths continues to face Customs and Border Protection's scrutiny, culminating in a 2017 raid of a desert campsite medical clinic.<sup>237</sup> American sanctuary workers faced a similar fate decades ago.<sup>238</sup> Thus, anti-smuggling laws have criminalized acts of private humanitarian aid.<sup>239</sup>

#### *b. International, EU, and Canadian Law*

Several international instruments also address smuggling and trafficking. Although they frame unlawful migration as a matter of international criminal law, they explicitly recognize an exception for humanitarian acts. The United Nations Convention against Transnational Organized Crime, drafted in 2000, is the foundational instrument.<sup>240</sup> Its *Protocol Against the Smuggling of Migrants by Land, Sea, and Air* defines the "smuggling of migrants" to involve the "procurement . . . of the illegal entry" of a person, who is neither a citizen nor a permanent resident of the country entered, for direct or indirect "financial or

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<sup>233</sup> Jain, *supra* note 30, at 166, 169.

<sup>234</sup> *Id.* at 176 (discussing court's observation, in a harboring case, that "a host of commonplace interactions could arguably help an unauthorized alien remain in the United States").

<sup>235</sup> Cook, *supra* note 159, at 562.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 574–75; Eric Boodman, *After Trump's Immigration Crackdown, a Desert Clinic Tries to Save Lives Without Breaking the Law*, STAT NEWS (July 6, 2017), <https://www.statnews.com/2017/07/06/immigration-desert-clinic/> [<https://perma.cc/K9DP-JSTX>] (describing the Trump Administration's aggressive stance toward NGOs providing humanitarian aid to migrants in the southwest United States).

<sup>238</sup> GARCÍA, *supra* note 167, at 106.

<sup>239</sup> See Jain, *supra* note 30, at 171–74. State governments have led more recent efforts to outlaw sanctuary. See Campbell, *supra* note 38, at 81. Such criminalization has a much longer history. See GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–43 (2003) (describing state and federal efforts to limit migration of criminals, the sick, the poor, and slaves in the nineteenth century).

<sup>240</sup> G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).



other material benefit.”<sup>241</sup> By limiting the definition to smuggling for “financial or . . . material benefit,” the Migrant Smuggling Protocol expressly excludes humanitarian smuggling from the ambit of criminal law.<sup>242</sup>

In light of these international instruments, the European Union adopted several measures regarding smuggling. In 2002, the European Union adopted a directive on the “facilitation of unauthori[z]ed entry, transit and residence” and a Framework Decision on strengthening criminal laws on the same.<sup>243</sup> The Facilitation Directive applies broadly to “any person who intentionally assists [a non-citizen] . . . to enter, or transit across, the territory of a Member State” in breach of that state’s migration laws.<sup>244</sup> Although the Framework Decision contains a “savings clause” to avoid prejudicing the rights of refugees and asylum seekers under international law, it does not define smuggling as narrowly as the Migrant Smuggling Protocol.<sup>245</sup> As such, the Facilitation Directive and Framework Decision contain an expansive definition of smuggling.

The European Union’s anti-smuggling laws have complicated the work of European NGOs saving lives on the Mediterranean. NGOs such as Sea-Watch note the legal uncertainty created by these laws, whereby humanitarian organizations can become the targets of prosecution for assisting refugees and migrants in distress if those refugees and migrants are brought to shore.<sup>246</sup> Back

<sup>241</sup> Migrant Smuggling Protocol, *supra* note 21, at art. 3.

<sup>242</sup> Abdelnaser Aljehani, *The Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol*, 79 J. CRIM. L. 122, 127 (2015). Importantly, this means only that the Migrant Smuggling Protocol imposes no obligations on states to criminalize humanitarian smuggling, but it does not preclude them from doing so.

<sup>243</sup> GALLAGHER & DAVID, *supra* note 84, at 91; *see* Directive 2002/90/EC, of the Council of the European Union of 28 November 2002 on Defining the Facilitation of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328/17) [hereinafter Facilitation Directive] (defining punishable offenses of entry and transit without reference to financial or material benefit); Framework Decision 2002/946/JHA, of the Council of the European Union of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence, 2002 O.J. (L 328/1) [hereinafter Framework Decision] (same).

<sup>244</sup> Facilitation Directive, *supra* note 243. Article 1.2 of the Facilitation Directive contains an optional clause permitting states to decriminalize humanitarian facilitation of illegal entry and transit, but most states have chosen to adopt the broad definition of entry and transit in Article 1.1(a), without an exception for humanitarian assistance. *Id.* at art. 1.2; *see* EUR. UNION AGENCY FUNDAMENTAL RTS., CRIMINALISATION OF MIGRANTS IN AN IRREGULAR SITUATION AND OF PERSONS ENGAGING WITH THEM 9–10 (Mar. 2014), <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them> [<https://perma.cc/9YCC-QN72>] (noting that most EU states do not require proof of financial gain to punish facilitation of entry, but rather view financial gain as an aggravating factor). Both the Facilitation Directive and the Framework Decision require states to criminalize facilitation of residence only when done for “financial gain,” but states remain free to criminalize facilitation of residence without a financial gain requirement.

<sup>245</sup> GALLAGHER & DAVID, *supra* note 84, at 91; *see* Framework Decision, *supra* note 243, at art. 6 (savings clause).

<sup>246</sup> *See* GALLAGHER & DAVID, *supra* note 84, at 91–92; *Anti-Smuggling Legislation and Migrant Rights*, HUM. RTS. AT SEA (May 26, 2015), <https://hras-seawatch.org/2015/05/26/anti-smuggling-legislation-and-migrant-rights/> [<https://perma.cc/Q4QS-9BNR>].

in 2004, Italy prosecuted Cap Anamur, an NGO that docked at an Italian port without authorization.<sup>247</sup> The ship carried refugees and migrants from Ghana and Nigeria who had been rescued at sea.<sup>248</sup> In executing the duty to rescue under international maritime law, the captain of Cap Anamur sought to bring the refugees and migrants to a “safe place.”<sup>249</sup> No such safe place, however, consented to the docking.<sup>250</sup> After a two-week standoff with Italian authorities, the captain docked the ship without authorization.<sup>251</sup> Italy prosecuted the rescuers with the crime of “aiding illegal migration.”<sup>252</sup> Five years later, the defendants were acquitted.<sup>253</sup> The court ruled that the master of the ship could not be *liable* for rescue because international law *mandated* such rescue.<sup>254</sup> Moreover, the master of the ship was not liable for bringing the refugees and migrants to the Italian coast without authorization because the duty to rescue, under international maritime law, includes the transport of those in danger to a “place of safety.”<sup>255</sup> Scholars have argued that this “arguably extends the mantle of what constitutes a ‘rescue operation’ up until the point of disembarkation, whether this is on to land or some other suitable facility.”<sup>256</sup> On this view, merely holding rescued persons on the rescuer’s vessel does not discharge the duty owed.<sup>257</sup> Although scholars contend that a finding of criminal liability under such circumstances would result in “manifest injustice,” governments continue to regard with suspicion the transport of rescued refugees and migrants to their territory for processing.<sup>258</sup>

For many years, Canadian law echoed these themes, and historically, the Canadian government has responded to asylum seekers’ unauthorized travel by prosecuting the private actors who organized the journey to Canada, whether for

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<sup>247</sup> GALLAGHER & DAVID, *supra* note 84, at 462.

<sup>248</sup> Rupert Colville, *Handling of Cap Anamur Asylum Claims Was Flawed, Says UNHCR*, U.N. HIGH COMM’R REFUGEES (July 23, 2004), <http://www.unhcr.org/4101252e4.html> [<https://perma.cc/MWM3-WJS8>] (noting that refugees and migrants were ultimately deported to Ghana and Nigeria).

<sup>249</sup> *See id.*

<sup>250</sup> GALLAGHER & DAVID, *supra* note 84, at 462.

<sup>251</sup> Colville, *supra* note 248.

<sup>252</sup> GALLAGHER & DAVID, *supra* note 84, at 462. More recently, Italy acquitted an activist who assisted migrants in crossing the French border. *See Italy Acquits Activist Who Helped Migrants Cross French Border*, THE LOCAL (Apr. 27, 2017), <https://www.thelocal.it/20170427/italy-acquits-activist-who-helped-migrants-cross-french-border> [<https://perma.cc/HZ3Z-NYCK>].

<sup>253</sup> GALLAGHER & DAVID, *supra* note 84, at 462.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 463.

<sup>257</sup> *See id.*

<sup>258</sup> *Id.* (“It remains to be seen whether the crew of a rescuing vessel that . . . disembarks rescued persons in breach of instructions from the coastal State, would be able to avoid prosecution under domestic laws by relying on their obligation to render humanitarian assistance.”).

profit or not.<sup>259</sup> The government has also “aggressive[ly]” punished asylum seekers who assist fellow asylum seekers on the same unauthorized journeys as them by placing such individuals in inadmissibility proceedings.<sup>260</sup> These proceedings are likely to extinguish their asylum rights permanently.<sup>261</sup> Ultimately, anti-smuggling legislation in the major Western asylum states generally reveals little to no concern about potentially criminalizing private humanitarian aid.<sup>262</sup>

## 2. Asylum Seekers as Economic Threats

Concerns about the economic impact of asylum seekers on wages and jobs for existing residents of an asylum state also motivate the prosecution of humanitarian actors rendering aid to unauthorized migrants, even if those migrants are ultimately recognized as refugees.<sup>263</sup> Although some evidence indicates that refugees are, in fact, an economic asset—perhaps due to the “stimulative effect” on the economy—<sup>264</sup> the public frequently views them as a liability.<sup>265</sup> Restrictionists also imagine refugees requiring massive public support, stoking fears that refugees will strain public welfare budgets.<sup>266</sup> Scholars,

<sup>259</sup> Angus Grant, *The Smuggled and the Smuggler: Exploring the Distinctions Between Mutual Aid, Humanitarian Refugee Assistance and People Smuggling in Canadian Law*, REFLAW, <http://www.reflaw.org/the-smuggled-and-the-smuggler-exploring-the-distinctions-between-mutual-aid-humanitarian-refugee-assistance-and-people-smuggling-in-canadian-law/> [https://perma.cc/4T7G-9USG].

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See GALLAGHER & DAVID, *supra* note 84, at 91 (noting that “[t]he Protocol sets out a straightforward definition of migrant smuggling that clearly includes a profit element,” while “[t]he Framework Decision and Directive do not . . . take full account of the profit element”). Compare Migrant Smuggling Protocol, *supra* note 21, at art. 3 (defining criminal smuggling more narrowly as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry into a State party” of a person who is not a citizen or permanent resident of that state), with 18 U.S.C. § 1324 (2012) (defining without reference to financial or material benefit the punishable offenses of bringing in, transporting, concealing, harboring, or shielding from detection unauthorized migrants), and Framework Decision, *supra* note 243, at art. 1(1) (describing penalties without reference to “financial gain”), and *Appulonappa*, 3 S.C.R. ¶¶ 39, 69.

<sup>263</sup> See Helton, *supra* note 32, at 561 (discussing government’s justification for prosecuting sanctuary workers based on “the need to maintain a strict immigration policy in order to stem the tide of undocumented aliens entering the United States as ‘economic migrants’”).

<sup>264</sup> Robert J. Shiller, *Economists on the Refugee Path*, PROJECT SYNDICATE (Jan. 19, 2016), <https://www.project-syndicate.org/commentary/economic-research-contribution-to-asylum-reform-by-robert-j--shiller-2016-01?barrier=accessreg> [https://perma.cc/6JTM-DNW4].

<sup>265</sup> See *id.* (noting that opponents of policies admitting refugees frequently argue that “the newcomers will take locals’ jobs and drive down wages”).

<sup>266</sup> See Didier Bigo, *Criminalization of “Migrants”*: *The Side Effects of the Will to Control the Frontiers and the Sovereign Illusion*, in IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES 61, 63–64 (Barbara Bogusz et al. eds., 2004) (“Migration of the poor, and of the people obliged to flee from their own country—that is asylum seekers—is seen as the equivalent of an ‘invasion,’ based on the idea that people coming that way, want to settle definitely in the prosperous economies to benefit from the welfare state.”); see also Jacob Poushter, *European Opinions of the Refugee Crisis In 5 Charts*, PEW RES. CTR. (Sept. 16,

however, have noted that the tendency for refugees to become assets or liabilities to the economy depends largely on the policy framework in place in the asylum state.<sup>267</sup> For example, in Uganda, where the law grants refugees freedom of movement and freedom to work, refugees have contributed positively to the economy and country as a whole.<sup>268</sup> The notion that refugees are a monolithic group that either benefit or burden a society misses the point that a particular society's institutions facilitate or stifle refugees' capacity to contribute.<sup>269</sup>

As a historical matter, however, anxiety about the economic effects of irregular migration has been the most significant concern behind calls for stiffer penalties for alien smuggling and transport, as well as for the creation of new offenses for harboring and concealment under U.S. law.<sup>270</sup> President Harry S. Truman, in a message to Congress, highlighted the wage depressive effects of illegal immigration from Mexico, noting also the conditions for exploitation created when a group works under constant threat of deportation.<sup>271</sup> He called for stricter smuggling and transport prohibitions, as well as punishment for harboring or concealing immigrants who entered illegally.<sup>272</sup> Noting the difficulty of sealing the entire U.S. land border to unauthorized entry, he concluded that these criminal laws would serve as tools to locate and process unauthorized migrants and to discourage U.S. citizens from assisting their entry into the United States.<sup>273</sup> Unsurprisingly, the legislative history of the anti-smuggling law reveals not a single mention of "persecution" or the possible refugee status of any aliens who enter illegally, for the Refugee Convention had not yet been drafted, and Central America did not become the site of widespread political violence and turmoil until the 1980s.<sup>274</sup> Thus, the subsequent prosecution of NGOs for assisting asylum seekers was likely never contemplated when the statute was drafted and passed,<sup>275</sup> because Congress was principally concerned about regulating migrants seeking economic opportunity, not asylum.<sup>276</sup>

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2016), <http://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/> [<https://perma.cc/9QRH-5T37>].

<sup>267</sup> See Betts, *supra* note 197.

<sup>268</sup> *Id.*

<sup>269</sup> *See id.*

<sup>270</sup> *See* 97 CONG. REC. 82, 8144–46 (1951); *cf.* Jain, *supra* note 30, at 160 (describing lawmakers' view that irregular migrants seek economic opportunity).

<sup>271</sup> *See* 97 CONG. REC. 82, at 8144–46.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 8145.

<sup>274</sup> *Cf.* Jain, *supra* note 30, at 169 (discussing legislative history of statute).

<sup>275</sup> *Id.*; *see also* Bau, *supra* note 168, at 102 (noting that Congress later considered amending the statute to specifically require proof of commercial motivation).

<sup>276</sup> Jain, *supra* note 30, at 160, 164 ("The debates reflected lawmakers' consensus that unauthorized aliens came to the United States because of the lure of jobs.").

### B. Policy-Based Concerns

Apart from concerns about national security, crime control, and economic preservation, there are other reasons to limit private humanitarian aid. First, private humanitarian aid simply may not be the right tool to address the massive humanitarian crisis facing refugees.<sup>277</sup> Only the government can lawfully establish criteria for screening, meaning that private actors can never fully substitute for the government in managing migration.<sup>278</sup> Further, humanitarian crises merit a coordinated, appropriately scaled response—another comparative advantage of government solutions.<sup>279</sup> This line of thinking presents a false choice, though, for none of these advantages of government action precludes meaningful private action in responding to the immediate human needs of refugees “in our midst,” whether within our borders or just beyond them.<sup>280</sup> Relying completely on coordinated state action also creates a risk that many people will go without the help they need.<sup>281</sup>

Some may also worry that private humanitarian aid serves as a “pull factor,” drawing asylum seekers into perilous journeys with the hope of rescue and a better life, and that private humanitarian aid will displace government aid, or create incentives for governments to reduce already-limited support for search and rescue operations.<sup>282</sup> These concerns require empirical analysis, but generally, they appear misplaced. First, asylum seekers and migrants continue to embark on dangerous journeys quite possibly because most people who undertake them actually survive. Out of 1 million migrants who crossed the Med-

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<sup>277</sup> Cf. Oliver Cunningham, *The Humanitarian Aid Regime in the Republic of NGOs: The Fallacy of ‘Building Back Better,’* 4 JOSEPH KORBEL J. ADV. INT’L STUD. 102, 113–14 (2012), [http://www.du.edu/korbel/jais/journal/volume4/volume4\\_cunningham.pdf](http://www.du.edu/korbel/jais/journal/volume4/volume4_cunningham.pdf) [<https://perma.cc/VZ32-3XWP>] (discussing merits of government-based alternative solutions to traditional humanitarian aid under certain circumstances).

<sup>278</sup> See Cox & Posner, *supra* note 202, at 812 (discussing substantive screening criteria under U.S. law and more general theoretical insights regarding *ex ante* and *ex post* screening performed by the government).

<sup>279</sup> Governments typically have more resources than private actors, including both money and the equipment necessary to carry out large-scale responses to international crises; governments are the only actors that have the power to alter international law; governments are responsible for determining their own immigration policies and procedures, whereas private actors merely work legally within those frameworks or illegally outside of them; and governments are not restricted by market forces, like many private actors, which typically must generate enough revenue to cover their operating costs. Thus, governments are uniquely positioned to formulate and execute an appropriate response to mass migrations.

<sup>280</sup> See Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT’L L. 1, 42 (1998) (noting the “special moral claims of those in our midst seeking U.S. protection”).

<sup>281</sup> I thank Martha Minow for raising this point.

<sup>282</sup> Leila Østerbø, *Who Is Who in the Mediterranean Rescue Scene*, MIGRANT REP. (June 20, 2015), <http://migrantreport.org/infographic-mediterranean-assets/> [<https://perma.cc/PQ8N-6BDC>] (noting UK’s opposition to Mare Nostrum based on the view that it served as a “pull factor”).

iterranean without authorization in 2015, ninety-eight percent reached the shore safely.<sup>283</sup> 360,000 migrants successfully crossed the Mediterranean and roughly 5,000 died on the journey in 2016.<sup>284</sup> Even if several thousand were rescued out of the population of migrants who undertook the journey, the vast majority still successfully completed the journey without rescue or humanitarian assistance. Thus, it appears empirically rational for migrants to continue to choose risky dinghy boat passage to Europe because, in fact, most survive.

Second, critics have failed to establish a causal connection between increased private humanitarian assistance and reduced government spending on search and rescue operations. Indeed, in some instances, the causation is reversed. For example, Italy ceased its highly successful, but costly, search and rescue program, *Mare Nostrum* in October of 2014.<sup>285</sup> *Triton*, a program that is largely funded by the European Union, replaced it, but with an emphasis on border enforcement, instead of search and rescue.<sup>286</sup> When deaths at sea spiked, private actors entered the arena *to replace government aid that had already been eliminated*.<sup>287</sup> In addition, political pressure mounted on the European Union to expand its search and rescue efforts, which resulted in a “commitment to triple *Triton*’s budget for 2015–16.”<sup>288</sup> Thus, the presence of multiple NGOs performing search and rescue work has not had a chilling effect on governments. As a historical matter, the incentives have worked in the opposite direction, with government retrenchment prompting private humanitarian actors to intervene.

Systemic restrictions on such assistance, however, might make sense generally in light of questions about the sustainability of private charitable interests and the accountability of private actors. If societies encourage private actors to provide humanitarian assistance to asylum seekers in need over a longer time period, what happens if and when private humanitarian actors become

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<sup>283</sup> See *Latest Global Figures*, INT’L ORG. MIGRATION: MISSING MIGRANTS PROJECT, <http://missingmigrants.iom.int/latest-global-figures> [<https://perma.cc/LDP6-X9LB>].

<sup>284</sup> Ben Quinn, *Migrant Death Toll Passes 5,000 After Two Boats Capsize Off Italy*, THE GUARDIAN (Dec. 23, 2016), <https://www.theguardian.com/world/2016/dec/23/record-migrant-death-toll-two-boats-capsize-italy-un-refugee> [<https://perma.cc/EQ6A-WPXR>].

<sup>285</sup> *Sea-Watch Rescue Blog*, *supra* note 52 (“The general opinion in Brussels was that the greater the rescue capability . . . the greater the likelihood more migrants would attempt to enter Europe via these means.”).

<sup>286</sup> Østerbø, *supra* note 282; see Glenda Garelli & Martina Tazzioli, *The EU Hotspot Approach at Lampedusa*, OPENDEMOCRACY (Feb. 26, 2016), <https://www.opendemocracy.net/can-europe-make-it/glenda-garelli-martina-tazzioli/eu-hotspot-approach-at-lampedusa> [<https://perma.cc/9DGG-4B96>]; *MareNorstrum to End—New Frontex Operation Will Not Ensure Rescue of Migrants in International Waters*, EUR. COUNCIL REFUGEES & EXILES (Oct. 10, 2014), <http://www.ecre.org/operation-mare-norstrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/> [<https://perma.cc/3YL6-EWUE>].

<sup>287</sup> See Østerbø, *supra* note 282 (identifying dates when MOAS, Sea-Watch, and Norwegian Society for S&R began their efforts, *after* *Mare Nostrum* ended).

<sup>288</sup> *Id.*

exhausted, find that they have taken on more than they can handle, or simply lose interest?<sup>289</sup> Are private desires to assist asylum seekers sufficiently resilient for the task at hand?<sup>290</sup> Supporting asylum seekers in the process of applying for refugee status and then integrating into society is a long-term commitment. The danger of permitting individuals to privately assist refugees of their choosing is that private interest in those refugees may prove short-lived.<sup>291</sup> Relatedly, questions of accountability arise. How can we trust the quality of private humanitarian aid when it is decentralized, potentially capricious, and answers to no one?<sup>292</sup> What oversight is required as to the quality of aid provided? Restrictions on private humanitarian aid might ultimately benefit some asylum seekers because private smuggling and housing could lead to exploitation, particularly if the asylum seeker lacks a reasonable path to legal status.<sup>293</sup>

Governments, however, can address many of these concerns through prudent policy choices. For example, governments can educate volunteers and train them on best search and rescue practices or how best to meet asylum seekers' needs during the period when their asylum applications are pending.<sup>294</sup> Through such public-private partnerships, private actors can work to meet asylum seekers' needs while answering to public standards.<sup>295</sup>

Ultimately, security, crime control, and economic preservation are all generally legitimate interests that asylum states invoke to justify restricting private aid to refugees. To the extent that private aid might lead asylum seekers to bypass government screening, it creates potential security or crime risks and facilitates acts, such as smuggling, that are themselves viewed as crimes. Policy-makers should also consider the potential distortion of incentives that private humanitarian aid might cause, both with respect to government commitment to search and rescue and asylum seekers' willingness to risk peril in travelling to the asylum state. In the most recent mass flights from violence, however, these feared incentive effects do not appear to have materialized.

<sup>289</sup> Cf. Tracey M. Derwing & Marlene Mulder, *The Kosovar Sponsoring Experience in Northern Alberta*, 4 J. INT'L MIGRATION & INTEGRATION 217, 227 (discussing Canadian private refugee sponsors' frustrations with refugees' "unrealistic expectations" that sponsors be "on call at all times").

<sup>290</sup> Cf. *id.*

<sup>291</sup> See *id.*

<sup>292</sup> See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 31–35 (2002) (discussing the lack of "accountability mechanisms" over private organizations receiving public funding).

<sup>293</sup> Cf. Krzysztof Kotsarski & Samuel Walker, *Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, 7 IUS GENTIUM: COMP. PERSP. L. & JUST. 239, 257 (2011).

<sup>294</sup> E.g., *Guide to the Private Sponsorship of Refugees Program*, GOV'T CANADA (last updated May 26, 2017), <http://www.cic.gc.ca/english/resources/publications/ref-sponsor/index.asp> [<https://perma.cc/GZW3-LDLG>] [hereinafter Canadian Private Refugee Sponsorship program].

<sup>295</sup> See MINOW, *supra* note 292, at 142 ("It should not be controversial to insist that public values follow public dollars.").

### C. *The Case for Private Humanitarian Aid*

Private individuals and NGOs have an important role in responding to the needs of migrants. A complete exploration of the philosophical arguments relating to the role of NGOs and private humanitarian actors in civil society is beyond the scope of this Article, but at the most basic level, private humanitarian aid is important because it defends human life and promotes related rights articulated by international human rights law.<sup>296</sup> It further stands to strengthen civil society by providing a space for individuals to act freely and to strengthen democratic capacities of those who participate.<sup>297</sup> Finally, it provides an avenue for expressing dissent from government policy and constructing a positive vision of the law.<sup>298</sup>

International human rights law protects many rights.<sup>299</sup> Core rights relate to life, bodily integrity, freedom of movement, and freedom from state-imposed harm.<sup>300</sup> Asylum seekers are typically fleeing threats to these core rights. Humanitarian aid in the form of funding or providing basic needs, such as food, shelter, clothing, and medical care, helps preserve life—in either the country of origin or in the asylum state. Acts of rescue along the way also preserve life, often dramatically.<sup>301</sup> Such aid protects fundamental rights, because without it some asylum seekers would lose their lives. In this way, private humanitarian aid is valuable because it protects fundamental rights recognized by international human rights law.

Promoting and protecting private humanitarian aid also stands to strengthen civil society. As Corbett and other participants in the Sanctuary Movement have noted, serving those in need remedies injustice more directly than petitioning the government to pass a law to require government officials to do the same.<sup>302</sup> Private humanitarian aid places the tools of justice in the hands of non-state actors, empowering and strengthening those non-state ac-

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<sup>296</sup> See *infra* notes 299–314 and accompanying text.

<sup>297</sup> See *infra* notes 299–314 and accompanying text.

<sup>298</sup> See *infra* notes 299–314 and accompanying text.

<sup>299</sup> See UDHR, *supra* note 125 (containing thirty articles, almost all of them declaring individual rights); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (enumerating individual rights in the first twenty-seven Articles, for the most part); ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* app. at 151–61 (2014).

<sup>300</sup> The rights to life, freedom from torture, and freedom of movement are protected by both the UDHR and ICCPR. UDHR, *supra* note 125, at arts. 3, 5, 13; ICCPR, *supra* note 299, at arts. 6, 7, 12.

<sup>301</sup> See *MOAS Saves Migrants at Sea in Record Numbers: More Than 1,400 Saved from Inhumane Conditions in First Two-Week Mission*, MOAS, <https://www.moas.eu/moas-saves-migrants-at-sea-in-record-numbers-more-than-1400-saved-from-inhumane-conditions-in-first-two-week-mission/> [<https://perma.cc/9UCE-GDEE>] (“The search and rescue charity Migrant Offshore Aid Station (MOAS) helped rescue 1,441 people in just 12 days in back-to-back sea rescues from unseaworthy boats in the central Mediterranean Sea.”).

<sup>302</sup> See Corbett, *supra* note 173.



tors entrusted to “do justice” themselves.<sup>303</sup> It is, in this sense, justice unmediated. It permits the expression of dissent<sup>304</sup> but also the communication of a positive vision of the law.<sup>305</sup>

Opportunities for private individuals and groups to aid asylum seekers have other value for society as a whole.<sup>306</sup> Acts of private humanitarian aid, unlike state-sponsored humanitarian action, embody and promote essential freedoms, such as expression and association.<sup>307</sup> Individuals can join together, publicly asserting their values, ideas, and visions through action and through communication with others.<sup>308</sup> More generally, engagement in associational activities promotes pluralism, tolerance, and solidarity.<sup>309</sup> Scholars have defined pluralism as “the lively interaction among inherited particularities,” a process through which new particularities evolve.<sup>310</sup> When people experience pluralism and participate in a range of associational activities, individuals’ sense of their own effectiveness grows, promoting tolerance.<sup>311</sup> This, in turn, creates space for solidarity.<sup>312</sup> Ultimately, scholars have argued that participating in associational activities allows individuals to develop critical faculties such as arguing, deliberating, decision making, and taking responsibility that then redound to the benefit of a democratic society as a whole.<sup>313</sup>

The law should facilitate private humanitarian aid because it creates space for ordinary individuals to act in big and small ways, and slowly change socie-

<sup>303</sup> Corbett, *supra* note 173; Bezdek, *supra* note 181, at 910.

<sup>304</sup> Cf. Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1147 (2009) (noting that state and local governments enact “moving border laws” to express symbolic messages of disagreement with the federal government).

<sup>305</sup> See Bezdek, *supra* note 181, at 905.

<sup>306</sup> See Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL’Y 555, 573 (1998) (summarizing Professor Michael Walzer’s view that “it makes good public policy to encourage the proliferation and strength of these associational ties that constitute American civil society”).

<sup>307</sup> MINOW, *supra* note 292, at 44 (noting that nonprofits play a key role in democratic society through “vitaliz[ing] civil society,” promoting First Amendment freedoms of association and expression, and “enable[ing] people to participate in running their lives”).

<sup>308</sup> Philosopher Hannah Arendt’s theory linking freedom to pluralism is particularly powerful in this context. HANNAH ARENDT, *THE HUMAN CONDITION* 7 (1958) (“Action . . . corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world.”); Hannah Arendt, STAN. ENCYCLOPEDIA PHIL., (July 27, 2006), <http://plato.stanford.edu/entries/arendt/#ActFrePlu> [<https://perma.cc/4GJN-D86Y>].

<sup>309</sup> See Bucholtz, *supra* note 306, at 576.

<sup>310</sup> *Id.* at 573 (citing PETER L. BERGER & RICHARD I. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURE IN PUBLIC POLICY* 206 (1977)).

<sup>311</sup> *Id.* at 573.

<sup>312</sup> *Id.* at 565 (noting that a leading commentator has concluded that “the nonprofit sector promotes solidarity among individuals, and thereby empowers them to influence activities in the public sector”).

<sup>313</sup> *Id.* at 576 (quoting ALEXIS DE TOCQUEVILLE, *2 DEMOCRACY IN AMERICA* 516 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840)).

ty until a time when the humanitarian aid provided by private people is no longer necessary. It provides “hope in the dark.”<sup>314</sup>

### III. LAW REFORM TO UNLEASH PRIVATE HUMANITARIAN AID TO ASYLUM SEEKERS

Private humanitarian actors have the desire to assist asylum seekers, but states also have an interest in criminalizing smuggling, trafficking, harboring, and related conduct involving unauthorized migrants, including asylum seekers. This Part considers potential reforms to mediate this seemingly impossible division. It considers the broader context for asylum seekers’ dangerous travel and two specific responses: first, the notion of protected entry procedures; and second, a humanitarian exception to smuggling and related crimes, or possibly redefining smuggling to require proof of “material benefit, direct or indirect,” consistent with the standard articulated in the Migrant Smuggling Protocol.<sup>315</sup>

#### *A. Protected Entry Procedures*

Under current legal regimes, asylum seekers must resort to dangerous journeys to reach asylum states, thus triggering the need for search and rescue and other humanitarian assistance.<sup>316</sup> Scholars and policymakers alike have called for asylum states’ governments to issue asylum visas so that asylum seekers can travel by air or other common carriers rather than on unseaworthy vessels or other hazardous means.<sup>317</sup> Such a proposal has significant costs and benefits,<sup>318</sup> but inaction and a complete failure even to consider the matter has taken a horrible human toll.<sup>319</sup> Such measures should become a regular part of

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<sup>314</sup> See generally SOLNIT, *supra* note 1 (cataloging and comparing pivotal moments of social activism across the globe from the late 1980s to the early 2000s).

<sup>315</sup> Migrant Smuggling Protocol, *supra* note 21, at art. 3.

<sup>316</sup> See *infra* notes 317–319 and accompanying text.

<sup>317</sup> Eakin, *supra* note 46 (describing the human toll of a lack of any legal course of travel for refugees); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT’L J. REFUGEE L. 542, 573 (2005) (arguing that States ought to provide Protected Entry Procedures to asylum seekers, although such an obligation is relatively weak); Ray, *supra* note 48, at 1218 (arguing that the United States should issue asylum visas to individuals who demonstrate a credible asylum claim in order to improve access to asylum as well as the amount and accuracy of the government’s information about individuals entering the country); Alexander Betts, *Let Refugees Fly to Europe*, N.Y. TIMES (Sept. 25, 2015), <https://nyti.ms/2tym1wg> [<https://perma.cc/KD33-53MB>].

<sup>318</sup> See Ray, *supra* note 48, at 1252–65.

<sup>319</sup> To the extent that financial costs impede such programs, asylum states should consider creating opportunities for private individuals to fund additional consular staffing at embassies in key locations. This suggestion is inspired by an analog, the private refugee sponsorship program in Canada. See *Guide to the Private Sponsorship of Refugees Program*, *supra* note 294. An analysis of the program, which has inspired calls for a similar program here in the United States, is beyond the scope of this Article. This Article focuses solely on asylum seekers who lack travel authorization. The private refugee sponsorship in Canada, however, is focused solely on refugees, those permitted to travel for

the conversation on the legal status of asylum seekers and the private humanitarian actors who assist them.

*B. Governments Should Define “Smuggling” and Related Offenses to Require Financial or Material Benefit or Adopt a Humanitarian Exception*

Second, governments receiving asylum seekers should reform anti-smuggling statutes to shift the law’s focus away from the prevention of border-crossing and toward protecting migrants from exploitation. For-profit human smuggling and trafficking produces serious harm, and exploitation is most likely to occur when smugglers and traffickers engage in for-profit smuggling and trafficking.<sup>320</sup> The U.S. anti-smuggling statute currently imposes criminal penalties on:

any person who—(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever [that alien] at a place other than a designated port of entry . . . ; (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remain in the United States in violation of law, transports, or moves or attempts to transport or move . . . such alien within the United States . . . in furtherance of such violation of law; (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place . . . .<sup>321</sup>

The statute lacks any express exception for humanitarian smuggling, transport, shielding, concealing, or harboring.<sup>322</sup> Instead, it criminalizes the facilitation of noncitizens’ unlawful presence,<sup>323</sup> even if those noncitizens have a credible asylum claim.<sup>324</sup> Scholars, however, have observed that Congress never in-

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resettlement purposes. The legal issues facing these populations differ based on their access to legal authorization to travel to the asylum state; refugees enjoy such status, while asylum seekers do not. I thank Elissa Steglich for highlighting the importance of this distinction.

<sup>320</sup> See Firas Nasr, *Refugees and Trafficking: A Dangerous Nexus*, HUM. TRAFFICKING SEARCH (Sept. 28, 2015), <http://www.humantraffickingsearch.net/wp1/refugees-and-trafficking-a-dangerous-nexus> [https://perma.cc/T4UA-PBHN]; *Smuggling of Migrants: The Harsh Search for a Better Life*, U.N. OFF. DRUGS & CRIME, <https://www.unodc.org/toc/en/crimes/migrant-smuggling.html> [https://perma.cc/4WCM-RLL7].

<sup>321</sup> 8 U.S.C. § 1324(a)(1)(A)(i)–(iii) (2012). Omitted from the excerpt above, due to their limited relevance, are provisions criminalizing knowing or reckless acts of “encouraging or inducing” an unauthorized migrant to “come to, enter, or reside in the United States” and conspiracy to commit any of the preceding acts. See *id.* § 1324(a)(1)(A)(iv)–(v).

<sup>322</sup> *Id.* § 1324(a)(1)(A)(i)–(v).

<sup>323</sup> Jain, *supra* note 30, at 169.

<sup>324</sup> See Leitman & Hudson, *supra* note 228, at 47–48; Loken & Babino, *supra* note 38, at 138.

tended for the law to criminalize humanitarian aid,<sup>325</sup> and thus, an exception should be created explicitly in the legislative text to prevent the prosecution of humanitarian actors.<sup>326</sup> Merely relying on prosecutorial discretion is insufficient to prevent this outcome, as evidenced by the sanctuary prosecutions of individuals for sheltering or transporting unauthorized migrants who they believed were refugees eligible for asylum.<sup>327</sup> When government officials remain free to target humanitarian actors, they will do so. The following subsections discuss several specific options for pursuing reform.

### 1. Defining Offenses to Require Proof of “Financial or Material Benefit”

The first option is for legislatures to redefine smuggling and related offenses to require proof of “financial or . . . material benefit,” thereby excluding humanitarian assistance.<sup>328</sup> The Migrant Smuggling Protocol defines smuggling in terms of acting intentionally “in order to obtain, directly or indirectly, a financial or other material benefit.”<sup>329</sup> Such a broad benefit clause was designed to close potential loopholes for smugglers receiving indirect benefits, including sexual gratification, as related to child pornography rings or trafficking schemes.<sup>330</sup> Scholars note that the Protocol’s Interpretive Notes reveal that the parties did not intend for the Protocol to require states to criminalize humanitarian smuggling by family, religious groups, or NGOs.<sup>331</sup> Thus, the one major international treaty on the subject insulates private humanitarian actors from criminal liability for humanitarian smuggling.<sup>332</sup>

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<sup>325</sup> Jain, *supra* note 30, at 169 (discussing Congress’ preoccupation with preventing entry of “economic migrants”).

<sup>326</sup> See Campbell, *supra* note 38, at 72; Breslin, *supra* note 37, at 217; Loken & Babino, *supra* note 38, at 161; cf. Helton, *supra* note 32, at 554–58 (describing prosecutions of sanctuary workers).

<sup>327</sup> See *supra* notes 162–190 and accompanying text.

<sup>328</sup> This is the standard in the Migrant Smuggling Protocol. European NGOs engaged in rescue work have endorsed this idea of distinguishing for-profit smuggling from humanitarian transport of asylum-seekers. On this view, where private actors transport migrants for profit, such acts should be illegal (and barred by laws against “human trafficking”). On the other hand, where private actors transport migrants for free, such acts should not be criminalized at all, because such actors are not seeking to exploit migrants or profit from their work on behalf of migrants. This manner of distinguishing smuggling from trafficking, however, does not track migrants’ consent. Smuggling typically refers to voluntary transit, for profit or not, while trafficking implies involuntary transit. IRPA §§ 118–119; see *Sea-Watch Rescue Blog*, *supra* note 52.

<sup>329</sup> Migrant Smuggling Protocol, *supra* note 21, at arts. 3, 6.

<sup>330</sup> GALLAGHER & DAVID, *supra* note 84, at 365–66.

<sup>331</sup> *Id.* at 46.

<sup>332</sup> The Migrant Smuggling Protocol is not a human rights instrument, but rather an agreement to coordinate criminal sanctions across UN member states for human smuggling. Thus, its failure to criminalize humanitarian assistance does not indicate that a signatory *may not* criminalize it, but simply that signatories *are not required to criminalize it*. See *id.* at 48 (discussing the Migrant Smuggling Protocol’s lack of victim protection and assistance provisions and noting that, “the Protocol is essentially an instrument of international cooperation”); Grant, *supra* note 259.

It is critical to consider the implications of the “financial or material benefit” standard on the influential Migrant Smuggling Protocol. For example, would salaries received by employees of rescue organizations count as financial or material benefit, direct or indirect, thus requiring that all rescue be performed on a volunteer-basis or without the provision of food, drink, or safety equipment to workers?<sup>333</sup> Or might the law be construed to require that the benefit come *from* the provision of service to the smuggled migrants, such as payment by family members or smugglers from an earlier leg of the journey?

An analogy to insider trading liability, in the context of liability for tipper who reveal inside information about a corporation and tippees who trade on that inside information, under U.S. securities law might prove instructive.<sup>334</sup> The U.S. Supreme Court has determined that a tipper breaches a duty if, for example, the tipper “receives a direct or indirect personal benefit *from the disclosure*, such as a pecuniary gain or a reputational benefit that will translate into future earnings.”<sup>335</sup> Thus, in a sense, the *disclosure* itself must be the source of the benefit—not a random third party.<sup>336</sup> As applied to the example of salaried NGO employees, one might compare the NGO employee to a tipper, and the rescued migrant to the tippee. In rescuing a migrant, the NGO employee performs a service, just as a tipper would offer a service to the tippee in the form of a disclosure of information. But in the usual case, the NGO employee would not receive a financial or material benefit *from performing the service* (the “disclosure”). Instead, the NGO employee’s financial or material benefit—the salary for working as an NGO staff member, for example—would be attributable to potentially unknown philanthropic donors. This is like a tipper disclosing information, doing nothing else, and then enjoying a nice dinner out, his friend’s treat, to congratulate him on his work anniversary. Such a benefit has nothing to do with the particular act of service or “disclosure,” although it might relate generally to the work the tipper does. Thus, one can argue that, even though the current international framework lacks such nuanced treatment of private humanitarian actors, there are workable frameworks available to parse liability to target better the population of smugglers the parties to the treaty intended to target, but without ensnaring humanitarian actors, even those who earn salaries for their work. Ultimately, humanitarian actors might passively receive benefits (from someone) while transporting unauthorized migrants, but this is not equivalent to those actors transporting unauthorized migrants *for the purpose of receiving financial or other material benefits*.

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<sup>333</sup> See Migrant Smuggling Protocol, *supra* note 21, at art. 6.

<sup>334</sup> See *Dirks v. SEC*, 463 U.S. 646, 647 (1983).

<sup>335</sup> *Id.* at 663 (emphasis added).

<sup>336</sup> *Id.* (emphasis added).

## 2. Recent Canadian Precedent

Heeding the Migrant Smuggling Protocol's framework, the Canadian Supreme Court recently struck down Canada's anti-smuggling law as unconstitutionally overbroad due to its possible application to humanitarian actors.<sup>337</sup> At the relevant time, section 117 of the Immigration and Refugee Protection Act ("IRPA") stated: "No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act."<sup>338</sup> The Canadian Supreme Court recently determined that the statute unconstitutionally failed to distinguish humanitarian smuggling from for-profit smuggling. The court characterized the text of the disputed provision as "broad."<sup>339</sup> The court also determined that the actual object of the statute was narrower on account of Canada's international obligations, the role of the disputed provision in the overall scheme, and statements of legislative purpose at the time the statute was passed.<sup>340</sup>

First, the court examined Canada's international obligations, focusing on Article 31 of the Refugee Convention, which prohibits states from penalizing refugees' illegal entry when refugees flee a place where "their lives or freedom are threatened" and who promptly seek to "show good cause" for entering the country without authorization.<sup>341</sup> Canadian law reflects this principle, as IRPA section 133 prohibits the authorities from charging foreigners with "illegal entry or presence while their refugee claims are pending."<sup>342</sup> The court further noted that refugees often flee in groups, and thus, may aid others in entering Canada illegally. A state cannot punish refugees solely for their act of aiding others in illegal entry. The court also determined that the Smuggling Protocol's material or financial benefit element indicates a desire not to criminalize humanitarian smuggling. Although states are free to do so, the Protocol's "savings clause" provides that the Protocol shall not affect states' other responsibilities and obligations under humanitarian and human rights law. Thus, the court determined that the disputed provision's purpose must be harmonized with Canada's international obligations to limit it to smuggling in the context of organized crime.<sup>343</sup>

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<sup>337</sup> *Appulonappa*, 3 S.C.R. ¶¶ 39, 69 (finding the Canadian Parliament did not intend to criminalize humanitarian assistance to unauthorized migrants). I thank Audrey Macklin for directing me to this decision.

<sup>338</sup> *Id.* ¶ 19. Canada's anti-smuggling law addressed smuggling only—the transgression of the Canadian border—and not subsequent assistance, unlike the U.S. anti-smuggling statute, which also addresses post-entry acts such as harboring.

<sup>339</sup> *Id.* ¶ 36.

<sup>340</sup> *Id.* ¶ 34.

<sup>341</sup> *Id.* ¶ 42 (quoting the Refugee Convention, *supra* note 127, at art. 31).

<sup>342</sup> *Id.* ¶ 43.

<sup>343</sup> *Id.* ¶ 45.

The court next observed that the role of IRPA section 117 within the broader statutory framework and the statements of legislative purpose also supported finding a narrower purpose. Specifically, section 117 mirrors the language of the Migrant Smuggling Protocol, a scheme created to penalize smuggling in the context of organized crime rather than humanitarian assistance.<sup>344</sup> Further, at the time section 117 was adopted, the Canadian Parliament expressly indicated its desire to shield humanitarian actors and immediate family members from prosecution, but these concerns never made their way into the statutory text.<sup>345</sup> The court determined that Parliament itself understood that the statute would likely ensnare humanitarian actors, contrary to Parliament's intent.<sup>346</sup> Nonetheless, Parliament apparently believed this possibility would not come to pass because the Attorney General (AG) authorized all prosecutions and presumed that the AG would not authorize the prosecution of humanitarian actors. The Canadian Supreme Court rejected this purported safety valve of AG screening and concluded that, essentially, Parliament threw up its hands and passed a law that codified a "drafting dilemma."<sup>347</sup>

As a result, the court deemed the actual purpose of section 117 to be far narrower than it initially appeared. Unlike U.S. First Amendment jurisprudence, Canadian jurisprudence regards a statute as unconstitutionally overbroad if it "deprives individuals of life, liberty or security of the person in cases that do not further [its] object."<sup>348</sup> As section 117 of IRPA covered classes of conduct beyond the narrow purpose of the statute, it was overbroad. Accordingly, the court struck down the law and invited Parliament to redraft the anti-smuggling statute.<sup>349</sup>

This result offers a point of comparison to the U.S. legal regime. In both instances, the law-making bodies expressly indicated a desire not to ensnare humanitarian actors. In the United States, government officials deliberately pursued such prosecutions to advance an anti-migrant agenda years later. Can-

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<sup>344</sup> *Id.* ¶ 48; see also GALLAGHER & DAVID, *supra* note 84, at 366 (explaining that the Protocol's drafting history "confirms that . . . [the financial or material benefit element] was intended to . . . [exclude] . . . the activities of those who provided support to migrants for humanitarian reasons").

<sup>345</sup> *Appulonappa*, 3 S.C.R. ¶ 67.

<sup>346</sup> *Id.* ¶ 68.

<sup>347</sup> *Id.* ¶ 66.

<sup>348</sup> *Id.* ¶¶ 26–27. This overbreadth analysis differs significantly from the analysis under U.S. First Amendment jurisprudence. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (noting that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge").

<sup>349</sup> *Appulonappa*, 3 S.C.R. ¶ 86. The Canadian law was already narrower in scope than the U.S. law, as it focused on transgressing the national boundary, not on transporting, harboring, concealing or shielding upon entry. Nonetheless, the Canadian Supreme Court *still* found the law insufficiently focused on the true "bad actors," for-profit smugglers. *Id.* It stands to reason that the U.S. law, which more broadly covers harboring after entry and not merely transgression of the national boundary, requires refinement as well.

ada has a similar history of responding to asylum seekers and those who assist them with prosecution and inadmissibility proceedings, where relevant.<sup>350</sup> Poorly drafted statutes from decades ago have inadvertently empowered today's prosecutors to pursue harsh, anti-migrant policies.

### 3. Statutorily-Based "Humanitarian" Exception

Ultimately, the Migrant Smuggling Protocol and recent Canadian Supreme Court decisions suggest an emerging consensus that states should define smuggling and related offenses to require "material benefit." The proposal, however, is controversial, and some have criticized the "material benefit" requirement as creating a loophole for smugglers. Arguing that prosecutors lack methods at the border to investigate and uncover facts to prove this "material benefit" element,<sup>351</sup> critics contend that it can be impossible to prove that the smugglers expected or received payment.<sup>352</sup> They assert the "benefit" element has thereby suppressed convictions for for-profit smuggling.<sup>353</sup>

To some extent, the choice for lawmakers is between over- and under-inclusion. States may purport to prefer erring on the side of prosecuting too many rather than too few, but the drafting history of the relevant statutes in the United States and Canada indicates that legislators actually held no such preference.<sup>354</sup> In fact, lawmakers in both countries expressed concern about the effects of anti-smuggling laws on humanitarian actors or immediate family members of smuggled persons.<sup>355</sup> At least one nation's highest court has found over-inclusion impermissible.<sup>356</sup>

As an alternative, to the extent that requiring proof of "benefit" may thwart the prosecution of criminal, for-profit smuggling, states might consider adopting a "humanitarian" exception. In 2006, the U.S. Senate considered a humanitarian exception to certain offenses as part of comprehensive immigration reform.<sup>357</sup> The package of reforms never became law because the Senate passed the bill containing them, but the House did not.<sup>358</sup> The text of this pro-

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<sup>350</sup> Grant, *supra* note 259.

<sup>351</sup> Aljehani, *supra* note 242, at 128 (noting the difficulty of establishing "an intention or agreement to receive payment" in the "initial stages of investigations" due to a lack of "investigative methods used at borders").

<sup>352</sup> *See id.*

<sup>353</sup> *Id.*

<sup>354</sup> *See Appulonappa*, 3 S.C.R. ¶ 38 (discussing Parliament's intention not to apply the anti-smuggling law to humanitarian actors); Jain, *supra* note 30 at 160–61 (discussing legislative history).

<sup>355</sup> *See Appulonappa*, 3 S.C.R. ¶ 38; Jain, *supra* note 26 at 160–61.

<sup>356</sup> *Appulonappa*, 3 S.C.R. ¶ 77.

<sup>357</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 205(c)(1) (as passed by Senate May 25, 2006) [hereinafter CIRA]; *see also* 152 CONG. REC. S5174 (daily ed. May 25, 2006) (remarks of Sen. Durbin describing humanitarian exception).

<sup>358</sup> *See CIRA, supra* note 357; S. 2611 (109th): *Comprehensive Immigration Reform Act of 2006*, GOVTRACK, <https://www.govtrack.us/congress/bills/109/s2611> [<https://perma.cc/N4UC-FHJL>].



posal added a provision to the anti-smuggling statute that insulated humanitarian aid from criminal liability:

It is not a violation of [statutory provisions prohibiting alien harboring, concealing, shielding, or transporting] . . . (B) for an individual or organization, not previously convicted of a violation of this section, to provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.<sup>359</sup>

This illustrative list of forms of humanitarian assistance creates a “blanket exception” to criminal liability for all offenses other than smuggling, thus indicating that humanitarian actors would still face liability for assisting unauthorized migrants in entering U.S. territory, or “smuggling.”<sup>360</sup>

In general, where the description of a criminal offense is complete without considering the exception, the absence of the exception is not an “element” of the crime that the prosecution must prove.<sup>361</sup> Smuggling and related offenses can be defined without reference to their humanitarian quality and without consulting the list of exceptions. Thus, an exception to anti-smuggling statutes would likely function as an affirmative defense rather than an element of the statute that the government would have to prove. Under this regime, states would initiate prosecutions of humanitarian actors for a smuggling-related offense.<sup>362</sup> The humanitarian actors would then assert the statutorily defined defense and bear the burden of proving that their work was truly “humanitarian.”

This approach would insufficiently protect humanitarian actors because it would subject them to criminal prosecution and only protect them from criminal liability only later, offering immunity from liability, but not prosecution.<sup>363</sup>

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<sup>359</sup> CIRA, *supra* note 357, § 205(c)(1) (proposed amendment to 8 U.S.C. § 1324 (2012)); see Breslin, *supra* note 37, at 241.

<sup>360</sup> Breslin, *supra* note 37, at 241–42.

<sup>361</sup> See *McKelvey v. United States*, 260 U.S. 353, 357 (1922) (“[I]t has come to be a settled rule in this jurisdiction that an indictment . . . on a general provision defining the elements of an offense . . . need not negative the matter of an exception made by a proviso or other distinct clause.”); *United States v. Cook*, 84 U.S. (17 Wall.) 168, 173–74 (1872) (“[I]f the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference.”).

<sup>362</sup> Senator Durbin described the proposed humanitarian exception in these very terms. See 152 Cong. Rec. S5174; see also *Immigration Reform Bill: Senate Judiciary Committee Markup* (C-Span television broadcast Mar. 27, 2006) (Senator Durbin describing humanitarian exception as an affirmative defense that defendant would have to prove).

<sup>363</sup> Cf. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (describing qualified immunity as “immunity from suit rather than a mere defense to liability . . .” and noting that such immunity is “effectively lost if a case is erroneously permitted to go to trial”) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Moreover, focusing on an “exception” for humanitarian assistance misses the point that the “bad act” at the root of smuggling and related offenses is not evading immigration authorities *per se*, but exploiting migrants’ desperation to procure financial or material benefit from their lack of safe travel options. The “material benefit” standard captures this concern more effectively.

Ultimately, an affirmative defense would prove costly. Separating humanitarian actors from for-profit smugglers requires time and expertise.<sup>364</sup> Distinguishing the source of funds received by private actors, whether from donors or from the migrants themselves, is another task that would require authorities to parse facts and law carefully. Finally, subjecting humanitarian actors to prosecution and only later eliminating liability stands to reduce the supply of humanitarian aid. For all of these reasons, states might instead consider providing an administrative process of pre-approval for humanitarian actors,<sup>365</sup> thus preventing needless prosecutions and expenditure of time and money by governments and NGOs.<sup>366</sup>

#### 4. Accounting for Asylum States’ Interests

Each of the proposals stands to frustrate national interests understood in a general sense.<sup>367</sup> A humanitarian exception shields from liability NGOs and individuals who, for reasons other than procuring financial or material benefit, assist migrants, including asylum seekers. These migrants are typically individuals whom the government has not yet screened, thus implicating the na-

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<sup>364</sup> I thank Martha Minow for making this point specifically and for raising the general possibility of an administrative process to sort humanitarian from for-profit actors.

<sup>365</sup> I thank Alyson Flournoy for raising this point.

<sup>366</sup> The details of such a proposal are beyond the scope of this Article.

<sup>367</sup> The proposals for reform also do not make or depend on distinctions among migrants. The proposed statutory revisions apply equally, no matter whether an unauthorized migrant seeks refugee status, some other form of humanitarian protection, or economic opportunity. Thus, the proposals are not designed solely to protect those who assist asylum seekers, but to protect those who assist all unauthorized migrants. Avoiding this outcome appears impossible. First, if proposed reform were to apply exclusively to “asylum seekers,” NGOs would not know whom to assist. Without asking questions first, an NGO or coast guard officer will not know if a given migrant intends to apply for asylum, and is, thus, an asylum seeker. Often, questioning cannot occur during rescue operations, when migrants are necessarily in distress. Second, a given boat of migrants could contain a mix of asylum seekers and economic migrants. Requiring rescuers to sort asylum seekers from economic migrants before rendering aid would likely prove unworkable. Finally, the distinction between the two groups of migrants is not always clear, and some economic migrants may ultimately have good claims for asylum, while some asylum seekers will ultimately lose their bid for refugee status and be deported. Better distinguishing the groups would require NGOs to engage in more probing questioning about the basis of the asylum claim—something ill-suited for situations where NGOs provide humanitarian assistance, especially in emergencies. Many migrants are asylum seekers, however, and thus, the proposals contained here will often, but not exclusively, apply to asylum seekers. I thank Gerald Neuman for raising these issues.

tional security and crime control interests of asylum states.<sup>368</sup> How might legislators address this concern through the proposed reform?<sup>369</sup>

One option is to limit the scope of the exception to exclude smuggling. Under this option, the humanitarian exception would extend only to acts committed *after* entry in the asylum state, i.e., to transport and harboring offenses. As in the Senate's proposal, the humanitarian exception could be limited *only* to assistance rendered after the asylum seeker has entered on their own (or at a minimum, without help from the NGO seeking immunity from liability).<sup>370</sup> Thus, NGOs would not be immune to liability for smuggling itself.

The law, however, ought to permit humanitarian smuggling when required under international law. When asylum seekers take dangerous journeys on the high seas—whether from Libya or Haiti—the international duty to rescue applies,<sup>371</sup> and humanitarian actors bringing asylum seekers to shore for processing should not be subject to criminal liability for discharging their duties. Criminalizing humanitarian smuggling—the act of bringing unauthorized migrants to the frontiers of asylum states' territories—leaves NGOs with almost no alternative but to let refugees and migrants die in the water, a result that violates international law.<sup>372</sup> Thus, immunity from liability for humanitarian smuggling is necessary in such scenarios.

In contrast, humanitarian actors generally have no obligation under international law to rescue asylum seekers traveling by land, whether via Mexico or Turkey. As a result, international legal duties do not compel smuggling in those circumstances, and a more limited exception might be called for in such scenarios. Drafters of the humanitarian exception should consider these matters.

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<sup>368</sup> See *supra* notes 194–295 and accompanying text.

<sup>369</sup> The most obvious route is to promote policies that permit willing donors to serve willing migrants without imposing any third-party costs. A private refugee sponsorship program, for example, would preserve the government's usual role in screening incoming migrants and would not otherwise threaten asylum states' interests. See *Guide to the Private Sponsorship of Refugees Program*, *supra* note 294.

<sup>370</sup> See 152 CONG. REC. S5174 (remarks of Senator Durbin describing humanitarian exception); Breslin, *supra* note 37, at 241.

<sup>371</sup> Nessel, *supra* note 117, at 626. This is not to suggest that individuals and organizations on land have a general obligation to bring asylum seekers to shore; rather, international law obligates only those at sea who *encounter* distressed vessels to make reasonable rescue efforts. See UNCLOS, *supra* note 117, at art. 98(1)(b).

<sup>372</sup> See, e.g., International Convention on Salvage art. 10, Apr. 28, 1989, S. Treaty Doc. No. 102-12, 1953 U.N.T.S. 194 (“Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.”); United Nations Convention on the Law of the Sea art. 98, Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 (“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers . . . to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance.”); Convention for the Safety of Life at Sea annex, at c. 5, regulation 10, Nov. 1, 1974, 32 U.S.T. 47 (“The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance.”).

Canada's legal regime, which prohibits the criminalization of humanitarian *smuggling*, is well-suited to its particular status as an asylum state that receives large numbers of asylum seekers who have traveled by sea.<sup>373</sup> In contrast, such a regime may ultimately be wrong for the United States, which has a porous border with Mexico, a country that itself receives a large number of asylum seekers fleeing violence.<sup>374</sup>

Humanitarian aid is not a cure for the suffering of millions of asylum seekers, but it is a way of creating organic change; of slowly untying a seemingly indissoluble knot of violence, poverty, insecurity, and exclusion through uncoordinated, unmediated action. Protecting humanitarian actors is an important step in creating a culture that values human lives, even migrant ones.

### CONCLUSION

Individuals and organizations around the world provide or wish to provide humanitarian aid to asylum seekers, and such aid currently manifests in many forms and in a range of places—from the asylum seeker's home country to the asylum state and all points in between. The laws prohibiting smuggling and related offenses in the United States and the European Union criminalize much of this aid. At the very least, these laws create a cloud of legal uncertainty under which humanitarian actors provide aid with some risk of prosecution. Until recently, Canadian law did the same. These laws, although over-inclusive, are based on core interests in national security, crime control, and economic preservation.

By acknowledging these core interests but also exposing their thinness, this Article argues for a specific reform to ease the toll of the dilemma. Specifically, it proposes law reform: creating a humanitarian exception to anti-

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<sup>373</sup> See *Appulonappa*, 3 S.C.R. ¶ 5 (“[I]nsofar as [the Immigration and Refugee Protection Act] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members, it is unconstitutional.”); CANADIAN COUNCIL ON REFUGEES, *SUN SEA: FIVE YEARS LATER* 14 (Aug. 2015), <http://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf> [<https://perma.cc/2TQT-NPBE>] (noting the Canadian government's “increased priority” to “disrupt people smuggling, especially by sea”). But see Mike Blanchfield, *Haitian Asylum Seekers Flee to Canada After Trump Proposes End to Protected Status*, GLOBAL NEWS (Aug. 27, 2017), <http://globalnews.ca/news/3699160/haitian-asylum-seekers-canada-trump-end-protected-status/> [<https://perma.cc/EG4R-QN7U>].

<sup>374</sup> See John Burnett, *U.S.-Mexico Border Sees Resurgence of Central Americans Seeking Asylum*, NPR (May 31, 2016), <http://www.npr.org/2016/05/31/480073262/u-s-mexico-border-sees-resurgence-of-central-americans-seeking-asylum> [<https://perma.cc/W436-HWSB>] (noting that although “U.S. Border Patrol averaged 330 apprehensions of Central Americans a day,” the agency nevertheless “ends up releasing the vast majority of family members it apprehends because U.S. court rulings restrict its ability to detain them”). But see W. Gardner Selby, *Barack Obama, in Austin, Says Illegal Immigration at 40-Year Low*, POLITIFACT (Mar. 17, 2016), <http://www.politifact.com/texas/statements/2016/mar/17/barack-obama/barack-obama-austin-says-illegal-immigration-40-ye/> [<https://perma.cc/V3GR-CWE>].

harboring and anti-transport laws and, in some instances, anti-smuggling laws. It further proposes law reform through which asylum seekers can obtain travel authorization or status prior to making a long, perilous journey to the asylum state. Such reforms would potentially obviate the need for much of the private humanitarian aid provided today.

The widespread desire to provide private humanitarian aid to refugees and migrants, and the pervasive criminalization of such aid create a dilemma that is neither new nor unique to this context. Scholars have rightly characterized the clash of state sovereignty, border control, and individual human rights as a “wicked problem.”<sup>375</sup> Such problems do not lend themselves to neat solutions, either in law or politics.<sup>376</sup> They often point to the need for large-scale institutional transformations. Here, the dilemma identified is a symptom of a legal regime that is not equipped to regulate migration and protect refugees effectively.<sup>377</sup> Without economic, political, and social development in refugee-producing countries and reductions in global inequality, little will change, and the demand to reach asylum states—by any means necessary—will only rise.<sup>378</sup>

These stark global trends create the backdrop and impetus for the responses that have followed: individuals and NGOs in the United States and around the world working, individually, locally, and immediately, to meet the urgent needs of those seeking refuge. They are sending donations to rebuild war-torn villages; rescuing asylum seekers making perilous journeys; sending baby carriers to ease the physical burdens of refugee parents crossing a continent with young children in their arms; and welcoming asylum seekers with food, shelter, clothing, foreign language instruction, and other necessities to help them integrate into the asylum states they have reached while awaiting the adjudication of their claims for asylum.

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<sup>375</sup> GALLAGHER & DAVID, *supra* note 84, at 18 (quoting JEFFREY CONKLIN, *DIALOGUE MAPPING: BUILDING SHARED UNDERSTANDING OF WICKED PROBLEMS* 13–16 (2006) (describing criteria for so-called “wicked problems”)).

<sup>376</sup> *Id.* (defining a “wicked problem” as a dynamic problem that is difficult to define or resolve “because of preexisting factors that are themselves highly resistant to change,” such as “the very existence of States, gross inequalities among them, and strong motivations on the part of some to keep out others”).

<sup>377</sup> *See id.* at 17 (“Migration is one of the oldest strategies of human advancement and . . . it is unsurprising that the modern Nation State, specifically liberal democracies, are not up to the task of stopping it.”).

<sup>378</sup> *Id.* at 18 (asserting that smuggling will endure as a key method of unregulated migration unless there is a “fundamental change to global migration governance,” and that to deny this fact is a “willful disregard of both evidence and experience”); *see also id.* (quoting the U.N. Special Rapporteur on the Human Rights of Migrants opining that escalating “repressive mechanisms [in response to migration] . . . will not lower the pressure . . . it will only exacerbate the tensions, fuel international criminality and result in more rights violations for the migrants themselves”).

Asylum states and the international community can do more. They can facilitate the work of private humanitarian actors. Public-private partnerships and collaborations are not new, but they are increasingly important in emergency situations. Moreover, although private humanitarian aid is no substitute for effective, humane government policy, it constitutes a form of profound engagement in the world.<sup>379</sup> To criminalize private humanitarian actors' direct service to asylum seekers is to deny completely any role for private actors in the assertion of asylum rights, an extreme position not justified by states' interests. Taken together, the proposals articulated in this Article offer a humane path forward.

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<sup>379</sup> See Corbett, *supra* note 173; see also SOLNIT, *supra* note 1, at 95 (“These other versions of what revolution means suggest that the goal is not so much to go on and create the world as to live in that time of creation, and with this the emphasis shifts from institutional power to the power of consciousness and the enactments of daily life, toward a revolution that does not institute its idea of perfection but opens up the freedom for each to participate in inventing the world.”).

