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Uncharted Waters: Solidarity with Migrants at Sea and the Freedom of Expression

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Abstract

European States have adopted policies to push back not only against migrants fleeing across the Mediterranean Sea but also against those individuals and NGOs who act in solidarity with them. This article seeks to demonstrate how the activities of maritime NGOs in solidarity with migrants may be protected from States' interferences within the framework of international human rights law. In a novel inquiry, we submit that both monitoring as the gathering of information and even search and rescue operations may be considered forms of the freedom of expression. Furthermore, as State measures, ranging from intimidation to criminalization, undoubtedly serve to counter migration to Europe, we argue that Article 18 ECHR may be violated if the interferences' ulterior purpose is exposed. By showing solidarity, at times we also express ideas. Think of those who hid Jewish people during the Nazi regime, the NGOs who organized private aircrafts to save Afghans after the Taliban's takeover, and those who today go to the Ukrainian border to collect people fleeing the war. This article is based on the authors' conviction that human rights law must adapt to remain viable in the face of unprecedented human rights challenges and the resourceful civic actions to meet them.

Keywords: Freedom of expression; European Convention on Human Rights; Migrants at Sea; Search and Rescue Operations; NGOs

A. Introduction: Migrant Drownings, Solidarity Activism, and States' Obstruction

The Mediterranean Sea has become a mass grave for migrants¹. Between 2014 and 2021, more than 22,500 people have drowned on what has become the world's deadliest flight route.² The EU and its Member States have not only failed to protect migrants at sea, but have adopted tactics to actively impede their arrival in Europe, including through illegal pushbacks at sea.³

¹In this article, the umbrella term "migrant" is used to describe any "person who moves away from his or her place of usual residence, . . . temporarily or permanently, and for a variety of reasons;" the scope of this article is limited to "irregular migrants," that is persons who move or have moved across an international border without the authorization to enter or stay in a state. Alice Sironi, Céline Bauloz & Milen Emmanel, *Glossary on Migration*, 34 INT'L ORG. FOR MIGRATION 1, 132–33 (June 18, 2019), https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf.

²United Nations High Commissioner for Refugees (UNHCR), *Mediterranean Situation*, OPERATIONAL DATA PORTAL REFUGEE SITUATIONS (July 23, 2021), <https://data2.unhcr.org/en/situations/mediterranean>; PHILIPPE FARGUES, FOUR DECADES OF CROSS-MEDITERRANEAN UNDOCUMENTED MIGRATION TO EUROPE: A REVIEW OF THE EVIDENCE 13 (2017), https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

³Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 353–55 (2018); The EU Approach on Migration in the Mediterranean, EUR. PARL. DOC. PE 694.413, at 70–71, 78 (June 2021), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf).

Confronted with the humanitarian catastrophe in the Mediterranean and disillusioned by the conduct of the public authorities, the European civil society has become active to address both issues. In particular, “maritime non-governmental organizations (NGOs) in solidarity with migrants”⁴ have undertaken two types of actions that have resulted in the saving of lives of migrants at sea, or at the very least the documentation of the inhumane and illegal practices. The first activity concerns search and rescue (SAR) operations by maritime NGOs in solidarity with migrants. The second activity concerns their monitoring of cases of migrant boats in distress and human rights violations at sea.⁵

As regards the first activity, private initiatives like the Maltese foundation *Migrant Offshore Aid Station* (MOAS) and the German association *Sea-Watch* began to conduct SAR missions in the Mediterranean,⁶ following a particularly tragic incident of migrants drowning off the coast of Lampedusa in October 2013.⁷ Established humanitarian organizations like *Médecins Sans Frontières* and *Save the Children* soon followed.⁸ Although the provision of SAR by NGOs is not a new phenomenon, it has reached an unprecedented level in the Mediterranean since 2014.⁹ Until October 2019, over fourteen different maritime NGOs in solidarity with migrants assisted a total of over 115,000 migrants in distress.¹⁰ In the first half of 2018, NGOs accounted for 40% of all sea rescues.¹¹

Regarding the second activity of monitoring, some maritime NGOs, in solidarity with migrants, have been founded with the sole aim of monitoring distress cases and human rights violations at sea. For example, the German association *Mare Liberum*, which monitors the human rights of migrants crossing the Aegean Sea from Turkey to Greece,¹² has documented 312 incidents of pushbacks, affecting a total of 9,798 migrants, in 2020 alone.¹³ Additionally, the SAR NGOs described above make room for independent journalists on board and document their every mission.¹⁴ Via their websites and various social media channels, they keep the public informed to generate the donations they operate on and advocate for migrants’ rights.¹⁵ For example, according to their website, it is the declared aim of *Sea-Watch* to “shine a light on the humanitarian crisis in the Mediterranean.”¹⁶ Thus, regular SAR NGOs also contribute to the monitoring of distress cases and human rights violations.

By continuously documenting incidents at sea and accounting for large shares of the sea rescues,¹⁷ as well as accompanying their activities with outspoken advocacy work, maritime NGOs in solidarity with migrants have become key players in the field of migration via the Mediterranean Sea.¹⁸ However, the EU and its Member States remain committed to the “Fortress

⁴This term is established in and employed throughout this contribution to describe NGOs who are present at sea in solidarity with migrants.

⁵*Follow-Up Report to the 2019 Recommendation by the Council of Europe Commissioner for Human Rights*, at 8 (March 2021), <https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protection/1680a1abcd>.

⁶Paolo Cuttitta, *Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean*, 23 *GEOPOLITICS* 632, 633 (2018); Eugenio Cusumano & Matteo Villa, *From “Angels” to “Vice Smugglers”: The Criminalization of Sea Rescue NGOs in Italy*, 27 *EUR. J. ON CRIM. POL’Y RES.* 23, 25 (2021).

⁷*History*, MOAS, <https://www.moas.eu/moas-history/> (last visited May 18, 2023).

⁸Cusumano, *supra* note 6, at 25.

⁹*Id.* at 25–26.

¹⁰*Id.* at 24–26.

¹¹Isabella Lloyd-Damjanovic, *Criminalization of Search-and-Rescue Operations in the Mediterranean Has Been Accompanied by Rising Migrant Death Rate*, *MIGRATION POL’Y. INST.* (Oct. 9, 2020).

¹²*Unsere Mission*, MARE LIBERUM (July 15, 2020), <https://mare-liberum.org/en/unsere-mission/>.

¹³*Pushback Report 2020*, MARE LIBERUM (July 15, 2020), <https://mare-liberum.org/en/pushback-report>.

¹⁴Cuttitta, *supra* note 6, at 645; Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 *GERMAN L.J.* 598, 612 (2020).

¹⁵Cuttitta, *supra* note 6, at 645.

¹⁶*Mission & Vision*, SEA-WATCH, <https://sea-watch.org/en/about/vision/> (last visited May 18, 2023).

¹⁷Eugenio Cusumano & Matteo Villa, *Sea Rescue NGOs: A Pull Factor of Irregular Migration?*, *MIGRATION POL’Y CTR.* 2, 5 (Nov. 2019). See Lloyd-Damjanovic, *supra* note 11.

¹⁸EUR. PAR. DOC. PE 694.413, *supra* note 3, at 92.

Europe¹⁹ regardless of the human costs and view the NGOs as an unwelcome “pull factor”²⁰ for irregular migration. In order to reduce migrant arrivals and discourage and deter migratory flows to Europe, European coastal states like Italy, Greece and Malta, but also others like Germany and the Netherlands have increasingly obstructed the NGOs’ activities;²¹ by today, States’ obstruction of these NGOs has become an “EU-wide phenomenon.”²² It encompasses a variety of measures which range from social delegitimization, intimidation, police investigations, detention and the seizure of vessels and humanitarian equipment over administrative regulations and sanctions up to criminal investigations, proceedings and convictions against the NGOs, their volunteers and employees.²³

In total, a minimum of 171 individuals had been criminally investigated in at least 60 cases in 13 different EU Member States by the end of 2019.²⁴ The criminal proceedings against NGOs and individuals are based on charges of money laundering, membership in a criminal organization, and espionage in addition to accusations of crimes like the facilitation of entry, transit or residence.²⁵ As of February 2020, the vast majority of the criminal investigations did not even find sufficient evidence to begin a trial.²⁶ However, the investigations are traumatic for the individuals and organizations involved and undermine their work.²⁷ Besides the financial pressure, activists are confronted with the threat of fines of up to €1 million and even imprisonment.²⁸

Out of 28 NGO vessels that have been present in the Mediterranean Sea in solidarity with migrants since January 2015, at least 18 have been subject to administrative and criminal investigations and were impounded or otherwise prevented from leaving the port.²⁹ Due to the individual and cumulative impact of States’ measures, the number of NGOs conducting SAR in the Mediterranean plummeted from 15 in 2016 to five organizations operating only three vessels in 2020.³⁰ The consequences are disastrous, as the rising mortality rate of migrants at sea since 2015 demonstrates.³¹

In this article, we explore the activities of maritime NGOs in solidarity with migrants under two fields of international law. First, we demonstrate the permissibility of SAR operations under the international law of the sea. Second, in a more novel inquiry under international human rights law, we thereafter assess whether the activities of maritime NGOs in solidarity with migrants—monitoring and SAR—may qualify as forms of freedom of expression as protected by the European Convention on Human Rights (ECHR or the Convention), and whether consequently, the measures taken by States against the NGOs violate Articles 10 and 18 of the Convention.

Conclusions will zoom out and reflect on the importance of exploring the rights of solidarity activists in order to protect civic actions that aim to counter or compensate states’ actions and inactions in view of humanitarian catastrophes such as the one in the Mediterranean Sea.

Before delving into the content of this article, it must be noted that, no NGO in solidarity with migrants at sea has, to our knowledge, filed a case before the European Court of Human Rights claiming violations of the freedom of expression regarding a specific SAR or monitoring operation. Hence, the aim of this article is to stimulate the legal imagination rather than to assess

¹⁹Kenan Malik, Opinion, *Migrants Face Fortress Europe’s Deadly Moat*, N.Y. TIMES, Apr. 21, 2015.

²⁰See Cusumano, *supra* note 17.

²¹EUR. PAR. DOC. PE 694.413, *supra* note 3, at 92.

²²*Id.*

²³*Id.* at 92–93.

²⁴*Id.* at 92.

²⁵*Id.*

²⁶Cusumano, *supra* note 6, at 32.

²⁷EUR. PAR. DOC. PE 694.413, *supra* note 3, at 92.

²⁸*Id.* at 108; FELICITY G. ATTARD, THE DUTY OF THE SHIPMASTER TO RENDER ASSISTANCE AT SEA UNDER INTERNATIONAL LAW 171 (2020).

²⁹EUR. PAR. DOC. PE 694.413, *supra* note 3, at 92.

³⁰*Id.* at 108.

³¹*Id.* at 80.

specific cases of SAR and monitoring operations. However, our analysis is not based on imaginary but on real problems that NGO's in solidarity with migrants at sea, as explained above, face on a daily basis while exercising their civic tasks. In this vein, our approach is not new but mimics the work of other scholars, such as climate law, who aim to explore the potential of human rights law to address new and societal challenges.

B. The NGOs' Activities Under the International Law of the Sea

The rescue of migrants at sea and their disembarkation in European States are among the most important activities of SAR NGOs. These two distinct moments raise different legal issues and are therefore addressed separately hereinafter.

1. The Duty to Rescue and the NGOs' Navigation at Sea

The point of departure and foundation for the NGOs' activity of SAR is the duty to render assistance to persons in distress at sea, which is widely considered to constitute a rule of customary international law.³² It has also been codified in various legal instruments, most importantly Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS), which reads:

“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; . . .”

As an international treaty, UNCLOS primarily creates rights and obligations for state parties, and not for NGOs or individuals. However, to fulfill their obligations under Article 98(1) UNCLOS, states must take the necessary legislative or other measures under internal law to oblige the masters of ships flying their flag to assist persons in distress at sea.³³ Thus, the captains of NGO vessels—as those of all other vessels at sea—are typically obliged or at the very least encouraged under the domestic law of their vessel's flag state to render assistance to persons in distress at sea.³⁴

When the NGOs spot a migrant boat, receive a distress call or an indication by the Maritime Rescue Coordination Centre MRCC in Rome, for example, they proceed to rescue the persons in distress according to this obligation. While there is no clear definition of “distress” under international law, the MRCC Rome and the NGOs interpret it extensively to include all migrant boats,³⁵ since they generally are unseaworthy and overcrowded.³⁶ According to the wording of Article 98(1) UNCLOS, the duty to render assistance is not confined to high seas.³⁷ Thus, in principle it applies in all areas of the sea, though it is subject to the respective rules of a certain zone.³⁸

³²Kristof Gombeer & Melanie Fink, *Non-Governmental Organisations and Search and Rescue at Sea*, 4 MAR. SAFETY L. J. 1, 3 (2018).

³³ATTARD, *supra* note 28, at 129–30, 209.

³⁴Gombeer, *supra* note 32, at 17.

³⁵Cuttitta, *supra* note 6, at 645.

³⁶ATTARD, *supra* note 28, at 5.

³⁷*Id.* at 167.

³⁸*Id.*

The rescue of persons in distress, but also the monitoring of distress cases and human rights violations, requires the NGO vessels to navigate through various maritime zones of the Mediterranean Sea, searching for migrant boats, including the high seas as well as coastal States' Contiguous Zone and Exclusive Economic Zone, if declared. In those areas beyond States' territorial sea, NGO vessels generally enjoy the freedom of navigation.³⁹ Therefore, the NGO vessels' navigation in these zones may, in principle, be considered lawful.

Moreover, the NGO vessels navigate through the territorial sea of coastal states. States' territorial sea may encompass up to 12 nautical miles from the coast and constitutes part of the coastal states' territory, where states enjoy full sovereignty.⁴⁰ In principle, states are therefore free to determine who may enter their territorial sea.⁴¹ However, the right to "innocent passage" poses an exception to this rule which is vital for the work of the NGOs.⁴² Thus, Articles 17 to 32 UNCLOS grant vessels flying the flags of foreign states, including the NGO vessels, the right to innocently pass through coastal states' territorial sea.⁴³ This includes the passage through the territorial sea in order to enter or exit the coastal states' ports.⁴⁴

One might argue that NGO vessels' passage thorough or presence in a state's territorial sea does not constitute "innocent passage" due to its purpose of monitoring or SAR.⁴⁵ According to Gombeer and Fink, however, the right of innocent passage and its limitations have to be construed "in light of the object and purpose of UNCLOS, including its humanitarian objectives, and in line with international human rights law, in particular the right to leave and the right to life."⁴⁶ As a consequence, the navigation of the vessels of maritime NGOs in solidarity with migrants within states' territorial waters should, in principle, be considered lawful.⁴⁷

II. The Disembarkation of the Rescued Migrants

The central and most contentious aspect of the activity of SAR both from a legal and a political point of view is the disembarkation of the rescued migrants. The rescued migrants are regularly disembarked by the NGOs on the territories of European coastal states, mainly Italy and Malta. According to estimations by the Italian coastguard, in the years between 2014 and 2019, NGOs have disembarked around 30,000 migrants per year in Italy.⁴⁸ Thus, the NGOs' activities go to the heart of the immigration policies of the EU and its Member States and directly undermine them.

Although the disembarkation of rescued persons is not explicitly provided for in Article 98(1) UNCLOS,⁴⁹ according to the 1979 International Convention on Maritime Search and Rescue (SAR Convention), the duty to rescue includes the obligation to deliver the rescued persons to a "place of safety."⁵⁰ This notion is not defined in UNCLOS, the SAR Convention or the International Convention for the Safety of Life at Sea (SOLAS Convention).^{51,52} However, under the auspices of the International Maritime Organization (IMO), SAR standards have been

³⁹UN Convention on the Law of the Sea, Dec. 10, 1982, arts. 58, 87 [hereinafter UNCLOS]; Gombeer, *supra* note 32, at 14.

⁴⁰UNCLOS arts. 2(1), 3–4.

⁴¹Gombeer, *supra* note 32, at 9–10.

⁴²*Id.* at 9.

⁴³*Id.* at 10.

⁴⁴*Id.*; UNCLOS art. 18(2).

⁴⁵Gombeer, *supra* note 32, at 9–14.

⁴⁶*Id.* at 21–22.

⁴⁷*Id.*

⁴⁸*Italy to Fine NGOs Who Rescue Migrants at Sea*, DEUTSCHE WELLE (June 12, 2019), <https://www.dw.com/en/italy-to-fine-ngos-who-rescue-migrants-at-sea/a-49143481>.

⁴⁹ATTARD, *supra* note 28, at 48.

⁵⁰International Convention on Maritime Search and Rescue § 1.3.2, Apr. 27, 1979, 1405 U.N.T.S. 118 (amended 1998 and 2004 [hereinafter SAR Convention]; Gombeer, *supra* note 32, at 20.

⁵¹See International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 277 [hereinafter SOLAS Convention].

⁵²ATTARD, *supra* note 28, at 81.

developed which are not as such legally binding, but should be followed by states as far as possible.⁵³ Importantly, these include the 2004 “Guidelines on the Treatment of Persons Rescued at Sea” (hereinafter “IMO Guidelines”).⁵⁴ In the IMO Guidelines, a “place of safety” is defined as “a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.”⁵⁵ Moreover, the Guidelines make it clear that a ship should only serve as a “temporary place of safety.”⁵⁶ Thus, the duty to render assistance is only fulfilled in legal terms when the rescued persons are disembarked in such a “place of safety.”⁵⁷ The location of this place may not be the geographically closest place and depends on the circumstances of each rescue.⁵⁸ Besides the rules of the law of the sea, relevant human rights law and refugee law may have to be considered in its determination, in particular the principle of non-refoulement.⁵⁹

In accordance with the above-mentioned Article 98(2) UNCLOS, the responsibility for the provision of SAR service is divided among the Mediterranean coastal States in so-called “SAR Regions” (hereinafter SRR).⁶⁰ The state in whose SRR the persons were rescued is primarily responsible for ensuring the disembarkation of those persons.⁶¹ While the scope of this obligation is unclear,⁶² it does not grant shipmasters a right of entry to the respective state’s territory.⁶³ The IMO Facilitation Committee’s soft-law “Principles Relating to Administrative Procedures for Disembarking Rescued Persons at Sea” provide that the responsible State should accept the disembarkation of the rescued persons in a place under its control if it “cannot be arranged swiftly elsewhere.”⁶⁴ However, this is not consistently confirmed by state practice.⁶⁵

The authorities of European States frequently assign Libya as the “place of safety” for the NGOs to disembark the rescued migrants. In September 2020, the UNHCR declared its “Position on the Designations of Libya as . . . a Place of Safety for the Purpose of Disembarkation following Rescue at Sea” as follows: “In light of the volatile security situation in general and the particular protection risks for foreign nationals . . . UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea.”⁶⁶

In line with this position, the NGO vessels’ shipmasters regularly reject the Libyan ports as unsafe, and instead request the disembarkation in the port of a European State.⁶⁷ The case of *Sea-Watch’s* Captain Rackete illustrates this. When in 2019 the Italian authorities assigned the captain a port in Libya for the disembarkation of the rescued migrants, she rejected it as unsafe and repeatedly requested access to the nearest acceptable port of Lampedusa, Italy.⁶⁸ After waiting

⁵³Gombeer, *supra* note 32, at 4.

⁵⁴See IMO Resolution MSC.167(78) (May 20, 2004).

⁵⁵*Id.* at para. 6.12.

⁵⁶*Id.* at para. 6.13.

⁵⁷Seline Trevisanut, *Recognizing the Right to be Rescued at Sea*, 31 OCEAN Y.B. 139, 142–43 (2017); Gombeer, *supra* note 32, at 20.

⁵⁸ATTARD, *supra* note 28, at 123.

⁵⁹*Id.* at 125; Gombeer, *supra* note 32, at 21.

⁶⁰SAR Convention, *supra* note 50, at § 2.1; Gombeer, *supra* note 32, at 3–4.

⁶¹SAR Convention, *supra* note 50, at § 3.1.9; Trevisanut, *supra* note 57, at 143; Gombeer, *supra* note 32, at 20.

⁶²Gombeer, *supra* note 32, at 20; ATTARD, *supra* note 28, at 81.

⁶³Trevisanut, *supra* note 57, at 143.

⁶⁴Int’l Mar. Org., *Principles Relating to Admin. Procs. for Disembarking Pers. Rescued at Sea*, Fal 3/Circ.194, at para. 3 (2009); ATTARD, *supra* note 28, at 82–83.

⁶⁵ATTARD, *supra* note 28, at 82–83.

⁶⁶U.N. REFUGEE AGENCY, POSITION ON THE DESIGNATIONS OF LIBYA AS A SAFE THIRD COUNTRY & AS A PLACE OF SAFETY FOR THE PURPOSE OF DISEMBARKATION FOLLOWING RESCUE AT SEA, at para. 33 (2020) <https://www.refworld.org/pdfid/5f1edee24.pdf>.

⁶⁷Gombeer, *supra* note 32, at 20.

⁶⁸Zara Freudenberg, Karl Mauer, Florian Schöler & Marco Goldoni, *The Island of Hope in a Sea of Misery: The Italian Court of Cassation’s Unequivocal Stance on the Right to Disembark*, VERFASSUNGSBLOG (Mar. 10, 2020), <https://verfassungsblog.de/the-island-of-hope-in-a-sea-of-misery/>.

for the authorization to disembark the migrants for over two weeks, Rackete declared a state of necessity and steered the vessel into the port of Lampedusa, where she disembarked the migrants against the orders of the Italian authorities.⁶⁹ This led to severe criminal charges and concomitant investigations against her.⁷⁰ When the Italian Court of Cassation addressed these charges in January 2020, the landmark judgment included significant statements on the disembarkation of rescued persons. The highest Italian Court confirmed that the obligation to rescue people in distress at sea includes the subsequent disembarkation of those persons in a safe place, and that a vessel at sea cannot be considered to constitute such a place.⁷¹ Notably, the Court granted an unambiguous right to disembarkation for persons rescued from distress at sea and acquitted Captain Rackete despite the unauthorized disembarkation of the rescued migrants in Italy.⁷²

The foregoing considerations and jurisprudence elucidate that both the rescue and disembarkation of migrants on the territories of European coastal states are lawful actions. Despite that, maritime NGOs in solidarity with migrants continue to suffer from immense pressures and obstructions by states. As Itamar Mann has argued, activists in solidarity with migrants are increasingly expelled from the sea.⁷³ Against this background, the next part of the article will explore whether human rights law can provide a further source of legitimation and protection of maritime NGOs in solidarity with migrants.

C. Whither Human Rights: Monitoring and SAR as Forms of the Freedom of Expression

The law of the sea provides guidance on the permissibility of activities of maritime NGOs in solidarity with migrants. Human rights law, however, is an important source of law that may help us frame maritime NGOs SAR and monitoring activities, as well as offer another layer of protection to such activities.

Depending on the facts of an actual case, most if not all of the NGOs' rights under the Convention could be triggered in relation to SAR or monitoring activities. For example, questions regarding the disembarkation of migrants could raise issues under Article 5, 8 or 14 of the ECHR. However, for the purpose of this article, which will deal more fundamentally with the idea of protecting the activities of NGOs in solidarity with migrants at sea, we will explore whether both SAR and monitoring activities may be qualified as forms of expression as protected by Article 10 ECHR, which includes the "freedom to hold opinions and to receive and impart information and ideas." In the following, the NGOs' two activities of monitoring and SAR will therefore be examined separately under Article 10 ECHR.

I. Monitoring as the Gathering of Information

Article 10(1) ECHR protects the right "to receive and impart information." Contrary to comparable provisions in international or other regional human rights instruments, it does not contain an express provision on the freedom to *seek* information.⁷⁴ However, the Court has clarified in its jurisprudence that "the gathering of information [is] an essential preparatory step in journalism and an inherent, protected part of press freedom."⁷⁵

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*; ATTARD, *supra* note 28, at 180.

⁷³Mann, *supra* note 14, at 611.

⁷⁴Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11, para. 117 (Nov. 8, 2016), <https://hudoc.echr.coe.int/eng?i=002-11282>.

⁷⁵Magyar Helsinki Bizottság, App. No 18030/11 at para. 130.

The protection afforded by the Court to the gathering of information is not limited to the press and journalists. The Court has recognized that when civil society organizations such as NGOs contribute to a debate of public interest, they exercise the role of a “public watchdog” which is similarly important to the role of the press.⁷⁶ In the case of *Steel and Morris v. the United Kingdom*, this status was even applied to small, informal campaign groups.⁷⁷ Therefore, the right to gather information may, in principle, be invoked by maritime NGOs in solidarity with migrants.

The case of *Társaság a Szabadságjogokért v Hungary* may serve to illustrate this. In that case, the Court found that Hungary had acted in violation of Article 10 ECHR by denying an NGO access to public documents.⁷⁸ In its reasoning, the Court placed a particular emphasis on the watchdog role of the NGO and relied on the applicant organization’s intention to impart the information in question to the public, and thereby contribute to debate of public interest.⁷⁹

The intention of maritime NGOs in solidarity with migrants to impart the information gathered via the activity of monitoring to the public has been described above. However, the question of whether this information contributes to a debate of public interest warrants closer examination. The notion of “public interest” has an autonomous meaning under the Convention and is construed broadly.⁸⁰ In the case of *Magyar Helsinki Bizottság v. Hungary*, the Court held that the interest of the public may relate to matters which sufficiently affect it, draw its attention or significantly concern it, especially with regard to the well-being of citizens or their community life or matters which are considerably controversial.⁸¹

The Court determines whether a certain matter is of public interest on a case-by-case basis.⁸² Hitherto, it has found the notion applicable to, inter alia, the broadcasting of a program on the collaboration between Switzerland and Nazi Germany in the Second World War,⁸³ a small campaign on the alleged responsibility of a fast food chain for health issues, environmental damages and human rights violations,⁸⁴ and a complaint by a Member of Parliament on the constitutionality of criminal legislation on drug-related offences.⁸⁵

The content at issue in the activity of monitoring relates to distress cases of migrants in the Mediterranean Sea on their flight to Europe and human rights violations which European States commit against them. In view of the wide scope of the notion of “public interest” and the low threshold previously applied by the Court, this must be regarded as a matter of public interest. Irregular migration to Europe by sea is a highly controversial, politicized and mediatized issue which has taken an increasingly central position in the European public debate.⁸⁶ This holds true not only for debates on the right side of the political spectrum in European States, where migration is a key topic.⁸⁷ It can

⁷⁶Vides Aizsardzības Klubs v. Latvia, App. No. 57829/00, para. 42 (May 27, 2004), <https://hudoc.echr.coe.int/eng?i=001-66349>.

⁷⁷Steel & Morris v. U.K., App. No. 68416/01, para. 89 (Feb. 15, 2005), <https://hudoc.echr.coe.int/eng?i=001-68224>.

⁷⁸Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05 (Apr. 14, 2009), <https://hudoc.echr.coe.int/eng?i=001-92171>.

⁷⁹Társaság a Szabadságjogokért, App. No. 37374/05 at paras. 26–28, 38.

⁸⁰David Harris, Michael O’Boyle, Edward Bates & Carla Buckley, *Article 10: Freedom of Expression*, in HARRIS, O’BOYLE, AND WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 19 (4th ed. 2018).

⁸¹Magyar Helsinki Bizottság, App. No. 18030/11, at para. 162.

⁸²*Id.*

⁸³Monnat v. Switzerland, App. No. 73604/01, para. 58 (Sept. 21, 2006), <https://hudoc.echr.coe.int/eng?i=001-76947>.

⁸⁴Steel & Morris, App. No. 68416/01, at para. 88.

⁸⁵Társaság a Szabadságjogokért, App. No. 37374/05, at para. 28.

⁸⁶Carlo Berti, *Right-Wing Populism and the Criminalization of Sea-Rescue NGOs: The “Sea-Watch 3” Case in Italy, and Matteo Salvini’s Communication on Facebook*, MED., CULTURE, & SOC’Y 4 (2020).

⁸⁷Berti, *supra* note 86, at 3–4.

also be seen in the numerous contributions by media outlets who have been constantly calling attention to the “[s]hameful” European migration policy in the Mediterranean Sea.⁸⁸

It follows from the considerations above that the NGOs’ activity of monitoring migrant boats in distress at sea and human rights violations against them falls, in principle, within the scope of Article 10 of the Convention. Since maritime NGOs in solidarity with migrants constitute “public watchdogs” with the intention to impart information on the public which contributes to a debate of public interest, the activity is, in principle, protected as the gathering of information under Article 10 ECHR.

II. Search and Rescue as Expressive Conduct

Regarding the second activity of maritime NGOs in solidarity with migrants, it is the Court’s well-established case-law that Article 10 of the Convention protects the *form* in which ideas and information are conveyed besides their substance.⁸⁹ The Court has furthermore noted that it is up to the person(s) exercising their expression rights to choose the method which they consider most effective for reaching the maximum number of persons.⁹⁰ Thus, the Court has hitherto recognized a variety of forms of expression as falling within the scope of Article 10 ECHR, including a satirical puppet show,⁹¹ the displaying of a historical flag,⁹² a principled decision for public nudity,⁹³ the pouring of paint on statues,⁹⁴ and the hanging of dirty laundry around a parliament building.⁹⁵ Besides artistic work and symbols, the Court has explicitly held in the case of *Murat Vural v Turkey* that opinions can be expressed through conduct.⁹⁶ It thus stated the following:

[I]n deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its *expressive character seen from an objective point of view*, as well as of the *purpose or the intention of the person performing the act or carrying out the conduct* in question [emphases added].⁹⁷

According to this statement, the Court relies on two criteria when determining whether a certain conduct falls within the scope of Article 10 ECHR: (i) the objectively expressive character of the conduct, and (ii) the purpose or intention of the individuals carrying out the conduct. In the following, the conduct of search and rescue will be examined in relation to these two criteria.

1. The Expressive Character of the Conduct from an Objective Point of View

In the case of *Sinkova v Ukraine*, the Court accepted the frying of eggs over the Eternal Flame at a memorial for fallen soldiers, while being filmed, as falling under Article 10 of the Convention.⁹⁸ The Court has also found Article 10 ECHR applicable to the applicant’s conduct in the case of

⁸⁸See Maximilian Popp, *An Inside Look at EU’s Shameful Immigration Policy*, SPIEGEL INT. (Sept. 11, 2014), <https://www.spiegel.de/international/europe/europe-tightens-borders-and-fails-to-protect-people-a-989502.html>; Azad Essa, *Migrant Crisis a Failure of European Policy*, UN SAYS, AL JAZEERA (Aug. 6, 2015), <https://www.aljazeera.com/news/2015/8/6/migrant-crisis-a-failure-of-european-policy-un-says>; *Migrant Crisis: UN says 5,000 Drown Trying to Reach Europe This Year*, BBC NEWS (Dec. 23, 2016), <https://www.bbc.com/news/world-europe-38420779>.

⁸⁹*Murat Vural v. Turkey*, App. No. 9540/07, para. 44 (Oct. 21, 2014), <https://hudoc.echr.coe.int/eng?i=001-147284>.

⁹⁰*Women on Waves et al. v. Portugal*, App. No. 31276/05, para. 38 (Feb. 3, 2009), <https://hudoc.echr.coe.int/eng?i=001-91046>.

⁹¹*Alves da Silva v. Portugal*, App. No. 41665/07, paras. 27–28 (Oct. 20, 2009), <https://hudoc.echr.coe.int/eng?i=001-95154>.

⁹²*Fáber v. Hungary*, App. No. 40721/08, paras. 47, 57 (July 24, 2012), <https://hudoc.echr.coe.int/eng?i=001-112446>.

⁹³*Gough v. U.K.*, App. No. 49327/11, para. 150 (Oct. 28, 2014), <https://hudoc.echr.coe.int/eng?i=001-147623>.

⁹⁴*Murat Vural*, App. No. 9540/07, at para. 54.

⁹⁵*Tatár & Fáber v. Hungary*, App. No. 26005/08, para. 29 (June 12, 2012), <https://hudoc.echr.coe.int/eng?i=001-111421>.

⁹⁶*Murat Vural*, App. No. 9540/07, at para. 47.

⁹⁷*Id.* at para. 54.

⁹⁸*Sinkova v. Ukraine*, App. No. 39496/11, para. 7, 100 (Feb. 27, 2018), <https://hudoc.echr.coe.int/eng?i=001-181210>.

Shvydka v Ukraine, where a ribbon with the name of the President at the time was broken from a wreath and ripped in front of a crowd during the Independence Day celebrations.⁹⁹ Moreover, Article 10 was found to be applicable to the conduct of Stern Taulats and Roura Capellera in the case by the same name against Spain, where the applicants had publicly burned a picture of the Spanish royals during their official visit.¹⁰⁰

Common features of these cases, which apparently contribute to a conduct's expressive character, are the public setting surrounding the conduct and the public attention it generates.¹⁰¹ By implication, a conduct which is carried out in private or even in secret and without any audience during or after its execution may, in principle, not be attributed with an expressive character.

With regard to the conduct of search and rescue as carried out by maritime NGOs in solidarity with migrants, both requirements may, in principle, be fulfilled: Search and rescue takes place at sea, which has been recognized by the Court as a public and open space by its very nature.¹⁰² Moreover, it has been demonstrated above that search and rescue attracts the attention of a considerable audience from all over Europe through various channels.

In the absence of further guidance by the Court on how to assess an expressive character,¹⁰³ the first criterion may therefore, in principle, be regarded as fulfilled by the NGOs' activity of SAR.

2. The Purpose or Intention of the Person(s) Carrying Out the Conduct

As the second criterion for the determination of whether a certain conduct can be regarded as expressive and thus falls within the scope of Article 10 ECHR, the Court referred to the purpose or intention of the person(s) carrying out the conduct. Similarly, "expressive conduct" is defined in legal scholarship as "forms of conduct, *intended* by the actors to communicate opinions and so understood by others [emphasis added]."¹⁰⁴

When examining the cases above, it seems reasonable to assume that it was not the actual purpose of Ms. Sinkova to fry eggs, while the Eternal Flame just happened to be the nearest source of heat. Instead, it seems obvious that the conduct primarily served the expression of a certain opinion. This was confirmed by the applicant, who described her conduct as an "act of performance" as a protest against the waste of natural gas.¹⁰⁵ Thus, when determining the purpose or intention of the person carrying out a certain conduct, the Court takes into account their statements in the national proceedings and before the Court itself.¹⁰⁶ In the absence of a concrete case and such statements to rely on, the purpose or intention of the persons(s) carrying out the conduct of search and rescue, namely maritime NGOs in solidarity with migrants, will have to be considered in a more general manner hereinafter.

Search and rescue may be regarded as a form of direct action protest by maritime NGOs in solidarity with migrants. The purpose of direct action is inherently two-fold. By definition, it "seeks to achieve an end directly and by the most immediately effective means."¹⁰⁷ However, it

⁹⁹*Shvydka v. Ukraine*, App. No. 17888/12, paras. 35–38 (Oct. 30, 2014), <https://hudoc.echr.coe.int/eng?i=001-147445>.

¹⁰⁰*Stern Taulats & Roura Capellera v. Spain*, App. No. 51168/15, paras. 36–38 (Mar. 13, 2018), <https://hudoc.echr.coe.int/eng?i=001-181719>.

¹⁰¹*Shvydka*, App. No. 17888/12, at paras. 35–38; *Sinkova*, App. No. 39496/11, at paras. 7–9; *Stern Taulats & Roura Capellera*, App. No. 51168/15, at paras. 36–38. See Hashman & Harrup v. U.K., App. No. 25594/94, paras. 4–6 (Nov. 25, 1999), <https://hudoc.echr.coe.int/eng?i=001-58365>.

¹⁰²See *Women on Waves et. al.*, App. No. 31276/05, at para. 40 (where the Court has confirmed the public nature of a state's territorial sea. A fortiori, this holds true for all maritime zones where states exercise fewer sovereignty rights).

¹⁰³The notion of expressive conduct has hitherto been subject only to very limited scholarly attention within the European Convention system.

¹⁰⁴ERIC BARENDT, *FREEDOM OF SPEECH* 78 (2nd ed., 2005).

¹⁰⁵*Sinkova*, App. No. 39496/11, at para. 7.

¹⁰⁶*Murat Vural*, App. No. 9540/07, at para. 54.

¹⁰⁷*Direct Action*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/direct%20action> (last visited May 18, 2023).

simultaneously fulfills the purpose of drawing attention to a certain cause. The difficulty of determining the *primary* purpose of the person(s) carrying out the conduct in direct action cases is demonstrated by the Court's case law, which mostly relates to environmental activism and animal protection in particular.

Thus, the Court has found the conduct of the applicants in *Hashman and Harrup v. the United Kingdom* as well as the first applicant in *Steel and Others v. the United Kingdom*, who respectively disrupted a fox hunt and a grouse shoot, as falling within the scope of Article 10 ECHR.¹⁰⁸ In the application of *Drieman and Others v. Norway* (dec), the applicants had been involved in a direct action campaign by an environmental NGO on the high seas to obstruct Norwegian whaling.¹⁰⁹ The Court preliminarily accepted that the conduct "was aimed to express a protest against Norwegian whaling," though it did not find it necessary to determine whether it fell within the scope of Article 10 and/or Article ECHR.¹¹⁰ Instead, it rejected the application as manifestly ill-founded due to the weighty public interest in the State's interference.¹¹¹ Importantly, however, the Court did not reject the direct action protest as falling within the scope of the Convention. Was it the applicants' primary intention in these cases to save the lives of animals, some of whom belong to endangered species? Or was it their primary intention to express an opinion on the hunting of these animals, to call attention to the cause of animal protection?

When applying the above consideration, one might argue that when maritime NGOs conduct SAR activities, they also communicate a clear opinion on the importance of saving lives of innocent citizens. As Mann has argued in relation to SAR operations of NGOs, "any such mission carries with it a message."¹¹² The message's content may include views on the European debt to peoples who were formerly colonized by them, on global inequality, or racial discrimination, and may vary between NGOs, but also between individual activists.¹¹³ For example, when describing their vision, the German NGO *Sea-Watch* declared that they "[stand] up vehemently for the goal that no one has to die when trying to reach Europe's shores," and that their "initiative cannot save all refugees and migrants crossing the the [sic!] Mediterranean Sea . . . but with our presence and through the lives we do save, we are standing up for humanity."¹¹⁴

Generally, it has been demonstrated above that accompanying publicity and advocacy work constitutes a core element of the NGOs' work. However, it is questionable whether that is always their primary purpose. The picture is certainly complex because the landscape of maritime NGOs in solidarity with migrants shows that their self-conception is varied. The field of tension between humanitarian and political aspirations lies at the very core of the NGOs' work, and causes constant debate on their identities among each other as well as within. Therefore, the determination of the primary purpose of the person(s) carrying out the conduct of SAR depends not only on the particular NGO, but also on the time, circumstances and the very person who is asked or involved in SAR activities.

E. States' Measures Against NGOs in Solidarity with Migrants: Whither Justified?

Arguing that SAR activities of migrant NGOs constitute a freedom of expression is in itself a bold claim. Even if accepting that argument, it is important to note that the right to freedom of expression is not absolute but may be subject to restrictions. The interferences with the NGOs'

¹⁰⁸*Hashman & Harrup*, App. No. 25594/94, at para. 28; *Steel et al. v. U.K.*, App. No. 67/1997/851/1058, para. 92 (Sept. 23, 1998), <https://hudoc.echr.coe.int/eng?i=001-58240>.

¹⁰⁹*Drieman et al. v. Norway*, App. No. 33678/96, para. 2 (May 4, 2000) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?filename=DRIEMAN+AND+OTHERS+v.+NORWAY.pdf&id=001-5290&library=ECHR&logEvent=False>.

¹¹⁰*Drieman*, App. No. 33678/96 at paras. 8–9.

¹¹¹*Id.* at 9–10.

¹¹²Mann, *supra* note 14, at 612.

¹¹³*Id.*

¹¹⁴See *SEA-WATCH*, *supra* note 16.

rights under Article 10 ECHR may thus be permissible as justified restrictions, provided that they fulfill the tripartite test of being (i) prescribed by law, (ii) in pursuance of a legitimate aim and (iii) “necessary in a democratic society.” Such measures must not be used by states for any ulterior purposes as stipulated by Article 18 ECHR. In the following, it will be discussed whether states’ measures may constitute justified restrictions or instead violate the NGOs’ Convention rights, and whether their conduct follows ulterior purposes as prohibited by Article 18 ECHR.

I. States’ Measures: Justified Restrictions or Violations of the Convention?

According to the first requirement, states’ interferences must be based on national law. Moreover, it is the Court’s well-established case law that the law which the measures are based on must also fulfill the qualitative criteria of accessibility and foreseeability.¹¹⁵ In a potential case of maritime NGOs in solidarity with migrants, questions may be raised concerning the legality of states’ interferences. For example, observers to recent amendments of the ship safety laws by the German authorities, as a result of which several NGO vessels with Germany as their flag state are prevented from leaving the port altogether, harshly criticize the lack of a sufficient legal basis for the administrative initiative.¹¹⁶

The second requirement stipulates that states’ interferences must pursue at least one of the legitimate aims specified in the respective Convention article. The legitimate aims which are most likely to be invoked by states to justify their interferences with the rights of maritime NGOs in solidarity with migrants are the interests of national security or public safety and the prevention of disorder or crime. In most, if certainly not all cases, the Court in practice accepts the legitimate aim as put forward by the state.¹¹⁷

The crux of the assessment thus lies in the third requirement, according to which the states’ measures must be necessary in a democratic society.¹¹⁸ According to the Court, this presupposes the existence of a “pressing social need,”¹¹⁹ and the proportionality of the measure to the legitimate aim it pursues. In the following, four factors will be discussed which may influence the Court’s qualification of states’ measures as justified restrictions or interferences with the NGOs’ Convention rights in a concrete case.

First, within the proportionality assessment, the scope of the “margin of appreciation” which the Court grants to states in deciding whether, how and to what extent to restrict and applicant’s rights is decisive for a judgment’s outcome.¹²⁰ As has been elaborated above, the disembarkation of migrants directly contradicts and undermines the immigration policy of the EU and its Member States. It may therefore be that in view of states’ interest in border control and the preservation of their immigration policies, the Court may decide to grant states a wide margin of appreciation.¹²¹ This would enhance the likelihood of the Court’s finding that the states’ interferences with the NGOs’ rights merely constitute justified restrictions.

On the other hand, the Court takes into account the importance of the rights interfered with by the state.¹²² Since it is its well-established case law that the “[f]reedom of expression constitutes one of the essential foundations” of a democratic society,¹²³ the balance may be shifted in favor of the NGOs.

¹¹⁵The Sunday Times v. U.K., App. No. 6538/74, paras. 46–50 (Apr. 26, 1979), <https://hudoc.echr.coe.int/eng?i=001-57584>.

¹¹⁶Vera M. Keller, Nassim Madjidian, Florian Schöler, *Hypocritical and Illegitimate: Maritime Safety Law and Its Latest Use to Outlaw Humanitarian Missions in the Mediterranean*, VERFASSUNGSBLOG (June 9, 2020), <https://verfassungsblog.de/hypocritical-and-illegitimate/>.

¹¹⁷DAVID MEAD, *THE NEW LAW OF PEACEFUL PROTEST* 93 (2010).

¹¹⁸Harris, *supra* note 80, at 3.

¹¹⁹MEAD, *supra* note 117, at 94.

¹²⁰*Id.* at 96–97.

¹²¹*Id.*

¹²²*Id.* at 94.

¹²³Handyside v. U.K., App. No. 5493/72, para. 49 (Dec. 7, 1976), <https://hudoc.echr.coe.int/eng?i=001-57499>.

Second, the political nature of the content which both monitoring and Search and Rescue revolve around as well as its previously established status as a matter of public interest is likely to further enhance its level of protection by the Court. The Court has held explicitly that “‘political expression’, including expression on matters of public interest and concern, requires a high level of protection under Article 10.”¹²⁴ In the past, the Court has consistently granted a higher level of protection to expression which contributes to a political debate than to artistic and commercial expression.¹²⁵

Third, the aforementioned role of maritime NGOs in solidarity with migrants as “public watchdogs” “safeguarding healthy democracies”¹²⁶ is likely to further heighten the level of protection afforded to them.¹²⁷ Thus, maritime NGOs in solidarity with migrants may, in principle, enjoy a level of freedom of expression similarly high to that of the press.

Fourth and lastly, the nature of the interference by the state is a factor which is frequently taken into account by the Court and may be conducive to the finding of a violation in the present case. Thus, the Court may consider whether the means adopted by the State were the least restrictive to the rights at stake, as it has done in the case of *Women on Waves v. Portugal*.¹²⁸ Since the applicants in *Women on Waves* were refused entry to the Portuguese territorial waters and blocked with a war ship, the Court paid special attention to the fact that the authorities had “other means less prejudicial to the applicants’ rights” at their disposal.¹²⁹ Therefore, the state’s “radical measure” of imposing a total ban on the civilian vessel’s entry and sending a war ship to enforce it was not considered necessary to meet a “pressing social need,” whereby a violation of Article 10 of the Convention was found.¹³⁰

In general, the likelihood of a violation increases with the severity of the interference. Thus, the Court has held that the “nature and severity” of ex-post measures are to be considered within the proportionality assessment.¹³¹ Criminal sanctions “require particular justification” by the state.¹³² The mere threat of a criminal sanction may suffice to render an interference disproportionate, even when it is deferred or suspended.¹³³ However, even minor sanctions are only compatible with the Convention if they can be regarded as “necessary in a democratic society.”¹³⁴ In the case of maritime NGOs in solidarity with migrants, the criminal prosecution and excessive penalties may therefore further sway the Court towards finding that the states’ interferences have violated their rights.

It must furthermore be addressed that the protection of the activities of maritime NGOs in solidarity with migrants may be challenged with the availability of alternative means for the applicants to exercise their expression rights.¹³⁵ It emanates from the Court’s case law that where an interference “leaves the applicants sufficient other possibilities to express their opinions,” the Court will be more likely to accept it as a justified restriction under the Convention.¹³⁶

¹²⁴*Steel & Morris*, App. No. 68416/01 at para. 88.

¹²⁵Bernadette Rainey, Elizabeth Wicks & Clare Ovey, *Freedom of Expression*, in JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 4 (7th ed. 2017).

¹²⁶*Vides Aizsardzibas Klubs*, App. No. 57829/00 at para. 42.

¹²⁷*Társaság a Szabadságjogokért*, App. No. 37374/05 at paras. 36–39.

¹²⁸*Women on Waves*, App. No. 31276/05 at paras. 4–43.

¹²⁹*Id.* at para. 41.

¹³⁰*Id.* at para. 42.

¹³¹*Chernega et al. v. Ukraine*, App. No 74768/10, para. 221 (June 18, 2019), <https://hudoc.echr.coe.int/eng?i=001-193877>. Though the Court has established this doctrine mostly with regard to applications under Article 11 of the Convention, it also forms a part of the proportionality assessment under the freedom of expression. Dirk Voorhoof & Hannes Cannie, *Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights*, 72 INT. COMMUN. GAZ. 407, 419 (2010).

¹³²*Chernega*, App. No 74768/10 at para. 221.

¹³³*Erdođdu & İnce v. Turkey*, App. No. 25067/94, para. 53 (July 8, 1999), <https://hudoc.echr.coe.int/eng?i=001-58275>.

¹³⁴*Csánics v. Hungary*, App. No. 12188/06, para. 46 (Jan. 20, 2009), <https://hudoc.echr.coe.int/eng?i=001-90704>.

¹³⁵MEAD, *supra* note 117, at 100.

¹³⁶Voorhoof & Cannie, *supra* note 131, at 420.

With regards to the activity of monitoring, it could be argued that NGOs could monitor distress cases and human rights violations without being present at sea, as is demonstrated by initiatives such as *Alarm Phone*.¹³⁷ Notably, such initiatives do not gather information themselves, but rely on the reports of other persons and entities. However, in the case of *Szurovecz v. Hungary*, which dealt with a journalist's access to a reception center for asylum seekers, the Court held that the applicant's interest in direct newsgathering was not extinguished by less direct alternatives.¹³⁸ Furthermore, it held that "[t]he public interest in reporting from certain locations is especially relevant where the authorities' handling of vulnerable groups is at stake."¹³⁹ It must therefore be inferred that the availability of alternative means does not extinguish the NGOs' interest in monitoring directly at sea.

As regards alternative means to the activity of SAR, the crucial question is whether more conventional protest activities would be similarly effective in generating attention to the NGOs' cause. This may be assumed to not be the case. After all, it has been held that "whether or not one applauds the fact, effective protest is often protest which involves some disruption to others, or disorder."¹⁴⁰ Therefore, the availability of alternative means should not prevent the activities' protection under the Convention.

Lastly, it emanates from the Court's jurisprudence that the peacefulness of the applicants' conduct plays a significant role for the extent to which the Court affords the Convention's protection to it.¹⁴¹ Thus, the European Court of Human Rights has hitherto sharply differentiated between peaceful communication on the one hand, and obstructive protest on the other hand.¹⁴² While the activity of monitoring is *prima facie* of a peaceful nature, the peacefulness of SAR, including disembarkation, may appear more contentious.

On the one hand, in the Court's more recent jurisprudence, it has defined the notion of "peaceful" under Article 11 ECHR as excluding assemblies where the organizers and participants "have violent intentions, . . . incite violence or otherwise reject the foundations of a democratic society."¹⁴³ The Court has made clear that the protection it affords to protests which are intentionally obstructive is very limited.¹⁴⁴ On the other hand, the Court has repeatedly held that even serious incidental disruption through an assembly will not render it non-peaceful.¹⁴⁵ Since it cannot be held that the organizers or participants of SAR have "violent intentions"—quite the opposite—the peacefulness of the activities should, in principle, not negatively affect their protection under the Convention.

Altogether, the analysis above shows that despite a potential wide margin of appreciation which may be granted to the state, several factors may increase the likelihood of the Court to find a violation in a concrete case of a maritime NGO in solidarity with migrants.

II. Article 18 ECHR and the States' Measures' Ulterior Purpose

States' interferences with the activities of maritime NGOs in solidarity with migrants may additionally trigger Article 18 ECHR. Article 18 ECHR holds that "[t]he restrictions permitted

¹³⁷EUR. PARL. DOC. PE 694.413, at 95.

¹³⁸*Szurovecz v. Hungary*, App. No. 15428/16, para. 74 (Oct. 8, 2019) <https://hudoc.echr.coe.int/eng?i=001-196418>.

¹³⁹*Id.* at paras. 61–62.

¹⁴⁰AVROM SHERR, FREEDOM OF PROTEST, PUBLIC ORDER, AND THE LAW 14 (1989).

¹⁴¹*Steel*, App. No. 67/1997/851/1058 at paras. 90–93; *Murat Vural*, App. No. 9540/07 at para. 47; *Sinkova*, App. No. 39496/11 at para. 111. See *Drieman*, App. No. 33678/96 at para. 10.

¹⁴²MEAD, *supra* note 117, at 11.

¹⁴³Kudrevičius et al. v. Lithuania, App. No. 37553/05, para. 92 (Oct. 15, 2015), <https://hudoc.echr.coe.int/eng?i=001-158200>.

¹⁴⁴*Steel*, App. No. 67/1997/851/1058; MEAD, *supra* note 117, at 61.

¹⁴⁵Primov et al. v. Russia, App. No. 17391/06, para. 155 (June 12, 2014), <https://hudoc.echr.coe.int/eng?i=001-144673>; *Kudrevičius*, App. No. 37553/05 at paras. 92–94.

under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” Thus, it is the provision’s object and purpose are to prevent the misuse of power.¹⁴⁶ The notion of “ulterior purpose” or “bad faith” is central.¹⁴⁷

It should not come as a surprise that such “bad faith judgments” are not issued easily by the Court.¹⁴⁸ A violation of Article 18 ECHR in conjunction with Article 10 ECHR has been found for the first time in the recent case of *Miroslava Todorova v. Bulgaria*.¹⁴⁹ In that case, the Court unanimously concluded that the disciplinary proceedings against the applicant, who at the relevant time had been a judge and the President of the Bulgarian Union of Judges, were intended to retaliate against her criticism of the Supreme Judicial Council and the executive.¹⁵⁰ Moreover, the Court has examined several cases where applicants alleged the ulterior purpose of impeding their *activities*.¹⁵¹

In the case of maritime NGOs in solidarity with migrants, it has been demonstrated above that states adopt a variety of measures to obstruct their activities, the purported purposes of which include national security, public safety and the prevention of disorder and crime among those enumerated in Article 10 ECHR. That in cases like the amendment of the German ship safety laws mentioned above or then notorious Port State Controls—the inspection of foreign ships to verify their condition and equipment—the public authorities claim to act in the interest of the very migrants who the NGOs aim to protect from drowning appears nothing but cynical. The true agenda of the EU and its Member States is all but obvious. It is the states’ aim to impede illegal migration to Europe, to stop migrants from arriving today and deter future arrivals.

In the eyes of the authorities maritime NGOs in solidarity with migrants therefore constitute a “pull factor” encouraging future migration.¹⁵² Thus, obstructing the NGOs’ activities is necessary to pursue the states’ migration policy, and any ostensible ground for restricting their rights is good enough.

For the activists themselves, it is clear that these moves are made “under false pretenses” and instead constitute a deliberate move to impede the privately carried out sea rescues.¹⁵³ Similarly, most if not all commentators treat the criminalization of NGOs in solidarity with migrants at sea as part of a wider strategy to discourage and deter migration by sea to the EU in disguise. In case of a complaint as envisioned in this work, it would be up to the Court to decide whether States’ potentially ulterior purposes in their handling of the NGOs suffice to trigger a violation of Article 18 ECHR. In case that a plurality of purposes is put forward by the state, it would be up to the Court to establish its “predominant purpose” which “truly” actuated its behavior towards the NGO.¹⁵⁴

As the Court has previously held, for Article 18 to come into play, the claim that a state’s measures do not follow one of the purposes protected by the Convention must appear to be

¹⁴⁶Merabishvili v. Georgia, App. No. 72508/13, para. 303, 306 (Nov. 28, 2017), <https://hudoc.echr.coe.int/eng?i=001-178753>.

¹⁴⁷Merabishvili, App. No. 72508/13 at paras. 283, 292.

¹⁴⁸Başak Çalı, *Byzantine Manoeuvres: Turkey’s Responses to Bad Faith Judgments of the ECtHR*, VERFASSUNGSBLOG (Feb. 19, 2020), <https://verfassungsblog.de/byzantine-manoevres/>.

¹⁴⁹See *Miroslava Todorova v. Bulgaria*, App. No. 40072/13, (Oct. 19, 2021), <https://hudoc.echr.coe.int/eng?i=001-212376>.

¹⁵⁰*Miroslava Todorova*, App. No. 40072/13 at paras. 248–52.

¹⁵¹See, among many others, Natig Jafarov v. Azerbaijan, App. No. 64581/16, para. 70 (Nov. 7, 2019), <https://hudoc.echr.coe.int/eng?i=001-198565>; Kaval v. Turkey, App. No. 28749/18, para. 232 (Dec. 10, 2019), <https://hudoc.echr.coe.int/eng?i=001-199515>; Khadija Ismayilova v. Azerbaijan, App. No. 30778/15, para. 119 (Feb. 27, 2020), <https://hudoc.echr.coe.int/eng?i=001-201340>; Yunusova & Yunusov v. Azerbaijan, App. No. 68817/14, para. 194 (July 16, 2020), <https://hudoc.echr.coe.int/eng?i=001-203562>.

¹⁵²See Cusumano, *supra* note 17.

¹⁵³*Italy Impounds German Migrant Rescue Ship Sea-Watch 4*, DEUTSCHE WELLE (Sept. 20, 2020), <https://www.dw.com/en/italy-impounds-german-migrant-rescue-ship-sea-watch-4/a-54994064>.

¹⁵⁴Merabishvili, App. No. 72508/13 at paras. 303, 309; Navalnyy v. Russia, App. No. 29580/12, para. 165 (Nov. 15, 2018), <https://hudoc.echr.coe.int/eng?i=001-187605>.

“a fundamental aspect of the case.”¹⁵⁵ Moreover, the repetitive nature and potential “pattern of misuse of power targeting specific groups” of a state’s restrictions is an important aspect to be considered.¹⁵⁶ As regards the restrictions placed by States on the rights of maritime NGOs in solidarity with migrants, both aspects may be expected to work in favor of the Court’s finding of a violation under Article 18 of the Convention.

In the past decade, the most common ulterior purposes identified by the Court was “to silence and punish politicians and human rights defenders.”¹⁵⁷ This trend is in line with the present case of maritime NGOs in solidarity with migrants, who defend not only the rights of migrants to life, safety and asylum, but also their own rights to express and assemble in solidarity with them.

F. Conclusion

European States have applied a deliberate policy of pushing back not only against migrants attempting to cross the Mediterranean Sea but also against activists who document the drowning of and human rights violations against them, and risk their safety by searching for, rescuing and transferring migrants to a safe place.

The NGOs’ activities go beyond the practical aspects of monitoring and SAR as protected by the law of the sea. They aim to raise awareness about European migration policies that result in ongoing human tragedies. In fact, monitoring and SAR should be understood as vehicles for the protection of core human values. It is in this light that these activities come within the realm of, inter alia, the freedom of expression as protected by Article 10 ECHR.

The activity of monitoring distress cases and human rights violations at sea present an unambiguous form of the gathering of information which is covered by Article 10 ECHR. A lot more contentious is the determination when or whether the activity of SAR is also protected by Article 10 ECHR. This is because saving lives is an action that does not fit squarely under a traditional understanding of the freedom of expression. However, when the saving of lives takes place in a coordinated and public fashion in response to government policies that intentionally let people drown at sea, the actions of activists themselves become a form of expression. In fact, if the Court was willing to accept in *Steel and Others v. United Kingdom* that disrupting a fox hunt and a grouse shoot is a form of freedom of expression, it would be paradoxical to overlook activities that aim to save human lives as a form of the freedom of expression.¹⁵⁸ While this article focuses on the solidarity with migrants at sea, the rationale that some forms of solidarity are protected under the freedom of expression—and possibly other human rights—may be transferable to manifestations and contexts of solidarization. In short, we argue that by showing solidarity, at times we also express ideas. Think of individuals who hid the Jews during the Nazi regime, the NGOs who organized private aircrafts to save Afghans when the Taliban regained power, those who today go to the Ukrainian border to collect people fleeing from Russian terror. Solidarity expressed through such forms of activism is at times used also to raise societal awareness and contest regimes that have caused human tragedies.

“A rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written.”¹⁵⁹ Even more, according to Barendt, “in some circumstances, views can *only* be expressed effectively to the public by engaging in a course of conduct [emphasis added].”¹⁶⁰ Thus, Article 10 ECHR becomes pertinent to protect opinions expressed through the conduct of SAR. As judges Yudkivska, Motoc and Paczolay have put it in *Sinkova v Ukraine*:

¹⁵⁵*Merabishvili*, App. No. 72508/13 at para. 291.

¹⁵⁶*Navalnyy*, App. No. 29580/12 at paras. 167–170.

¹⁵⁷See Çalı, *supra* note 148.

¹⁵⁸*Hashman & Harrup*, App. No. 25594/94 at para. 28; *Steel*, App. No. 67/1997/851/1058 at para. 92.

¹⁵⁹*Levy v Victoria* (1997) 189 CLR 579, 638 (Austl.).

¹⁶⁰BARENDET, *supra* note 104, at 78.

In a fast-moving world, it is not surprising that those who wish to highlight a particular cause or voice an opinion would have recourse to those symbolic acts and demonstrations which are likely to gather a greater degree of attention and trigger a wider debate than might have been achievable with more conventional and established forms of protest.¹⁶¹

In our view, this form of expression should be recognized also in the context of exceptional human activities, including SAR, that aim to trigger a wider societal debate about core values as constitutes the protection of the right to life.

We are cognizant that our viewpoints may be at the crossroads of a revolutionary and evolutionary interpretation of the freedom of expression as developed in the Court's case-law so far. However, the foregoing approach may be viewed as revolutionary only because the ECHR, like other human rights treaties, was crafted to address past rather than future problems. As put by Itamar Mann, "human rights law [has] emerged from a backward looking orientation to time: holocaust, absolute destruction. Those bases have lost relevance. The project will remain viable only by a forward looking orientation to the time of unfolding . . . crisis."¹⁶²

Domestic and regional courts have tried to address some of these obstacles through the evolutive interpretation of human rights provisions. In recent years, we have seen a progressive use of ECHR to address current or unfolding crises, such as climate change. Our argument on the protection of the activities of maritime NGOs in solidarity with migrants should, like climate change, be seen in the light of ongoing societal problems where daring interpretations of international law are not a luxury of scholarly pondering, but an urgent humanitarian necessity to protect human rights in modern societies.

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¹⁶¹*Sinkova*, App. No. 39496/11, Joint Partly Dissenting Opinion of Judges Yudkivska, Motoc and Paczolay.

¹⁶²Itamar Mann (@itamann), TWITTER (Dec. 5, 2021, 4:19 AM), <https://twitter.com/itamann/status/1467423463526834178>.