

E-PAPER

Support for civil search and rescue activities

Options for the German government



**BY PROF. DR. NORA MARKARD, MARLENE STILLER,
PROF. DR. ANUSCHEH FARAHAT, ISABEL KIENZLE AND
JONATHAN KIESSLING**

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About the Authors

Nora Markard is a Professor of International Public Law and International Human Rights at the University of Münster. She works on international and constitutional law issues, with a focus on inequalities and forced migration. She holds a PhD in law from Humboldt University and an MA in International Peace & Security from King's College London, and she was a visiting fellow at the University of Michigan and at Columbia Law School. In 2023-24, she is a Scholar in Residence at the NYU Center for Human Rights and Global Justice. She is a co-founder of the Humboldt Law Clinic Human and Fundamental Rights and of the Refugee Law Clinic Hamburg, and Vice President of the Gesellschaft für Freiheitsrechte e.V. (GFF), a strategic litigation NGO. She also regularly advises other organizations on issues of migration, search and rescue, human rights and diversity.

Anuscheh Farahat is a Professor of Public Law, Migration Law and Human Rights Law at the University of Erlangen-Nuremberg. In 2022, she was appointed Max Planck Fellow at the Max Planck Institute for Social Anthropology in Halle, where she leads the research project 'Just Migration: Labour migration regimes in transnationalised contexts'. She is also a Senior Research Affiliate at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. From 2017–22, she led an Emmy-Noether research group on the role of constitutional courts in transnational solidarity conflicts in Europe. Anuscheh Farahat studied law in Frankfurt, Paris and Berkeley. She received her PhD in law from the Goethe University Frankfurt. She publishes widely on issues of European and German constitutional law, German and international migration and citizenship law, international human rights law, and comparative constitutionalism.

Marlene Stiller received her BA in Politics and Law from the University of Münster, followed by an LL.M. in International Migration and Refugee Law from Vrije Universiteit Amsterdam. She is currently taking her first state exam in law at the University of Münster, where she is also a research associate at Prof. Markard's chair. Among other things, she co-authored the 2022 AIDA report on Temporary Protection in Germany and the 2022 update of the AIDA country report Germany.

Isabel Kienzle is a research associate and doctoral candidate in Prof. Farahat's team at the University of Erlangen-Nuremberg. She studied law in Freiburg and Madrid, with additional training in international, European and foreign Law. During her legal clerkship in Munich, she worked, among others, in a law firm specialising in migration law and for the European Center for Constitutional and Human Rights (ECCHR) in Berlin. Her research focuses on migration law, the protection of human rights in the context of border regimes and the law of evidence before human rights institutions.

Jonathan Kießling is a research associate and doctoral candidate in Prof. Farahat's team at the University of Erlangen-Nuremberg. He studied law in Bayreuth and Tartu, with a focus on international law and human rights. At the University of Erlangen-Nuremberg, he coordinates and supervises the FAU Human Rights Clinic. His own research focuses on the intersection of migration law and human rights law, and the jurisprudence of the European of Court of Human Rights on migrants' rights, with particular regard to questions of access to international protection and the illegality of collective expulsions.

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Abbreviations

AMMR	Asylum and Migration Management Regulation
ANSA	Agenzia Nazionale Stampa Associata (Italian National Associated Press Agency)
ASGI	Associazione per gli Studi Giuridici sull'Immigrazione (Association for Juridical Studies on Immigration)
AufenthG	Aufenthaltsgesetz (German Residence Act)
BMDV	Bundesministerium für Digitales und Verkehr (German Federal Ministry for Digital and Transport)
CEPS	Centre for European Policy Studies
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CJTL	Columbia Journal of Transnational Law
CSSE	Cargo Ship Safety Equipment Certificate
DGzRS	Deutsche Gesellschaft zur Rettung Schiffbrüchiger (German Maritime Search and Rescue Service)
ECCHR	European Centre for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ERCI	Emergency Response Centre International
EU	European Union
Eur. J. Int'l L.	European Journal of International Law
LIBE Committee	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
EUTF	European Union Trust Fund for Africa
FRA	EU Fundamental Rights Agency
GC	Grand Chamber
GDP	Gross domestic product
German L.J.	German Law Journal
GIZ	Deutsche Gesellschaft für internationale Zusammenarbeit (German Corporation for International Cooperation)
GLAN	Global Legal Action Network
GT	Gross tonnage

ICC	International Criminal Court
IMO	International Maritime Organisation
IOM	International Organisation for Migration
JMD	Joint Ministerial Decision
LYCG/LCG	Libyan Coast Guard
MEP	Member(s) of the European Parliament
MEPC	IMO Maritime Environment Protection Committee
MOAS	Migrant Offshore Aid Station
MRCC	Maritime Rescue and Coordination Centre
MSC	IMO Maritime Safety Committee
MSF	Médecins Sans Frontières
NGO/ONG	Non-governmental organisation/Organisation non gouvernementale
OHCHR	Office of the High Commissioner for Human Rights
OLAF	European Anti-Fraud Office
PSC	Paris Memorandum of Understanding on Port State Control
RCC	Rescue Coordination Centre
SAR	Search and rescue
SAR Convention	International Convention on Maritime Search and Rescue
SchSV	Schiffssicherheitsverordnung (German Ship Safety Ordinance)
SeeArbG	Seearbeitsgesetz (German Sea Labour Act)
SeeAufgG	Seeaufgabengesetz (German Maritime Responsibilities Act)
SeeFSichV	Verordnung über die Sicherung der Seefahrt (German Maritime Safety Regulation)
SeeSpbootV	See-Sportbootverordnung (German Ordinance on Sea Leisure Yachts)
SIBMMIL	Support to Integrated Border Management and Migration Management in Libya
SOLAS	International Convention for the Safety of Life at Sea
SW3	Sea-Watch 3
SW4	Sea-Watch 4
TFEU	Treaty on the Functioning of the EU
UNCLOS	UN Convention on the Law of the Sea
UNHCR	UN High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

Executive summary

Ten years after the 2013 Lampedusa shipwreck killed an estimated 360 migrants, state-led search and rescue operations are persistently absent in the Mediterranean — despite the continuously high number of distress cases of persons attempting to cross in unseaworthy boats. In response, over the past 10 years, various non-profit actors have set up civil search and rescue operations. However, their operability and effectiveness fluctuate to a considerable degree depending on state actions. This is because European governments have been restricting and hampering civil search and rescue activities in various ways over the past years. In light of this, the present study examines the options for the German government to support civil search and rescue operations at the national and European level.

In order to outline key areas for support, Part I provides an overview of how EU governments are currently obstructing civil search and rescue operations. These measures include restricting the entry of ships seeking to disembark rescued migrants (Part I.1), delays in granting port access (Part I.2), the detention of ships under the guise of maritime safety checks (Part I.3), restrictive codes of conduct (Part I.4), registration requirements for NGOs (Part I.5), the criminalisation of humanitarian action (Part I.6) and the denial of flag state registration (Part I.7).

Against this background, Part II highlights options for the German government to support civil search and rescue operations and outlines recommendations anchored in the current legislative reforms discussed at the EU and national level.

At the national level, the study recommends that the German government establishes continuous funding for civil search and rescue operations (Part II.1). As a flag state, it should also set a best practice example by, inter alia, revoking the recent amendments of the German Ship Safety Ordinance and protecting vessels registered under German flag from excessive detention practices by other Member States (Part II.2).

At the EU level, the study proposes that the German government increases its cooperation and coordination efforts with other EU Member States. Specifically, Germany should advocate for a European framework focussing on human rights and the rescue of persons in distress, mitigating excessive national requirements for ship registration or rescue operations, and providing for effective monitoring mechanisms for any state- and EU-led missions at sea (Part II.3).

The recommendations also call on the German government to effectively contribute to EU solidarity and relocation mechanisms, in particular by advocating for a human rights-based solidarity mechanism, by stepping up its ad hoc relocation and solidarity quota, and by facilitating humanitarian relocation by cities and federal states under Section 23 of the German Residence Act (Part II.4).

In the ongoing negotiations over the New Pact for Migration and Asylum, Germany should increase efforts to prevent the criminalisation of civil search and rescue operations, inter alia by advocating for a reform of the Facilitation Directive, which prioritises the safeguarding of life and clearly distinguishes between smuggling and rescue operations. To set a best practice example in that respect, the study proposes that Germany should implement the humanitarian exception clause in Section 96 of the German Residence Act (Part II.5).

Lastly, the German government should require that any EU cooperation with third countries, including Libya, be conditioned on their full compliance with international human rights law and with the Law of the Sea standards for search and rescue. The study therefore calls upon the German government to refrain from supporting the so-called Libyan Coast Guard in any European Union Trust Fund project and to push for revising the mission of the EU military operation EUNAVOR MED IRINI (Part II.6).

The concluding Part III organises the recommendations into those concerning Germany as a flag state, as an important financial player and as a powerful political player at the EU level, and those calling for best practice examples.

Foreword

"Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."

(International Convention on Maritime Search and Rescue, Annex 2.1.10, 1979)

Every year, hundreds of migrants and refugees drown by crossing the Mediterranean Sea, making it the world's most dangerous journey. The latest dramatic shipwreck off the coast of Pylos, Greece, in June 2023, was again sad evidence of this reality. Since 2014, the International Organisation for Migration (IOM) has recorded more than 20,000 deaths on this route. Incidentally, in 2014, the Italian government also terminated their rescue operation 'Mare Nostrum', due to a lack of support by other EU Member States. Within one year, this operation had saved the lives of around 150,000 people. Since then, European governments have left a dangerous vacuum, which civil society organisations attempt to fill by saving lives through their search and rescue (SAR) efforts. Both, the *International Convention on Maritime Search and Rescue*, as well as EU law, necessitate assisting people in distress at sea.

Besides not fulfilling these duties via effective state-led search and rescue operations, some EU Member States have gone the opposite direction by restricting and hindering civilian-led search and rescue. These restrictions include banning or delaying the entry of vessels carrying rescued migrants, misuse of port state control or flag state jurisdiction, and putting additional burdens on civil society actors, ranging from administrative hurdles to criminalization. Despite these challenges, civil society actors across Europe persevere in their SAR activities in the Mediterranean Sea.

The current German government has explicitly committed to state-led SAR, supported and coordinated by the EU, and stated in their coalition agreement that civilian SAR operations shall not be obstructed. In this context, the Heinrich Böll Foundation European Union wants to contribute to this debate and has commissioned a study to explore the different options the German government could take to support SAR operations. We hope that this study can help the German government, and other EU Member States, in taking a leadership role in this field.

Exploring the scope for action to live up to international law and improve the human rights situation of migrants and refugees, this study is guided by three essential questions:

1. How have search and rescue operations in the Mediterranean Sea been hampered by government action?
2. What legal scope for action exists for the German government to support search and rescue at sea?
3. What avenues for action does the German government have within the European context?

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We hope that the findings of this study will contribute to an evidence-based discourse on the responsibility and feasibility of rescuing and providing assistance to people in distress at sea, and that it can contribute to decisive decision-making in this regard.

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Roderick Kefferpütz

Director, Heinrich-Böll-Stiftung European Union, Brussels

Neda Noraie-Kia,

Head of Migration Policy Europe, Heinrich-Böll-Stiftung, Thessaloniki

Hannah Goerlich

**Head of Programme EU and International Politics,
Heinrich-Böll-Stiftung European Union, Brussels**

Introduction

The duty to render assistance to persons in distress at sea is an age-old obligation that is today also contained in the 1980 UN Convention on the Law of the Sea (UNCLOS), the 1979 International Search and Rescue Convention (SAR Convention) and the 1974 International Convention for the Safety of Life at Sea (SOLAS). This codification 'constitutes a recognition that a universal duty to rescue at sea has existed since time immemorial, that this duty has been respected without regard to changing views regarding the juridical status of the sea, and that this duty finds new support in modern international law in the increasing acceptance of humanitarian norms in state practice and conventional law.'^[1]

This obligation under international law binds any seafarer who comes across a person in distress at sea,^[2] furthermore, flag states must ensure that their shipmasters fulfil this duty,^[3] and coastal states must establish and maintain effective search and rescue (SAR) services in order to be able to respond effectively to distress calls in their declared search and rescue regions (SAR zones).

The Mediterranean has long become the deadliest strait in the world.^[4] Since 2014, the International Organization for Migration (IOM)'s Missing Migrants Project has documented 25,390 migrants who have died or went missing trying to cross it.^[5] In October 2013, the death of over 500 men, women and children in three shipwrecks shocked many. EU Commissioner for Home Affairs Cecilia Malmström commented: 'Let's make sure that what happened in Lampedusa will be a wakeup call to increase solidarity and mutual support and to prevent similar tragedies in the future.'^[6]

Only Italy responded by launching Operation Mare Nostrum, a deployment of its Navy forces that rescued over 100,000 people between 18 October 2013 and September 2014. Despite these efforts, between 1 June and 15 September 2014 alone, 2,200 died.^[7] When Italy ended its operation after one year, Frontex Operation Triton, and later its successor Operation Themis, shifted the focus to 'enhanced law enforcement'.^[8] The number of deaths rose immediately,^[9] as experts had warned it would.^[10] The shipwrecks in April 2015 left over 1,300 migrants dead or missing in a single month.^[11] While the 2019 Frontex Regulation now contains express language on SAR obligations, it only makes them part of the agency's mission 'during border surveillance operations at sea' that are ongoing anyway.^[12] Operation Themis focusses on aircrafts and drones that cannot be directly called to rescue.^[13] In 2014, the European Commission asserted: 'Frontex is neither a search and rescue body nor does it take up the functions of a Rescue Coordination Centre'^[14]; this has not changed. Meanwhile, the agency continues to be accused of involvement in pushbacks and other illegal activities,^[15] as corroborated by a recently leaked report of the European Anti-Fraud Office (OLAF),^[16] and several non-governmental organisations (NGOs) have urged the International Criminal Court (ICC) to investigate.^[17] Despite repeated calls for the re-activation of state-led search and rescue operations,^[18] neither the EU nor its Member States have launched an operation with an express search and rescue focus.

Against this background, civil society actors around Europe have sought to fill the gap left by state inaction, by mounting their own rescue operations. A whole range of NGOs have been founded since the end of Mare Nostrum, including the Migrant Offshore Aid Station, Watch the Med Alarm Phone (both in 2014), Sea-Watch, SOS Méditerranée, Proactiva Open Arms, Jugend Rettet (all in 2015) and Sea-Eye (in 2016). Most of these organisations continue to provide search and rescue services to this day.^[19]

Over the years, however, European governments have been restricting and hampering civil search and rescue operations in various ways, in particular by banning or delaying the entry of ships seeking to disembark rescued migrants, by abusing port state control or flag state jurisdiction, or by seeking to hamstring civil society actors through administrative burdens or criminalisation. **Part I** of this study examines these practices and their repercussions on civil search and rescue operations.

Part II then examines what Germany can do to support civil search and rescue operations and makes concrete recommendations, anchored in the current legislative reforms discussed at the EU and national level. Specifically, this study recommends that the German government: (1) establishes continuous funding for civil search and rescue operations; (2) sets a best practice example as a reliable flag state; (3) increases its cooperation and coordination efforts with other EU Member States; (4) effectively contributes to solidarity and relocation mechanisms; (5) increases efforts to prevent the criminalisation of civil SAR missions; and (6) requires that any cooperation with third countries is conditioned on their compliance with human rights and the law of the sea.

I. How EU governments are obstructing civil search and rescue missions in the Mediterranean

As soon as civil search and rescue activities began, EU Member States have sought to obstruct them. Measures include blanket entry restrictions, especially during the Covid-19 pandemic (see I.1.), long delays in granting port access (see I.2.), the detention of ships under the guise of maritime safety checks (see I.3.), or denial of flag state registration (see I.7.); thus, since 2016, NGO ships were blocked at least 24 times for varying administrative reasons.^[20] Other measures target civil search and rescue providers specifically or civil society organisations more generally, including restrictive codes of conduct (see I.4.), registration requirements for NGOs (see I.5.) or the criminalisation of humanitarian action (see I.6.). Their common denominator is the aim to impede effective search and rescue operations by civil society organisations.

1. Obstruction through entry restrictions

In 2019, the Italian government under Minister of Interior Matteo Salvini aimed at closing Italian ports to civil search and rescue ships. Salvini issued several ministerial instructions prohibiting particular ships from entering coastal waters.^[21] A 2019 decree-law^[22] enabled the minister to prohibit a ship with undocumented migrants on board from entering Italian coastal waters,^[23] and it increased the maximum fine for entry without authorisation to EUR 1 million (previously EUR 50,000).^[24] It also authorised the arrest of captains of such ships and ordered the automatic seizure of the ship. The decree made no mention of the non-refoulement principle.^[25] Salvini is facing several trials for these instructions.^[26] On 5 October 2020, the new government repealed the decree and reduced the fine to EUR 10–50,000.^[27]

During the Covid-19 pandemic, Italy and Malta also declared that, for the duration of the national Covid-19 health emergency, their ports did not fulfil the criteria of a Place of Safety for the purposes of SAR conducted by vessels flying foreign flags.^[28]

As set out in our previous study, such blanket port closures are inconsistent with international law, including with World Health Organization (WHO) Regulations.^[29]

On 2 January 2023, the new Italian government issued a subsequent decree^[30] that makes the permission for entry of search and rescue vessels into Italian ports conditional upon a range of criteria that are partly also contained in Italy's Code of Conduct, which will be addressed below (section 4).

2. Obstruction by delay: stand-offs

Shipmasters who have rescued persons from distress at sea are under an obligation to disembark the rescued persons at a 'place of safety'.^[31] However, no state is under a specific obligation to provide such a place of safety by opening its ports to a rescue ship. This gap in the law of search and rescue – as well as the lack of any European guidance on this point – means that civil SAR vessels must negotiate access to a port of safety on a case-by-case basis with different coastal states.

Mediterranean EU Member States have often been intransigent in such situations, leaving rescue ships at sea in week-long stand-offs, thus delaying the assignment of a port of safety. The EU Fundamental Rights Agency (FRA) reported 19 such stand-offs in the first half of 2022, in which a total of 3,716 rescued people had to remain at sea for more than 24 hours before the national authorities allowed them to disembark; in 12 of these cases, the stand-offs lasted for more than a week.^[32] As Malta has been failing to meet its responsibility to secure effective rescues within its SAR zone,^[33] all of these cases concerned Italy. During Matteo Salvini's time in office as Italy's Minister of Interior, at least 25 stand-offs took place.^[34] In relation to such stand-offs, the former minister is facing several criminal charges for kidnapping; the Italian Senate has lifted Salvini's immunity for that purpose.^[35] The government led by Meloni has returned to this hard-line stance.^[36]

Denying rescue vessels port access causes security risks on board, especially since rescued persons are often in urgent need of intensive medical care, for which the vessels are not equipped. It can also cause high costs, especially for merchant vessels, which are diverted from their route and experience undue delays for their cargo. As a result, these stand-offs also have a deterring effect on merchant vessels, incentivising them to ignore distress calls or to avoid routes where they may have to render assistance. Long stand-offs thus make rescue activities much more dangerous. They are also not in keeping with the International Maritime Organisation's Guidelines on the Treatment of Persons Rescued at Sea, according to which: 'Governments and the responsible RCC should make every effort to minimize the time survivors remain aboard the assisting ship'^[37] and only cause delays that are the 'unavoidable' result of coordination.^[38] The guidelines also stress: 'A ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable.'^[39]

3. Obstruction under the guise of ship safety: port state controls

Generally, a flag state exercises exclusive jurisdiction over ships flying its flags; this includes the duty to 'take such measures for ships flying its flag as are necessary to ensure safety at sea'.^[40] However, when a ship accesses a coastal state's port, the port state has the right to inspect ships sailing under a foreign flag. This power has been used aggressively by Mediterranean port states to detain private search and rescue ships.

Legal framework

This inspection power is outlined in the 1982 Paris Memorandum of Understanding on Port State Control (PSC),^[41] and it is contained in the SOLAS Convention.^[42] The International Maritime Organisation (IMO) has passed Procedures for Port State Control^[43] and a code of good practice for port state control officers.^[44]

The EU Directive on Port State Control (Recast)^[45] governs the inspection powers of EU port states. While Article 3(4) of the Directive excludes from its scope, inter alia, government ships used for non-commercial purposes and pleasure yachts not engaged in trade, the Court of Justice has recently clarified that private SAR vessels do fall within the Directive's scope, despite their non-commercial activities, because the exceptions are to be regarded as exhaustive and interpreted strictly.^[46]

Under the Directive, the port state can periodically inspect ships entering its ports. The frequency of these inspections depends on the risk profile of the ship (low risk/standard risk/high risk).^[47] Standard-risk ships are regularly inspected every 10 to 12 months. Additional inspections can be triggered by 'unexpected factors'^[48] and must be carried out in case of 'overriding factors'.^[49] Depending on the category of inspection (periodic or additional), different types of inspection (initial, more detailed or expanded) can be conducted.^[50]

Deficiencies found during an inspection can constitute grounds for detaining the ship.^[51] Undue or delayed detentions must be compensated.^[52] The quantity of deficiencies found, and detentions ordered, upon ships sailing under its flag impacts the flag state's ranking in the classification from quality flags to high-risk flags (white, grey and black list).^[53]

In Germany, the relevant provisions are transposed in Section 12 of the Ship Safety Ordinance^[54] (*Schiffssicherheitsverordnung*, SchSV) and Section 138 of the Sea Labour Act^[55] (*Seearbeitsgesetz*, SeeArbG). In Italy, they are contained in Legislative Decree No. 53/2011,^[56] this law is relatively narrowly worded and only includes vessels used for commercial purposes.

Practice and obstacles to civil SAR activities

Ships belonging to NGOs that conduct civil search and rescue activities are frequently detained following Port State Controls by Italy. The EU Fundamental Rights Agency's June 2022 update reports 11 such detentions by Italy^[57]; in addition, the *Sea-Watch 3* was again detained in September 2022.^[58]

Among the most common deficiencies found in SAR vessels by port authorities are an excessive number of people on board, an excessive number of life jackets on board (which are not included in the certificates), an inadequate sewage system, environmental pollution and the lack of a registration as rescue ship. Since deviations from such rules can usually be justified by the duty to rescue at sea, not only the vessel owners but also the flag states regularly object to these allegations.

Between 2019 and 2021, out of the 17 German flagged ships that were detained,^[59] most were civil search and rescue ships. The comparatively high number stands in stark contrast to the overall performance of the German flag, which is ranked on the white list.

These practices have partly been found to be unlawful by the EU Court of Justice in the *Sea-Watch* case.

Limits on port state control: the Court of Justice on the Sea-Watch case

Following the detention of the *Sea-Watch 3* and the *Sea-Watch 4* in the summer of 2020, the NGO Sea-Watch initiated legal proceedings against the Italian port state inspection reports and detention measures. Seized with a preliminary question by the Regional Administrative Tribunal of Sicily (which had also suspended legal proceedings by Sea-Eye against two detentions of its former ship *Alan Kurdi*^[60]), the Court of Justice of the European Union (CJEU) delivered its ruling on the interpretation of the Port State Control Directive in August 2022.^[61] It not only clarified that private SAR vessels fall within the scope of the Directive, as already mentioned,^[62] but also contributed to more legal certainty regarding Port State Controls on private SAR vessels.^[63]

Both ships were flying the German flag and were registered in Germany as 'general cargo/multipurpose' ships, equipped with a Cargo Ship Safety Equipment Certificate (CSSE).^[64] Following rescue operations by the *SW3* and the *SW4* in the summer of 2020, the Italian Health Minister ordered both ships to anchor nearby for Covid-19 prevention measures, and then, following an inspection, due to technical and operational irregularities. The case concerned the claims by Italy that the ships were not 'certified to take on board and transport several hundred persons, as they did in the summer of 2020, or fitted with suitable technical equipment, in particular as regards the treatment of wastewater, showers and toilets'.^[65]

Finding no reference point for an 'overriding factor',^[66] the Court examined whether the number of persons on board a ship exceeding the maximum number provided for in its safety certificate can constitute an 'unexpected factor', in particular '[s]hips which have been operated in a manner posing a danger to persons, property or the environment'.^[67]

The Court clarified that this is not the case as such:

Having regard to the legal context of that provision, the systematic use of cargo ships for activities relating to the search for and rescue of persons in danger or distress at sea may not be regarded, solely on the ground that it results in those ships transporting persons in numbers which are out of all proportion to their capacity in that regard as derived from their classification and certification, and regardless of any other circumstance, as an unexpected factor [...], permitting the port State to undertake an additional inspection.^[68]

Such an interpretation, it added, would be incompatible with SOLAS and UNCLOS^[69] because it would 'hamper the effective implementation of the duty to render assistance at sea'^[70] and because persons on board by reason of *force majeure* or rescue obligations do not count for the purposes of SOLAS's safety requirements.^[71]

The Court emphasised that the Directive does not preclude the finding that ships which systematically carry out SAR activities *have been* operated in a manner posing a danger to persons, property or the environment. While Article 11(b) of the Directive, which assigns the decision on additional inspections to the professional judgment of the competent authority, confers a broad discretion,^[72] this discretion is not without limits:

However, the decision taken by that authority must nevertheless still be *reasoned* and, as to the substance, *justified both in law and in fact*. In order for this to be the case, that decision must be *based on serious indications* capable of establishing that there is a danger to health, safety, on-board working conditions or the environment, in view of the relevant provisions of international and EU law, having regard to the conditions under which the operation in question took place. [...] The *factors which may be taken into account* for the purposes of that verification include (i) the activities for which the ship in question is used in practice, (ii) any difference between those activities and the activities in respect of which the ship is certified and equipped, (iii) how frequently those activities are carried out and (iv) the equipment of that ship with regard to the expected (but also the actual) number of persons on board.^[73]

Italy had also criticized the discrepancy between the use of the ships for systematic SAR activities and their 'cargo ship' certificates. The Court emphasized the flag state's exclusive power to issue certificates and its primary obligation to ensure compliance with classification requirements, with the port state as a 'second line of defence'.^[74] Therefore, the port state cannot require that the ship obtain different certificates or that it comply with requirements applicable to a different classification.^[75]

The Court thus clarified that additional port state inspections on private SAR vessels may only take place 'if that State has established, on the basis of *detailed legal and factual evidence*, that there are *serious indications* capable of proving' that there is a relevant safety risk.^[76] In other words, in contrast to the current practice in Italy, the decision to conduct additional inspections must be based on a thorough assessment of the circumstances in the individual case. Therefore, the threshold for such inspections is high.

However, even when a *past* unsafe operation (and thus a reason for inspection) has been established, this does not in itself justify detention. Rather:

It is also necessary for that State to establish in a given case, first, that such a *danger or future risk is a clear hazard* and, second, that the deficiencies giving rise to that danger or risk, either individually or together, *make the ship concerned unseaworthy*.^[77]

The Court has thus rightly clarified that the Directive must be interpreted in line with UNCLOS and SOLAS. However, its focus on 'systematic' SAR activities finds no basis in these conventions. International law does not distinguish between coincidental or systematic rescue activities. While it is the right of the NGO ships to sail in the Mediterranean,^[78] it becomes their duty to rescue persons in distress once in their vicinity. Article 98(1) of UNCLOS only provides for a very narrow exception in cases of 'serious danger to the ship, the crew or the passengers'; this is because 'a master's first obligation is to the safety of his or her ship'.^[79] This means that the duty to rescue does not apply when saving lives would mean risking the lives of crew and passengers – a threshold that is certainly not reached in the situations at issue here. Lack of certification for the number of persons rescued and the inadequacy of toilets and showers is certainly not in itself a 'serious danger to [...] the crew or the passengers'.

In addition, there is no telling how many persons will have to be rescued in a hypothetical future distress scenario, so there is no clear standard that the ship would have to fulfil. This is part of the reason why international law explicitly exempts ships from regular safety standards upon life-saving rescues; the Court itself mentions Article IV(b) of the SOLAS Convention.^[80]

It is unfortunate that the Court missed the opportunity to stress the *bona fide* principle^[81] in a situation where Italy is rather obviously relying on technical safety issues to obstruct private search and rescue in order to avoid the disembarkation of rescued migrants on its territory. In addition, this reliance constitutes a *venire contra factum proprium*, in that Italy's Interior Minister Matteo Piantedosi argued, in November 2022, that a disembarkation in Italy was not necessary because those rescued were already safe on board the NGO ships, which, in his words, are 'fully functional and well equipped' and therefore 'pose no problems in terms of the safety of navigation'.^[82] This is to say nothing about the hypocrisy in protecting those in distress from purportedly unsafe conditions by not permitting their rescue (nor stepping up the state's own SAR services).

Continued practice in Italy

Only one month after the CJEU's judgment, the *Sea-Watch 3* was again detained in the Italian port of Reggio Calabria following an additional port state control.^[83] As of mid-January 2023, the ship remains blocked,^[84] while Sea-Watch has challenged the measure in court. The inspection report, in an apparent effort to circumvent the European ruling, linked the number of people rescued to stability concerns. Relying on Article V SOLAS,^[85] the Italian authorities thus once again disregarded the exception established by Article IV(b) of the same convention.

The compliance with the CJEU ruling remains questionable. It is already doubtful whether the high threshold of a danger to health, safety, on-board working conditions or the environment was met to justify the additional *inspection*. For the *detention* to be justified, the deficiencies must have been 'clearly hazardous to safety, health or the environment';^[86] in light of the continuous safety assessments during rescue operations,^[87] there is no indication

for such clear hazards. This suggests that the Italian state is not acting for the sake of the safety of rescued persons, but is misusing these arguments in order to prevent their rescue and to cause a 'chilling effect'^[88] on search and rescue activities.

4. Obstruction through restrictive codes of conduct

The 2017 voluntary Code of Conduct

In July 2017, with the support of the EU Commission,^[89] Italy drafted a Code of Conduct^[90] that NGOs providing SAR services were expected to sign in order to be able to operate in Italian ports and waters. Inter alia, the Code required that NGOs: refrain from entering Libyan territorial waters unless in exceptional circumstances and under previous authorization; not interfere with vessel satellite tracking devices or 'make communications or send light signals to facilitate the departure and embarkation of vessels carrying migrants'; demonstrate that the crew is trained and the vessel equipped to conduct SAR operations; always cooperate loyally with the Italian Maritime Rescue and Coordination Centre (MRCC) and follow its instructions concerning the place of disembarkation; declare their sources of financing; not transfer those on rescued vessels to other ships; and 'receive on board, upon request by Italian authorities, judicial police officers [...] conducting investigations related to migrant smuggling'.^[91]

While some NGOs signed the document, others refused,^[92] pointing to the fact that in parts it simply repeated international law, but partly implied unfounded accusations against the NGOs or sought to require them to follow instructions resulting in violations of international human rights law and the law of the sea.

For example, an unconditional requirement to loyally cooperate with the Italian MRCC and follow its instructions concerning the place of disembarkation clashes with law of the sea obligations when the MRCC orders disembarkation in Libya. As numerous accounts of the inhumane detention, rape, torture and killing of migrants prove, Libya is not a place of safety, because disembarkation there would violate the principle of non-refoulement, a cornerstone of international refugee and human rights law.^[93] As the UN High Commissioner for Refugees (UNHCR) has stressed, coastal states should 'refrain from giving directions or advice to vessels involved in rescue operations which they know or ought reasonably to know would have negative human-rights implications for those requiring assistance'^[94] and cannot require private rescuers to comply with illegal instructions.

The entry ban for Libyan territorial waters violates international law. While the right of innocent passage^[95] may be subjected to national laws and regulations, any restriction must be in line with international law and other obligations under the law of the sea.^[96] A general prohibition to enter a state's territorial waters would impede ships from rescuing people in distress and therefore not be in line with the obligation to rescue under the law of the sea.

The same is true for the ban on obstructing Libyan search and rescue missions. Firstly, according to UN reports, it is the so-called Libyan Coast Guard (LYCG) that violently

obstructs NGO rescue operations.^[97] Secondly, the LYCG regularly commits human rights violations during interceptions^[98] and disembarks migrants in Libya, in violation of the law of the sea. LYCG missions can therefore not be assumed to fulfil international rescue obligations, meaning that private vessels are not relieved from their own obligation to rescue. Overall, Libya's SAR system does not meet international standards.^[99] The SAR Convention requires the installation of an MRCC,^[100] but despite EUR 42 million of EU funding since 2017, the MRCC in Tripoli is not operational, and the whereabouts of the funding and equipment provided remain unclear.^[101] Several NGOs have therefore been calling for the revocation of Libya's SAR zone.^[102] Banning interference with Libyan rescue missions therefore perverts the understanding of effectiveness of search and rescue^[103] and legitimises the inhumane actions of the so-called Libyan Coast Guard.

Critics have also noted that the ban on transshipments – transferring rescued persons to a bigger ship, rather than bringing them ashore on whichever vessel first rescued them – not only delays rescue vessels going out to sea again, but also worsens the situation of the rescued persons, who are often in poor health after having spent several days on unseaworthy boats and have to remain on board overcrowded ships of first rescue.^[104]

A binding Code of Conduct: The January 2023 decree

In December 2022, the new Italian government announced that it will pass a new, binding Code of Conduct in January 2023, which will effectively distinguish between unanticipated rescues (to which Italy will be willing to assign a port) and systematic SAR operations that the Minister of Interior considers as favouring trafficking organisations.^[105] Violations will lead to administrative sanctions, including personal fines and the seizure of the ship. The Code will require that NGOs request safe harbour and bring rescues ashore immediately after each intervention. They may not remain in the SAR area searching for more migrant boats; transshipments from the ship of first rescue to another are forbidden. NGOs who ask for a place of safety after several days will not be permitted entry. NGOs that enter Italian waters anyway, for example, to shelter from bad weather, will be subject to sanctions for violating the Code.

On 2 January 2023, the Meloni government issued a new decree that integrates most of these requirements.^[106] In particular, the decree requires that: vessels conducting systematic SAR missions must be in compliance with their flag state's requirements and – in addition – must fulfil the necessary technical-nautical safety requirements; the vessel's staff must have informed the persons on board of the possibility to request international protection and collected any relevant data for the authorities; the vessel must have immediately requested the assignation of a port of disembarkation and travelled to the assigned port without delay; details on the mission must be provided to the SAR authorities; and the vessel's SAR arrangements must not have contributed to 'creating dangerous situations on board nor prevented the prompt arrival at the port of disembarkation'.^[107] Violations of such requirements and instructions are subject to sanctions up to EUR 50,000 (imposed on the shipmaster, jointly with the owner of the vessel) and a two-month detention of the vessel.

Civil rescue organisations have warned that this decree 'will reduce rescue capacities at sea and thereby make the central Mediterranean, one of the world's deadliest migration routes, even more dangerous.' They comment:

Among other rules, the Italian Government requires civilian rescue ships to immediately head to Italy after each rescue. This delays further lifesaving operations, as ships usually carry out multiple rescues over the course of several days. Instructing SAR NGOs to proceed immediately to a port, while other people are in distress at sea, contradicts the captain's obligation to render immediate assistance to people in distress, as enshrined in the UNCLOS.

This element of the decree is compounded by the Italian Government's recent policy to assign 'distant ports' more frequently, which can be up to four days of navigation from a ship's current location.

Both factors are designed to keep SAR vessels out of the rescue area for prolonged periods and reduce their ability to assist people in distress. NGOs are already overstretched due to the absence of a state-run SAR operation, and the decreased presence of rescue ships will inevitably result in more people tragically drowning at sea.^[108]

The requirement that private shipmasters and their staff collect information in international protection needs is also not in line with international law. While the SAR Convention requires that assistance to any person in distress at sea be provided 'regardless of the nationality or status of such a person or the circumstances in which that person is found',^[109] according to the IMO Guidelines '[a]ny operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s)'.^[110] UNHCR has recently affirmed that this is the duty of states, not of shipmasters, and that it should be performed 'on dry land';^[111] it rightly points out: 'It is the duty of states to initiate this process and a private vessel is not an appropriate place for this.'^[112]

The ban on transshipments is combined with routinely assigning vessels with rescued people on board to distant ports.^[113] This disregards the obligation under international law to identify 'the most appropriate place(s) for disembarking'^[114] and to reduce delays for assisting ships and survivors to an unavoidable minimum.^[115]

5. Obstruction through registration requirements

In Greece, NGOs are targeted even more aggressively. In 2020, a series of Joint Ministerial Decisions (JMDs)^[116] introduced a highly restrictive framework, obstructing the mere existence of NGOs working in the field of migration all over Greece. All NGOs working in this field are required to register in order to operate and have to get certified in order to be allowed to receive funding. This requires extensive documentation, such as certified financial reports, but also checks whether the NGO works 'efficiently'. This burdensome and costly process^[117] has forced many organisations to halt their operations. As a result, in

February 2022, Mare Liberum stated that there are currently no civil monitoring or rescue assets active in the Aegean Sea.^[118] Other non-profit organisations were unable to continue providing legal aid or humanitarian assistance pending lengthy administrative and judicial proceedings.^[119]

Key points of criticism concern: the excessive documentation requirements, which create a dissuading effect and disproportionately limit the freedom of NGOs, especially foreign ones; the vague wording in the grounds for refusal of registration, which creates legal uncertainty incompatible with the rule of law; and the lack of an effective remedy in case of refusal.^[120]

Upon her visit to Greece, the UN Special Rapporteur on the situation of human rights defenders, Mary Lawlor, found these restrictions to be in violation of Greece's human rights obligations.^[121] She also warned that the Greek migration policy was having a 'suffocating effect' on civil society in Greece.^[122]

A number of NGOs has challenged the JMDs in court. On 2 December 2022, the Council of State, sitting in a chamber of 25 judges, conducted a hearing in which the government representative argued that NGOs do not benefit from the human right to the freedom of association as enshrined in Article 11 of the European Convention on Human Rights (ECHR).^[123] This position is incompatible with Article 34 ECHR, according to which any 'non-governmental organisation' can rely on the Convention. A judgment is not expected before mid-2023.

6. Obstruction through criminalisation

NGOs providing search and rescue services at sea also face severe criminal charges in European Member States. Accusations include: smuggling of migrants; aiding and abetting illegal immigration; formation of a criminal association; and refusal of obedience to orders of maritime authorities. Since 2016, Germany, Greece, Italy, Malta, the Netherlands and Spain have together initiated 60 administrative or criminal proceedings against search and rescue NGOs and their members.^[124] This number doesn't reflect the numerous criminal proceedings against rescued people for (self-)smuggling.^[125]

The Italian case of *Sea-Watch 3* captain Carola Rackete is a well-known example. After a stand-off near the island of Lampedusa, having been denied entry under the 'Salvini decree',^[126] Captain Rackete entered port without permission, citing health emergencies on board. She was arrested upon arrival. The prosecutor of Agrigento (Sicily) started an investigation for resistance or violence against warships and aiding illegal immigration, and placed her under house arrest. She was released when the preliminary investigation judge declined to validate the house arrest. The *Corte di cassazione* upheld the judge's decision on appeal, relying on the argument that the international obligation to rescue includes the right to disembark those rescued. The Tribunal of Agrigento finally dismissed the charges on 20 December 2021.^[127]

In the case of the *Juventa*, owned by the German NGO Jugend Rettet and seized in August 2017, the prosecutor of Trapani (Sicily) started investigations against 21 individual (former)

crew members, in July 2018, for aiding and abetting illegal immigration. The preliminary hearings started in May 2022. In December 2022, the Tribunal of Trapani finally authorised international observers to monitor the trial and ordered the restoration and maintenance of the ship, which has decayed significantly since being seized over five years ago.^[128] The new Italian government intends to intervene in the trial as plaintiff to recover damages from the crew, both for the reputational harm suffered and the cost incurred for those rescued.^[129]

The *Vos Hestia*, chartered by Save the Children in 2016, was searched in October 2017 after an undercover agent working as security on board had told the police the NGO was collaborating with smugglers; he now asserts that his charges were fabricated at the behest of the government.^[130] In March 2021, the Prosecutor's Office in Trapani issued a notice of completion of investigation without pressing any charges. As of October 2022, the case is still pending.^[131]

In the case of the *Vos Prudence*, operated until 2017 by the NGO Médecins Sans Frontières (MSF), seven persons were charged by the Criminal Court of Catania in March 2021. The trial hearings began in June 2022. Parallel hearings also began in the case of the *Aquarius*, operated by SOS Méditerranée, in which crew members were investigated by the prosecutor of Catania for operations conducted between January 2017 and May 2018.^[132]

The criminalisation of SAR activities has also become a common practice in Greece. An early case concerns the founder of the non-profit organisation Team Humanity, Salam Kamal-Aldeen. In 2016, he and fellow volunteers were arrested by the Hellenic Coast Guard during a rescue operation. Their ship was confiscated, and they were detained and left without any information on their rights and without an interpreter. Mr. Kamal-Aldeen was convicted of 'illegal transport from abroad to Greece of third country nationals, who do not have a right to enter the Greek territory' and of 'illegally carrying a weapon' (a small knife that was part of the rescue equipment).^[133] Despite the fact that no evidence supported the accusations, the judge decided that Mr. Kamal-Aldeen used the 'rescue as pretext' for criminal actions.^[134]

The most recent case concerns 24 activists involved in rescue missions for the Emergency Response Centre International (ERCI), amongst them the Syrian swimmer Sarah Mardini and the Irish humanitarian worker Séan Binder. A study for the European Parliament's LIBE committee^[135] calls the trial the largest case of criminalisation of solidarity in Europe.^[136] The accusations against the activists include espionage, assisting smuggling networks, membership of a criminal organisation and money laundering.^[137] Several of the accused were placed in pre-trial detention, and Sarah Mardini was kept in a high security prison for several months.^[138] In January 2023, a Greek court dropped the charges concerning the alleged espionage, acknowledging procedural flaws, but the proceedings on the alleged facilitation of human trafficking and money laundering are still pending.^[139]

Charges against SAR activists are based on the Greek Migration Code,^[140] which, in Article 29, criminalises the facilitation of irregular entry and transit of third-country nationals, but does not define what constitutes facilitation.^[141] This means that the provision of

humanitarian search and rescue services may be criminalised. During her visit to Greece, the UN Special Rapporteur on the situation of human rights defenders, observed that efforts to curb people smuggling and trafficking had come 'at a great expense to human rights defenders, who have seen prosecutions and criminal proceedings initiated against them in some cases merely for providing water or food for people landing on shores of Greece, or for carrying out search and rescue operations.' She was concerned that this 'generates fear among human rights defenders and leads to self-censorship and withdrawal from certain activities'. Furthermore, she observed that: 'In order not to be wrongly pursued or painted as complicit in illegal activities, many of them have scaled back their operations'.^[142] Migrants themselves are also targeted with criminal prosecution for 'self-smuggling'.^[143]

This criminalisation trend also increasingly targets journalists and other civil society actors. In November 2021, the Greek parliament adopted Article 191 of the Criminal Code, whose aim is to combat fake news, but which combines high sanctions (three months to five years of prison) with vague definitions. The Greek authorities are increasingly using this new crime to threaten and arrest journalists reporting on asylum and migration issues. In August 2022, Giorgos Christides, a journalist working for the German weekly magazine *Der Spiegel*, was threatened with legal action by the Greek Ministry of Migration and Asylum for his investigations on the death of a 9-year-old girl after she and 38 others had been pushed back by the Greek authorities.^[144] These threats and the current wiretapping scandal affecting journalists heavily restrict the freedom of the press, ranking Greece number 108 out of 180 countries on the 2022 World Press Freedom Index, the last country in Europe.^[145]

In summary, NGOs involved in SAR missions are increasingly criminalised by Member State governments.^[146] The threat of criminal prosecution not only has a chilling effect on involvement in non-profit humanitarian aid at external borders, but also restricts the ability to conduct rescue operations, a legal obligation under the law of the sea. The targeting of journalists also threatens European civil society more generally.^[147]

7. Obstruction through excessive flag state registration requirements

SAR vessels are subject to the national maritime safety laws of their flag state. Over the past years, flag states have used their registration regulations to make it harder for SAR vessels to be registered in categories with lower safety standards. Operated non-commercially and by volunteers, the smaller ones among these vessels are often registered as pleasure crafts or leisure yachts (the terminology varies) or small non-commercial vessels. Subjecting them, instead, to the full range of safety standards that apply to commercially operated cargo ships would be financially ruinous or require modifications that are simply unfeasible. Importantly, however, such higher standards may conflict with harmonised EU standards.

The Netherlands: idealism is not pleasure

In February 2019, the *Sea-Watch 3* – then sailing under Dutch flag – was blocked from leaving the port of Catania, Italy, due to additional inspections in which, remarkably, the

Dutch authorities participated, despite the fact that they had already cleared the *Sea-Watch 3* in her five-yearly flag state inspection some six months prior.^[148] Two months later, in April 2019, the Dutch Ministry of Infrastructure and Water Management issued new safety regulations for ships belonging to ‘organizations with idealistic objectives’, preventing them from being registered as pleasure crafts.^[149] Documents released under the Dutch Freedom of Information Act reveal that the amendments were not motivated by safety concerns; the files do not mention any specific safety risks or incidents, nor a risk analysis. Furthermore, they were led by the Ministries for Justice and Security and for Foreign Affairs, whereas the Transport Inspectorate – the competent authority for ship safety and registration – was only involved at a late stage.^[150]

The new regulations applied to the *Sea-Watch 3* immediately; *Sea-Watch* managed to obtain a court-ordered transitional period until 31 December 2019.^[151] On 5 December 2019, the NGO announced that the *Sea-Watch 3* was now flying the German flag.^[152]

Germany: disproportionate safety standards through restrictive definitions

In German law, the relevant safety standards are contained in the Ship Safety Ordinance (SchSV). Under that ordinance, any vessel flying the German flag requires a safety certificate^[153] verifying its conformity with the ordinance’s safety standards. Ships with a gross tonnage (GT) of over 500 are covered by Section 5 and Annex 1 of the SchSV; this applies, for example, to the *Sea-Watch 3* (GT 640) and the *Humanity 1*, formerly *Sea-Watch 4* (GT 1,100). Smaller ships, covered by section 6 of the SchSV, apply the Annex 1a standards.

Exemptions apply to leisure yachts (*Sportboote*^[154]) and small vessels (*Kleinfahrzeuge*).^[155] Several smaller SAR vessels operating in the Mediterranean, such as the *Rise Above*, the *Aurora* and the *Nadir*, rely on these exemptions; conforming to the safety standards for commercial ships would require costly modifications that are deemed infeasible by the respective NGOs, and in some cases are de facto impossible.

Over recent years, Germany has made moves to restrict these exceptions for SAR vessels. In 2019, the German authorities prohibited the *Mare Liberum* – just over 20 metres long and weighing 120 tonnes – from leaving port in the Eastern Aegean, citing insufficient safety certificates because the vessel was used neither for sport nor for leisure purposes. At the time, leisure yachts were defined as ‘watercrafts [...] that have been built for and are used for sport and leisure purposes’,^[156] whereas small vessels were exempt when used ‘non-commercially for sport and leisure purposes’. The courts affirmed that the vessel fulfilled these exemption categories, as ‘leisure’ had to be read in distinction to ‘professional’ purposes and the crew consisted of volunteers.^[157]

In response, the ministry amended the exception clause and the definition of leisure yachts, by restricting them to ‘exclusively sport or recreational purposes’.^[158] Internal documents reveal that the purpose of these changes was to make the safety standards mandatory for SAR ships specifically, in order to keep these vessels off the waters.^[159] Citing these new

standards, the *Mare Liberum*, as well as the *Sebastian K*, were ordered to stay in port. The administrative court of Hamburg declined to apply these changes, ruling them incompatible with EU law because the European Commission had not been notified prior to the amendments.^[160] The amendments remain in place, however, but are not being applied pending examination.^[161]

In 2023, another initiative to amend the Ship Safety Ordinance is aiming to revive the restricted conception of small vessels.^[162] Despite the assertion of the federal government to include the perspective of civil SAR initiatives in the legislative process, an exclusion for SAR vessels operating in the Mediterranean from the resulting requirements is not envisaged. The federal government asserts that the increased safety standards target regular cargo ships and are not meant to hamper SAR activities, but the current draft would cause heavy financial burdens on SAR NGOs and thereby severely impede their SAR activities.^[163] NGOs also point out that the proposed amendments would not actually increase safety on board, because they are not designed for SAR vessels and would partly even undercut existing safety standards of such vessels.^[164] The fact that safety standards for cargo ships do not fit SAR vessels is also reflected in current law, which exempts the vessels of the German Maritime Search and Rescue Service (*Deutsche Gesellschaft zur Rettung Schiffbrüchiger*, DGzRS), which conduct rescue operations on behalf of the federal government.^[165] The German Ministry for Digital and Transport (*Bundesministerium für Digitales und Verkehr*, BMDV) points to the fact that DGzRS vessels are specifically designed for their rescue purpose, whereas accident surveys of work boats, water taxis and fishing boats had revealed shortcomings and vulnerabilities that are also 'imaginable' for SAR vessels.^[166] As pointed out above, however, there is no actual evidence of any accidents nor of dangerous shortcomings with SAR vessels in operation under the current safety standards.

Incompatibility with EU standards for recreational crafts

Lack of notification aside, parts of the German amendments are also incompatible with the EU Recreational Craft Directive (2013/53). According to Article 6(1) of the Directive, the Member States shall not impede the putting into service of watercrafts complying with the Directive. According to Article 5, this includes subjecting watercrafts to higher safety standards than those set out in the Directive itself (contained in Annex 1), provided that compliance with the higher standards requires modifications to the watercrafts. Since the requirements of the Ship Safety Ordinance go far beyond the Directive's safety standards and would require modifications, the ordinance's exemptions must cover all 'recreational crafts' in the sense of the Directive. However, the amendments are specifically designed to be more restrictive.

The Directive defines 'recreational crafts' as 'any watercraft of any type [...] intended for sports and leisure purposes of hull length from 2.5 m to 24 m'.^[167] This is incompatible with the amendment of the German ordinance replacing the term 'sport and leisure purposes' with 'exclusive sport or recreational purposes'. German law cannot narrow the intended purposes of a 'recreational craft' in ways that the Directive does not provide for. Therefore,

narrow definitions of either the term 'recreational craft' itself, or the respective purposes such crafts may be used for, do not dispense of the legal obligations under Article 6(1) of Directive 2013/53.

In addition, the German ordinance requires that leisure yachts be both 'built for and [...] used for' such purposes, creating difficulties for former cargo vessels repurposed as SAR vessels. The German authorities have already relied on this point when informing SAR NGOs about the new regulations in April 2020, specifically stressing the fact that the original purpose a vessel was built for cannot be changed by subsequent modifications.^[168] This distinction between the purpose a vessel *is built for* and the one it *is used for* has no basis in Directive 2013/53. Article 3(2) of the Directive only requires that the watercraft is (presently) 'intended for sports and leisure purposes', meaning that the purpose of a vessel can change over time.

Therefore, vessels that fall outside the scope of Section 2(1) of the SeeSpbootV following the recent changes to the definition – or expected future changes – are nevertheless to be classified as 'recreational crafts' under Directive 2013/53. Accordingly, raising the safety requirements for these vessels is only permitted within the limits of Article 5 of the Directive, meaning only if such provisions do not require modifications to the watercraft and provided that the provisions are 'justified and proportionate'.^[169] As modifications will usually be necessary, these conditions are not fulfilled.

In any case, subjecting SAR vessels to more stringent, commercial safety standards is not 'justified and proportionate', as substantive reasons for doing so are not in evidence. In the over seven years that SAR NGOs have been operating in the Mediterranean, not a single safety incident has been reported that led to bodily injury.^[170]

II. How Germany can support civil search and rescue

Germany has a whole range of avenues for supporting civil search and rescue at the national level and at the EU level, both by soft measures, such as advocating and funding, as well as through legislative action. The following sections lay out the measures that the German government could implement as a flag state, through continuous funding (see II.1.) and best practices, namely in the area of registration (see II.2.), and at the EU level, in particular through increasing coordination and cooperation among Member States (see II.3.), participating actively in solidarity schemes (see II.4.), preventing SAR criminalisation (see II.5.) and ending the endorsement of Libyan human rights violations (see II.6.).

1. Establishing continuous funding of civil search and rescue activities

Since civil search and rescue missions started in 2014, Germany is the first national government to provide funding to such missions. The German government aims to fund United4Rescue with an annual EUR 2 million until 2026, starting in 2023.^[171] However, as of May 2023, no further information exists when and under which premises the funding will be disbursed. United4Rescue is a broad alliance of 860 partners, ranging from church organisations to NGOs and businesses. It provides financial support to several civil society organisations conducting search and rescue activities and supported the purchase of the *Sea-Eye 4*, the *Sea-Watch 5* and the *Humanity 1*.^[172]

This vital funding should be continued in the future, to also serve as a sign to other EU Member States that the German government stands with humanitarian rescue missions. Standing with humanitarian rescue missions is one vital step towards developing a forward-looking migration policy that is grounded in humanitarian and international law obligations, as anticipated in the German government's coalition agreement.^[173] The funding should not be used to counter further calls for support for SAR activities or justify costly obstacles imposed on SAR NGOs through overly restrictive safety standards.^[174]

2. Being a reliable and supportive flag state

As a flag state, Germany determines the conditions for registering ships under the German flag, and it exercises jurisdiction over ships flying the German flag, also in relation to coastal states who conduct port state controls.^[175] In these respects, Germany should strive to serve as a best practice model for other flag states, in particular by implementing the following recommendations.

Firstly, Germany should revoke the March 2020 amendments to its Ship Safety Ordinance and refrain from further changing these laws to the disadvantage of SAR vessels. Instead, due to the importance of the humanitarian work they are used for, SAR vessels should

receive privileged treatment in maritime safety law by being exempt from safety standards designed for commercial ships. Such an exception is already provided for the vessels of the German Maritime Search and Rescue Service (DGzRS). Extending this exception clause to private SAR vessels would be a natural opportunity to support civil search and rescue under German law.

Secondly, in cases where SAR ships flying the German flag are detained at foreign ports, the German government should cooperate with the port states in such a way that NGO vessels are protected from arbitrary detention in line with the CJEU judgment outlined above.^[176]

3. Increasing coordination and cooperation in relation to civil search and rescue

At the EU level, as part of the New Pact on Migration and Asylum, the European Commission is calling for enhanced coordination and cooperation between the Member States and private rescuers.^[177] In the negotiations over the Pact, Germany should ensure that this framework does not unduly impede effective search and rescue efforts, and it should seek to lead by example in its own practice.

The 2020 European Commission Recommendation

The European Commission's Recommendation on cooperation among Member States concerning private search and rescue activities,^[178] introduced in September 2020 with the New Pact, is a strange mix of encouraging effective private search and rescue and using a restrictive language of 'concern' in relation to NGOs.

The European Commission begins by stressing the EU's and Member States' obligations under international law to rescue people in distress,^[179] and by acknowledging the increased deaths at sea, Parliament's call for greater SAR capacities and the need to avoid criminalisation of private SAR missions.^[180] It highlights that SAR operations shall respect fundamental rights, including the principle of non-refoulement and the requirement of disembarking in a place of safety.^[181] It therefore recommends that 'Member States should cooperate with each other' in relation to private rescue operations 'with a view to reducing fatalities at sea, maintaining safety of navigation and ensuring effective migration management in compliance with relevant legal obligations.'^[182]

At the same time, the European Commission considers it 'a matter of public policy, including safety, that these [private] vessels be suitably registered and properly equipped to meet the relevant safety and health requirements associated with this activity, so as not to pose a danger to the crew or the persons rescued.'^[183] It references Italy's Code of Conduct,^[184] despite its repressive use (see Part I, Section 4.). And it calls for a framework for cooperation with private rescuers that aims to 'provide appropriate information as regards the operations and the administrative structure of these entities, in line with the principle of proportionality and the EU Charter of fundamental rights, and enhance safety, in compliance with the applicable international legislation in the interests of all those on board'.^[185]

It also recommends that 'flag and coastal Member States should exchange information, on a regular and timely basis, on the vessels involved in particular rescue operations and the entities that operate or own them'^[186] – in light of the policies outlined above (see Part I, Sections 5 and 6), a worrying approach.

2022 EU Action Plan for the Central Mediterranean

The European Commission's EU Action Plan for the Central Mediterranean,^[187] released in November 2022 in reaction to the 'immediate and ongoing challenges' there, also calls for enhanced Member State cooperation, including between Member States and vessels owned or operated by private entities.^[188] In addition, it proposes a dialogue on regional approaches to search and rescue, 'based on solidarity, international cooperation, and partnership' and in cooperation with UNHCR and IOM.^[189]

The European Commission also proposes to promote discussions in the IMO 'on the need for a specific framework and guidelines for vessels having a particular focus on search and rescue activities, particularly in view of developments in the European context.'^[190] European Commissioner Ylva Johansson maintained that the maritime law has not been designed for private rescue missions and that therefore common rules on NGOs SAR vessels are necessary.^[191]

Scope for action

The 2020 Recommendation proposes a coordinated framework on registration and equipment requirements for private SAR vessels. As seen above (Part I, Section 7), the core of a common framework on registration and safety obligations for SAR missions should be the safety of persons in need, and it should not lead to excessive administrative burdens which impede SAR missions. In addition, contrary to European Commissioner Johansson's implications, there is no evidence or reported incidents which give rise to increased safety obligations for civil SAR vessels.^[192]

Taking up the European Commission's call for cooperation, the German government should therefore, **firstly**, set a best practice example and refrain from implementing disproportionate requirements on the national level (see Section 2 above).

Secondly, the German government should advocate for a European framework with a clear focus on human rights and the rescue of persons in distress. This framework should also include secure and effective monitoring mechanisms for rescue operations that are based on a human rights-based approach.

Thirdly, Germany should instruct all of its state vessels to fully comply with the duty to render assistance to people in distress at sea, supporting and cooperating with private rescue ships if they are in proximity, and ensure that the rescues are carried out in full compliance with international law, instead of refraining from action, as has been observed in the past.^[193]

4. Participating effectively in solidarity and relocation systems

Additionally, at the EU level, the European Commission's calls for cooperation also concern the need for solidarity among the Member States.^[194] The unwillingness of coastal states to permit the disembarkation of rescued migrants has a lot to do with the long-problematized fact that the Common European Asylum System places a disproportionate burden on the Member State of first arrival, which is responsible for conducting the asylum procedure (Dublin Regulation, Asylum Procedure Regulation), housing applicants during the procedure (Reception Conditions Directive) and granting them status rights (Qualification Directive) until they acquire freedom of movement after five years (Long-Term Residents Directive), or returning them (Return Directive). Despite the fact that Article 80 of the TFEU refers to the principle of solidarity, calls from the southern EU Member States for such solidarity go mostly unheeded.

Member States who are not Mediterranean port states themselves, including Germany, can therefore significantly improve conditions for civil search and rescue by offering to receive rescued migrants. Germany should therefore continue to offer relocation spots for applicants in Member States bearing a disproportionate amount of responsibility for protection, and significantly increase the number of spots offered.

Cities of refuge stepping up

Given the slow response from Member State governments to calls for solidarity, cities around Europe have declared themselves willing to receive protection seekers over and above their regular share. For example, Solidarity Cities is an initiative by the mayor of Athens in the framework of the Eurocities network.^[195]

In Germany, the Seebrücke ('sea bridge') and Sichere Häfen ('safe ports') movement has mobilised over 130 cities and municipalities to advocate for the reception of rescued persons. Over 800 organisations support this movement and addressed Chancellor Merkel in an open letter in April 2019, while 210 Members of Parliament from five parties endorsed the demands of the movement in an 'Easter appeal'.^[196] Additionally, a network of different civil society organisations and the Berlin governance platform collected the demands of migrant-receiving municipalities and developed ideas and strategies regarding how to implement municipality-focused relocation mechanisms.^[197]

Since the admission of third-country nationals is considered the power of the national government, however, German cities need the support from the German government in order to relieve pressure on southern EU Member States and to offer rescued persons a safe environment for protection and integration.

Under its prior conservative leadership, the German Ministry of Interior has thwarted the initiative by the state of Berlin to receive 300 particularly vulnerable persons from the former Greek camp of Moria, as well as a similar initiative by the state of Thuringia, by denying its consent under Section 23 of the Residence Act.^[198] The new coalition government could easily change this policy.

Solidarity in the New Pact

While the cities of rescue offer relocation spots on a voluntary basis and ‘on top’ of existing Member State commitments, the European Commission’s proposal for an Asylum and Migration Management Regulation (AMMR)^[199] contains a permanent solidarity mechanism that also applies to disembarkations following search and rescue.

This mechanism would apply when the European Commission determines, in a detailed assessment of the developments over the past six months, that a Member State is under ‘migratory pressure’. Migratory pressure is defined as a situation of migrants arriving in large numbers, including following search and rescue operations, such that this places a burden even on well-prepared Member States and requires immediate action.^[200] The measures needed to respond to SAR disembarkations are projected by the European Commission in its Migration Management Report,^[201] and the Member States submit SAR Response Plans, thus creating a ‘solidarity pool’.^[202] All Member States must contribute according to a key calculated on the basis of their GDP and population, but they can choose the form of their contribution: relocation, return sponsorships or other measures, as long as there is no significant shortfall in relocation offers.^[203]

As has been noted elsewhere,^[204] introducing such a mechanism would be a significant step forward, given the impracticability of the current ad-hoc system of ship-by-ship negotiations, which often leaves survivors rescued at sea in limbo for weeks. But the greater question is whether it will really work – or, rather, whether it will even pass.^[205]

Ad hoc solidarity

Given the deadlock over the New Pact, Member States have continued to rely on ad-hoc mechanisms. In June 2022, the French EU presidency brought together 21 Member States for an ad hoc Solidarity Declaration.^[206] This was followed by a Solidarity Platform meeting, where Member States pledged relocation places for disembarked migrants.^[207]

In contrast to the proposed AMMR mechanism, this instrument is explicitly non-binding, meaning there is no democratic oversight, no judicial control and no enforcement by the European Commission.^[208] There is also no clear procedure for assessing ‘disproportionate pressure’.^[209] The broad wording allows for different modes and levels of contribution, and lets Member States preselect based on political preferences who is to be relocated (‘persons in need of international protection’ or only ‘most vulnerable ones’), whereas there are no standardised procedures for vulnerability assessment.^[210]

Nonetheless, 13 member states have pledged a total of 8,000 places.^[211] However, as of November 2022, only 117 asylum seekers had been relocated.^[212]

Scope for action

Firstly, it is commendable that Germany has proposed to relocate a total of 3,500 people from southern EU Member States under the 2022 ad hoc Solidarity Declaration.^[213] Given

the low numbers of relocations so far, however, Germany should step up its implementation efforts. In addition, it should continue to pledge reception places. While Germany has received many protection seekers in the past, and has recently received many Ukrainians fleeing the Russian war of aggression, it is important for it to lead by example in order to also motivate other Member States to continue pledging. Germany should therefore significantly increase this absolute number or commit to receiving a minimum percentage of those rescued.

Secondly, going forward, the German government should also advocate for a solidarity mechanism that is human rights based. In its judgment on the 2015 mandatory emergency relocation mechanism, the EU Court of Justice not only acknowledged that solidarity among Member States must be based on equality and fair sharing,^[214] it also stressed that any relocation mechanism must comply with the fundamental rights of relocated applicants.^[215] Such a framework must therefore guarantee fast relocation, accountability for human rights violations and legal certainty both for the rescued persons and for the port states disembarking them. With a view to the New Pact, Germany should thus advocate for a binding solidarity mechanism that is democratically accountable, enforceable and subject to judicial control, and that relies on these criteria.

Thirdly, Germany should make room for cities and federal states willing to take on additional protection responsibility, thereby incorporating the knowledge and ideas already developed by civil society networks (e.g. in the form of matching networks). The federal Ministry of Interior should revise its restrictive policy and grant consent to such initiatives under Section 23 of the Residence Act wherever possible. The government should also initiate a legislative reform of Section 23 to remove this approval power, or at least make its exercise subject to narrow conditions.

5. Preventing criminalisation of civil search and rescue activities

In light of the criminalisation practice of several Member States (see Part I, Section 6), Germany should advocate for a reform of the EU Facilitation Directive that clearly exempts humanitarian assistance from criminalisation, take a clear stance against Member States criminalising humanitarian assistance and set a best practice example by implementing the humanitarian exception in the Facilitation Directive in a comprehensive manner.

Problems with the Facilitation Package

Penalties for facilitating unauthorised entry, transit and residence in the EU are governed by Directive 2002/90/EC (Facilitation Directive)^[216] and a Council Framework Decision.^[217] Since the very beginning, this 'Facilitation Package' has been heavily criticised by legal scholars and NGOs for its broad definition of 'smuggling'.^[218] In contrast to UN standards,^[219] this definition does not require 'financial or other material benefit'.^[220] As of 2020, only four Member States, – Germany, Ireland, Luxembourg and Portugal – include the link to financial gains in their legislation.^[221] This broad definition leaves Member States a wide margin of appreciation on which conduct is to be criminalised as a form of

'smuggling'. In recent years, this has facilitated the increasing criminalisation of NGOs performing search and rescue operations.^[222]

While the Directive contains a 'humanitarian assistance' exception clause, this clause is both optional and vague.^[223] Member States 'may' decide to refrain from sanctions in cases where the facilitation of unauthorised entry was part of providing humanitarian assistance, leaving the criminalisation of such assistance up to the Member States themselves. Additionally, 'humanitarian assistance' is not defined, giving the Member States further leeway. Such 'discretionary' or 'optional' clauses raise questions over the principle of legality of offences under Article 49 of the Charter of Fundamental Rights (CFR),^[224] which requires that the EU legislator provide a clear definition of the criminal conduct and determine the interest(s) protected by the offence.^[225]

New Pact: no 'new start' for the Facilitation Package

Despite the continued criticism of, and reports on, criminalised NGOs,^[226] as well as the European Commission's own acknowledgement of the possible deterrent effects on rescue operations,^[227] the European Commission concluded, in 2017, that 'the Facilitators Package should be maintained in its present form'^[228] and has not proposed any substantial reforms in the EU Pact on Migration.

Instead, the European Commission published a Guidance on the implementation of the Directive that aims at clarifying the scope of application.^[229] Herein, the European Commission acknowledges that humanitarian assistance of NGOs has been increasingly criminalised^[230] and calls upon the Member States to fully comply with their international obligations under UNCLOS, SOLAS and SAR, and to refrain from the criminalisation of humanitarian assistance, including SAR operations of NGOs. However, the European Commission retains the broad definition of 'smuggling', justifying the derogation from the UN standards with the overall goal of fighting irregular migration, and suggests a case-by-case approach to 'humanitarian assistance', where all relevant circumstances should be considered. The fact that it only *invites* Member States to implement the humanitarian exception clause does not remedy the concerns over legal certainty.

The European Commission only explicitly condemns the criminalisation of such forms of humanitarian assistance that are *mandated* by law. This is helpful for search and rescue operations, which are indeed mandated by international obligations. The restrictiveness is nonetheless alarming, in that other forms of humanitarian assistance, such as providing food, shelter or coordination and monitoring activities of NGOs, are not grounded in international law.^[231] Through this continued vagueness in the definition of 'smuggling' and 'humanitarian assistance', the possibility of Member States criminalising NGOs under the framework of 'smuggling' persists.

This narrow and non-binding Guidance on the implementation of the Facilitation Directive has no bite. While it aims to support search and rescue NGOs, it does not effectively protect them from being criminalised.

Scope for action

This means that the current legal framework on the facilitation of unauthorised entry, transit and residence continues to set the path for the criminalisation of NGOs involved in search and rescue operations. The European Commission plans to report on the implementation of the Facilitators Package, including the 2020 Guidance in 2023, and, if necessary, propose revising the legal framework.^[232] In this context, the German government should, **firstly**, push for a reform of the Facilitation Directive that provides legal certainty and clearly distinguishes between ‘smuggling’ and ‘humanitarian assistance’.

Secondly, the German government should take a clear stance against Member State policies currently criminalising NGOs, and point out that these policies threaten democratic freedoms and undermine the rule of law.

Thirdly, in conformity with the European Commission’s proposal on an effective exchange, and of knowledge and good practice,^[233] the German government should set a best practice example on how the humanitarian exception clause can be comprehensively implemented in national law. So far, no explicit exception for humanitarian assistance has been included in Section 96 of the German Residence Act (*Aufenthaltsgesetz*, AufenthG). This provision penalises the facilitation of unauthorised entry if: (a) material benefits have been promised or obtained, or (b) this was done repeatedly or for more than one person.^[234] The fact that the second option is not tied to financial or other benefits leaves the possibility of targeting NGOs for providing humanitarian assistance.

Implementing the humanitarian exception clause is therefore a first step toward protecting civil rescue missions. The implementation should further be designed to not only protect missions mandated by international law but to cover a variety of humanitarian assistance. Since Germany is not confronted with irregular entries by sea but rather at land borders, it is all the more necessary to guarantee that the provision of food and shelter is also covered by the humanitarian exception. This would protect civil society initiatives currently operating at Germany’s borders and set a best practice example for other EU Member States.

6. Ending the endorsement of Libyan “rescue” activities

Some of the restrictive measures on NGOs adopted at the European level, or by other Member States, are designed to enforce cooperation with the so-called Libyan Coast Guard.

As outlined above (Part I, Section 4), cooperating with the LYCG in rescue missions can amount to complicity in severe human rights violations and is not compatible with the law of the sea requirements for search and rescue, in particular with the requirement of disembarking rescued persons in a place of safety: Libya is not a place of safety.^[235] Several NGOs called upon the International Criminal Court to start investigations on the alleged crimes against humanity committed by the LYCG.^[236] In September 2022, the ICC’s prosecutor Karim A. A. Khan QC stated that the preliminary assessment of his office confirms that the incidents raised may indeed constitute crimes against humanity.^[237]

Germany should therefore use all avenues to push back against efforts to compel civil rescuers to cooperate with the LYCG.

Strict conditionality of all cooperation with Libya

Additionally, the EU should refrain from any cooperation with the LYCG. This involves revisions of EU policies which fund the activities of the LYCG, and the European Commission's endorsement of Italy's Code of Conduct (see above: Part I, section 4).

One main financial source for the LYCG is the European Union Trust Fund for Africa (EUTF).^[238] The sub-project 'Support to Integrated Border Management and Migration Management in Libya' (SIBMMIL) aims to support Libya in controlling its borders and saving lives at sea. Actions include training the LYCG and setting up a national MRCC, both coordinated by Italy. Despite five years of funding with EUR 42 million spent by the EUTF, as of November 2022, the Libyan MRCC continues to be non-operational.^[239] This raises questions on where the money went, but an Italian journalist's freedom of information request was denied; she has appealed.^[240]

Germany is the largest contributor to the European Union Trust Fund for Africa, with a total of EUR 316 million between 2016 and 2021; in addition, the German Corporation for International Cooperation (GIZ) is one of the implementing organisations for the SIBMMIL project.^[241] The German government should therefore step up to its role as the biggest funder and call upon the other contributing Member States and the EU Council to undertake the following.

Firstly, refrain from supporting the so-called Libyan Coast Guard in any European Union Trust Fund project.

Secondly, set up effective monitoring mechanisms for projects implemented under the European Union Trust Fund, to ensure: a) that the money is spent in the intended manner, and b) that human rights and the obligation to rescue are complied with.

Thirdly, Germany should generally push for a strict approach on the relationship with Libya in the EU Council. Any bilateral or EU cooperation with Libya in the field of migration management should be made conditional on the prior establishment that Libyan authorities are consistently complying with international human rights and the law of the sea, in particular by bringing rescued persons to an actual place of safety. As long as this is not the case, Libya must not be put in charge of protecting migrants. Additionally, monitoring measures should be introduced to guarantee the effectiveness of human rights and to guarantee transparency.

Fourthly, Germany should push against any EU endorsement of Codes of Conduct or decrees that seek to compel private rescuers to cooperate with the LYCG or to disembark rescued persons in Libya, until conditions there have changed.

Revising EUNAVOR MED IRINI

EU military operation EUNAVOR MED IRINI was introduced in 2020 to enforce the UN arms embargo on Libya,^[242] but also has a mandate to gather information on human trafficking and smuggling, and to support capacity building and training of the LYCG and the Libyan navy. The operation currently focuses on airborne assets, operating only two vessels.^[243] Following political pressure, the area of operation was shifted east, evading common migration routes.^[244]

In January 2022, a military report was leaked in which the head of Operation IRINI acknowledged that 'excessive use of force' is used by the LYCG and that the EU training is 'no longer fully followed'.^[245]

In response, the German Parliament agreed to the prolongation of Germany's support for the operation in April 2022, but decided to refrain from supporting the training of the LYCG. The activities of the German military delegation shall instead focus on the implementation of the arms embargo and the information gathering on illicit exports of petroleum, while remaining committed to international and EU law, and their obligation to rescue people in distress. This constitutes an important first step.

In order to support civil rescue missions in the Mediterranean, the German government furthermore needs to do the following.

Firstly, use their role in the EU Council to call for a change of the IRINI mandate, and to include a clear search and rescue mandate. All support of, and cooperation with, the LYCG must be withdrawn until a strict compliance with human rights and the law of the sea has been consistently achieved.

Secondly, increase the effort of their and other Member States' personnel involved in the IRINI mission to save lives at sea and to increase resources for rescue missions. This includes deploying vessels capable of conducting rescues, and in areas where boats regularly get into distress, as well as strictly complying with the duty to render assistance to people in distress at sea and constructively cooperating with civil search and rescue organisations at sea.

III. Conclusion

Part I of this study noted the various ways in which EU Member States obstruct civil search and rescue efforts. Against this background, Part II of this study set out the various ways in which Germany could more effectively support civil search and rescue as a flag state, an important funding partner and a powerful political coordinator at the EU level.

As a flag state, Germany has direct control over ships registered in Germany. As such, legal reforms in the Ship Safety Ordinance, as well as executive orders for state vessels, have a direct impact on the situation in the Mediterranean Sea. As a flag state, Germany should:

- Revoke the recent amendments of the Ship Safety Ordinance.
- Order its state vessels to fully comply with the duty to render assistance.
- Protect vessels registered under German flag from excessive detention practices by other Member States.

Additionally, as Germany is the state with the highest GDP in the EU^[246] and the biggest funding partner for the EU's Trust Fund for Africa,^[247] Germany is an important economic force. As an important financial player, the German government should:

- Establish long-term funding for civil search and rescue.
- Condition any funding for third countries active in SAR missions on their strict compliance with human rights.

The different legislative and non-legislative proposals of the European Commission and the EU Council currently on the table are emblematic for the discrepancies in the views of different Member States on how to deal with private rescue missions. In this context, Germany should use its position in the EU Council to push for a clearer, more liberal framework for such rescue missions and to stand up against the erosion of the rule of law for NGOs operating in this sector in several Member States. Thus, in its role as powerful political player at the EU level, Germany should advocate:

- Against excessive national requirements for ship registration and codes of conducts which impede SAR missions.
- To end cooperation with the Libyan Coast Guard until their SAR system is fully functional and complies with the standards under the law of the sea.
- To end any forms of criminalisation of NGOs.
- For a human rights-based solidarity mechanism.
- For a reform of the Facilitation Directive which prioritises the safeguarding of life and clearly distinguishes between smuggling and rescue operations.
- For effective monitoring mechanisms which guarantee full human rights compliance with regard to all state- and EU-led missions at sea.

Finally, Germany should set a best practice example for other EU Member States by:

- Implementing the humanitarian exception clause in Section 96 of the German Residence Act.
- Stepping up its ad hoc relocation and solidarity quota.
- Facilitating humanitarian relocation by cities and federal states under Section 23 of the Residence Act.

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- [41] The Memorandum of Understanding, agreed by 14 European states, was crafted in the aftermath of a major shipwreck caused mainly by the ship’s poor technical condition: In March 1978, the Liberian-flagged oil tanker *Amoco Cadiz* ran aground off the coast of Brittany (France). See <https://www.parismou.org/about-us/history>
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- [43] IMO, Procedures for Port State Control, Assembly resolution A.1052(27), 30 Nov. 2011, available at [https://www.wcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.1052\(27\).pdf](https://www.wcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.1052(27).pdf)
- [44] IMO Maritime Safety Committee (MSC) and Maritime Environment Protection Committee (MEPC), Code of good practice for port State control officers, 2007, MSC-MEPC.4/Circ.2, available at <https://crewtraffic.com/page/352-msc-mepc-4-circ-2-port-state-control-related-matterscode-of-good-practice-for-port-state-control.html>
- [45] Directive 2009/16/EC amended by EU-Directive 2013/38/EU (‘Port State Control Directive’).
- [46] CJEU (Grand Chamber), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21, para. 72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CJ0014>. Fishing vessels and ‘wooden ships of a primitive build’ are also excluded.

- [47] Article 11 taken with Part I of Annex I to Directive 2009/16. Aggravating or mitigating risk factors include: the type of ship (e.g., passenger ship, oil tanker); the age (under or over 12 years); the flag state's performance (detention rate, audits); whether the ship has certificates from recognised organisations; the company's performance; past detentions of the ship and past inspection results.
- [48] Article 11(b) taken with Part II 2B of Annex I to Directive 2009/16. Unexpected factors include reports or complaints by the master, a crew member, or any person or organisation with a legitimate interest in the safe operation of the ship, on-board living and working conditions or the prevention of pollution; a previous detention of the ship more than three months ago; reports of outstanding deficiencies; reports of noxious and dangerous cargoes; operating the ship in a manner posing a danger to persons, property or the environment; information from a reliable source that the ship's risk parameters differ from those recorded and the risk level is thereby increased.
- [49] Article 11(b) taken with Part II 2A of Annex I to Directive 2009/16. Overriding factors include reports or notifications from another Member State; alleged violations of the provisions on discharge of harmful substances or effluents; or having manoeuvred in an erratic or unsafe manner whereby IMO routing measures or safe navigation practices and procedures have not been followed.
- [50] Article 13, 14 Directive 2009/16.
- [51] Article 19(2) Directive 2009/16.
- [52] Article 19(8) Directive 2009/16.
- [53] See <https://www.parismou.org/detentions-banning/white-grey-and-black-list>
- [54] A working translation of Annex 1a Part 6, on Safety Requirements for Cargo Ships (as of 20 Mar. 2020), is available at <https://www.deutsche-flagge.de/de/redaktion/dokumente/dokumente-sonstige/part-6-cargo-ships>
- [55] English translation available at https://www.gesetze-im-internet.de/englisch_seearbg/index.html
- [56] Legislative decree n. 53, 24 Mar. 2011, available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-03-24;53>
- [57] FRA, June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', 2022 (note 19).
- [58] Sea-Watch e.V., 'Sea-Watch 3 blocked – Italy ignores ECJ ruling', Press release, 23 Sept. 2022, available at <https://sea-watch.org/en/sea-watch-3-blockade/>
- [59] See <https://www.parismou.org/detentions-banning/white-grey-and-black-list>
- [60] See N. Madjidian, 'Seenotrettung vor dem EuGH', *Verfassungsblog*, 30 Aug. 2022, available at <https://verfassungsblog.de/seenotrettung-vor-dem-eugh/>
- [61] CJEU (Grand Chamber), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62021CJ0014>
- [62] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 72. The question was brought up by Italy, in light of the narrow wording of its implementation of the Directive (quoted in para. 44 of the judgment), which only applies to vessels used for commercial purposes (see above, in this section).
- [63] Likewise: N. Madjidian, 'Seenotrettung vor dem EuGH', *Verfassungsblog*, 30 Aug. 2022, available at <https://verfassungsblog.de/seenotrettung-vor-dem-eugh/>
- [64] For the requirements, see the working translation of Annex 1a Part 6 to the Ship Safety Ordinance, on Safety Requirements for Cargo Ships (as of 20 Mar. 2020), available at <https://www.deutsche-flagge.de/de/redaktion/dokumente/dokumente-sonstige/part-6-cargo-ships>
- [65] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 7.
- [66] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 (note 60), para. 114. On 'overriding factors', see above, note 48.

- [67] Annex I Part II 2B, ninth indent of Directive 2009/16. On 'unexpected factors', see above note 47.
- [68] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 117.
- [69] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 90–91 (clarifying that the Directive must be read in light of these treaties, to which the EU or all Member States are parties and with which the Directive seeks to increase compliance).
- [70] Article 98 UNCLOS; CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 118.
- [71] Article IV(b) SOLAS provides: 'Persons who are on board a ship by reason of *force majeure* or in consequence of the obligation laid upon the master to carry shipwrecked or other persons shall not be taken into account for the purpose of ascertaining the application to a ship of any provisions of the present Convention.' On distress as an 'exculpating factor', see also E. Papastavridis, 'Sea Watch cases before the EU Court of Justice: An analysis of International Law of the Sea', *EU Law Migration Blog*, 12 Dec. 2022, available at: <https://eumigrationlawblog.eu/sea-watch-cases-before-the-eu-court-of-justice-an-analysis-of-international-law-of-the-sea/>
- [72] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 119.
- [73] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 120 (emphases added).
- [74] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), paras. 125 and 140 et seqq.
- [75] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 150.
- [76] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 126 (emphases added).
- [77] CJEU (GC), *Sea Watch v. Italy*, 1 Aug. 2022 – C14/21 and C15/21 (note 60), para. 147 (emphases added).
- [78] This is known as the freedom of the high seas, or freedom of navigation (Art. 87 UNCLOS).
- [79] D. Guilfoyle, 'Article 98', in: A. Proelss (ed.), *UNCLOS Commentary*, 2017, 726, at para. 7 (also noting that a rescue vessel may itself become unseaworthy when overcrowded as the result of a rescue mission; *ibid.* at 11).
- [80] See note 70 above.
- [81] Article 26 of the Vienna Convention on the Law of Treaties (VCLT) requires that treaties 'must be performed [...] in good faith'.
- [82] The minister stated that migrants were brought to Italy on '*assetti navali privati, perfettamente funzionanti, ben attrezzati e quindi senza problemi sotto il profilo della sicurezza della navigazione.*' He added that most NGO ships fulfilled these requirements and could therefore be considered (temporary) places of safety: '*Segnalo che, allo stato, la gran parte delle navi ONG che operano in quel quadrante del Mediterraneo presenta proprio queste caratteristiche simili. [...] è anche vero che le linee guida dell'IMO, Organizzazione internazionale marittima onusiana, affermano che le navi possano essere considerate luoghi sicuri temporanei qualora esse siano in grado di ospitare in sicurezza i sopravvissuti; lo sottolineo non solo perché molte delle navi ONG presentano le caratteristiche appena richiamate*'; Urgent Information by the Government on the Management of Migratory Flows and, in Particular, on the Recent Interventions of NGO Naval Assets in the Central Mediterranean, Stenographic record of the Assembly, Session No. 10 of Wed., 16 Nov. 2022, available at https://www.camera.it/leg19/1008?idLegislatura=19&sezione=documenti&tipoDoc=assemblea_file&idSeduta=0010&nomefile=stenografico&back_to=0. On the insufficiency of ships as places of safety, see A. Farahat & N. Markard, *Closed Ports, Dubious Partners*, 2020 (note 28).
- [83] Sea-Watch, 'Sea-Watch 3 blocked – Italy ignores ECJ ruling', Press release, 23 Sept. 2022, available at <https://sea-watch.org/en/sea-watch-3-blockade/>

- [84] See current detentions, <https://www.parismou.org/detentions-banning/current-detentions>
- [85] Whereas Article IV SOLAS concerns cases of *force majeure* and explicitly mentions ‘Persons who are on board a ship [...]in consequence of the obligation laid upon the master to carry shipwrecked or other persons’, Article V relates to – more general – cases of ‘persons in emergency’ and contains a savings clause for port state control, which is absent in Article IV.
- [86] Article 19(2) Directive 2009/16.
- [87] Sea-Watch, ‘Sea-Watch 3 blocked – Italy ignores ECJ ruling’, Press release, 23 Sept. 2022, available at <https://sea-watch.org/en/sea-watch-3-blockade/>
- [88] I. Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’, 21 *German L.J.* (2020) 598, at 599.
- [89] European Commission, ‘Central Mediterranean Route: Commission proposes Action Plan to support Italy, reduce pressure and increase solidarity’, Press release, 4 July 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1882
- [90] Codice di condotta per le ONG impegnate nel salvataggio dei migranti in mare, available at <https://www.interno.gov.it/it/amministrazione-trasparente/disposizioni-general/atti-general/atti-amministrativi-general/decreti-direttive-e-altri-documenti/codice-condotta-ong-impegnate-nel-salvataggio-dei-migranti-mare>. For an English translation, see ‘Italy’s Code of Conduct for NGOs involved in migrant rescue: text’, *Euronews*, 3 Aug. 2017, available at <https://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue>
- [91] See E. Cusumano, ‘Straightjacketing migrant rescuers? The Code of Conduct on maritime NGOs’, 24 *Mediterranean Politics* (2019) 106, available at <https://www.tandfonline.com/doi/full/10.1080/13629395.2017.1381400>
- [92] Cusumano, *ibid.*
- [93] See A. Farahat & N. Markard, *Places of Safety in the Mediterranean*, 2020 (note 2), at 22–23.
- [94] UNHCR, ‘Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum’, 1 Dec. 2022, at para. 3.5 (internal references omitted), available at <https://www.refworld.org/docid/6389bfc84.html>
- [95] Art. 17 UNCLOS.
- [96] Art. 21 UNCLOS.
- [97] See Office of the High Commissioner for Human Rights (OHCHR), *Situation of human rights in Libya, and the effectiveness of technical assistance and capacity building measures received by the Government of Libya*, UN Doc. A/HRC/37/46, 21 Feb. 2018, para. 46;. See also OHCHR, ‘*Lethal Disregard*: Search and rescue and the protection of migrants in the central Mediterranean Sea, May 2021, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>
- [98] See A. Farahat & N. Markard, *Places of Safety in the Mediterranean*, 2020 (note 2), at 24.
- [99] See the recommendations by the OHCHR, in its report ‘*Lethal Disregard*’ (*supra* note 96), at 13: ‘To the Libyan authorities: Ensure that Libya’s Joint Rescue Coordination Centre is adequately and professionally staffed, including the ability to answer and respond to distress calls in a timely manner. Refrain from denying assistance or leaving migrants to die at sea if/when they refuse to be disembarked in Libya, instead taking responsibility to coordinate their rescue and disembarkation in a port of safety. To the European Union and its Member States: Refrain from encouraging a shifting responsibility for SAR operations in international waters to the LCG.’ For the recent case of the *Ocean Viking*, see: K. Hearst, ‘No rescue from above: Europe’s surveillance in the Mediterranean leaves migrants to their fate’, *Middle East Eye*, 30 Jan. 2022, available at <https://www.middleeasteye.net/news/libya-europe-migration-frontex-surveillance-deadly-fate>
- [100] See SAR Convention Annex, Chapter 2, para. 2.3.

- [101] See European Parliament, 'Answer given by High Representative/Vice-President Borrell i Fontelles on behalf of the European Commission', answer to parliamentary request, 8 Nov. 2022, available at https://www.europarl.europa.eu/doceo/document/E-9-2022-003014-ASW_EN.html
See also below, Part II, Section 6.
- [102] Statewatch, 'Hundreds of NGOs and individuals call for the revocation of Libya's maritime search and rescue zone', Press release, 29 June 2020, available at <https://www.statewatch.org/news/2020/june/press-release-hundreds-of-ngos-and-individuals-call-for-the-revocation-of-libya-s-maritime-search-and-rescue-zone/>
- [103] See Art. 98(2) UNCLOS.
- [104] Sea Watch, "'Nonsensical'", "Dishonest", "Illegal": the "Code of Conduct"', Interview with Violeta Moreno-Lax, 24 July 2017, available at <https://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct/#cmplz-manage-consent-container>; Amnesty International, 'EU: Draft Code for Sea Rescues Threatens Lives', 12 July 2017, available at <https://www.amnesty.eu/news/eu-draft-code-for-sea-rescues-threatens-lives-1057/>
- [105] A. Ziniti, 'Piantedosi: basta soccorsi multipli. Un porto solo a chi lo chiede subito', *la Repubblica*, 18 Dec. 2022, available at https://www.repubblica.it/cronaca/2022/12/18/news/piantedosi_regole_ong_viminale-379536120/
- [106] Decreto-Legge 1/2023, Disposizioni urgenti per la gestione dei flussi migratori, 2 Jan. 2023, available at <https://www.gazzettaufficiale.it/eli/id/2023/01/02/23G00001/sg>
- [107] The decree is somewhat confusing in that the cumulative fulfilment of all of these requirements is a precondition for non-application of the minister of interior's power to deny entry (see above Section 1.).
- [108] 'Statement: New Italian government decree will cause more deaths in the Mediterranean Sea', 5 Jan. 2023, available at <https://sea-watch.org/en/statement-by-civil-rescue-organizations-new-italian-government-decree/>
- [109] SAR Convention Annex, Chapter 2, para. 2.1.10.
- [110] IMO Maritime Safety Committee (MSC), Guidelines on the Treatment of Persons Rescued at Sea, Res. MSC. 167(78), 20 May 2004, para. 6.20.
- [111] UNHCR, 'Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum', 1 Dec. 2022, at paras. 4.1 and 4.4, available at <https://www.refworld.org/docid/6389bfc84.html>
- [112] Ibid.
- [113] For example, the *Geo Barents* (Médecins Sans Frontières) and the *Ocean Viking* (SOS Méditerranée) were assigned the port of Ancona in Central Italy despite of deteriorating weather conditions; see 'Italy rejects NGO ship's request for closer safe port', *Euronews*, 9 Jan. 2023, available at <https://www.euronews.com/2023/01/09/italy-migrants>, and 'Piantedosi plays down migrant ships being assigned Ancona', ANSA, 9 Jan. 2023, available at https://www.ansa.it/english/news/general_news/2023/01/09/piantedosi-plays-down-migrant-ships-being-assigned-ancona_27969ad9-6003-48e0-b68f-4867704b4b3e.html
- [114] SAR Convention Annex, Chapter 2, paras. 3.1.6.4 and 4.8.5.
- [115] IMO Maritime Safety Committee (MSC), Guidelines on the Treatment of Persons Rescued at Sea, Res. MSC. 167(78), 20 May 2004, para. 6.3, 6.8, 6.9.
- [116] In particular, Joint Ministerial Decision 3063/2020, Government Gazette B' 1382/14.04.2020, available at <https://rb.gy/2qphoto> (in Greek), and its successor, Joint Ministerial Decision 10616/2020, Government Gazette B' 3820/09.09.2020, available at <https://rb.gy/sjoncz> (in Greek). These are based on the Law 4662/2020, Government Gazette A'27/07.02.2020, available at <https://bit.ly/3xJG5ei> (in Greek). The first decision, passed in 2018, introduced an NGO register.

- [117] The procedure costs each NGO thousands of euros, which for small organisations can be prohibitive; see W. Schauseil, 'On the radar – How civil society work is under threat in Greece', 1 Feb. 2022, available at <https://eu.boell.org/en/2022/02/01/radar-how-civil-society-work-under-threat-greece>; see also the joint letter to the Greek government by three UN Special Procedures of 31 March 2021, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26314>
- [118] Mare Liberum, 'Crackdown on solidarity: Forced to develop new operations', Feb. 2022, available at <https://mare-liberum.org/en/crack-down-on-solidarity/>
- [119] See, e.g., R. Nestler, 'NGO Law at the Council of State', Equal Rights Beyond Borders, 4 Dec. 2022, available at <https://equal-rights.org/articles/87>
- [120] ECRE, 'Expert Opinion concerning the lawfulness of Greek legislation regulating the registration of non-governmental organisations (NGOs) on the Registry of NGOs working with refugees and migrants in Greece', Dec. 2021, available at <https://ecre.org/wp-content/uploads/2021/12/Expert-opinion-NGO-Registry-final.pdf>
- [121] UN Special Rapporteur on the situation of human rights defenders, Mary Lawlor, Preliminary observations and recommendations, Athens, 22 June 2022, available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2F2022-06%2FEOM-Statement-Greece-SR-Defenders.docx&wdOrigin=BROWSELINK>.
- [122] OHCHR, 'Greece: Migration policy having "suffocating effect" on human rights defenders says UN expert', Press release, 22 June 2022, <https://www.ohchr.org/en/press-releases/2022/06/greece-migration-policy-having-suffocating-effect-human-rights-defenders>
- [123] See R. Nestler, 'NGO Law at the Council of State', Equal Rights Beyond Borders, 4 Dec. 2022, <https://equal-rights.org/articles/87>. On this argument, see ECRE, 'Expert Opinion' (note 119), paras. 21–24.
- [124] FRA, June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', 2022 (note 19).
- [125] See, e.g., F. Patanè, M.P. Bolhuis, J. van Wijk, H. Kreiensiek, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy', 39 *Refugee Survey Quarterly* (2020) 123, available at <https://academic.oup.com/rsq/article/39/2/123/5837196> (reporting 1,300 jailed in Italy in 2015–18).
- [126] See above, Section 1.
- [127] Tribunale di Agrigento, Decreto di Archiviazione, 20 Dec. 2021, n. 3150/2019, available at https://www.sistemapenale.it/pdf_contenuti/1642369860_20211220-gip-agrigento-archiviazione-rackete.pdf
- [128] A. Ziniti, 'Le Ong vincono ancora: lo Stato italiano dovrà rimettere a nuovo la Iuventa, la nave umanitaria sotto sequestro da cinque anni', *la Repubblica*, 8 Dec. 2022, available at https://www.repubblica.it/cronaca/2022/12/08/news/ong_iuventa_trapani-378112278/
- [129] See Iuventa Crew, Press release, 19 Dec. 2022, available at <https://iuventa-crew.org/en/2022/12/19/italian-government-to-intervene-in-trial-of-iuventa-rescuers-as-plaintiff/>
- [130] See B. von Laffert, 'Salvini's Spy on the Mediterranean', *ZEIT Online*, 8 May 2019, available at <https://www.zeit.de/gesellschaft/zeitgeschehen/2019-05/saving-refugees-mediterranean-iuventa-matteo-salvini>
- [131] L. Tomasetta, 'Ong, processo Iuventa: ennesimo rinvio. L'avvocato dei 4 imputati: "Nessun passo in avanti del giudice"', *The Post Internazionale*, 29 Oct. 2022, available at <https://www.tpi.it/cronaca/ong-processo-iuventa-ennesimo-rinvio-20221029944970/>
- [132] FRA, 'Criminalisation of NGOs involved in SAR as of June 2022', 2022 (note 20).

- [133] International Federation for Human Rights, Greece, 'Ongoing crackdown on civil society providing humanitarian assistance to migrants and asylum seekers', 27 April 2016, available at <https://www.fidh.org/en/issues/human-rights-defenders/greece-ongoing-crackdown-on-civil-society-providing-humanitarian#nb2>
- [134] Global Legal Action Network (GLAN), 'Greece's crackdown on humanitarian organisations', available at <https://www.glanlaw.org/salamaldeen>. The European Court of Human Rights dismissed a challenge of the Greek judgement as inadmissible without reasons; *ibid*.
- [135] The Committee on Civil Liberties, Justice and Home Affairs is safeguarding the compliance with civil liberties and human rights.
- [136] V. Moreno-Lax, 'The EU Approach on Migration in the Mediterranean', June 2021, at 111, available at [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)
- [137] *Ibid*.
- [138] *Ibid*.
- [139] 'Greek court drops spying charges against migrant rescuers', *Le monde*, 13 Jan. 2023, available at https://www.lemonde.fr/en/europe/article/2023/01/13/greek-court-drops-spying-charges-against-migrant-rescuers_6011471_143.html
- [140] Law 4251/2014.
- [141] Article 30(6) of the Migration Code provides an exception from punishment (although not from prosecution) for humanitarian actions, but is equally vague.
- [142] UN Special Rapporteur on the situation of human rights defenders, Mary Lawlor, Preliminary observations and recommendations, Athens, 22 June 2022, available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2F2022-06%2FEOM-Statement-Greece-SR-Defenders.docx&wdOrigin=BROWSELINK>
- [143] See W. Schauseil, 'On the radar – How civil society work is under threat in Greece', 1 Feb. 2022, available at <https://eu.boell.org/en/2022/02/01/radar-how-civil-society-work-under-threat-greece>
- [144] ECRE, 'Greece: Government Takes Another Crack at Preventing Free Press – Reports of Pushbacks and Non-Response Continue', 2 Sep. 2022, available at <https://ecre.org/greece-government-takes-another-crack-at-preventing-free-press-reports-of-pushbacks-and-non-response-continue/>
- [145] See Reporters without Borders, 'Greece: The government's silence about new revelations in the surveillance scandal is deafening', 3 Nov. 2022, available at <https://rsf.org/en/greece-government-s-silence-about-new-revelations-surveillance-scandal-deafening>
- [146] FRA, 'June 2022 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights', 2022 (note 19).
- [147] See FRA, 'Protecting civic space in the EU', 2021, at 54, available at <https://fra.europa.eu/en/publication/2021/civic-space-challenges>
- [148] Sea-Watch, 'Dutch Government Concedes: Sea-Watch 3 Sails to Scheduled Shipyard Maintenance in France', Press release, 22 Feb. 2019, available at <https://sea-watch.org/en/sea-watch-3-sails-to-scheduled-shipyard-maintenance-in-france/>
- [149] 'NL implements stricter rules for refugee rescue ships; Sea Watch dissatisfied', *NL Times*, 2 April 2020, available at <https://nltimes.nl/2019/04/02/nl-implements-stricter-rules-refugee-rescue-ships-sea-watch-dissatisfied>
- [150] The entire 322 pages and a summary in English can be accessed here: <https://www.dropbox.com/sh/y6ly0g34zafhqeb/AACMWH5twBk6y5EeCkFcURHba?dl=0>. See also Sea-Watch, 'Dutch government blocks Sea-Watch 3', Press release, 2 April 2019, available at <https://sea-watch.org/en/dutch-government-blocks-sea-watch-3/>

- [151] See Prakken d'Oliveira Human Rights Lawyers, 7 May 2019, available at <https://www.prakkendoliveira.nl/en/news/2019/judge-determines-in-preliminary-relief-proceedings-that-sea-watch-may-continue-to-sail>, and 1 Aug. 2019, available at <https://www.prakkendoliveira.nl/en/news/2019/sea-watch-also-wins-appeal-against-the-dutch-state>
- [152] Sea-Watch 'Sea-Watch 3 switches to German flag', Press release, 5 Dec. 2019, available at <https://sea-watch.org/en/sea-watch-3-switches-to-the-german-flag-2/>
- [153] Issued under Section 9(3) SchSV.
- [154] There are different English translations for the term. The EU directive 2013/53 uses the term 'recreational craft', which is defined as 'any craft, intended for sports and leisure purposes'. The website vesselfinder.com uses the term 'pleasure craft' for the *Mare Liberum*.
- [155] Appendix 1a Part 6 Chapter 1, 1.2.4 and 1.2.5 SchSV.
- [156] Section 2(1) of the Ordinance on Sea Leisure Yachts (*See-Sportbootverordnung*, *SeeSpbootV*).
- [157] OVG Hamburg, 3 Bs 124/19, 5 Sept. 2019, confirming the decision of the lower administrative court of 13 Mar. 2019.
- [158] Emphasis added.
- [159] 903 pages of official correspondence were released following a freedom of information request and are available at <https://fragdenstaat.de/dokumente/5279-bmvi-schiffsfahrtsicherheitsverordnung/>
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- [161] 'Die deutsche Flaggenstaatverwaltung wendet den Wortlaut des § 2 Abs. 1 Nr. 1 und 6 SeeSpbootV in der Fassung vom 3. März 2020 aktuell aufgrund europarechtlicher Vorgaben **nicht** an. Das Bundesministerium für Digitales und Verkehr (BMDV) prüft, wie die europarechtlichen formellen Anforderungen und die Gewährleistung der Schiffssicherheit erfüllt werden können.' See <https://www.deutsche-flagge.de/de/flagge/schiffsarten/sportboote> and for a similar notice <https://www.deutsche-flagge.de/de/flagge/schiffsarten/sonderfahrzeuge>
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Heinrich-Böll-Stiftung European Union, Brussels

Rue du Luxembourg 47-51, 1050 Brussels, Belgium

Contact: Hannah Goerlich, Head of Programme – EU and International Politics
Heinrich-Boll-Stiftung European Union, Brussels

E Hannah.Goerlich@eu.boell.org

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