The Ethics of Migration Policy Dilemmas
Can there be a common ground between NGOs engaged in SAR and state actors? A response to Mann and Mourão Permoser (2022)

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The year 2022 has proven to be another challenging year for NGOs active in search and rescue (SAR) in the Mediterranean. The adoption of new restrictions for NGO ships operating in the Mediterranean by the new Italian government under Giorgia Meloni is only the latest move to obstruct SAR. Together with other pre-existing measures, SAR in the Mediterranean is unfortunately being quite effectively hindered. By contrast, the voluntary solidarity mechanism signed by 18 EU Member and three Schengen States in June 2022 under which up to 10,000 migrants rescued at sea should be relocated has so far not had any discernible impact on debates on SAR, and certainly has not stopped the continuing trend towards deterrent measures (Welfens, Rasche, and Engler 2022).

But how can we move out of this impasse? In my response to Itamar Mann's and Julia Mourão Permoser's (2022) paper on the ethics of search and rescue at sea, I want to focus on transparency and the adoption of clear operational standards by SAR NGOs as central elements in responding to states' current assaults on NGO's SAR operations.

Mann's and Mourão Permoser's focus on the practical ethical dilemmas faced by SAR activists in a politically charged and morally ambiguous field offers an excellent starting point for reflecting on how the humanitarian space carved out by humanitarian actors at sea can be defended, and perhaps even be expanded. Starting off from the perspective of individual actors committed to defending the right to life at sea rather than the bird's eye perspective of the state is useful, as it shifts the focus towards the possibility of reconciling competing and contradictory objectives on a practical level. This approach recognises the inevitable tension between different perspectives on SAR, and in particular between a bird's eye perspective centred around the governance of migration as a whole and a bottom-up perspective focusing on individual ethical practices in such a context, while also pointing at possible strategies to deal with these tensions.

In their paper the authors show that SAR activists carefully walk a thin line between what the authors call 'the command' – the humanitarian imperative to save lives – and the chain(s), linking SAR to broader, morally ambivalent dynamics in the Mediterranean passage. One chain links SAR to the often abusive and exploitative activities of human smugglers and other actors in countries of departure who instrumentalise migrants for profit and other gains.[1] In addition to potentially colluding with exploitative human smugglers and incentivising some of their risky strategies (such as use of lower quality dinghies, providing inadequate fuel supply, sending off boats in adverse weather conditions, etc.), rescuers also risk prosecution as a result of the increasing criminalisation of NGOs active in SAR and support to irregular migrants more generally. The other chain links them to the violent enforcement of border and migration control by European states, rendering rescuers potentially complicit in the denial of safety and protection by European states, and in the violence imposed by them. Both chains raise issues of responsibility, potential adverse consequences of SAR, and the implication of activists in morally problematic actions (Mann and Mourão Permoser 2022). As the authors imply, the chain undermines the moral purity of the 'command' and imbues it with ambiguity and, importantly, politics. All this occurs in the context of a quickly shrinking space for civil society actors in the Mediterranean (Müller and Slominski 2022).

A brief look back at the beginning of the past decade is illuminating here. In 2013, the European Union Agency for Fundamental Rights (FRA) released a report on 'Fundamental Rights at the EU's Southern Borders', drawing on empirical research conducted in 2011. While identifying various challenges regarding interception and search and rescue at sea as well as in regard to screening and referral mechanisms post-disembarkation, the report did not see any fundamental challenges, and indeed, contradictions between migration control and the protection of human rights. Despite a number of issues,[2] the report observed a largely professional ethos of authorities involved in SAR (see European Union Agency for Fundamental Rights 2013, 34). This goes to show that a more productive and human-rights-abiding cooperation between authorities and SAR NGOs is possible and indeed already existed in the past. As I shall argue, both states and SAR NGOs should adapt their current practices so as to make this kind of cooperation a reality again.

Evidently, the FRA report reflects a different era: It was researched at a time when crossings in the Eastern and Western Mediterranean had almost come to a halt and arrivals via the Central Mediterranean had only started to rise following the Tunisian revolution and the conflict in Libya. SAR was the responsibility of specialised state agencies, with a significant involvement of commercial vessels and fishing boats. NGOs were almost entirely absent at sea, although they did play important roles after disembarkation. The use of criminal charges against non-state actors engaged in SAR was rare and considered by the FRA as a potential rather than an actual threat deterring shipmasters from engaging in SAR.[3] Thus,

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1   It is important to note though that human smuggling does not need to include abusive relation-ships; their presence or absence is related to the types of smuggling dominating particular routes at particu-lar times (see Bilger 2018).

2   Among the issues identified by the report are joint Italian-Libyan interception and push-backs oper-ations, at the time rather individualised push-backs in the Aegean, the evasion of responsibility for migrant arrivals by avoiding active patrolling or, in the case of Malta, by equipping migrant boats with fuel to contin-ue their onward journeys.

3   "Though rare, such proceedings could create fear among shipmasters that they could face criminal charges under similar circumstances" (European Union Agency for Fundamental Rights 2013, 74).

at the time, economic factors associated with expected loss of income and profit were considered more important impediments to engaging in SAR.

As we know, the situation now could not be more different. Optimism about the transformative power of human rights legislation regulating the activities of state and supranational actors engaged in border control (see for an example Slominski 2013) has since given way to far more pessimistic views of a shift towards a model of 'rescue-without-protection' (Moreno-Lax 2018) and the observation that intercepted and rescued migrants and refugees are removed from moral concern altogether through their routinised return to departure countries (Barnes 2022). In contrast to the situation 10 years ago, NGOs now have a central role in SAR, while several national and EU SAR operations have been terminated or stopped having any active role, and Frontex operations in the Eastern Mediterranean have been implicated in aggressive pushback practices adopted by the Greek government. At the same time, NGOs have come under severe pressure, with multiple court proceedings being initiated and vessels being seized and stopped from operating on a regular basis (see the documentation of incidents in European Union Agency for Fundamental Rights 2022) or being obstructed otherwise (Müller and Slominski 2022). It is these changed circumstances in which the SAR activists interviewed by Mann and Mourão Permoser operate.

One key strategy to deal with this moral ambivalence that Mann and Mourão Permoser identify is that activists try to insulate their activities from the two chains connecting the 'command' to points of departure and destination, thus carving out a fragile space of humanitarian action, the 'floating sanctuary,' as they call it. This involves a focus on the act of rescuing itself, 'wilful ignorance' and the elaboration of principles and operating procedures guiding their actions. As Jaqueline Bhabha has noted in her response to Mann's and Mourão Permoser's paper, similar challenges have been faced by humanitarians before. Indeed, carving out a space for humanitarian action against the interests of and rules dictated by states and other powerful actors has been a defining impetus of modern humanitarianism at large (Barnett and Weiss 2008). Challenges to humanitarian practice have become particularly apparent in the context of the 'complex emergencies' of the 1990s, notably in Somalia, Bosnia, and Rwanda. In these crises, humanitarians had to face hard choices about the consequences of aid, triggering fierce debates about the ethics of humanitarianism, and involving calls for a 'new humanitarianism' – a humanitarianism that "is 'principled', 'human-rights based' and politically sensitive" (Fox 2001, 275), going beyond providing 'a bed for a night' (Rieff 2002).

Yet it has also become clear that humanitarians cannot resolve fundamental tensions. Indeed, humanitarian action cannot change the conditions that give rise to an 'emergency' – these require political solutions that may or may not be feasible. At the same time, humanitarians need do consider consequences of their actions and the political context in which humanitarian action takes place. In the context of the complex emergencies of the 1990s the main dilemma humanitarians faced was whether the provision of humanitarian aid fuelled and indeed exacerbated conflicts, for example when refugee camps maintained by the international community were used as safe haven for militarised groups; or when international aid was (ab)used to finance military activities, if through some form of 'taxation' of beneficiaries or through deals for humanitarian access, etc. Ultimately, humanitarians faced the dilemma of whether to provide aid at all (Terry 2013). This dilemma was in part resolved by shifting the focus towards the quality and accountability of humanitarian aid,

that is, towards aspects that humanitarians could address; for example, by systematically evaluating operations, promoting learning and exchange, and creating frameworks of conduct made up of basic principles, standards and operating procedures. In the context of humanitarian aid these were prominently formulated in the SPHERE handbook (Sphere Project 2018), first issued in a 1998 pilot version and revised four times since. The handbook was initiated in the context of the massive Rwanda emergency operation in the wake of the 1994 Rwandan genocide and ensuing crisis and followed up on recommendations of an unprecedented comprehensive evaluation of the emergency operation (Eriksson 1996; see Borton and Eriksson 2004 for an assessment of the evaluation's impact).[4]

Such frameworks have both an internal and an external function: they provide an internal governance code while transparently communicating 'rules of engagement' to the outside. As noted by Mann and Mourão Permoser, a similar process of codification has taken shape within the SAR community, if in a less coordinated and systematic fashion. At the same time, states – and the recent rules for SAR adopted by Italy are a case in point – try to impose their own version of such standards. NGOs in this context are well advised to proactively formulate and communicate their standards. Clearly, there is also an important role for academic research in informing such standards: as noted above, the SPHERE handbook was based on a systematic and comprehensive evaluation of emergency assistance to Rwanda, which amongst others, also critically analysed the impact of aid in terms of prolonging the conflict and alimenting those responsible for the 1994 genocide.[5] No comparable evaluation has been conducted in regard to search and rescue operations in the Mediterranean to date.

But what are the political implications of such a process? How does the definition of an action-guiding normative framework help address the political impasse reached in a context in which policy-makers are convinced of the pull-effect of SAR and the need for deterrence (Hadj Abdou 2020)?

As I would argue, the codification of humanitarian practices and standards can be a means to consolidate the fields as well as the boundaries between humanitarian action and migration and border politics. Yet while 'insulating' the command from the politics of the chain, it does not deny the presence of the chain, but rather addresses its implications in a reflective, and ideally iterative process. At the same time, a codification of practices enhances the accountability of organisations engaged in SAR, not only vis-à-vis their own constituency, but also towards the state. It is a way to show that SAR practitioners consider objections to their activities, take them seriously and reckon with the implications of their actions, but also that they draw red lines – both for those implicated in the two chains and for SAR activists trying to live up to the 'command.' Such codes and standards also provide a discursive – and legal – basis to engage with state actors, be it in front of courts or when engaging with rescue coordination centres or other actors. By adopting codes of conduct and standards taking into account possible adverse consequences of humanitarian actions, NGOs engaged in SAR can show that they act with 'due diligence.' Moreover, grounding

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4   Another important outcome of the Rwanda evaluation was the creation of the Active Learning Network for Accountability and Performance in humanitarian action (ALNAP).
5   The evaluation financed by various donors involved four studies (on historical perspectives and explanatory factors, on early warnings and conflict management, on humanitarian aid and effects, and on post-conflict reconstruction) and a synthesis report. A similar evaluation was conducted in response to the Indian Ocean Tsunami ten years on.

and standards in international human rights law and national constitutional law would provide NGOs with instruments to counter state challenges to their practices. On a more practical level, codes of conducts and related standards could be helpful in engaging with state agencies following comparable mandates, thus possibly supporting internal challenges to political directions taken.

From a systemic perspective, the consolidation of both the field of SAR practice and its boundaries helps to reinforce the distinctiveness of SAR (or humanitarian practice more widely) and its operating logic. This also implies that we need to accept that the different logics of humanitarian action, migration control, and crime prevention or enforcement (in the form of anti-smuggling policies) cannot be fully reconciled, in the sense that humanitarian action cannot be expected to be fully aligned with migration control objectives. A certain degree of policy incoherence – the result of different systemic logics at play – has thus to be considered as "a normal and inevitable feature (…) of any pluralistic, democratic and rule of law based system of government" (den Hertog 2018, 364).

But what does this mean in practice? Understanding states as differentiated entities opens a path for forging and strengthening 'communities of practice' across organisational boundaries and seeking new alliances (Bicchi 2022). Of course this does not by itself help to unsettle the dominance of the migration-security frame in the EU's and EU Member States' migration and border policies and associated practices (Ferreira et al. 2022), but it still has the potential to strengthen humanitarian practices based on a professionalisation and standardisation of such practices and fostering of a shared understanding of the humanitarian mission that goes beyond the NGO community and involves relevant parts of the state. While maritime border spaces are indeed of a particular kind in terms of governance and legality, there are also important parallels to comparable domestic situations. Consider, for example, the provision of health or other services to undocumented migrants. Here too practitioners engage in 'wilful ignorance' and provide services irrespective of legal status based on a professional ethos and the priority of basic needs. In many contexts organisations providing such services are tacitly tolerated by enforcement actors on the ground – and actively supported by subnational authorities – because fundamental social objectives (such as public health, prevention of homelessness or destitution) take priority over migration control goals. Evidently, low visibility or what Michael Bommes and Giuseppe Sciortino have called 'foggy social structures' (Bommes and Sciortino 2011) do help such – often quite fragile – arrangements. Yet there have also been repeated calls for 'firewall policies' to stabilise and indeed institutionalise such arrangements, to push states for transparency and a clear commitment to providing access to basic rights, irrespective of legal status (Crépeau and Hastie 2015).

SAR operates in a very different environment and has high visibility. Yet 'firewall' policies between migration control and humanitarian practices, and the related acceptance by states of some of the (from their perspective) negative consequences of SAR, are also in this context essential for them to live up to their own humanitarian commitments. And in many ways, controversies over SAR are exactly about this: whether there should be some sort of firewall between migration control and SAR, or whether the latter should be subordinated to migration policy objectives. Formulating standards and practical guidelines can help to institute and defend such firewalls. In addition, the process of developing standards could

also provide opportunities for alliances with parts of the state (for example with agencies engaged in SAR and related training institutions, based on shared understandings of professional conduct etc.). Supranational and international actors with a stake in SAR could also be involved. In a situation in which NGOs active in SAR are already in the spotlight, transparency and professional and ethical standards are key in demonstrating accountability and safeguarding spaces for humanitarian action.

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