

Mediterranean Missing

Understanding the Needs of Families
and the Obligations of States

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The Italian legal framework for the management of missing persons and unidentified dead bodies, and the rights of the relatives

Italian Legal Briefing

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The cover photograph shows the cemetery shows a view of the cemetery of Lampedusa. 28 migrant bodies rest there, some of them identified.

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TABLE OF CONTENTS

Introduction	4
The Italian normative framework on missing people	4
The Special Commissioner for Missing Persons and the DNA Database	6
The management of unidentified bodies or human remains under Italian law	9
Memorandum of understanding on the identification of the victims of three shipwrecks	11
Burial	12
Extradition of the body and repatriation	13
Summary of Italy's International Legal Obligations	14
Conclusions	15

INTRODUCTION

They are called the new “desaparecidos” (the “disappeared”), people who were lost without trace in the Mediterranean sea, swallowed by the waters, while they were escaping from wars, poverty, persecution, looking for a better life somewhere in Europe.

It has been calculated that 27,000 have died since 2000, and that in 2015 alone about 3,770 people died¹. Sometimes only a part of the body reaches the coast. According to the latest report on missing people, 760 bodies were recovered from the sea in Italy in 2015: 669 in Sicily, 29 in Apulia, 12 in Calabria and 12 in Sardinia². For a number of reasons, most notably the lack of identification documents which are lost in the shipwrecks, and the difficulties experienced by families in accessing identification procedures, most of the bodies remain unidentified, buried without names, as numbers, far from their nearest and dearest, in a foreign country.

This situation gives rise to many inter-related legal and ethical issues, and at least four main levels of needs and rights: first, respect for the principle of human dignity after life; second, the right to identity and its continuation after death; third, the right to a private life, meaning the right to be linked to one’s family, once dead; fourth, the right of the relatives to know about the fate of their loved ones, to elaborate the mourning and to move on, in practical as well as in psychological terms. It would be interesting to ask whether the Italian legal system considers and takes care of these needs, whether it articulates them in terms of rights, or in other terms, or whether it does not consider them at all.

The subject is quite new. It requires governments in Europe, especially those states that are most involved with the phenomenon of missing migrants, such as Italy and Greece, to reflect deeply about their duties and obligations towards the families, and to facilitate access to identification procedures and to release the bodies.

THE ITALIAN NORMATIVE FRAMEWORK ON MISSING PEOPLE

The subject of the “missing” in Italy has been normatively considered only in the context of inheritance, through the institutions of “presumed death” and “absence”³. But in recent years, the increasing phenomenon of missing people, in addition to the growing interest in it shown by the media, has led the Parliament to reconsider the matter in normative terms.

Between 2008 and 2011 five legislative proposals were discussed by the Commission for Constitutional Affairs in the Senate, with the aim of institutionalizing treatment of the missing⁴. An examination of the Parliament's work suggests that the draft laws were linked less to the growing importance of migration and more to the need to clarify and determine

¹ <http://missingmigrants.iom.int/latest-global-figures>

² La scomparsa di persone: una sfida per i Paesi UE”, atti del convegno sulle persone scomparse, ed. by Commissario straordinario del Governo, per le persone scomparse.

³ These institutions respond to civil demands related to the administration of the property of the missing person, to the opening of an inheritance and the dissolution of a marriage. Art. 48 of the Civil Code, in particular, establishes that if a person has disappeared from his last residence, anyone who is interested may apply to the Court for the appointment of an administrator with the primary purpose of protecting the patrimony property. Two years after the last news of the missing person, the supposed heirs may ask the Court to declare his/her absence in order to take temporary possession of their property. After ten years, his/her heirs or the State's Attorney may ask the Court to make a declaration of presumed death so that they can succeed to the property.. Only after this is done may the spouse remarry. These institutions have their roots in Roman law and follow the Napoleonic code which is the model for Italian civil legislation.

⁴ Available at <http://leg16.camera.it/126?idDocumento=4568>; Legislature 16^a - 1^a Standing Committee – Summary report n. 81 del 18/02/2009.

the role of Italian institutions in the search for missing persons, and to make existing procedures simpler and more effective. This reading is confirmed by what was said during the Special Commissioner's hearing for missing persons, which took place in Parliament on 18 February 2009. During his speech the Special Commissioner mentioned the growing number of "people who choose voluntarily to go missing, children kidnapped by a parent, teenagers who run away from disadvantaged and difficult family situations, minors, especially foreigners, who escape from protected residences and institutions to fall, in some cases, into the hands of unscrupulous exploiters, people with psychological disorders, particularly the elderly suffering from Alzheimer's disease, people victimized by criminals and even incidents related to the world of sects. Only at the end was there a mention of the growing number of unaccompanied minors who disappear from homeless shelters and are potentially dragged into organ trafficking. Although the phenomenon of migrant deaths at sea was already well-known at that time, those people were evidently not part of the Commissioner's operational perspective. In none of the subsequent parliamentary sessions in which the law was discussed has the issue of migrants ever emerged.

In 2012 an administrative procedure was established.⁵ It involves many actors, and starts when somebody is officially reported as missing. Under the new law, when someone learns that a person left his own house or temporary residence, is missing and there are reasons to fear for his life, he or she can report the case to the police. In the original version of the bill, reporting was compulsory but the Parliament regarded this provision as too restrictive and not necessary⁶.

If anyone can report someone missing, then surely this can also be done by a foreign citizen's family. But it is clear that in the case of persons without a legal immigration status, the act of reporting carries with it a risk of being identified and expelled, or being charged with illegal entry. In these cases it is important that the family of a missing person is assisted by a lawyer or by associations that deal with migrant rights, in order to minimize the risk and ensure adequate legal representation. If the family member is later called to carry out identification procedures and to participate as an 'offended party' in legal proceedings to establish criminal responsibility for their relative's death, it may be possible to obtain a residence permit for judicial or for humanitarian reasons.

A copy of the report of the missing person is given to the person making the report and a notice is immediately sent to the Database of the Direction of Criminal Police⁷ (Centro elaborazione dati, CED).

At this point the police start the search process and inform the Prefect; the Special Commissioner for Missing Persons becomes involved in the inquiry. The Prefect can also involve other institutions in the search: local government authorities, firemen and the civil protection and private associations who specialize in work on missing people and family rights. In addition, with the consent of the judicial authorities and of the family of the missing person, the media can be contacted, in particular those broadcasters who have experience in the field.

⁵ Law n. 203 of 2012 came into force on 29 November 2012

⁶ Italian criminal law, with rare exceptions (crimes against the State punishable with life sentence, possession of weapons or explosives) imposes no report obligation for individuals, limiting such burden only to the public officials and public servants pursuant to arts. 357-358 of the Penal Code. The provision is in line with the general trend.

⁷ Set up by art. 8 of Law n. 121 of 1981.

THE SPECIAL COMMISSIONER FOR MISSING PERSONS AND THE DNA DATABASE

The “Commissario Straordinario per le Persone Scomparse” (Special Commissioner for Missing persons) [‘CSPS’] is a central figure in the search procedure. The office of the Special Commissioner was established by a presidential decree on 31 July 2007 and coordinates the most relevant public and private actors. It also facilitates the cross-checking of information on missing persons and unidentified bodies, constantly updates the national database on missing persons, and maintains contact with the families of the disappeared.

The CSPS is supported by a special department (called Ufficio del Commissario straordinario per le persone scomparse), which is responsible for updating the data on unidentified bodies and on missing people; and by a committee called “Tavolo tecnico” which reviews the strategies for collecting information and updating the data: The committee also, elaborates methods, information protocols and good practices in order to improve the work of the Office.

Every six months, the CSPS must make a statistical report on its activities to the Prime Minister. In 2007 the Register of Unidentified Bodies (Registro Nazionale dei cadaveri non Identificati) was created to record essential information: particular physical characteristics (sex, age, description of the body in terms of weight, distinguishing marks, clothing, personal effects), where and when the body was found, and this data shared with the Public Prosecutor’s Office and with offices that are dealing with the case.

The legislation which relates to the CSPS does not make any distinction between citizens and non-citizens in its search and access procedures, probably because, as already noted, the issue of the missing was normatively conceived and structured to focus on citizens. Because of this an important chance was lost to regulate important aspects which are specific to missing migrants, such as a permit of stay for a family who is searching for a missing relative, specific facilities linked with embassies, and economic support for families.

In 2010 the “Tavolo Tecnico” developed a new information system, called Ri.Sc. (Missing People Research, in Italian “Ricerca Scomparsi”). The system is located in the central database of the State Police (Ced) and it works in connection with S.D.I. (Sistema D’Indagini- System for investigation), the general database is managed by the judicial police and records all information concerning a crime, in order to collect data from the reports of missing people and from unidentified bodies.

The Ri.Sc aims to compare biometric data of missing persons with data on unidentified bodies, in order to expedite the investigation. To this end two different forms must be completed. The first - the ante-mortem (AM) data form - concerns the missing person and is filled in by the police when the missing person is reported. The second - the post-mortem (PM) data form - concerns the unidentified body and must be completed by the coroner when the body is examined , at the request of the Public prosecutor⁸ (see below).

The coroner plays a crucial role by providing post mortem identification data in the most precise and punctual way, according to criteria applied nationally.⁹

These AM and PM forms record biometric and personal details of the person (the missing person, in the first case; and the unidentified person, in the second one) such as the sex, the possible age, the ethnic group, the color of the skin, the color of the hair, information on

⁸ As required by art. 116 of the regulation for the implementation of the code of criminal procedure (Norme di Attuazione del Codice di Procedura Penale),

⁹ A circular dated 26 July 2015, issued by the Ministry of Justice, established that the Prosecutor, must give the technical advisor a form mod. P.M. to fill out in cases where technical assessments on an unidentified corpse are carried out, as well as adopting measures provided for in art. 116, paragraph 1. disp. att. c.p.p.. This form, once completed, must be delivered in electronic format, together with a signed copy, to the criminal investigation division who will update the Ri.sc. system.

the face, the nose, the mouth, the eyebrows, the teeth, particular signs such as scars, tattoo, piercing, circumcision, artificial limbs, and so on. The forms also contain information about clothing which was worn at the time the missing person was found, or when last seen, any documents like credit cards, permits of stay, or evidence of habits like smoking, alcoholism or drug addiction. Once a case is reported, the data related to the missing person are loaded into the system within 72 hours and the system produces a list of compatibilities with the unidentified bodies, i.e. it matches hypothesis of correspondence ordered by probability.

In the period from 2010, when the Ri.Sc was established, until 31 May 2014, 13,263 AM forms had been compiled and 84 PM forms.¹⁰

Although the Ri.Sc. system was not designed for migrants, the adoption of standardized procedures for recording post-mortem data, which also applies to the judiciary, is an important step towards developing more effective methods of registration. It must be noted that the method of compiling the missing persons register, in cases of unidentified foreigners, was anything but satisfactory, because it contained extremely generic information, which was not useful for identification, for example in many cases only the skin colour was recorded.

It has now been decided that the Ri. Sc. will soon also be interfaced with the central DNA database, which was set up in 2009 by Law n. 85 to address the obligations of the 2005 Prüm Treaty.¹¹ The Treaty establishes a system of transnational cooperation, especially the European Union, to identify those responsible for particular crimes., with a general DNA database, and a complex system of information exchange on the national and international level. The database contains the DNA profiles of people who were arrested or convicted of criminal offences; the data is from biological samples taken in the course of criminal proceedings, from unidentified bodies or remains, and from the close relatives of missing people (art. 7, lett. c).

The DNA database created by the Prüm Treaty is a different system from that of Ri.Sc. The Prüm database concerns the fight against terrorism, illegal immigration and cross-border crimes; it was planned with the aim of identifying those responsible for crimes through an examination of biological data. It should be noted that identification of corpses is outside the scope of the Treaty of Prüm¹² and in this sense the Italian decision to upload data on missing people and unidentified bodies may appear commendable.

However, it is important to note that identification of bodies is quite marginal to the Treaty. Significantly, the report of the Minister of the Interior, Mr Giuliano Amato [4 July 2006], focused only on unsolved crimes without mentioning the subject of the missing. On the other hand such a provision may not be useful in practice in the absence of similar provisions in other jurisdictions. In this sense, the Prüm Decisions of the European Union Council,¹³ which extend "the main provisions of the Treaty of Prüm" to all countries of the European Union, represent a significant lost opportunity. They establish standardized procedures for the exchange of DNA contained in national databases but, as in the Treaty, this is done only to prevent crimes, especially terrorism and illegal immigration. There is no reference, by contrast, to the subject of unidentified bodies. Finally, it is necessary to point out that it is not yet possible to assess the effectiveness and the utility of the national

¹⁰ Report of the minister, 18th June 2014.

¹¹ Prüm Convention on the Stepping Up of Cross-Border Cooperation, particularly in combating terrorism, cross-border crime and illegal migration; signed by the contracting parties in Prüm (Germany) on 27 May 2005, and ratified by Italy with Law n. 85 of 30 June 2009.

¹² It should be noted that the Prüm Treaty does not provide for the collection of data on the missing and their relatives in terms of rights. It should also be noted that although Art. 40, 1, gives an affected persons a remedy? in case of a violation of rights regarding personal data protection, it is intended to cover hypothetical cases of privacy violation resulting from the unlawful acquisition and retention of personal information. For the reasons expressed, compensation would not be available for family members in cases of a failure to identify the body or of a failure of the State to search for a missing family member.

¹³ EU Council Framework Decision 2008/615/GAI and 2008/616/GAI).

database in identifying missing migrants since the implementing regulation came into force only on June 6th 2016.¹⁴

The database is under the control of the Ministry of the Interior, which is responsible for the collection of biological samples. It is based on the “Servizio per il sistema informativo interforze della Direzione di Polizia criminale” (Service for the Joint Information System of the Criminal Police Office) in the Department of Public Safety. Collection, maintenance and classification of data, on the other hand, are managed by the Minister of Justice, through the Department of Penal Administration (Dap – Direzione generale dei detenuti e del trattamento), which has a special laboratory, “Laboratorio Centrale”.

Art. 6 of the implementing Regulation states that when a missing person is reported, the judicial police, if it considers necessary, will collect information about the missing person and any personal effects in order to obtain a DNA profile. The blood relatives can be asked to provide a biological sample on a voluntary basis. In this case the DNA profile of the blood relative is kept in a special section of the Database. This is done by the Police laboratories or by other laboratories of ‘highly specialized’ institutions.¹⁵ The DNA profile is then loaded into the Central Database by order of the judicial authority. If the analysis of the sample was conducted by the laboratory of a specialized institution, the upload is made by the Police laboratory specified by the judicial authority.

According to Art. 6(9) this procedure can also be used in the case of an unidentified body or when human remains have been found, in order to extract the DNA profile and to upload it in the central database. In these cases the police must immediately inform the local prefect in order to involve the CSPS and to activate the necessary cooperation. This co-operation is extremely important because the CSPS has greater access to the families and can more easily obtain information on the missing, including AM data. It is also possible that the unidentified body is that of a missing person who has already been reported to the CSPS. Furthermore, the involvement of the Commissioner should guarantee that the Ri.Sc. is updated.

Also relevant for our concerns is the procedure for the transnational exchange of data which is contained in other comparable databases of European Union member states, in implementation of the “Prum decisions”. Article 12 states that the database can be consulted by foreign institutions with analogous tasks (called “punti di contatto esteri”), in accordance with the provisions of the Prum Decisions.¹⁶ Art. 13 applies where the request for comparison comes from the Italian judicial police. Where there is a match, the results are immediately communicated by electronic means. In this respect the regulation could be a highly effective tool to improve identification procedures, but it is not clear if the norms concerning the transnational exchange of data also apply (or, at least, can be applied) to cases of unidentified bodies and missing reports.

Art. 12 and 13 contain specific references to the Prum Decisions, whose exclusive scope is the fight transnational crime, terrorism and illegal immigration. These decisions, as already noted, do not concern identification of the dead or searches for missing persons. For this reason, on the one hand, it may be that other EU member States do not upload the DNA profiles of missing persons or unidentified bodies (comparative research about the implementation of the Prum decisions in EU states would be desirable). If this were the case, the regulation would prove an ineffective tool, or at least would be useful only in a national context. On the other hand, it is not clear whether, where the Italian judicial police request data under art. 6 of the regulation (i.e. a missing person report or an unidentified body), the “punto di contatto estero” could reject the request since it does not fall within the objectives of the Prum decisions.

¹⁴ The implementing regulation was published in the Gazzetta Ufficiale n. 122 on 26 May,

¹⁵ The norm is very general and does not specify which labs are considered highly specialised; they are probably university laboratories.

¹⁶ n. 2008/615/GAI and n. 2008/616/GAI.

Therefore it would be premature at this stage to draw conclusions about the practical effects of the regulation in terms of improvement of the procedure of identification, and it is necessary to wait and see its further progress.

THE MANAGEMENT OF UNIDENTIFIED BODIES OR HUMAN REMAINS UNDER ITALIAN LAW

When someone finds an unidentified body or human remains, he must immediately inform the Mayor, who will contact the judicial authorities, the police and the local health authorities.¹⁷ The body must then be exhibited in a public place called “depot for recognition” (deposito di riconoscimento), as part of the procedure for identification, in case anyone should claim it.¹⁸ Whenever the number of inhabitants exceeds 5000 people, such a depot may not be located in the city morgue and must be provided with refrigeration rooms, with a ratio of 1 per 20.000 residents.¹⁹ If there are reasons for suspecting that the death is connected to a crime, the public prosecutor must ascertain the cause of the death. Whenever he regards it as necessary, he may order an autopsy,²⁰ or apply for the procedure of gathering evidence before a trial.

When a citizen has knowledge of a indictable offence (such as homicide, unpremeditated disaster or similar), he can report it to the competent authorities.²¹ If the registrar finds that a death is the result of a crime, he must communicate this to the Mayor in order to inform the judicial authority.

Furthermore, if the “death file”²² (scheda di morte) creates a suspicion that the death is the results of a crime, the Mayor must communicate this to the judicial authorities and to the police; if the judicial authority does not intervene, a coroner is appointed by the local health authority in order to examine the remains and the result must be communicated to the mayor and to the judicial authority. When suspicion of a crime arises during a medical examination, the doctor must inform the judicial authority.²³

When the dead person is unidentified, the Public Prosecutor must investigate in order to proceed with the identification and, at this stage, the exhibition of the body in a public place is ordered, and photographs of the body are taken.²⁴ The clothing and any personal effects found on the body are noted and kept in custody, together with the date and the identification data of the people who participated to the first examination.²⁵

The body is then sequestered and examined²⁶ to establish the causes of death. If the identity of the body is known, the public prosecutors must inform the relatives, who can take part to the examination, with the assistance of a medical adviser; but no provision is made in cases where relatives live abroad. When the documents show that the address of the victim of a crime – for example a relative - is outside Italy, he or she must be invited to choose a legal domicile in Italy in order to receive communications;²⁷ but, for obvious reasons, this regulation can hardly apply in case of the autopsy of those who have died in a shipwreck. The technical operation must be completed as soon as possible in order to prevent the decomposition of the body and its consequences (in terms of accuracy of the evidence and the reliability of results).

¹⁷ Art. 5, Regulation on the Mortuary Police (D.P.R. 285/1990) Regolamento di Polizia Mortuaria

¹⁸ Art. 12, D.P.R. 285/1990

¹⁹ Art. 116, Regulation for the implementation of the code of criminal procedure (C.P.P). D.P.R. n. 334/1989.

²⁰ Art. 360 C.P.P

²¹ Art. 333 C.P.P

²² Which every physician is required to complete after having confirmed a death.

²³ Art. 365, Code of Criminal Procedure

²⁴ Art. 116, DPR n. 334/89,

²⁵ Art. 134 ff. CPP.

²⁶ Art. 360 C.P.P

²⁷ Art. 154 C.P.P.

Where the body is subject to an identification procedure or to judicial autopsy, it must be kept in a depot for an indefinite period of time, until the investigations are closed. Although these depots should have a suitable number of refrigerated rooms and be located away from the city morgue, in practice these rules are not applied and, at least in Palermo, medical inspections occur in very unsatisfactory conditions, in the city morgue.

Unless the public prosecutor orders the autopsy as necessary to establish the cause of death, the body undergoes only an external examination. The scientific police takes a biological sample from the body, generally saliva or blood, and, as soon as the central DNA database is operative, the sample will be sent to it. In any event fingerprints are taken together with a detailed description of the body and of its particular signs. A minute of these findings is also filed. When an autopsy is ordered by the judicial authority, it must be performed by qualified police doctors according to the Ministerial Circular of the 30th June 1910²⁸ (Circolare Fani). According to this circular the autopsy must be performed by two coroners; it consists of an external examination of the body, followed by an internal examination of the organs. When the autopsy is concluded, an expert statement is submitted, describing the results of the observation.

For our purposes the external examination is extremely relevant as the Ministerial Circular Fani requires particular care when the body is that of an unidentified person, in order to send the results to advance identification. Specifically “the external inspection should first record the identifying features of the person, with particular precision and completeness in the case of an unknown person: sex, age, height, shape of skull, the hair features, the color of the iris, moles, scars, tattoos, rachitic deformation, professional prints, defects conformation, etc. Pictures of the body may be taken”. All this information is recorded in the expert statement called “verbale di ispezione cadaverica”.

However it is relevant to observe that, because this procedure specifically relates to the judicial process, and, moreover, its content is confidential because it is part of the investigation, there is a concrete risk that all information about the body, as observed immediately after it was found, is not communicated to the Office of the Special Register of Unidentified Bodies [established in 2007] and, as a result, that they will not be publicized or checked with data concerning missing people.

In this respect better coordination between the judiciary and the Ministry of Interior would be desirable. In any case, in order to fill the gap it is again worth of mentioning the circular issued by the Minister of Justice on 10 march 2010 and addressed to all Chief Public Prosecutors at the Courts of Appeal, where it was established that the coroner responsible for the examination of the body must also fill in the PM form (both in paper and in electronic format). The form is then delivered to the Department of Justice, which will update the Ri. Sc. System. Furthermore, as noted above, in order to facilitate mutual cooperation, when a missing report is completed the judicial police must immediately inform the local prefect in order to involve the CSPS.²⁹

Lastly it must be noted that the CSPS has issued some circulars, and that a memorandum of understanding³⁰ was signed with the Institutes of Legal Medicine of all the main universities, at its initiative,³¹ in order to implement mutual cooperation. The circulars generally contain practical information about results, search procedures and the objectives to be achieved, and are addressed to prefects, to the Interior Minister and to other executive institutions. In this respect they seem to have only an informative or, at least, an implementing scope, in order to implement administrative cooperation on a national level. Noteworthy is also the correspondence addressed to the national Prosecutor's Offices

²⁸ Circolare n. 1663 del 1910 del Ministro di Grazia e Giustizia e dei Culti: Istruzioni sulla tecnica medico legale delle autopsie giudiziarie.

²⁹ Art. 6, Regulation for the implementation of Law 30 June 2009, n. 85.

³⁰ See: Protocollo d'intesa del 23 luglio 2015

³¹ Circolare commissariale n. 155 del 14.1.2013; Circolare commissariale n. 3187 del 7 maggio 2014; Circolare commissariale n. 7580 del 9 ottobre 2014.

aiming to obtain a better cooperation for collecting Post Mortem Data through the use of the specific form (the PM form) and to provide information about the memorandum of understanding³².

MEMORANDUM OF UNDERSTANDING ON THE IDENTIFICATION OF THE VICTIMS OF THREE SHIPWRECKS

Because of the increasing phenomenon of missing migrants and, in particular, of the shipwrecks off Lampedusa on 3 and 11 October 2013 and on 18th of April 2015, the Special Commissioner signed a memorandum of understanding with the University of Milan – Labanof,³³ and the Department for civil liberties of the Ministry of the Interior, in order to facilitate identification of the victims. A second memorandum was signed on 23 July 2015, after the shipwreck of 18 April 2015, in order to organize and facilitate the identification of 750 bodies which were retrieved from the boats, and a third one was signed with the Ministry of Education on 31st March 2016 in order to involve all Italian Universities in the identification of victims of this shipwreck.

These memoranda provide for cooperation between coroners from the universities and personnel of the Public Security Department of the Ministry of Interior, in order to identify the victims of the three shipwrecks. They have no application outside these specific cases.³⁴ Some common guidelines were established in order to define and standardize the operations of the coroners, whose role is essential, and to collect and compare Ante Mortem data obtained from the families, with Post Mortem data, collected during the examination of the body and the autopsy.

These guidelines are consistent with the DVI (Disaster Victim Identification) protocols of Interpol and with those used by the ICRC (International Committee of the Red Cross). In order to make possible an exchange of information, if necessary, the collected data are communicated to the AM and PM archives of ICRC. As a first step, photographs of the body with metric references must be taken, as well as fingerprints; clothing and the personal effects described and recorded; the face and the head must be scanned in 3D. Secondly, the autopsy must be performed and particular signs like prosthesis, callus, or diseases, such as nephrolithiasis, are reported; a dental examination is performed and a dental cast is made. The third step consists of the reconstruction of the biological profile and the coroner must then ascertain the sex, the age (apparent age, pubic symphysis, fourth rib, dentition, Lamendin, and/or Kvaal-Cameriere method), ethnic origins (by considering the hair, the skin, the dentition), height, and build.

The procedure is quite different when the coroner deals with a skeleton or with fragmentary human remains instead of bodies, but the main phases at least are the same.

The Memorandum provides for a specific notice addressed to the families of the victims to be disseminated through Italian diplomatic missions, or through humanitarian organizations, or through associations which represent the interests of the families, in order to get information and collect ante-mortem data. It also establishes that relatives should undergo a detailed interview, and that they will be asked to provide objects which were used only by the victim, in order to obtain the DNA profile. Where an object is available, the direct relative will also be given a mouth swab.

³² See the communication n. 5911 of 10.08.2015.

³³ Laboratorio di Antropolgi e Odontologia Forense

³⁴ All the memoranda are public documents, which can be freely accessed and downloaded from the website of the Interior Ministry, on the page of the Special Commissioner. http://www.interno.gov.it/sites/default/files/allegati/protocollo_persono_scomparse_naufragi_lampedusa_3-11_ottobre_2013.pdf; http://www.interno.gov.it/sites/default/files/allegati/protocollo_comm_persono_scomparse_univ_milan_o_vittime_naufragio_18_aprile_2015.pdf, last visited on 2 June 2016.

The University of Milan has been analyzing AM data and creating an archive which contains the results of the autopsies, and anthropological information resulting from the analysis of the bodies. A report with the results of the forensic and anthropological investigation is then sent to the Public Prosecutor's office based in Catania which relatives can consult, on their request. There is no deadline for families to have access to information about the body.

In addition, the Labanof laboratory has the task of matching ante-mortem data with post-mortem data (taken from the archive); when a “suspicion of identity” arises, special scientific investigations, determined on a case by case basis by the forensic team in collaboration with the scientific police and the department of Public Security, are made.

A report with the results of the investigation of the bodies, and the ‘suspicion of identity’, when raised, are communicated to the Prosecutor’s Office in order to inform and give access to families who are interested in the case.

It is unclear whether and how the university laboratories can be involved in the extraction of DNA, and whether the biological samples must be sent to the National Database or not. The memoranda do not address these points or mention the database, but it must be noted that the new implementing regulation of Law n. 85 of 2009 includes laboratories of highly specialized institutions amongst those who can manage the samples, specifying that in these cases the upload is made by the police laboratory specified by the judicial authority, which has received the sample.

BURIAL

Within 24 hours of the confirmation of a death the coroner must fill in a form called “scheda di morte”.³⁵ A copy of this document must be sent within 30 days to the local health office (ASL), which is responsible for recording those who have died, and the causes of death. The Clerk’s Office of each town must be provided with a public register where all the documents concerning deaths ascertained in the district must be recorded.³⁶

Section B of part II of the register is dedicated to deaths reported by the Prosecutor’s Office or by the Judicial Police Office. According to Art. 76, when there are reasons for suspecting that the death resulted from violence, the body cannot be buried before the intervention of the Prosecutor and of the Coroner. After examination of the body, a report containing all information on its condition, on the causes of death and on the dead person, if available (name, surname, age, sex, nationality, date and place of birth), must be communicated to the Clerk’s Office in order to draw up the “Death Act”.

According to art. 73 of the DPR n. 396/2000, the Death Act must indicate the place³⁷, the date and the time of the death, the name, the surname, the age, the sex, the place and the date of birth, the nationality, in case of foreign people; Identification data of the person who communicated the death.

The death act is recorded in the local “register of deaths” and after that the Clerk’s office authorizes the burial. No body can be buried without this authorization.³⁸ In any case where the body is unidentified, a report on the death (description of the body, of the personal effects, of the identifying marks, relevant information for the identification) must be communicated to the Prosecutor so that the court can authorize registration of the death.

If the body is under judicial sequester, as usually happens in the case of shipwreck or when the cause of the death is, at least in hypothesis, connected with a murder and the

³⁵ Article 1, paragraph 5, DPR 285/90,

³⁶ DPR n. 396/2000.

³⁷ In case the person arrived already dead the Death Act, instead of the place, quotes “arrived already dead”.

³⁸ See art. 74 DPR 396/2000; art. 6 D.P.R. 285/1990

Prosecutor's office has been given responsibility for the case, a request must be addressed to the Prosecutor in order to release the body. Once it is released, the Clerk's office fills the Death Act and authorizes the burial. A copy of the Death Act is immediately sent to the competent consular and diplomatic authorities.³⁹

The body can either be buried in a local cemetery or it can be moved to the country of origin, if requested by the family. In the first situation,, the cemetery master plan can assign a certain area of cemeteries for religions others than Catholic and the relatives can ask for a place (*loculo*) in an area which has been assigned to their own religion.⁴⁰

The costs of the burial fall on the family, but the municipality is obliged to guarantee free burial to indigent people and to people whose relatives are unknown or unavailable (as in the case of unidentified bodies).⁴¹ In these cases the municipal authorities are required to assign a common area in the cemetery for free burials.

The Judicial authority can order the exhumation of a body if there are any strong indications of a crime.⁴² A body can be exhumed before the ordinary deadline (ten years) on the judicial authority's order for the purpose of investigation and in the interests of justice. In this situation, the body must be moved into the autopsy room, if necessary, in the presence of the coordinator of the local health authority and of the 'caretaker' of the body (probably the official responsible for the cemetery).

In a 2012 case the Italian Court of Cassation⁴³ held that the relatives may not challenge the decision concerning the exhumation. The Court also stated that the relatives have no legal right to the body of their loved ones and, for this reason, they may not dispose of it. On the basis of that decision one may assume that the relatives also have no legal right to ask for the exhumation of the body. However, it should be remembered that the relatives of a migrant who died in the context of a shipwreck are considered an "offended party of a crime" and that, as such, they have a qualified interest (and some corresponding powers) in the criminal proceedings. The offended party, as a matter of fact, may ask for additional investigations, may oppose the motion for dismissal and may bring a civil action in the criminal proceeding. In this respect the positive identification of the body is a priority for the effective exercise of their rights. On the contrary, it can be assumed that if there are strong doubts about the identification, the judicial authority, *for the purpose of the investigation and in the interest of justice*, on their request, will order the exhumation of the body in order to make further analysis, even long after the burial has taken place.

The Mayor can also authorize the exhumation of a body in order to move it to another burial place.⁴⁴ This provision can be combined with Art. 27 of DPR 285/1990, concerning onward transport, in a case where exhumation is required for the purpose of moving the body abroad (see *infra*).

EXTRADITION OF THE BODY AND REPATRIATION

Repatriation of the body is governed by Art. 27-33 of the D.P.R. 285/1990. Transportation of a body to another State Party to the Berlin Convention⁴⁵ - Austria Belgium Congo, Egypt, France, Germany, Italy, Mexico, Portugal, Czech Republic, Romania, Slovakia, Switzerland, Turkey - is governed by Art. 27. In these cases the local Prefect, who acts as

³⁹ Art. 83, D.P.R. n. 396/2000

⁴⁰ Art. 100, D.P.R. 285/1990

⁴¹ Art. 1, paragraph 7 bis of Law n. 26 of 2001

⁴² Art. 83 of the D.P.R. 285/1990 and Art. 116, Regulation for the implementation of the code of criminal procedure.

⁴³ Case n. 12549/2012

⁴⁴ Note 48, *supra*.

⁴⁵ Full title of treaty?

representative of the Health Ministry, releases the Death Passport (*passaporto mortuario*), a document in which the personal details of the deceased, the cause, the place and the date of the death are reported. Nothing else is required.

When the body is to be moved to a different State, a request for extradition must be addressed to the Prefect of the place where the body lies, with the following documents: 1) the entrance permit released by the consular authority of the State to which the body is directed; 2) the certificate of the local Health authority concerning respect for health provisions; 3) any other document requested by the Health Ministry according to the situation. The body must be placed in two containers, one made of metal, which must be hermetically sealed, and the other made of wood; between April and September the body must be treated with formalin to prevent decomposition. In addition, authorization from the Mayor of the town is required, who can impose a fee. The carrier must be provided with this authorization in order to transport the body.

No financial assistance is provided to families by the Italian Government. A provision on this point was contained in a legislative proposal but it was not approved by the Parliament.

SUMMARY OF ITALY'S INTERNATIONAL LEGAL OBLIGATIONS

Regulatory instruments that deal specifically with the subject of migrants lost at sea and its implications in terms of family rights and correlative obligations for the States have not yet been developed on the international level. Human rights, however, like any other form of legal subjectivity, are intrinsically tied to the condition of being alive and are typically defined, in the case of migrants who escape from their own countries, in terms of political asylum and humanitarian protection. There is also a regulatory core, that is receiving new and intense attention due to the exponential increase of *journeys of hope*, which concern the theme of rescue at sea, and finds its maximum expression in the London Convention for the Safety of Life at Sea (SOLAS - Safety of Life at Sea)⁴⁶ and in the Hamburg Convention on research and rescue at sea (SAR).⁴⁷

These Conventions provide an obligation for coastal states to promote and enable research and rescue services at sea; to provide aid and assistance to all those are risking their life at sea; to provide first aid and medical assistance to survivors and to escort them to a safe place where there is no danger for their own safety.

From similar obligations may arise consequences where a migrant goes missing as a result of the violation of an international rule on rescue at sea. However, even if that was the case, the “weak” nature of international treaty law implies that no effective sanction would follow the violation nor would any compensation in favor of the relatives of the missing person be provided.

Where violation of the duty to rescue causes a migrant's death, more protection can be found under art. 6 of the Covenant on Civil and Political Rights, adopted by the General Assembly on December 16th, 1966;⁴⁸ or better, under art. 2 of the European Convention on Human Rights,⁴⁹ both stating the right to life and the correlative obligation to protect it for the Contracting States.

The right of family members to search for their relative can certainly be set within the framework of the European Convention on Human Rights, under art. 3, which prohibits inhumane and degrading treatments; and under art. 8, which protects the right to have a family and private life.

⁴⁶ Signed in 1974 approved by Italy with the law n.313 of 1980.

⁴⁷ Signed in 1979 and approved by Italy with the law n.147 of 1989.

⁴⁸ Executive in Italy with the Law n. 881 of October 25th, 1977. Became Law in Italy on December 15th, 1978.

⁴⁹ Ratified by Italy with law August 4th, 1955.

There is no doubt that the prolonged lack of reliable information about the fate of their relatives is extremely difficult and is cause of anxiety and emotional stress, with consequences on people's lives that can be considered inhuman and degrading treatments. Similarly it must be included in the semantic spectrum of the right to family and private life (Art. 8) the fast restitution of the body in order to give back to the family members that necessary intimacy for the *exequies*.

In this sense, the Grand Chamber of the European Court of Human Rights in the case *Varnava vs Turkey* held that the suffering and the anxiety caused by uncertainty concerning the fate of their loved ones and the difficulties endured for years in obtaining information from the State authorities, make the families of the missing persons direct victims of inhuman and degrading treatments⁵⁰.

Finally, with specific reference to the position of the children of the missing, whose number recently has grown tragically, we must remember that art. 8 of the Convention on the Rights of the Child⁵¹, which States that “*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.*”

CONCLUSIONS

Finally, the following conclusions may be drawn from a comprehensive examination of the Italian legal framework.

There are two different procedures concerning our subject, with two different focuses: an administrative one, which is led by the CSPS with the cooperation of the local prefects and the police, whose main focus is the search for missing people. And a judicial one, which is led by a Public Prosecutor, whose focus is the detection or prosecution of possible criminal offences underlying the finding of an unidentified body.

As a result, until such time as a body is found and is associated with a possible criminal offence, the CSPS is the exclusive national contact point for the families (except in a case where someone is reported a missing person as the result of a crime) . The administrative procedure aims to find the missing and for the “common” cases it is based on a network of local authorities who are responsible for search operations under the coordination of the Commissioner.

But unfortunately this is not the case for migrants who are missing in the context of a shipwreck. In these cases there is a high probability that the missing migrant is dead and that the body lies somewhere without a name, impounded for criminal investigations. The

⁵⁰ The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court's case-law recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3. The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention (see, among many authorities, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164). Other relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, and the involvement of the family member in the attempts to obtain information about the disappeared person (see *Taniş and Others*, cited above, § 219). The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance (see *Osmanoğlu*, cited above, § 96) but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person.

⁵¹ Approved by Italy through the Law dated May 27th, 1991, n. 176.

role of the Commissioner, in such a case, is quite different because the primary interest will be the identification of the body and the assistance and the care of the families.

It must be noted that access to the judicial procedure, for the families, is quite difficult for many different reasons.

First, there is no investigative interest in the identification of the body, although Art. 116 of the DPR n. 334/89, explicitly states that the Public prosecutor must investigate in order to proceed with the identification. These considerations seem to be confirmed by some declarations made by the Chief Public Prosecutor in Catania, Salvi,⁵² dating from May 2015, where he explicitly said that the reasons for recovering the 800 bodies off the coast of Libya was solely humanitarian and that the public prosecutor's office wasn't supposed to be burdened with this difficult undertaking. The focus of the criminal investigation, as Salvi observed, is just the detection and the prosecution of the smugglers.

Second, there is not a central judicial authority with responsibility for the coordination of the investigations. Such an authority would guarantee an easier sharing of the information, as well as better coordinating the efforts in the investigations.

Third, until the body is identified, the families are not involved in the criminal procedure because, in formal terms, they are not yet offended parties.

Fourth, families are usually outside Italy or, at least, don't have a valid permit to stay. In this regard communication by them with the judicial authority can be problematic and is not easily available.

In this respect the role of the Special Commissioner is fundamental in establishing the interests of the families and interfacing it with the complicated judicial machine. Moreover the Commissioner is a "centralized" authority and because of its role and competences it may reduce the risk of fragmentary approaches to the identification and of dispersion of information and data. Indeed he can be a central point of reference for families, foreign authorities and associations involved in searching, being a national institution that can be easily identified and contacted in order to obtain help and information. These characteristics make the Commissioner a figure particularly suited to get detailed information needed to profile the missing (in the context, Art. 6. of DPR n. 87/2016 - on the Prum database - established that, when a missing case is reported, the judicial police must promptly inform the prefect in order to obtain the involvement of the Special Commissioner).

Given the above, in conclusion, no one can seriously doubt that families have a moral right to be reunited with their loved ones who died (see, for instance, the declaration of Prosecutor Salvi, above mentioned) but, from a legal point of view, it is a different matter.

Considering the Italian legal framework, it may be appropriate to distinguish between two different interests of the families, the interest in searching for the missing, on the one hand, and the interest in the identification of the body, on the other hand. Although these interests are strictly linked, nevertheless they have different interlocutors, the Special Commissioner, in the first case, under the administrative procedure; the Public Prosecutor, in the second one, under the judicial proceeding.

Concerning the first, such an interest can hardly be qualified as a "legal right", in so far as the system does not provide families with any specific legal remedies in order to pursue their objective. In a circular dated 7 May 2014 the Special Commissioner qualified it in terms of a "legitimate expectation" of the families, an expression very similar to that "legitimate interest", which in Italian Law is used to mean "the interest in the proper implementation of the public administration". It means that, as the Commissioner noticed in the circular quoted above, L. n. 241/1990 can be applied to the searching procedure and that, if the administrative procedure does not work properly, or if the families suffer

⁵² <http://catania.meridionews.it/articolo/33893/il-naufragio-con-800-morti-a-largo-della-libia-salvi-recupero-corpi-inutile-alle-indagini/>, last visited on 3 June 2016.

because of unjustified inertia or delay on the part of the Public Administration, they may apply the Court in order to obtain compensation for damage.

Concerning the second it is hard to establish, first, if the system recognizes the families any legal status concerning identification; second, if so, if such a position may be qualified in terms of a right or in terms of a “legitimate interest”. The matter is really complicated and more detailed thought is needed.

On the one hand, it should be remembered that families, until the body is unidentified, are not involved in the criminal procedure as, in formal terms, they are not yet offended parties. As a result they cannot ask for further investigations or appoint a technical advisor. On the other hand they nevertheless have, as already noted, an interest in the identification which is, at least, prodromal and instrumental in acquiring their legal status and rights. Under this point of view it seems reasonable to say that they have a continuing right of access to the body, to the biological samples and to the report containing all the relevant information on the dead, with no time limit. It is not a coincidence that the memoranda mentioned above states that the “Labanof archive” is sent to the prosecutor in order to show it to the families.

On the same basis, it seems reasonable to assert that there is a right of families to exhumation in the event that doubts about the identity of the body (already identified) should rise. However, in this latter case, the 2012 decision⁵³ of the Court of Cassation should be remembered, which held that the relatives have no legal rights in relation to the body of their own loved one.

At present it seems that no legal action has yet been taken against Italy by any families to require the state to search for a missing migrant or to take steps to identify a body. For this reasons the argument is purely theoretical and cannot be informed by the work of judges.

At the beginning of this brief report we approached the subject wondering whether the Italian legal system articulates the topic of missing migrant in terms of rights and principles: respect for human dignity after life; the right to the identity and its continuation post mortem; the right to a private life meant as the right to be joined to one’s own family, once dead; the right of the relatives to know about the fate of their loved ones, to elaborate the mourning and to go on. Returning to our initial observations now we can say that it does not yet provide a response to such, massive, themes, in these terms, at least.

Furthermore it must be noted that families are poorly represented on a political level and for this reason the chances are very small that any fundamental rights are recognized for them concerning search and identification on a normative basis. The only one chance to articulate their interest in terms of fundamental rights is through judges and in this respect some legal actions would be desirable in order to call all the legal actors to a new and deeper reflection on such a relevant topic and its different facets.

As noted at the beginning of this paper, the statement of constitutional principles in terms of rights is purely a hermeneutic procedure, the result of scholars cooperation, legal practitioners and judges in particular. However Italian jurisprudence does not yet seem to have started any interpretative process for this new and current frontier of human rights. The reasons are certainly related to the enormous difficulties of access to justice, that add to the difficulties of access to procedures. The families of missing migrants usually stay in Italy for limited periods of time, often with no valid immigration status, and search for their loved ones in conditions of great insecurity and emotional vulnerability, with scarce financial resources, and without contacts within the country. Such conditions rarely lead to action along a judicial path which can affirm their right to identification (theirs and of their relatives). For this reason it is better that such concerns are captured directly at the source and represented by associations that are able to activate for them the necessary monitoring and compensatory remedies, and give a voice to those who so far have had no voice.

⁵³ Case n. 12549/2012.

Mediterranean Missing

Understanding the Needs of Families
and the Obligations of States

www.mediterraneanmissing.eu

THE MEDITERRANEAN MISSING PROJECT



The Mediterranean Missing Project is a one year research project running that began in September 2015, funded by the Economic and Social Research Council of the United Kingdom. Resulting from collaboration between the University of York, City University London, and the International Organization for Migration, the project is one of the first efforts to systematically collect data and comparatively explore current responses to migrant bodies in the Mediterranean, and the impacts of a missing person on families left behind. In 2015, over 3,770 refugees and migrants are known to have died at sea while trying to reach Europe. The majority of these people are not identified, and in many cases bodies are never found. In each case, a family is left in a state of ambiguous loss, unable to fully grieve for their loved one. Despite the magnitude of unidentified deaths and the suffering of families, states have done little to address this humanitarian imperative. This project aims to shed light on the policy vacuum at EU and national levels, through investigating the policies and practices in Italy and Greece regarding the investigation, identification, burial and repatriation of migrant bodies. Research with families of missing migrants from a range of contexts aims to better understand the impacts of missing persons on families, both psychologically as well as economically and socially.

Research findings include the following publications:

- Italy and Greece country reports, including summary versions.
- A report of a study on the impact on families of having a relative missing in migration.
- A legal briefing summarising the obligations under International Human Rights Law of states concerning the migrant bodies and the missing.
- Studies of the legal frameworks relevant to missing migrants and the management of the bodies of migrants in Italy and Greece.

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