

## Dead and Missing Migrants: The Obligations of European States under International Human Rights Law

IHRL Briefing  
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This paper reviews how international human rights law (IHRL) applies in situations of migrant death and loss in the European region.<sup>1</sup> It sets out principles which should be at the centre of national responses when migrants<sup>1</sup> die or go missing at international borders.<sup>1</sup> It focuses on the state's legal duties under IHRL to protect the right to life, and specifically to investigate deaths and give information to families.

The paper takes as its starting point the rules which have been developed in relation to missing persons in international humanitarian law (IHL). It then asks what equivalent protections can be found in IHRL. It concludes that in some areas, notably investigation of deaths and identification, the state's duties are broadly similar, although IHRL is less developed and less specific than IHL. The last section summarises these duties, and also lists some areas where further work is needed.



The opinions expressed in the report are those of the authors and do not necessarily reflect the views of the International Organization for Migration. The designations employed and the presentation of material throughout the report do not imply the expression of any opinion whatsoever on the part of IOM concerning the legal status of any country, territory, city or area, or of its authorities, or concerning its frontiers or boundaries.

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## TABLE OF CONTENTS

<b>A Protection Gap</b>	<b>4</b>
<b>The Need for International Standards</b>	<b>4</b>
<b>Principles of International Humanitarian Law</b>	<b>5</b>
<b>International Human Rights Law</b>	<b>6</b>
Human Rights Duties of States in relation to migrant deaths	8
Jurisdiction	8
Respect and Protect in Domestic Law	9
Non Discrimination	9
The Right to Life	10
Investigation and Data Collection	12
The Rights of Families	13
Rights of Spouse and Children	16
<b>Conclusion</b>	<b>17</b>
Basic Human Rights Obligations	17

## A PROTECTION GAP

International norms have been agreed for tracing the missing and recording the dead in humanitarian disasters and situations of internal displacement, for identifying their mortal remains, and for recognising the rights of families. These standards build on well-established rules of international humanitarian law in time of war; they also reflect the long experience of the international Red Cross movement in its work to trace missing persons,<sup>1</sup> and of international agencies who work in situations of humanitarian disaster.<sup>2</sup> All recognise that identification is a duty, and that families have a right to know the fate of missing relatives. Both are at the centre of search and rescue operations in civil air crashes or where lives are lost in commercial shipping accidents.<sup>3</sup>

But these norms have little to say about migration. Although international human rights law protects migrants,<sup>4</sup> it has seldom been applied in situations of border death or loss in the course of migration. These deaths appear to have been seen as an exception to what is otherwise common practice, and the human rights duties of states have not been clearly understood or articulated.<sup>5</sup> In Europe, IHRL has sidestepped the issue,<sup>6</sup> for reasons which include the disempowerment and consequent ‘invisibility’ of families, many of whom are outside Europe, or in Europe but without a secure legal status.

Two immediate steps are needed to fill this protection gap, and the policy vacuum which it creates: recognition by states that missing migrants are entitled to protection similar to that enjoyed by other missing persons;<sup>7</sup> and the application of IHRL to migrant death and loss at international borders.

## THE NEED FOR INTERNATIONAL STANDARDS

States’ responses to migrant deaths on Mediterranean crossings have been determined by national law and practice. There has been little – often no – reference to international standards, despite the fact that all EU states are parties to the European Convention on Human Rights [‘ECHR’] and are legally bound to protect Convention rights. States in the European region have also undertaken to respect rights set out in international treaties, including the International Covenant on Civil and Political Rights [‘ICCPR’], and the Convention on the Rights of the Child (CRC). In addition, EU institutions and agencies are required to respect human rights when they are implementing EU law.<sup>8</sup> But in the absence of a clear international normative framework, which articulates what these rights and duties mean in the context of migrant death, it has not been easy for relatives or for civil society organisations to challenge states’ failures to investigate deaths and identify the dead. Nor

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<sup>1</sup> Notably, ICRC Guiding Principles/Model Law on the Missing, 2009.

<sup>2</sup> IASC Operational Guidelines: 2006. Interpol Disaster Victim Identification Guide, Annex 15: ‘Guidance and Information for Families’, 2014. Interpol has acknowledged the right of victims “not to lose their identities after death.. “Recognising that for legal, religious, cultural and other reasons, human beings have the right not to lose their identities after death...”. Resolution No. AGN/65/RES/13.

<sup>3</sup> See, eg, ICAO’s Guidance on Assistance to Aircraft Accident Victims [Circular 285-AN/166].

<sup>4</sup> The term migrant includes asylum seekers and refugees.

<sup>5</sup> This paper reflects discussions at a legal consultation, at the LSE on 14 April 2016, under the auspices of the *Last Rights Project*.

<sup>6</sup> But see Inter American Commission on Human Rights, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, OEA/Ser.L/V/II, Doc. 48/2013.

<sup>7</sup> Reporting on missing persons to the General Assembly in 2014, the UN Secretary General for the first time included missing migrants; he pointed to the similarities between missing persons in situations of conflict, disaster and migration, and urged states to recognize migrants as particularly vulnerable. UN Doc. A/69/293, 11 August 2014.

<sup>8</sup> European Charter of Fundamental Rights, 2000, art. 51.

have protocols been developed in the key area of data collection relating to the dead and missing, and its international standardization.

Identification, death registration and burial are first and foremost a matter for the national law of each state. Typically, burial is by families; a death is reported to the authorities by relatives, neighbours, or medical authorities; where questions arise concerning identity, these are first resolved through recognition by family and friends, or by documentary evidence, and where neither is available, by forensic evidence including dental records and DNA matching. These procedures are most effective where the dead person has ties within a community. Identification of migrants who die in the course of irregular border crossing often does not fit easily into national procedures which were designed primarily with deaths of citizens or residents in mind. The result has often been an information deficit, a lack of coherence between different institutions, and differing practices at national and local level within states.<sup>9</sup>

The importance of an international framework lies in the common rules and standards it sets to guide states, to assist families to know their rights, and to provide a yardstick against which deficits in national law and practice can be measured. The domestic law of each EU state typically contains the essential elements of protection, even if the language of human right is not used: investigation and identification, involvement of the family in the investigation, dignified treatment of the dead and burial in marked graves. The challenge is to ensure that migrant deaths are integrated into these national systems, and given equal treatment to those of citizens, despite the special obstacles present in the context of international migration.<sup>10</sup>

## PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

The oldest and most comprehensive rules for dealing with death and loss are found in international humanitarian law [IHL] – the law of armed conflict.<sup>11</sup> These rules limit methods of warfare and protect combatants who are no longer taking part in hostilities. Implementation relies primarily on reciprocity – reciprocal actions – between states. The rules set basic standards of humane and respectful conduct towards the dead and their families, including preserving the memory and dignity of the deceased person.<sup>12</sup> Although limited in their legal application to situations of conflict, the relevance and moral authority of these rules is much wider. They should be taken into account in formulating responses to death and loss in situations of international migration.

The duties of states engaged in – parties to – a conflict include the obligation to search for missing persons and to collect the dead; to identify and record information on the dead and missing, to issue death certificates or certified lists with the relevant particulars, to hold this information nationally, and to share it with other interested parties. The provisions on identifying, recording, and passing on information relating to the deceased reflect a right for families to know the fate of their relatives. Parties to a conflict have explicit duties to ensure decent and dignified burial and prevent the dead from being ‘despoiled’;<sup>13</sup> bodies, must be

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<sup>9</sup> See Deaths at the Border Database for the Southern European Union. <http://www.borderdeaths.org>.

<sup>10</sup> See generally, Fatal Journeys, Vol. 2, Identification and Tracing of Dead and Missing Migrants, IOM, Geneva, 2016.

<sup>11</sup> In particular the 1949 Geneva Conventions and their 1977 Additional Protocols, together with international customary law. For a summary of the rules, see *What is International Humanitarian Law?*, ICRC Advisory Service, Geneva, December 2014.

<sup>12</sup> See generally Daniela Gavshon, ‘The Dead’, *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp 277-296.

<sup>13</sup> International criminal law separately prohibits “outrages upon personal dignity”, including upon the dead, as a war crime. 1998 ICC Statute, 8(2)(c)(ii).

buried in individual marked graves, and where possible according to the religious beliefs of the deceased.<sup>14</sup>

These legal rules have been given practical expression in the ICRC's excellent *Guiding Principles/Model Laws on the Missing* ['ICRC Guiding Principles'] which set out the steps which should be taken to trace the missing,<sup>15</sup> recover and identify bodies, their burial, and notification to families. They reflect not only the practices of international humanitarian law but also the content of international human rights law. They apply principally in situations of conflict, where

[a]ll available means must be employed to identify human remains. If the remains of a person are found, yet not identified or identifiable, the body and all personal effects must still benefit from all measures that ensure dignified handling and burial. A record should necessarily be kept active in order to allow for future identification and subsequent notification to relatives and interested parties....<sup>16</sup>

The *ICRC Guiding Principles* state – inter alia – that:

- Everyone has the right to know about the fate of missing relatives, including their whereabouts or, if dead, the circumstances of their death and place of burial, and to receive mortal remains; P.7
- The authorities must keep relatives informed about the progress and results of investigations; P.7.
- All available means must be undertaken to recover and identify bodies and recover personal effects; P.19
- The dead should be treated with respect and dignity; identified and buried in individually marked graves in sites that are identified and registered; P.21
- the rights and interests of missing persons shall be protected until their fate has been ascertained or their death recognized; P.6

The *Guiding Principles* recommend the creation of national data bases (national information bureaux) to centralise information on the dead and missing, and transmit it to the ICRC's Central Tracing Agency in Geneva. Ps.12, 13 & 14.

Taken together, the *Guiding Principles* contain elements – most notably, identification, informing relatives and international data recording - which should be present in any international framework for the identification of migrant deaths and for the families of missing migrants.

## **INTERNATIONAL HUMAN RIGHTS LAW**

How far are equivalent protections to be found in international human rights law?

Unlike IHL, IHRL gives rights to all individuals, which states should respect and protect. Key treaties include the International Covenant on Civil and Political Rights and the UN

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<sup>14</sup> See 1949 Geneva Convention I, Arts. 15-17; 1977 Additional Protocol 1, Arts. 32-34.

<sup>15</sup> There is no legal definition of a missing person under international law. ICRC *Guiding Principles* [Art.2(1)] define a missing person as 'a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.' Introduction to ICRC *Guiding Principles* 2009.

<sup>16</sup> ICRC *Guiding Principles*, 2009, Commentary to Art. 23.

Convention on the Rights of the Child which are international in their scope and application, and the regional European Convention on Human Rights.<sup>17</sup>

In reviewing IHRL and its application in situations of migrant border deaths, some preliminary comments should be made:

- Unlike IHL, IHRL does not directly address the identification of the dead, or the ‘management’ of bodies. With one exception [enforced disappearances], human rights treaties do not set out explicit duties of states in relation to death: thus there is no explicit duty to register a death, in contrast to – eg - the CRC’s recognition that every child has the right to have his or her birth registered.<sup>18</sup>
- An assumption which has informed IHRL is that an individual’s rights end with death: the dead no longer have rights which must be respected.<sup>19</sup> Applying this reasoning to art. 3, which proscribes – inter alia – inhuman and degrading treatment, the European Court of Human Rights [‘ECtHR’] found that “human quality is extinguished after death, and, therefore prohibition of ill treatment is no longer applicable to corpses”.<sup>20</sup> An exception has been made in the special field of organ and tissue transplant, where the human body must be treated with respect even after death.<sup>21</sup> Separately, close relatives can apply to the ECtHR if they can show that they have been the indirect victims of a violation of an ECHR right, for example under art.3. In a different context, the ECtHR recently found that ‘dealing appropriately with the dead out of respect for their deceased relatives’ is within the scope of the European Convention.<sup>22</sup>
- It is unclear whether the right to dignity continues after death, and protects the human body from being mistreated or despoiled. The European Charter of Fundamental Rights requires EU institutions, and EU states, to respect and protect human rights when they apply EU law; this includes border control and surveillance measures by national coast guards or EU agencies such as Frontex.<sup>23</sup> ECFR art. 1 states that human dignity is ‘inviolable’, and must be respected and protected. It does not indicate that dignity continues after death, although this is a common constitutional tradition in some EU member states. The point will be clarified when the European Court of Justice decides a case on this issue.<sup>24</sup>
- Nonetheless human rights law imposes certain clear duties on states in relation to deaths. These are not expressly set out in the language of the treaties and must be

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<sup>17</sup> The Inter American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights protect rights in – respectively - the American and the African regions.

<sup>18</sup> CRC, art. 7.

<sup>19</sup> Whether protection under international refugee law continues after death has been raised in the Italy research. Specifically, should a state of nationality be permitted to take custody of the bodies of asylum seekers who had fled persecution in that country? In the specific case – Eritreans who had died in a shipwreck off Lampedusa in October 2013 – the bodies had not been identified, nor had they been formally recognized as refugees.

<sup>20</sup> ECtHR *Akpinar & Altun v Turkey*, (56760/00) 2007, para. 82. But ‘(i)f the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with requisite legal interest as next of kin to introduce an application raising complaints related to the death’. ECtHR *Varvarna & Others v Turkey*. (16064/90), para. 111.

<sup>21</sup> See, eg, Convention on Human Rights and Biomedicine, 1997, and Additional Protocol. ‘The object of these treaties is to protect the dignity, identity and integrity of “everyone” who has been born, whether now living or dead’. *Elberte v Latvia*, (61243/08) 2015 para 142.

<sup>22</sup> ECtHR *Genner v Austria*, (55495/08), 2016. para 35.

<sup>23</sup> For example, under the Schengen Border Code [Regulation EC No. 562/2006], and the Boreer Surveillance Regulation [EC No. 656/2014].

<sup>24</sup> See Catherine Dupre, ‘Art. 1: Human Dignity’, *The EU Charter of Fundamental Rights: a commentary*, ed. Peers, Hervey, Kenner & Ward, Hart, 2014, pp. 3-24.

defined through a process of interpretation, by applying broadly-drafted rights to a specific situation, through the decisions of international courts, and [in the case of UN treaties] through the interpretative General Comments of treaty bodies.<sup>25</sup> Thus, although international human rights law does not contain a specific provision requiring states to investigate deaths, international judicial bodies, including the ECtHR and the Human Rights Committee, have ruled that in order to protect the right to life, alleged breaches of the right must be investigated.<sup>26</sup>

- A further difficulty arises from a lack of case law dealing specifically with death and loss during migration. Families who wish to take cases to the European Court of Human Rights in Strasbourg have first to surmount practical and legal obstacles which include distance, cost and often their own irregular status. The result is that the Court has seldom been asked to apply Convention rights in relation to migrant deaths, and there is not yet a developed body of case law directly on this issue. Principles must therefore be developed by analogy, from decisions in cases dealing with broadly comparable situations.
- A causal link between closed maritime borders, dangerous journeys, smuggling operations, and migrant deaths has been generally accepted by academics and civil society.<sup>27</sup> But establishing the legal responsibility of states for deaths at sea is more difficult, outside clear situations such as deaths resulting from *refoulement*, ‘push backs’, or criminal actions by, for example, coast guards. This is a major obstacle for families since an application to the ECtHR must identify the responsible state.

## **Human Rights Duties of States in relation to migrant deaths**

### **Jurisdiction**

States have obligations to ensure and respect the rights of everyone within their territory and subject to their jurisdiction, power and effective control.<sup>28</sup> They are required to respect and protect the lives of all individuals located on ships or aircraft flying the state’s flag or registered by it, and of those individuals ‘who due to a situation of distress in sea’ find themselves in an area of the high seas over which a state has assumed de facto responsibility, including under international maritime law governing rescue at sea.<sup>29</sup>

Human rights responsibilities thus arise where, for example:<sup>30</sup>

- A person dies in a State’s territorial seas and/or their body is washed ashore;

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<sup>25</sup> This can be a complex process. Thus, ‘the obligation to investigate and prosecute deprivations of life ‘arises both from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with Article 6, and from the duty to provide an effective remedy to victims of human rights violations and their families, which is articulated in article 2, paragraph 3 of the Covenant, when read in conjunction with article 6, paragraph 1.’ Draft General Comment 36, para. 29.

<sup>26</sup> The obligation to investigate and prosecute deprivations of life ‘arises both from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with Article 6, and from the duty to provide an effective remedy to victims of human rights violations and their families, which is articulated in article 2, paragraph 3 of the Covenant, when read in conjunction with article 6, paragraph 1.’ Draft General Comment 36, para. 29.

<sup>27</sup> Starting with Spijkerboer, T., ‘The Human Costs of Border Control’, *European Journal of Migration and Law*, 9:127–139, 2007.

<sup>28</sup> States shall ‘secure to everyone within their jurisdiction’ the rights defined in the Convention. Art.1 ECHR.

<sup>29</sup> The duty to rescue is well established in international maritime law. States have an obligation to ‘require the master of a ship flying its flag. . . . to render assistance to any person found at sea in danger of being lost’. UN Convention on the Law of the Sea [‘UNCLOS’], 10 December 1982, Art. 98(1).. Also International Convention for the Safety of Life at Sea [‘SOLAS’], 1 November 1974, Chapter V,

<sup>30</sup> These responsibilities exist equally at land borders.



- A person is 'missing' within a State's territorial seas;
- A State retrieves bodies from the sea, including in international waters;
- A family member/relative of the missing and dead is within the jurisdiction of the State.

Rights should be protected at national borders. The UN has usefully set out the measures which states should take to protect human rights at borders in its *Recommended Principles and Guidelines on Human Rights at International Borders* ('OHCHR Principles').<sup>31</sup> These *Principles* start from the premise that states should recognise the 'primacy' of human rights, and that international borders are not 'zones of exclusion or exception for human rights'. States 'shall ensure that human rights are at the centre of the governance of migration'; the best interests of the child 'are a primary consideration applicable to all children who come under a state's jurisdiction at international borders'; and domestic law must be harmonized with IHRL 'to explicitly ensure that international human rights are respected, protected, and fulfilled ...in all encounters with migrants at international borders'. The only reference to migrant death concerns data collection.

### Respect and Protect in Domestic Law

States have a duty to implement - give effect to - the rights contained in international human rights treaties, and to that end are required 'to make such changes to domestic laws and practices as are necessary to ensure their conformity' with the treaty. The duties set out in the ICCPR are binding on every State 'as a whole', and 'on all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local'. Where there are inconsistencies between domestic law and the treaty, domestic law or practice must be changed to meet the standards imposed by the treaty's 'substantive guarantees'.<sup>32</sup>

### Non Discrimination

Human rights are universal; when governments ratify human rights treaties, which they do as a voluntary act, they undertake to protect the rights of 'everyone'<sup>33</sup> without discrimination: '[E]veryone' includes not only their citizens but also

all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party...<sup>34</sup>

In the case of children, rights are

not limited to children who are citizens... and must therefore, if not explicitly stated otherwise..., also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.<sup>35</sup>

The ECHR prohibits discrimination in the enjoyment of rights, with very limited exceptions.<sup>36</sup> Although states sometimes argue that they should be able to restrict the rights

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<sup>31</sup> *Recommended Principles and Guidelines on Human Rights at International Borders*, UN OHCHR, 2014.

<sup>32</sup> Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. UN Doc CCPR/C/21 Rev.1/Add.13. Adopted 29 March, 2004.

<sup>33</sup> '[S]ecure to everyone' ECHR art. 1.

<sup>34</sup> Human Rights Committee, General Comment 31, para. 10. *Supra*.

<sup>35</sup> CRC Committee General Comment No.6 (2005) *Treatment of Unaccompanied and Separated Children outside their Countries of Origin*, para. 12.

<sup>36</sup> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Art. 14

of non-nationals, including migrants, for example in the interests of national security, international human rights law generally requires the equal protection of citizens and non-citizens.<sup>37</sup>

### **The Right to Life<sup>38</sup>**

Human rights law requires states to protect the right to life – ‘the supreme right’.<sup>39</sup>

Everyone’s right to life shall be protected by law.<sup>40</sup>

Every human being has the inherent right to life. This right shall be protected by law....<sup>41</sup>

States have a duty to ‘take appropriate steps to safeguard the lives of those within their jurisdiction’.<sup>42</sup> Decisions of the ECtHR, the Human Rights Committee and other international judicial bodies establish that the duty involves two distinct but complementary obligations: a substantive obligation to prevent deaths, and a procedural obligation to investigate suspicious deaths.

The duty to protect life in the specific context of dangerous sea journeys has not yet been directly considered by international human rights courts. But the case law of the ECtHR and other international courts and tribunals establishes the general principles which should apply.<sup>43</sup>

One basic principle is that states should take ‘exceptional measures of protection towards vulnerable persons, including ... children, asylum seekers and refugees, and individuals whose lives have been placed at particular risk because of ... pre-existing patterns of violence’.<sup>44</sup> Although migrants on irregular journeys are not named, they clearly come within this vulnerable group.

### ***The Duty to Prevent deaths***

The state is under a positive – substantive - duty to take preventive action where there are, inter alia, foreseeable threats to life originating not only from state authorities but also from private persons. The state must take ‘adequate preventive measures in order to protect individuals from being murdered or killed by criminals and organized crime’.<sup>45</sup> The obligation also arises where loss of life results from a life-threatening activity or situation of which the authorities knew or ought to have known.<sup>46</sup> In certain circumstances, states must also protect individuals from risks to their lives which result from their own actions;<sup>47</sup> this means that states should not argue an exception in the case of migrants who pay smugglers to take them on dangerous journeys.

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<sup>37</sup> *A & others v Secretary of State for the Home Department*, [2004] UKHL 56. This UK case confirmed that the right to liberty of non citizens could not be limited on grounds of national security if the limitation did not also apply to citizens.

<sup>38</sup> See, generally, Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, 2014, pp. 203 – 224.

<sup>39</sup> Human Rights Committee Draft General Comment 36. Article 6: *Right to Life*, UN Doc. CCPR/C/GC/R.36/Rev.2, 2 September 2015, para. 2. [‘Draft General Comment 36’]

<sup>40</sup> *ECHR, Art.2.*

<sup>41</sup> *ICCPR, Art 6.*

<sup>42</sup> *LCB v UK, 1998-III; EHRR 212, para 36.*

<sup>43</sup> These are usefully set out and synthesized in the Human Rights Committee’s Draft General Comment 36, *Supra*.

<sup>44</sup> Draft General Comment 36, para 26.

<sup>45</sup> Draft General Comment 36, para 25.

<sup>46</sup> ECtHR caselaw refers to risks arising from – eg – a state’s failure to act to prevent flooding, death on an unsafe ski slope, and from a toxic waste dump. See – eg – ECtHR, *Oneryıldız v Turkey*, 2004-XII; 41 EHRR 325 para 71.

<sup>47</sup> ECtHR *Furdik v Slovakia*. (42994/05) 2008. The case concerned the adequacy of rescue arrangements on a risky ski-slope.

In order to conclude that there has been a violation of the positive obligation to protect life,

it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.<sup>48</sup>

The duty to prevent is not unlimited. It ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’, bearing in mind – inter alia – the operational choices which must be made in terms of priorities and resources.

The Italian *Mare Nostrum* Mediterranean rescue operation is an exemplary example of preventive action by the state.

### ***The Duty to Investigate***

The state also has a procedural duty to investigate unlawful or suspicious deaths which are within its jurisdiction, on land or at sea. The duty goes beyond investigating deaths where state involvement is suspected, and encompasses suspicious deaths at the hands of ‘private persons, or persons unknown’, regardless of whether there is evidence of criminal action requiring investigation and prosecution under criminal law. It follows that there is a duty to investigate migrant deaths in the course of coastguard operations, and in the course of smuggling operations.

Investigation is also required when deaths are caused by unsafe conditions, in circumstances where the authorities ‘had known or ought to have known’ of a threat to life. The case law includes deaths which were caused by an explosion at a toxic rubbish tip, where the state’s failure to prevent and investigate, despite having known of risks to life, was held to be a violation of ECHR art.2.<sup>49</sup> There is an obvious parallel to be drawn with deaths on dangerous sea crossings, where a history of previous shipwrecks indicates that the state should have known the risk, taken preventive action, and investigated loss of life.

Investigation is not dependent upon the lodging of a formal complaint by next of kin. It should start, ex officio, once the death has come to the attention of the authorities. Investigation should not be limited to criminal proceedings.

The purpose of investigation includes, but goes beyond, ensuring the accountability of those responsible. Investigation should enable - inter alia - “the facts to become known to the public and in particular the relatives of any victims”; it should provide an effective remedy to victims of human rights violations and their families, and should enable necessary lessons to be drawn with a view to avoiding repeated violations.<sup>50</sup>

In its investigation, the state should take ‘appropriate measures’ to establish the truth relating to the events leading to the deprivation of life; this includes identifying the bodies of individuals who have lost their lives.<sup>51</sup>

The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony,

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<sup>48</sup> ECtHR *Rantsev v Cyprus & Russia* (25965/04) 2008. para 17.

<sup>49</sup> ECtHR *Oneryildiz v Turkey*, Supra The case concerned deaths caused by a methane explosion at a rubbish tip when refuse erupting from the pile of waste engulfed more than ten houses situated below it, including the one belonging to the applicant, who lost nine close relatives. The authorities had ‘known or ought to have known’ of a ‘real and immediate risk to persons living near the tip, and taken preventive action. Failure to prevent, and failure to investigate were held to be violations of art.2.

<sup>50</sup> Draft General Comment 36, para 29.

<sup>51</sup> Draft General Comment 36, para 30.

forensic evidence and, where appropriate an autopsy which provides a complete and accurate record of injury and an objective analysis of analysis of clinical findings, including the cause of death.<sup>52</sup>

The investigation may take different forms, depending on whether there is evidence of criminal responsibility, or whether a civil enquiry is appropriate. But it must be effective. This in turn requires that it is adequate, prompt, and subject to public scrutiny. To be adequate, an investigation must be capable of establishing the cause and circumstances of the death, and the identification and punishment of those responsible. A prompt investigation is needed ‘to ensure public confidence in ...the rule of law’ and prevent any “appearance of [official] collusion in or tolerance of unlawful acts’.<sup>53</sup>

There must be public scrutiny and the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”.

Relevant details about the investigation should be disclosed to the victim’s next of kin and the findings of an investigation should normally be made public.

For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence.... The investigation must be capable of leading to the identification and punishment of those responsible ...A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention ...In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests...<sup>54</sup>

It is not clear what resources the state is required to make available for the investigation. The case law indicates that states must take ‘all suitable measures, which can reasonably be expected from them’ to prevent deaths; but at the same time the burden on the authorities should not be ‘impossible or disproportionate’.<sup>55</sup> Human rights bodies have not yet considered the meaning of ‘impossible’ and ‘disproportionate’ in the context of investigating border deaths. The answer may well depend on what resources are or could be made available as a matter of fact, both nationally and with international assistance.<sup>56</sup>

There is no direct authority on the extent of the procedural duty to investigate in relation to the search for and collection of a body, or to the preservation of personal possessions. Both are means to investigation. Preservation of personal possessions and their return to relatives are adjuncts to the protection of a family’s property and inheritance rights.<sup>57</sup> Similarly, the procedural duty to investigate should include issuance of a death certificate showing the cause of death.

Given the obligation to take ‘exceptional measures’ to protect vulnerable people, there should be an investigation whenever a body is recovered from the sea after a shipwreck, or found on a beach.<sup>58</sup>

## Investigation and Data Collection

IHRL is also relevant to the collection and storage of personal data which is collected for use in investigation and identification. Drawing on IHRL, the ICRC has set out the

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<sup>52</sup> ECtHR *Mikayil Mammadov v Azerbaijan*.(4762/05. 2009). para 223

<sup>53</sup> ECtHR *Akpınar and Altun v Turkey*, para. 58. Supra,

<sup>54</sup> ECtHR *Rantsev v Cyprus & Russia*. Supra, para 23.

<sup>55</sup> ECtHR *Osman v. United Kingdom* (23452/94) 1998, para 116.

<sup>56</sup> Despite the limited resources of south east Asian states at the time of the 2004 Tsunami, international assistance made it possible to organize an ambitious operation to identify victims.

<sup>57</sup> Protocol 1 to ECHR. ‘Every... person is entitled to the peaceful enjoyment of his possessions’.

<sup>58</sup> Greek law (Law 3772/2009) includes drowning at sea in the category of ‘violent deaths’ which should be investigated..

obligations of states regarding the protection and processing of personal data relating to missing persons, emphasizing that '[a]ppropriate safeguards should be applied when collecting, storing or otherwise processing data, taking into account the sensitivity of the information.'<sup>59</sup>

OHCHR's *Principles* recommend the standardised collection and analysis of data on migrant border deaths. There should be explicit data protection guarantees in information sharing and exchange agreements between and within states, including through establishing 'firewalls' between immigration enforcement and public services.<sup>60</sup>

Specific issues arise in the context of the collection and retention of forensic genetic data. The UN Human rights Council has noted the need to ensure respect for the protection of human rights in the collection, processing and storage of human genetic data; it included the search for missing persons where post mortem or ante mortem information is collected from bodies or from families.<sup>61</sup>

## **The Rights of Families**

States' duties to respect and ensure rights to all persons within their territory and jurisdiction include, on the one hand, respecting a family's rights in relation to a dead or missing relative and, on the other hand, protecting their civil, political, economic, social and cultural rights in the country where they are living.

### ***Rights in relation to Dead and Missing Relatives***

Families' rights in relation to burial of a relative may be protected as a matter of private and family life [ECHR art. 8]. In the absence of a direct duty to respect the rights of someone who has died, families may be able to argue that the ill treatment of their deceased relatives, or the intentional and deliberate withholding of information, has violated their own rights; they may then be entitled to protection as the *indirect* victims of inhuman and degrading treatment by the state [ECHR art. 3]. In either situation, where there is discrimination, there may be a breach of ECHR art. 14.

The most relevant rights for families include [a] the right to participate in an investigation, and the right to know if a relative has died; [b] the right to family and private life, including in relation to burial; [c] the right of children to special protection; [d] protection from inhuman and degrading treatment; and [e] the right to reparation.

Much of the case law on families' rights in relation to a dead relative concerns situations where the state has a responsibility for the death; cases have been brought by families of victims of disappearance or extra judicial killings by security forces, or deaths at the hands of state officials; other cases concern, for example, actions by hospitals. The families were generally citizens living within the jurisdiction of the responsible state. While these cases establish a number of important principles, more work is needed to establish their application in situations of migrant death, where the responsibility of the state for the deaths is likely to be – at most - indirect, and arise from the enforcement of immigration and border controls.

The exception is the right to life, and its application in situations of migrant death.

### ***[a] Right to Know and Participate in Investigation***

Under IHL, families have a right 'to know the fate of their relatives'.<sup>62</sup> There is a growing consensus that a right to know can also be found in IHRL.<sup>63</sup> The right to truth has been

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<sup>59</sup> ICRC *Missing Persons and Their Families*, Advisory Service, December 2015.

<sup>60</sup> OHCHR *Principles* 10 & 11.

<sup>61</sup> Report of the Office of the UN High Commissioner for Human Rights on the Right to Truth and on forensic genetics and human rights, A/HRC/15/26, 24 August 2010.

<sup>62</sup> Additional Protocol 1, Art. 32.

widely endorsed within the Inter American human rights system.<sup>64</sup> It has been less recognized by the ECtHR, although it is accepted as being an adjunct to the investigative obligation contained in the right to life, and an element in the right to an effective remedy and reparation.

Families have a right to participate in an investigation as part of the state's procedural obligation to protect the right to life. They should be involved in the investigation 'to the extent necessary to safeguard their legitimate interests', informed about the details of the investigation, and able to know the facts surrounding the death as part of their right to know the truth. [See above]

When the Italian Government announced the Pisciatelli Commission's investigation into deaths in the October 2013 Lampedusa shipwrecks, it acknowledged that families had a 'legitimate expectation' that the dead would be identified, and indicated that Italy recognized the families' right to know the fate of their relatives.

### **[b] Right to Family and Private Life**

Families have a right to respect for their private and family life under the ECHR art.8(1).

Everyone has the right to respect for his private and family life, his home and his correspondence.

In a series of cases, the ECtHR has considered the rights of the family in relation to the treatment of a relative's body after death. Although the facts of these cases do not directly concern migrant deaths at sea it is clear that the right to family life can be breached through interference with return of the body and the burial.

In some cases where authorities have refused to give families information about the place of burial of a close relative, international courts have found violations of the right to family life. In *Abdulayeva v Russia*<sup>65</sup> the ECtHR noted that the concepts of "private life" and "family life" were 'broad terms not susceptible to exhaustive definition'. In earlier cases, it found that an excessive delay in the restitution of the body after an autopsy might constitute an interference with both the "private life" and the "family life" of the surviving family members; similarly, the state's refusal to transfer an urn containing the ashes of the applicant's husband could fall within the ambit of Article 8; as could a mother's presence at the funeral of her stillborn child, along with related 'transfer and ceremonial arrangements'. Thus – for example - art. 8 can protect a family's right to participate in the burial of the body of a deceased family member, to know the location of the grave, and to be able to visit the grave;<sup>66</sup> it can apply to a mother's attendance at the burial of her stillborn child, and the manner of transporting the child's remains.<sup>67</sup>

In a case involving deaths during a terrorist attack, the Court found a violation of art.8 where relatives had been prevented from organizing and taking part in burial of a family member, from knowing the location of the grave and from visiting it. The interference with the applicants' right to family life was 'particularly severe in that it completely precluded them from any participation in the relevant funeral ceremonies and involved a ban on the

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<sup>63</sup> Building on UN Commission on Human Rights Resolution 2005/66, Right to the Truth E/CN.4/RES/2005/66.

<sup>64</sup> Starting with *Velasquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)

<sup>65</sup> ECtHR *Abdulayeva v Russia* (38552/05) 2014, para. 20.

<sup>66</sup> ECtHR *Sabanchiyeva & Others v Russia* (38450/05) 2013. Para 377

<sup>67</sup> ECtHR *Hadri-Vionnet v. Switzerland* (55525/00). [See](#) paras 51 - 57. The case concerned actions by a hospital, the applicant mother's right to be present at the funeral of her still born child, and the transfer and burial of the child's body in a communal grave. The mother was an asylum seeker

disclosure of the location of the grave, thus permanently cutting the links between the applicants and the location of the deceased's remains'.<sup>68</sup>

### **[c] Additional Protection for Children**

In addition to the 'exceptional measures' of protection for vulnerable persons which are required to protect the right to life, children have additional rights under human rights law. The CRC requires that the best interests of the child should be a primary consideration, and that states should 'respect the right of the child to preserve his or her identity, including name, ...and family relations...'. The African Charter on the Rights and Welfare of the Child requires states to take

all necessary measures to trace and re-unite children with parents or other relatives where separation is caused by internal or external displacement arising from armed conflicts.<sup>69</sup>

Neither treaty appears yet to have been applied directly to situations of death and loss affecting children at borders, including in the context of the death or loss of parents. But they arguably require – at a minimum - that children should be given priority and special protection, for example, where a child survives but his or her parents are lost. The child should have priority over others in terms of steps taken to identify those who have died and to trace the missing.

### **[d] Protection from Inhuman or degrading treatment<sup>70</sup>**

The treatment of bodies after death may engage the rights of families as indirect victims - to be protected themselves from inhuman and degrading treatment (ECHR art.3. and art. 7 ICCPR). The ECtHR has found violations where the state's actions reached an extreme level – pass a 'minimum level of severity' - inflicting moral pain and mental suffering on relatives. Whether close relatives can be considered indirect victims

will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be considered as inevitably caused to relatives of a victim of a serious human rights violation.

The Court takes into account the proximity of the family ties, the circumstances of the relationship, whether the relative witnessed the events in question, and the involvement of the family member in attempts to obtain information.<sup>71</sup>

The ECtHR's careful approach to art. 3 cases is illustrated by its decision in *Sabanchiyeva* where the relatives' suffering arose in part from what they had witnessed when they took part in an identification procedure. The bodies had decomposed because refrigeration facilities were insufficient, causing distress to the families. But the Court found no violation of art.3 because – inter alia - the 'lapses' in refrigeration resulted from 'objective logistical difficulties' arising from the number of bodies, and did not have as their purpose to subject the applicants to inhuman treatment, or cause them psychological suffering.<sup>72</sup>

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<sup>68</sup> ECtHR *Sabanchiyeva & Others v Russia*, Supra, para. 377. The authorities justified their refusal to return the body on the basis of legislation relating to terrorism. The ECtHR found that the interference with the family's rights had been legal but disproportionate.

<sup>69</sup> CRC A.8(1). ACRWC. A. 25

<sup>70</sup> 'No-one shall be subjected to torture or inhuman or degrading treatment or punishment'. ECHR Art. 3. 'No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Art 7 ICCPR.

<sup>71</sup> ECtHR *Cakici v Turkey*, (23657/94). para. 98.

<sup>72</sup> ECtHR *Sabanchiyeva & Others v Russia*, Supra, para 353.

The Inter American Court found a breach where families were unable to honour and bury relatives who had been killed in clashes with state authorities; they had been prevented from recovering the bodies. The Court noted that:

...one of the greatest sources of suffering for the Moiwana community members is that they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture.

Their suffering – which the Court described in detail – had amounted to inhuman and degrading treatment.<sup>73</sup>

### **[e] Right to Reparation**

The right to reparation is recognised in international human rights law, and has both procedural and substantive elements: including the right to an effective remedy, and the right to compensation.<sup>74</sup> Identification of the victim is, of course, a pre-requisite: before a claim for damages can be made, whether by the family or by someone [eg an ombudsman] acting on its behalf, the name of the individual and the fact of death must be established.

### **Rights of Spouse and Children**

Two issues are of particular importance: protecting a family's rights in their home country or in the country where they currently live, and protecting the legal interests of a missing person and those of his or her relatives.

International human rights law requires equal access to rights, including health, and education, without gender or other discrimination. The absence or death of a spouse or parent should not deprive his wife or children of their civil, economic, social and cultural rights, including to health and education, as well as inheritance and land rights.

Separately, the legal interests of a missing person should be protected until such time as there is certainty that he or she has died. The ICRC's *Guiding Principles* provide for a "declaration of absence"; a family member may then be appointed to manage the missing person's affairs 'in his/her best interests', and a declaration of death may later be issued. This practice is part of national law in a number of countries.<sup>75</sup>

The UN General Assembly has noted that the suffering that families of missing persons endure is 'often exacerbated by other challenges and difficulties.' It has called on states to take steps with regard to psychological and psychosocial support, financial matters, family law and property rights.<sup>76</sup> In his 2014 report, the Secretary General recommended that '[d]omestic law should clarify the legal situation of missing persons, including through provisions for the person to be declared absent or missing so that the families ...become

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<sup>73</sup> *Moiwana Village v. Suriname* (Inter-Am Ct. H.R., (Ser. C) No. 145 (2005)). 'The N'djuka have specific rituals that must followed up on the death of a community member.....It is extremely important to have possession of the physical remains of the deceased, as the corpse must be treated in a specific manner during the N'djuka death rituals and must be placed in the burial ground of the appropriate descent group. Only those who have been deemed evil do not receive an honourable burial. Furthermore, in all Maroon societies, the idea of cremation is considered very offensive.... If the various death rituals are not performed according to N'djuka tradition, it is considered a moral transgression, which will not only anger the spirit of the individual who died, but may also offend other ancestors of the community. This leads to a number of 'spiritually-caused illnesses' that become manifest as actual physical maladies and can potentially affect the entire natural lineage.' Para 86.

<sup>74</sup> Also restitution, satisfaction and non-repetition. See generally UN principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add.1

<sup>75</sup> ICRC *Guiding Principles*, Supra, Arts. 8,9,20. See, too, Council of Europe, Recommendation CM/Rec(2009)12 of the Council of Ministers to Member States, on principles concerning missing persons and the presumption of death, 9 December 2009.

<sup>76</sup> UN General Assembly Resolution 67/177.



eligible to social and financial benefits without forcing them to declare the missing relative dead'. Families of migrants were among the most vulnerable, and the state should make 'family needs assessments' to identify difficulties and determine the most appropriate response.<sup>77</sup>

## CONCLUSION

In comparison with the detailed and specific rules for dealing with the dead and missing in IHL, the application of international human rights law to death and loss in the course of international migration is as yet undeveloped. Nonetheless, all states in the European region have a clear duty under the ECHR and the ICCPR to protect the right to life, and in so doing to investigate the deaths of migrants at their borders, and provide information to families.

### Basic Human Rights Obligations

**IHRL places a duty on states – all branches and all levels of government - to:**

- Respect and protect the rights of everyone within its territory and jurisdiction
- Treat 'everyone' equally and without discrimination, including on grounds of sex, religion or nationality.
  - For example, bury the dead without discrimination and with respect for religious or cultural beliefs.
- Take exceptional measures of protection towards vulnerable persons, including asylum seekers, refugees, children and individuals whose lives are at particular risk.
- Protect the right to life of everyone by preventing and investigating deaths
  - Take positive steps to *prevent deaths* where the state knows or ought to have known of a real and immediate risk to lives;
  - *Investigate* cases of unlawful or suspicious death, regardless of whether there is evidence of criminal responsibility.
  - *Investigation* should, at a minimum:
    - Start as soon as the death is known
    - Be effective, adequate, independent, prompt, and open to public scrutiny
    - Not be restricted to investigation of a criminal offence
    - Establish the cause of death
    - Identify the body
    - Secure evidence, including eyewitness testimony, forensic evidence, and where appropriate an autopsy.
    - Involve next of kin and enable them to know the facts
    - Make public the findings
    - By implication, collect the body
    - By implication, trace families so they can participate in the investigation
    - By implication, confirm the death through issue of a death certificate
    - By implication, collect and preserve personal possessions, and return them to families
- Take special measures to protect children
  - Give children of missing and dead parents priority in investigation and identification.
- Ensure that families within the jurisdiction are able to :

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<sup>77</sup> *Report of Secretary General*, Supra, para 64 & 74

- Participate in the investigation, including in identification of a relative's body.
- Know the facts and the outcome of the investigation
- Be provided with information by state authority which has custody of a body.
- Take possession of the body.
- Organise and attend a burial ceremony, know the location of, and visit, the grave.
- Co-operate in providing support and assistance
- Ensure that Data collected and retained for the purposes of identification
  - should be subject to appropriate privacy safeguards, including 'firewalls' between personal data and immigration or criminal enforcement.

**Issues which need further consideration** include – inter alia:

- i. The duty to treat an individual with respect and dignity *after* death;
- ii. The duties owed by a state to relatives who are in another country;
- iii. The circumstances in which relatives of dead or missing migrants may become indirect victims of inhuman and degrading treatment;
- iv. the duration of the duty to investigate: whether time limited or continuing;
- v. the resources which a state should make available for the investigation, and what will be 'disproportionate';
- vi. the assistance which the state should provide to the families of missing migrants, particularly to protect their social and economic rights;
- vii. the scope of a duty of international co-operation in assisting in the investigation of deaths and identification of the dead, for example by providing equipment and forensic expertise, and assisting the collection and comparison of data in different states.



# Mediterranean Missing

Understanding the Needs of Families and the Obligations of States

[www.mediterraneanmissing.eu](http://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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