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**Migrant and Refugee Border Deaths:  
Defining a Human Rights Framework  
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## *Migrant and Refugee Border Deaths: Defining A Human Rights Framework*

Stefanie Grant\*

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Dear Editor,

Each year, thousands of migrants and refugees lose their lives or are missing at international borders:<sup>1</sup> those crossing the Mediterranean, those lost in the Sahara, those dying from thirst in the Chihuahuan and Sonoran deserts between Mexico and the US, or the Rohingya in flight from Myanmar.<sup>2</sup> They are casualties of dangerous journeys, extreme weather, unseaworthy boats, and unscrupulous smugglers. They are also an ‘unintended consequence’<sup>3</sup> of migration policies to control borders, and criminalise irregular movement. The names of most of the missing and dead are not known, their families are not traced, and where bodies are found, many are buried in unmarked graves. Relatives, often in other countries and continents, do not know if a missing family member – a parent, spouse, brother, sister or child – is alive or dead. These deaths are an exception to the general humanitarian rule that the dead ought to be recorded, identified, and buried with respect, and that their families are entitled to know the fate of the

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<sup>1</sup> Estimates suggest that at least 46,000 migrants and refugees died since 2000, with actual figures certainly much higher. Many more are missing. See International Organization for Migration, ‘Latest Global Figures’ <<https://missingmigrants.iom.int/latest-global-figures>> accessed 9 February 2018.

<sup>2</sup> International Organization for Migration, *Fatal Journeys: Tracking Lives Lost during Migration* (Vol 1, IOM 2014); International Organization for Migration, *Fatal Journeys: Identification and Tracking of Dead and Missing Migrants* (Vol 2, IOM 2016); International Organization for Migration, *Fatal Journeys: Improving Data on Missing Migrants* (Vol 3, IOM 2017).

<sup>3</sup> International Committee of the Red Cross, *Missing Migrants and their Families: The ICRC’s Recommendations to Policy Makers* (ICRC 2017).

missing.<sup>4</sup> It has been unclear how international legal principles ought to be applied to these tragedies.

I therefore organised a consultation at LSE's Human Rights Centre in April 2016. It reviewed issues arising in the application of international human rights law to migrant border deaths – the first review of its kind – and was a collaboration between human rights lawyers and the Last Rights Project.<sup>5</sup> A small group then drafted a *Legal Statement and Commentary*<sup>6</sup> ('the Statement') that identifies the core obligations of states to investigate deaths, identify the dead, assist families in finding out the fate of their missing relatives, and provide special protection to children [See Appendix A]. The Statement focuses on Europe, but its scope is global.

The Statement reviews relevant provisions of international law – including humanitarian law, human rights law, maritime law, and criminal law. It sets out a state's obligation to respect the right to life of everyone within its territory and subject to its jurisdiction, noting that human rights responsibilities towards the body of a dead person arise where the body is found within the territory of the State – whether this is on land or at sea. In the context of deaths at sea borders, the duty arises where, *inter alia*: a person dies in a State's territorial seas and/or their body is washed ashore; a person is 'missing' within a State's territorial seas; a State retrieves bodies from the sea, including in international waters. These duties are preventive, procedural, and substantive in nature. Such duties are complementary to, and inform, the rights and obligations concerning dead persons and their families set out in any applicable national legislation.

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<sup>4</sup> Stefanie Grant, 'Recording and Identifying European Frontier Deaths' (2011) 13 EJML 135, 156. See also Mediterranean Missing: Understanding Needs of Families and Obligations of Authorities <<http://www.mediterraneanmissing.eu/data/>> accessed 23 February 2018.

<sup>5</sup> Catriona Jarvis, 'Last Rights: Cross-border Deaths – Towards a New Framework' (2017) 31 JIANL 131, 150. Stefanie Grant 'Cross-Border Deaths on the Journey to Europe: towards a legal framework': short report of legal consultation, 14 April 2016. <https://drive.google.com/file/d/0ByFv9rzlqJaBcVMtQ1lfa1FmdnpORFBVSGlheDdJZXBSdkMw/view> accessed 3 March 2018.

<sup>6</sup> Last Rights project, 'The dead, the missing and the bereaved at Europe's international borders: proposal for a statement of the international legal obligations of States'. (September 2017). See Appendix A below.

The Statement identifies twelve core State obligations:

- to search for all missing persons at sea;
- to collect the bodies of the dead;
- to respect the bodies of the dead;
- to preserve personal effects of the dead and restore them to next of kin;
- to take all reasonable steps to identify the deceased and determine the cause of death;
- to issue a death certificate;
- to locate and notify relatives of the dead and missing;
- to facilitate the return of the remains of the dead to next-of-kin, on request;
- to otherwise dispose of remains in a dignified and respectful manner, appropriate to religious and cultural traditions of the person and taking into account the wishes of the next of kin;
- to record the location of burial and to respect and maintain gravesites;
- to treat citizens and non-citizens equally in these actions; and
- to provide special protection for children.

The Legal Commentary draws on treaty law and case law from international courts. It notes that most of these core obligations are derived from the right to life. As the European Court of Human Rights ('ECtHR') has repeatedly affirmed, the right to life, contained in Article 2 of the European Convention on Human Rights ('ECHR'), requires States not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction. The ECtHR has made it unambiguously clear that Article 2 ECHR also contains a procedural obligation: in circumstances where there has been a killing or a suspicious death, the State Party must conduct an effective official investigation. The procedural obligation to investigate also exists when an individual has gone missing in life-threatening circumstances, and is not confined to cases involving State agents. The obligation to conduct an effective investigation, including identifying the dead and determining the cause of death, does not end at a border. States must take all necessary and available steps to secure relevant evidence, including from other States. This obligation is particularly relevant in the context of migrant deaths, the vast majority of which have transboundary implications.

The Statement refers to case law stressing the importance of an effective investigation in establishing the truth – not only for the families of victims, but also for the general public who have the right to know what transpired.

It notes that the obligation to locate and notify the relatives of the dead and missing derives from the procedural obligation to ensure that the victim's relatives are not excluded from the investigation into the death or disappearance. The obligation to involve the next-of-kin to the extent necessary to safeguard his or her legitimate interests is a condition that the ECtHR has reaffirmed in numerous cases.<sup>7</sup> 'It follows that locating and notifying the relatives of the dead and missing who are in the State's jurisdiction is a necessary pre-condition to satisfying the criteria of an effective official investigation.'<sup>8</sup>

Furthermore, the Statement underscores a child's right to special protection: the United Nations Convention on the Rights of the Child requires States to 'recognize that every child has the inherent right to life', to 'ensure to the maximum extent possible the survival and development of the child',<sup>9</sup> and make the best interests of the child 'a primary consideration' in all actions concerning children.<sup>10</sup> States are under an additional duty to preserve a child's identity, 'including nationality, name and family relations'.<sup>11</sup> This would encompass giving priority to tracing missing parents and other relatives, where eg a child was travelling or living with a relative other than a parent, and to identification of the dead.

I hope that the Statement will encourage State action to trace the missing and identify the dead, and will also stimulate work by lawyers on issues such as the rights of the dead; duties to relatives of the dead who are in another country; the scope of a duty of international cooperation in assisting in investigation; and safeguards to prevent personal data provided by families only for the purpose of tracing missing relatives being used for border control and enforcement.

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<sup>7</sup> *Paul and Audrey Edwards v UK* App no 46477/99 (ECtHR, 14 March 2002) [73]; *Abmet Özkan and Others v Turkey*, App no 21689/93 (ECtHR, 6 April 2004) [311]-[314]; *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005) [211]-[214].

<sup>8</sup> See Appendix A, Legal Commentary, Obligation 7.

<sup>9</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 6.

<sup>10</sup> *ibid* art 3(1).

<sup>11</sup> *ibid* art 8.

The Statement was cited extensively in a UN expert report to the 2017 General Assembly on the Unlawful Death of Refugees and Migrants. The report concluded that this great ‘untold’ tragedy ‘triggers the responsibility of States to provide dignity and accountability in death’.<sup>12</sup>

The Statement should now inform UN Member States’ negotiations for the Global Compact on Migration<sup>13</sup> – an initial draft proposes an ‘actionable commitment’ by States to prevent migrant deaths, identify the dead and missing, and assist families (Objective 8).<sup>14</sup> It does so, however, without identifying the underlying legal principles. If this commitment survives the negotiations, and let us hope it does, it will serve as important precedent for States’ acceptance that they carry a common humanitarian responsibility when migrants die at their borders.

International Guiding Principles to provide more detailed assistance to States and civil society are now being drafted by the Last Rights Project.<sup>15</sup>

Yours,

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Visiting Senior Fellow  
LSE Human Rights

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<sup>12</sup> UNGA ‘Unlawful Death of Refugees and Migrants’ (15 August 2017) UN Doc A/72/335 [65].

<sup>13</sup> Global Compact for Migration, ‘Global Compact for Safe, Orderly and Regular Migration’ (5 February 2018) <[http://refugeesmigrants.un.org/sites/default/files/180205\\_gcm\\_zero\\_draft\\_final.pdf](http://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf)> accessed 6 February 2018.

<sup>14</sup> *ibid*, which states ‘We commit to saving lives and preventing migrant deaths through joint search and rescue operations’. Objective 8 goes on to read: ‘We further commit to identify those who have died or gone missing, and to facilitate communication with their families (...) Instrumental actions [include] Collect, centralize and systematize data regarding corpses and ensure traceability after burial, in accordance with internationally accepted forensic standards, and establish coordination channels at transnational level to facilitate immediate or future identification and the provision of information to families.’

<sup>15</sup> See the Last Rights Project <<http://lastrights.net>> accessed 8 February 2018.

## APPENDIX A [draft statement]

### Last Rights<sup>1</sup>

#### *The Dead, the Missing and the Bereaved at Europe's International Borders<sup>2</sup>*

#### *Proposal for a Statement of the International legal obligations of States*

September 2017

Large numbers of refugees and migrants die or go missing at international land and sea borders.<sup>3</sup> The names of most of the missing and dead are not known; their families have not been traced; where bodies have been found, they are often buried in unmarked graves. Families do not know if a missing relative – a parent, spouse, brother, sister or child – is alive or dead. This statement seeks to clarify the steps states should take to search for the missing, investigate the deaths, identify those who die, provide a decent burial for the dead [whether or not they have been identified], and trace their families, including their children.

In the legitimate exercise of their fundamental right to seek and enjoy asylum from persecution, enshrined in article 14 of the 1948 Universal Declaration of Human Rights, and in their search for a place to live where they may enjoy a minimum level of safety and security, and economic, social and cultural rights, thousands of children, women and men die every year in their efforts to enter Europe irregularly. Most of these deaths are by drowning in the Mediterranean Sea.

There is a substantial body of legal principles and rules in both customary and treaty law that applies to the treatment of the dead in the context of armed conflict. These principles and rules derive from what the Hague Conventions call ‘the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience’<sup>4</sup> and what the International Court of Justice referred to as ‘elementary considerations of humanity, even more exacting in peace than in war’.<sup>5</sup> But while international law addresses the treatment of the dead and next of kin in armed

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<sup>1</sup> lastrights.net. The Last Rights Project would welcome comments on the Draft Statement.

<sup>2</sup> The Last Rights Project thanks Dr Louise Arimatsu; Professor Susan Breau and Professor William Schabas for their generous advice and assistance.

<sup>3</sup> Estimates suggest that more than 46,000 migrants and refugees have died since 2000 in different regions of the world; the actual figures are certainly much higher. Many more are missing. In 2016, over 5,000 deaths were recorded on journeys to Europe. IOM (2017), “Latest Global Figures 2014-2017”, Missing Migrants Project, International Organisation for Migration, <http://missingmigrants.iom.int/latest-global-figures>; accessed 15 March 2017.

<sup>4</sup> Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907 Hague Convention IV), signed 18 October 1907, entered into force 26 January 2010, 187 CTS 227, Preamble.

<sup>5</sup> *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, International Court of Justice (ICJ), Judgment of 9 April 1949, I.C.J. Reports 1949, p.22.

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conflict, the obligations on states in respect of persons who die outside the context of an armed conflict have received less attention.

This statement is intended to address that issue. It draws upon international human rights law, international humanitarian law, international criminal law and international maritime law. It is premised on the principle that until there is a more adequate codification of the law applicable to their human rights obligations with respect to the dead and missing, States remain bound by treaty obligations including the duty to respect human dignity.

The law of armed conflict, also known as international humanitarian law establishes important principles applicable to the dead and missing in armed conflict. These principles are, in turn, rooted in fundamental human values that are not confined by or limited to notions of reciprocal treatment by parties to a conflict as is the case in international humanitarian law. For this reason, the content of principles that have been adopted by international humanitarian law from that earlier system of fundamental human values, may be regarded as lending themselves to transposition to peacetime contexts.

It should be stressed that the principles proposed in this document flow from fundamental international human rights law. To the extent that reference is also made to international humanitarian law, this is mainly because that body of law has developed useful formulations and terminology with respect to the treatment of the dead and missing.

The requirement that the dead be treated with respect and dignity existed as a fundamental human value long before there were any attempts to identify and codify international law. In *Antigone*, Sophocles treats the importance of burial as a principle incapable of being overridden by government. Homer condemns Achilles' disrespect for the body of the opponent whose life he has just taken. Similar principles are found in the customs, traditions and literature of all peoples.

The general obligations imposed by international humanitarian law, as a result of both custom and treaty, have been summarized by the International Committee of the Red Cross:

- Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.
- Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.
- Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.
- The dead must be disposed of in a respectful manner and their graves respected and properly maintained.
- With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.<sup>6</sup>

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<sup>6</sup> These principles are set out together with detailed commentary and sources in: J.-M. Henckaerts and L. Doswald-Beck (2005, reprint 2009), *Customary International Humanitarian Law, Vol. I, Rules*, International Committee of the Red Cross, Cambridge: ICRC and Cambridge University Press, pp. 406-420. See also : Gavshon D.(2015), 'The Dead', in Clapham A., Gaeta P., Sassòli M. (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford, United Kingdom: Oxford University Press, pp 277-296; International Committee of the Red Cross (2009), 'Guiding Principles/Model Law on the Missing', Geneva, Switzerland: ICRC publication,



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Human dignity lies at the core of all international human rights law. The applicable declarations and treaties do not, as a general rule, set out any detailed principles with respect to the treatment of the dead. To some extent, this has been addressed in the case law of international human rights courts and tribunals.<sup>7</sup> Specific rights with relevance in this area include the right to life, the prohibition of cruel, inhuman and degrading treatment, the right to equality, the right to family life, and the prohibition of discrimination, the right to property, and the right to legal personality. Special attention is directed to the protection of children, in accordance with the priorities established by international human rights law.

These international obligations are complementary to, and inform, the rights and obligations concerning dead persons and their families set out in applicable national legislation.

The human rights responsibilities of States towards the body of a dead person arise when the body is found within the territory of the State, including its territorial sea. Obligations also arise when there are reasonable grounds to believe that the body of a dead person is within the territory of the State, even if it has not yet been found. Obligations also exist with respect to the family and next-of-kin of the dead person, including some to those who may reside outside the territory of the State.

Similar obligations arise when State authorities find bodies in international waters. The fact of finding the body is tantamount to bringing it within the control of the State; from this, legal obligations towards the dead person and the family or next-of-kin may also arise.

This is an area where more elaborate legal codification is desirable. The rights of persons fleeing war and persecution and the protection of those whose lives are at risk are matters of international concern and responsibility, that should not fall exclusively to coastal States in the affected regions. That these matters remain to be properly addressed does not however reduce or mitigate the humanitarian and human rights duties of those States whose involvement is direct and immediate.

**These core international legal obligations**, many of which are subject to a requirement that reasonable means be exercised, **may be summarized as follows:**

- 1. To search for all missing persons;**
- 2. To collect the bodies of the dead;**
- 3. To respect the bodies of the dead;**
- 4. To preserve any personal effects of the dead, and to restore them to the next of kin;**
- 5. To take all reasonable steps to identify the deceased and to determine the cause of death;**
- 6. To issue a death certificate;**
- 7. To make every effort to locate and notify the relatives of the dead and missing;**
- 8. To facilitate return of the remains of the dead to their relatives if possible;**
- 9. Where the remains are not returned to the next-of-kin, they should be disposed of in**

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<https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law> : accessed 15 March 2017.

<sup>7</sup> Notably with respect to victims of enforced disappearance, by bodies like the UN Working Group on Enforced or Involuntary Disappearances established by Commission on Human Rights res. 20 (XXXVI) of 29 February 1980 (Res.20 XXXVI, 29 February 1980, Commission on Human Rights, Report, 36<sup>th</sup> Session, ESCOR, 1980, Suppl. No 3, Chapter XXVIA) and the Committee on Enforced Disappearances established by the International Convention for the Protection of All Persons from Enforced Disappearance, (adopted 20 December 2006, entered into force 23 December 2010, 2716 (United Nations Treaty Series (UNTS) 3), Art 26.

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**a dignified and respectful manner, appropriate to the religious and cultural traditions of the person and bearing in mind the wishes of the next of kin;**

- 10. To record the location of burial and to respect and maintain gravesites.**
- 11. To treat citizens and non-citizens equally in all these actions.**
- 12. To provide special protection for children**

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### Core Obligations: Legal Commentary

1. To search for all missing persons at sea
2. To collect the bodies of the dead
3. To respect the bodies of the dead
4. To preserve personal effects of the dead and restore them to next of kin
5. To take all reasonable steps to identify the deceased and determine the cause of death
6. To issue a death certificate
7. To locate and notify relatives of the dead and missing
8. To facilitate the return of the remains of the dead to next-of-kin, on request
9. To otherwise dispose of remains in a dignified and respectful manner, appropriate to religious and cultural traditions of the person and taking into account the wishes of the next-of-kin
10. To record the location of burial and to respect and maintain gravesites
11. To treat citizens and non-citizens equally in these actions
12. To provide special protection for children

### Introduction

This Commentary is intended to identify the legal basis of the twelve core obligations which have been identified and to explain the normative content of each. The Last Rights Project has an international focus. The Legal Statement and this Commentary spring from a collaboration between the Last Rights Project and some of those who participated in the meeting of experts in April 2016.<sup>8</sup> That meeting considered in large part the European regional sphere and therefore much of the case law cited in support is from the European Court of Human Rights (“ECtHR”).

This Commentary should not be interpreted as representing an exhaustive study on the relevant international and regional norms that apply to the member states of the Council of Europe. Thus, in addition to the European Convention on Human Rights (“ECHR”), other international human rights instruments which apply and provide important protections are occasionally referenced including, for example, the 1966 International Covenant on Civil and Political Rights (“ICCPR”), the 1979 Convention on the Elimination of All Discrimination Against Women (“CEDAW”) and the 1989 United Nations Convention on the Rights of the Child (“CRC”). Most states within the region will also be bound by other pertinent treaty obligations including the 2000 UN Convention against Transnational Organized Crime and the Protocols thereto,<sup>9</sup> the 1982 UN Convention on the Law of the Sea and the 1951 UN Convention relating to the Status of Refugees. In addition to these instruments, which give rise to specific treaty obligations, States are concurrently bound by customary international law obligations. This Commentary does not seek to suggest that the twelve obligations identified are binding on all States by virtue of their customary international law status. Finally, where a state is a party to an existing armed conflict, international humanitarian law obligations will also apply as a matter of treaty and/or customary international law.

Of the twelve core obligations identified, most are derived from the right to life (Article 2 ECHR) and are based on the jurisprudence of the European Court of Human Rights (‘ECtHR’). As the ECtHR has repeatedly affirmed, Article 2 requires States not only to refrain from the intentional and

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<sup>8</sup> <http://lastrights.net/links-docs/4592887361>.

<sup>9</sup> For the purpose of this study, the two relevant protocols to the convention are: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003, 2237 UNTS 319) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004, 2241 UNTS 507).

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unlawful taking of life but also to take appropriate steps to safeguard the lives of those within their jurisdiction. This positive obligation to protect requires States to put in place effective criminal law provisions backed up by law enforcement machinery. Through its case-law, the ECtHR has made it unambiguously clear that Article 2 also contains a procedural obligation: in circumstances where there has been a killing or a suspicious death States must conduct an effective official investigation.<sup>10</sup> The ECtHR has additionally stated that the procedural obligation to provide some form of effective official investigation also exists when an individual has gone missing in life-threatening circumstances, and is not confined to cases involving State agents.<sup>11</sup>

The obligation to investigate is inter-linked with the obligation to respect and protect the rights of family members, next-of-kin and loved ones of the victim, who are in agony and distress as a consequence of the death or disappearance in situations where the actions of states or serious state failure is involved. The failure on the part of the state to investigate a suspicious death or a disappearance may accordingly give rise to a violation of the prohibition on inhuman and degrading treatment in respect of those family members [ECHR Article.3].<sup>12</sup> The ECtHR has found violations where the state's actions passed a 'minimum level of severity', inflicting moral pain and mental suffering on the relatives.<sup>13</sup> More broadly, the Court has stressed the importance of an effective investigation in establishing the truth – not only for the families of victims, but also for other victims, as well as for the general public who have the right to know what transpired.<sup>14</sup>

### 1. To search for all missing persons at sea<sup>15</sup>

The obligation to search for missing persons at sea derives from international maritime law complemented by international human rights law and specifically from the right to life.

The duty of a shipmaster to rescue those in distress on the high seas is a long established customary international norm which is codified pursuant to Article 98 of the United Nations Convention on the Law of the Sea.<sup>16</sup> The obligations set forth in Article 98 are expanded in two international legal

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<sup>10</sup> *McCann and Others v. the United Kingdom*, European Court of Human Rights (ECtHR), no. 18984/91, 27 September 1995, Series A no. 324; *Osman v. the United Kingdom*, ECtHR, no 87/1997/871/1083, 28 October 1998, Reports of Judgments and Decisions 1998-VIII. On the search for missing persons, see particularly: *Cyprus v. Turkey*, ECtHR [Grand Chamber (GC)], no. 25781/94, 10 May 2001, ECHR 2001-IV; *Varnava and Others v. Turkey*, ECtHR [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; *Aslakhanova and Others v. Russia*, ECtHR, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.

<sup>11</sup> *Varnava and Others v Turkey* [GC], supra fn. 10, para 136; *Osmanoğlu v Turkey*, ECtHR, no. 48804/99, 24 January 2008, para 87.

<sup>12</sup> *Cyprus v. Turkey*, [GC], supra fn. 10; *Orhan v. Turkey*, ECtHR, no. 25656/94, 18 June 2002; *Varnava and Others v. Turkey*, [GC], supra fn.10; *Er and Others v. Turkey*, ECtHR, no. 23016/04, 31 July 2012; *Meryem Çelik and Others v. Turkey*, ECtHR, no. 3598/03, 16 April 2013; *Pitsayeva and Others v. Russia*, ECtHR, nos. 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10, 9 January 2014.

<sup>13</sup> 'Whether a family member is a victim of an Article 3 violation will depend on the existence of special factors which give the suffering ... 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.'. *Çakıcı v Turkey*, ECtHR [GC], no 23657/94, 8 July 1999, ECHR 1999-IV, para. 98.

<sup>14</sup> *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR [GC], no. 39630/09, 13 December 2012, ECHR 2012, para 191.

<sup>15</sup> The Last Rights Project is grateful for the advice of the International Maritime Organisation.

<sup>16</sup> 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 *insofar as he can do so without serious danger to the ship, the crew or the*

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instruments: the 1974 International Convention for the Safety of Life at Sea [‘SOLAS’] and the 1979 International Convention on Search and Rescue (“SAR”). These two instruments strengthen the duty to render assistance by clarifying that the obligation is to be fulfilled without consideration of the nationality, status or circumstances of the persons in distress and by elaborating on the operational details regarding the establishment by coastal States of search and rescue services.

If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the international maritime organization to inform the appropriate search and rescue service accordingly.

However, coastal States are under a legal obligation to coordinate such search and rescue operations to ensure that lives are not lost at sea, not least if the state is put on alert, or should have known, that persons were in distress. In 2006 amendments to SOLAS and SAR Conventions entered into force, complementing the obligation of the master to render assistance to persons in distress at sea by corresponding obligations of Contracting Governments to coordinate and cooperate in relieving the master of the responsibility to provide follow up care of survivors and to deliver persons retrieved at sea to a place of safety”.<sup>17</sup>

The obligation to search for all persons missing within a State’s territorial waters also derives from international humanitarian law [Additional Protocol I Article 33], and also from international human rights law: ECHR Article 2 provides that:

*“everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”*

The ECtHR has repeatedly interpreted this obligation as one that not only requires States to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>18</sup> This obligation requires the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also implies a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, as the Court has emphasized, the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities given the priorities – and resources that are at the disposal – of the state. It follows that while not every risk to life can entail an obligation to take operational measures to prevent that risk from materializing, if the authorities know or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged

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*passengers’*. UN Convention on the Law of the Sea [‘UNCLOS’], signed 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3, Art. 98(1) (emphasis added).

<sup>17</sup> [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MSC.155\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MSC.155(78).pdf);  
[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.153\(78\)-MSC%2078.pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.153(78)-MSC%2078.pdf)

<sup>18</sup> *LCB v the UK*, ECtHR, no 23413/94, 9 June 1998, Reports of Judgments and Decisions 1998-III

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reasonably, might have been expected to avoid that risk, the state will have failed to meet its positive obligations to protect life.<sup>19</sup>

It is common knowledge that traffickers and smugglers are placing the lives of those crossing the Mediterranean at enormous risk by providing them with vessels that are not sea-worthy or by transporting them under conditions that place their lives at high risk. This does not mean that states are under an obligation to take operational measures to protect those whose life is at risk from the criminal acts of another from materialising in *all* situations.<sup>20</sup> However, once a State is alerted to a *particular* situation where the lives of those at sea are at *real and immediate* risk, the authorities are under an obligation to take all reasonable measures within their territorial seas to protect those persons by undertaking search and rescue operations, since not to do so will constitute a violation of their Article 2 obligation.

The obligation on states to protect life is recognized in other international human rights instruments including the Universal Declaration of Human Rights (Article 3), the ICCPR (Article 6) and the CRC (Article 6).

To the extent that a large proportion of those crossing the Mediterranean are likely to be victims of trafficking or smuggling, it should be noted that the specific protection obligations as set forth in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air are of relevance to States Parties.<sup>21</sup>

The failure on the part of the State to take reasonable measures to search for the missing at sea in circumstances where the authorities knew or ought to have known that lives were at real and immediate risk may also give rise to a violation of Article 3 of the ECHR in respect of surviving families.<sup>22</sup>

The specific international humanitarian law norms concerning the missing and dead provide further important insights insofar as the 'rights-holders' are concerned. The text of the relevant treaties together with the accompanying commentaries make it clear that the obligation to search for the missing and the dead is founded primarily, albeit not exclusively, on a duty towards the families rather than on the protection of the missing and dead per se. For example, Article 32 of Additional Protocol I, which sets forth the general principle applicable to the specific rules pertaining to the 'Missing and Dead Persons', provides that:

*"[i]n the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and this Protocol shall be prompted mainly by the right of families to know the fate of their relatives".*

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<sup>19</sup> *Osman v UK*, supra fn.10; *Medova v Russia*, ECtHR, no. 25385/04, 15 January 2009; *Opuz v Turkey*, ECtHR, no. 33401/02, 9 June 2009, ECHR 2009.

<sup>20</sup> *Medova v Russia*, supra fn.17; *Opuz v Turkey*, supra fn.10; *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, ECHR 2010, para 219.

<sup>21</sup> See Article 2 in both Protocols, supra fn.9

<sup>22</sup> Article 3, ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". In some situations, a violation of the procedural obligation pursuant to Article 2 can give rise to a violation of the substantive obligation set forth in Article 3.

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It should be recalled that the ‘right to know’ under international humanitarian law is the basis upon which the normative development of the ‘right to know the truth’ has evolved in international human rights law (see Commentary to Obligation 5).

That these obligations apply as a matter of international treaty law should not raise any jurisdictional difficulties to the extent that the body is found or believed to be on the territory of the State concerned, including its territorial sea. The duty to search for missing persons should also extend to waters beyond a State’s territorial sea. As stated above (Obligation 1, page 3), the SAR regime does not require that coastal states actually conduct search and rescue operations for every vessel in distress in the respective SAR zone. However, States are under a legal obligation to coordinate such operations to ensure that lives are not lost at sea, not least if the state is put on alert, or should have known, that persons were in distress.

Especially within enclosed or semi-enclosed seas, of which the Mediterranean Sea is an example, international law also recognizes a variety of rights and responsibilities of States with a direct interest in the sea as a whole or to important parts of it that may go beyond the strict limits of their territory, for example in the exploitation of maritime resources and protection of the environment<sup>23</sup>. Humanitarian principles require that such States also assume duties with respect to the dead and missing within the sea as a whole and especially in parts of it that are close to or contiguous<sup>24</sup> to their territory, and where they exercise sovereign activities in one form or another.

### **2. To collect the bodies of the dead**

In contrast to international humanitarian law, international human rights law contains no express obligation on States to collect the bodies of the dead.<sup>25</sup> Nevertheless, it is self-evident that collecting the bodies of the dead is a condition *sine qua non* of respect for the other listed human rights obligations including identification of the dead, investigating the cause of the death, return of remains to the families and, in the event that this is not possible, providing for a decent burial.<sup>26</sup> The failure by the authorities to arrange for the orderly collection of the dead will hamper the State from complying fully with its positive procedural obligation under the right to life (Article 2 ECHR). Likewise, the failure to collect the bodies of the dead in an orderly manner will likely constitute an interference with the obligation to respect private and family life (Article 8, ECHR); and freedom of religion (Article 9, ECHR) and may, in some circumstances, amount to a violation of the right of families not to be subjected to inhuman and degrading treatment (Article 3, ECHR).

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<sup>23</sup> Nordquist M.H. (ed), Nandan S. N., Rosenne S., Grandy N.R. (vol. eds), (1995), *United Nations Convention on the Law of the Sea 1982: a commentary, Volume III*, Center for Oceans Law and Policy, University of Virginia School of Law, The Hague, The Netherlands: Martinus Nijhoff, pp. 125, 343

<sup>24</sup> See Article 33, UNCLOS.

<sup>25</sup> Article 15, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31; Article 18, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85; Article 16, Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 287. The authoritative commentary to article 16 of Geneva Convention IV states: ‘Even human remains must be collected with the utmost care. Apart from moral considerations, the interest of the next-of-kin of the deceased demands that the legal consequences of disappearances without the issue of a death certificate should be avoided as far as possible.’ Uhler O.M., Coursier H., Siordet F., Pilloud C., Boppe R., Wilhelm R.-J. and Schoenholzer J.P. (1958), *Commentary IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, Switzerland: International Committee of the Red Cross, p. 135

<sup>26</sup> This reasoning is common to both international human rights law and international humanitarian law; see Henckaerts J.M. and Doswald-Beck L., *supra* fn.6, ‘Commentary to Rule 112’, pp. 406-408

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As with international humanitarian law, the obligation to collect the dead in international human rights law is an obligation of means: it would follow that States have a duty to take *all reasonable measures* to collect the dead. This duty extends to permitting the collection of the dead by humanitarian organizations. Consent to external assistance, including the collection of bodies, may not be withheld arbitrarily.<sup>27</sup>

### 3. To respect the bodies of the dead

International human rights law instruments do not contain any express references to the treatment of dead bodies. Nevertheless, in the vast majority of States the mutilation of a corpse is a punishable offence under domestic legislation. Many different reasons have been advanced to account for this including a widely shared belief across all cultures that the dead should be respected. The obligation to respect a dead body is expressly set forth in some regional instruments.<sup>28</sup>

The ECtHR has engaged with this issue on a number of occasions under Art. 8 and – most typically – under Art. 3.

The Court has found that dealing appropriately with the dead out of respect for the feelings of the deceased's relatives can fall within the scope of Article 8.<sup>29</sup> It has also found violations of Art. 3, in the context of the *intentional* mutilation of dead bodies<sup>30</sup> The jurisprudence reveals that where there has been ill-treatment of a corpse, the Court has chosen to find a violation not on the basis of a right belonging to the dead but on the basis of a right that is held by the surviving relatives.<sup>31</sup> In circumstances where a corpse has been deliberately mutilated (whether by State agents or third parties) and the authorities display little or no interest in addressing the wrong-doing, a State can be held responsible for violating Article 3. Moreover, where a body has been mutilated, a wholly inadequate and inefficient response by the authorities (such as is demonstrated by a failure to offer the minimum humanitarian assistance to the families) in circumstances where the authorities ought reasonably to have offered that assistance, whether or not the death or mutilation was attributable to the state), in the aftermath of the event that caused such mutilation, may also constitute a breach of Article 3, where it can be shown that the required threshold has been met.<sup>32</sup>

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<sup>27</sup> Article 13, International Law Commission (2016), *Draft Articles on the Protection of Persons in the Event of Disaster*, 68<sup>th</sup> session, UN Doc A/CN.4/L.871

<sup>28</sup> For example, the Comment to Article 18 of the Additional Protocol on Transplantation of Organs and Tissues of Human Origin (adopted 24 January 2002, entered into force 1 May 2006, Council of Europe, CETS no. 186) states: "A dead body is not legally regarded as a person, but nonetheless should be treated with respect. This article accordingly provides that during removal the human body must be treated with respect and after removal the body should be restored as far as possible to its original appearance."

<sup>29</sup> *Genner v Austria*, ECtHR, no 55495/08, 12 January 2016, para 35, citing *Hadri-Vionnet v. Switzerland*, ECtHR, no. 55525/00, 14 February 2008, para 15.

<sup>30</sup> *Akkum and Others v Turkey*, ECtHR, no 21894/93, 24 March 2005, ECHR 2005-II: anguish caused to applicant as a result of the mutilation of the body of his son held to amount to degrading treatment contrary to Art. 3.

<sup>31</sup> In *Akpinar and Altun v Turkey*, ECtHR, no. 56760/00, 27 February 2007 the Court rejected the applicability of Article 3 in the context of disrespect for a dead body on the grounds that "the human quality is extinguished on death and, therefore, the prohibition on ill-treatment is no longer applicable to corpses ... despite the cruelty of the acts concerned" para 82. On the other hand, Article 3 was applicable to the members of the family of the deceased whose body had been mutilated in light of the "suffering caused to them as a result of [the] mutilation [which] amounted to degrading treatment" para 86. But see also, partly dissenting opinion of Judge Fura-Sandstrom who was of the opinion that "the duty imposed on the State authorities to respect an individual's human dignity, and to protect bodily integrity, cannot be deemed to end with the death of the individual in question... Human dignity extends not only to the living but also to the dead..."

<sup>32</sup> *Benzer and others v Turkey*, ECtHR, no 23502/06, 12 November 2013, paras. 208-213.



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It should also be noted that the need to treat dead bodies with respect would be a necessary precondition to the effective investigation into the events leading to the violent death of a person, as required pursuant to the procedural obligation under Article 2.

International humanitarian law has long protected the dead against being despoiled.<sup>33</sup> That the mutilation of a corpse can constitute the war crime of ‘outrages against personal dignity’ is expressly recognized in the Elements of the Crimes to the statute of the International Criminal Court.<sup>34</sup> It is hardly surprising that States have deemed it necessary to expressly prohibit and criminalize such conduct in the context of war when the mutilation of enemy corpses occurs all too often.

### **4. To preserve any personal effects of the dead, and to restore them to the next of kin**

The obligation to preserve any personal effects of the dead derives from the procedural obligation to investigate under Article 2. State authorities must take whatever reasonable steps they can to secure the evidence, including forensic evidence, to satisfy the obligation to conduct an effective investigation (see Commentary to Obligation 5 below).<sup>35</sup>

In situations where the personal effects of a dead or missing person have been collected by the authorities, those items should be returned to the next of kin once there is no legitimate reason for their further retention.<sup>36</sup> The retention of such property by the authorities, absent a legitimate aim, may constitute a violation of the right to property pursuant article 1 of the first Additional Protocol to the ECHR. This obligation also finds support in the human rights protection given to the right to property, set out in Article 17 of the Universal Declaration of Human Rights.

International humanitarian law expressly requires that States ‘facilitate the return of the remains of the deceased and of personal effects to the home country...’.<sup>37</sup>

### **5. To take all reasonable steps to identify the deceased and to determine the cause of death**

This obligation finds support in the case law of the ECtHR with respect to the procedural obligation to investigate deaths associated with the right to life.<sup>38</sup> The obligation to conduct an effective

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<sup>33</sup> Article 16, 1907 Hague Convention (X) (Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, signed 18 October 1907, entered into force 26 January 2010, 205 CTS 359). Articles 15 (1) Geneva Convention I; 18 (1) Geneva Convention II; 16 (2) Geneva Convention IV; Article 34, Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, signed 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3); Article 8 (2) Additional Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609)

<sup>34</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, ‘Elements of Crimes’, Report of 1<sup>st</sup> session, New York, 3-10 September 2002, ICC-ASP/1/3, Art. 8(2)(b)(xxi), p. 108.

<sup>35</sup> *Makaratzis v Greece*, ECtHR [GC], no 50385/99, 20 December 2004, ECHR 2004-XI, para 74; *Atiman v Turkey*, ECtHR, no 62279/09, 23 September 2014

<sup>36</sup> *Vasilescu v Romania*, ECtHR, no 27053/95, 22 May 1998, Reports of Judgments and Decisions 1998-III.

<sup>37</sup> Article 34(2) of Additional Protocol I to the Geneva Conventions, supra fn.31

<sup>38</sup> *Cyprus v. Turkey*, ECtHR [GG], supra fn.10; *McCann and Others v UK*, ECtHR, no. 18984/91, 27 September 1995, para 161; *Kaya v Turkey*, ECtHR, App No 22535/93, Judgment of 19 February 1998, Series A no. 324, para 86. In addition to Article 2, the procedural obligation to investigate also attaches to Article 3, namely the prohibition of inhuman and degrading treatment and to Article 4, the prohibition on slavery, servitude and forced and compulsory labour which has been interpreted broadly by the Court to encompass trafficking in persons (*Siliadin v France*, ECtHR, no. 73316/01, 26 October 2005, ECHR 2005-VII). The obligation to investigate situations of potential trafficking is that much greater where there has been a death.

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official investigation pursuant to Article 2 arises where there is a killing or a death that occurs in suspicious circumstances whether or not imputable to State agents.<sup>39</sup> It should also be noted that the Court has affirmed that the procedural obligation to provide some form of effective investigation exists when an individual has gone *missing* in life-threatening circumstances; this obligation is not confined to situations where it is apparent that the disappearance was caused by State agents.<sup>40</sup>

The death does not have to have come about as a result of a use of force for the obligation to apply.<sup>41</sup> The purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life.<sup>42</sup>

Through its case law the ECtHR has elaborated on the criteria which must be met for the investigation to satisfy international human rights standards. These include:

- State initiative. The State authorities must take the initiative to investigate once the matter has come to their attention and may not leave it to the next of kin to bring proceedings.<sup>43</sup>
- Independence. Those carrying out the investigation must be independent from those implicated in the death. They must be institutionally independent, and must also demonstrate their independence in practice.
- Effectiveness. The investigation must be capable of leading to a determination of whether the action taken by State officials was justified in the circumstances, to a determination of the culpability of those responsible for the death. This is an obligation of means rather than result, so that steps must be taken to secure all relevant evidence in relation to the death.
- Promptness. The investigation must take place promptly and must proceed with reasonable expedition.
- Transparency. The investigation must be open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case.
- Family Participation. The next of kin of the deceased must be involved in the inquiry to the extent necessary to safeguard his or her legitimate interests.<sup>44</sup> Where there is a real possibility that a dead person was a refugee, and relatives remain in the state from which he or she fled, their security should be a paramount consideration.

A State's obligation to conduct an effective investigation, including identifying the dead and determining the cause of death, does not end at its borders: states must take all necessary and available steps to secure relevant evidence including from other states. This obligation is

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<sup>39</sup> *Menson v UK* (dec.), ECtHR, no. 47916/99, 6 May 2003, ECHR 2003-V; *Kolevi v Bulgaria*, ECtHR, no 1108/02, 5 November 2009, para 191; *Rantsev v Cyprus and Russia*, supra fn. 18

<sup>40</sup> *Varnava and others v Turkey*, ECtHR [GC], supra fn. 10, para 136.

<sup>41</sup> *Calvelli and Ciglio v Italy*, ECtHR [GC], no. 32967/96, 17 January 2002, ECHR 2002-I, para 48-50; *Öneryıldız v. Turkey*, ECtHR [GC], no. 48939/99, 30 November 2004, ECHR 2004-XII, paras 70-74

<sup>42</sup> *Anguelova v Bulgaria*, ECtHR, no 38361/97, 30 June 2002, ECHR 2002-IV, para 137; *Jasinskis v Latvia*, ECtHR, no 45744/08, 21 December 2010, para 72

<sup>43</sup> *İlhan v Turkey*, ECtHR [GC], no. 22277/93, 27 June 2000, ECHR 2000-VII, para 93; *Ahmet Özkan and Others v Turkey*, ECtHR, no 21869/93, 6 April 2004, para 310.

<sup>44</sup> See UK Parliament Joint Committee on Human Rights, 'Deaths in Custody', Third Report, Session 2004-05, 14 December 2004, HL 15-I/HC 137-I and HL 15-II/HC 137-II. These criteria derive from a number of judgments including, *Paul and Audrey Edwards v UK*, ECtHR, no 46477/99, 14 March 2002, ECHR 2002-II; *Seidova and others v Bulgaria*, ECtHR, no 310/04, 18 November 2010; *Hugh Jordan v UK*, ECtHR, no 24746/94, 4 August 2001.

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particularly relevant in the context of migrant deaths, the vast majority of which have transboundary implications.<sup>45</sup>

Although primary responsibility for investigating a death lies with the state where the victim has died, or the body has been found, all States Parties to the European Convention on Mutual Assistance in Criminal Matters<sup>46</sup> are under a corollary obligation to render assistance to the investigating State where a legal request has been sought by that State not least when evidence is located within its jurisdiction.<sup>47</sup>

It should be noted that in the case of migrant deaths, the general obligation to conduct an effective investigation pursuant to Article 2 is further reinforced by the specific obligations set forth in a number of international and regional instruments including, in particular, the Protocol against the Smuggling of Migrants and the Protocol to Prevent, Suppress and Punish Trafficking in Persons insofar as those States Parties are concerned.<sup>48</sup>

Whether a breach of the Article 2 procedural obligation can, of itself, constitute a violation of Article 3 in respect of the families of the victims has been considered by the European Court in several cases.<sup>49</sup> In the absence of a finding of State responsibility for the death or the disappearance, the Court has not been persuaded that the conduct of the authorities, even if negligent, falls within the scope of Article 3. That said, the jurisprudence is ambiguous and given the widely recognised characteristic of the ECHR as a 'living instrument' coupled with the emerging jurisprudence of other bodies including the opinions issued by the Human Rights Advisory Panel, there are compelling arguments to be made that a failure to satisfy the Article 2 procedural obligation may constitute a violation of Article 3.<sup>50</sup>

### 6. To issue a death certificate

Official recognition of death in the form of a certificate is of legal relevance to the family, next-of-kin and others. A death certificate is often the only basis upon which a determination can be reached on, for example, the status of marriage, guardianship of under age children, parental rights, the right to social allowances of members of the families and the management of property of the dead or missing persons.

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<sup>45</sup> *Rantsev v Cyprus and Russia*, supra fn. 10, para 241.

<sup>46</sup> European Convention on Mutual Assistance in Criminal Matters, adopted 20 May 1959, entered into force 12 June 1962, Council of Europe Treaty Series (CETS) No 30, Chart of signatures and ratifications of Treaty 030, [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/signatures?p\\_auth=N4ZRRk5p](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/signatures?p_auth=N4ZRRk5p) : accessed 15 March 2017

<sup>47</sup> *Rantsev v Cyprus and Russia*, supra fn.10, para 245.

<sup>48</sup> Article 4 of both the Smuggling and Trafficking Protocols require States to prevent, investigate and prosecute the offence of smuggling and trafficking respectively, supra fn. 9. In addition, Article 7 of the Smuggling Protocol requires States Parties to cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea. Article 3 of the Trafficking Protocol as well as the Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008, CETS No. 197) include the offence of recruitment. Accordingly, States Parties must undertake a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation in circumstances where there is evidence to indicate that those who died were victims of smuggling or trafficking.

<sup>49</sup> *Tovsultanova v Russia*, ECtHR, no. 26974/06, 17 June 2010; *Shafiyeva v Russia*, ECtHR, no. 49379/09, 3 May 2012.

<sup>50</sup> *Five Complainants v UNMIK*, Human Rights Advisory Panel (HRAP), Cases nos 43/09, 54/09, 114/09, 173/09, 242/09, 31 July 2013, paras 145-150; *Ranko Milenkovic v UNMIK*, HRAP, case no. 255/09, 26 June 2015; *Andelkovic v. UNMIK*, HRAP, Case No. 277/09, 23 January 2014.

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Issue of a death certificate is a necessary pre-condition for families of the deceased to exercise their human rights – for example – to property, or for a wife to remarry. It also forms part of the effective and transparent investigation of a death which is required under Art. 2 ECHR.

Article 129 of the fourth Geneva Convention requires that '[d]eaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred'.

### **7. To locate and notify the relatives of the dead and missing**

This obligation derives from the Article 2 procedural obligation to ensure that the victim's relatives are not excluded from the investigation into the death or disappearance. The obligation to involve the next-of-kin of the victim in the procedure to the extent necessary to safeguard his or her legitimate interests is a condition that the Court has reaffirmed in numerous cases.<sup>51</sup> It follows that locating and notifying the relatives of the dead and missing who are in the State's jurisdiction is a necessary pre-condition to satisfying the criteria of an effective official investigation. This obligation does not necessarily apply in respect of the relatives who are located outside the State's jurisdiction. Nevertheless, if the relevant information is known, the authorities do have a positive obligation to inform, without delay, the appropriate consular post of the death.<sup>52</sup> However this obligation is not absolute, and will not arise where circumstances suggest that the deceased was or may have been a refugee.

Article 16(3) of the Universal Declaration of Human Rights recognizes the family as 'the natural and fundamental group unit of society' and its entitlement 'to protection by society and the State'.

Human rights law also acknowledges a right to know the truth that may also impose obligations upon States in this area.<sup>53</sup>

International humanitarian law affirms the duty of States to facilitate enquiries about missing family members. According to article 32 of Additional Protocol I, such measures are 'prompted mainly by the right of families to know the fate of their relatives'.

### **8. To facilitate the return of the remains of the dead to their next-of-kin, upon request**

The obligation to facilitate the return of the remains of the dead to their next-of-kin flows from the importance of the family unit in international human rights law, exemplified by Article 16 of the UDHR which recognizes that:

"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".<sup>54</sup>

Article 8 of the ECHR recognizes that "everyone has the right to respect for his private and family life, his home and his correspondence". The ECtHR has interpreted this right broadly and has found that an excessive delay in the restitution of a body after an autopsy or of bodily samples on completion of the relevant criminal proceedings may constitute an interference with both the

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<sup>51</sup> *Paul and Audrey Edwards v UK*, no 46477/99, 14 March 2002, para 73; *Ahmet Özkan and Others v. Turkey*, *supra fn.41*, paras 311-314; *Isayeva v Russia*, ECtHR, no 57950/00, 24 February 2005, Para 211-214.

<sup>52</sup> Vienna Convention on Consular Relations, concluded 24 April 1963, entered into force 19 March 1967, 596 UNTS 261, Art. 37(a).

<sup>53</sup> *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR [GC], no. 39630/09, 13 December 2012, ECHR 2012

<sup>54</sup> Article 23, ICCPR.

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‘private life’ and the ‘family life’ of the surviving family members.<sup>55</sup> Moreover, the failure to return a dead body to the relatives for burial, or disclose where it was buried, can constitute a violation of Article 8 if the interference with the right to bury one’s relative cannot be justified by reference to international human rights law by the state authorities.<sup>56</sup>

Under international humanitarian law, States should also ‘facilitate the return of the remains of the deceased and of personal effects to the home country’ (Additional Protocol I, art. 34(2)). Because the dead may be found far from their homes, repatriation of the remains may involve significant expenditure that may be well beyond the means of the family and next-of-kin.

The UN’s Inter Agency Standing Committee’s *Operational Guidelines on Human Rights and Natural Disasters [“UN Guidelines”]* recommend that appropriate measures should be taken ‘to facilitate the return of remains to the next of kin...Measures should allow for the possibility of recovery of human remains for future identification and reburial if required’.<sup>57</sup>

### **9. Where the remains are not returned to the next-of-kin, they should be disposed of in a dignified and respectful manner, appropriate to the religious and cultural traditions of the person and bearing in mind the wishes of the next of kin**

Repatriation or return to families may be impossible for a variety of reasons. In such cases, decent, dignified and respectful treatment of the body must be provided with due regard to religious and cultural traditions of the family where these are known. [ECHR Art. 9]. European biomedical law sets standards for the treatment of bodies. These have a wider relevance; they include the protection of dignity and identity; treatment with respect; and the prohibition of financial gain.<sup>58</sup>

International humanitarian law [Article 130(1) of the fourth Geneva Convention] provides that deceased persons should be ‘honourably buried, if possible according to the rites of the religion to which they belonged’. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his or her express wish to this effect.

The UN *Guidelines* recommend that where human remains cannot be returned to next of kin, ‘they must be disposed of respectfully and in a manner which will help their future recovery and identification. Cremation of unidentified bodies should be avoided. Instead, they should be stored or buried temporarily, pending future identification and return to families. All burials should be conducted in a manner that respects the dignity and privacy of the dead and of their living family members....Local religious and cultural practices should be taken into account....’<sup>59</sup>

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<sup>55</sup> *Pannullo and Forte v France*, ECtHR, Appl. no. 37794/97, 30 October 2001, ECHR 2001-X, paras 35-36; *Girard v France*, ECtHR, no 22590/04, 30 June 2011, para 107; *Zorica Jovanović v. Serbia*, no. 21794/08, 26 March 2013, ECHR 2013; *Arkhestov and Others v. Russia*, no. 22089/07, 16 January 2014.

<sup>56</sup> Non-return must be in accordance with the law, in pursuit of a legitimate aim, necessary in a democratic society, proportionate, and non-discriminatory; *Sabanchiyeva and Others v. Russia*, ECtHR, no. 38450/05, 6 June 2013, ECHR 2013. *Maskhadova and Others v. Russia*, ECtHR, no. 18071/05, 6 June 2013. In *Hadri-Vionnet v Switzerland*, (ECtHR, no. 55525/00, 14 February 2008), there was a violation of Article 8 where a still-born child was buried in a communal grave without the mother’s knowledge.

<sup>57</sup> Inter-Agency Standing Committee (2006), *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters* (hereafter: *IASC Guidelines*), *Brookings-Bern Project on Internal Displacement*, Washington, United States: Brookings-Bern Project on Internal Displacement, June 2006. [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_natural\\_disasters.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_natural_disasters.pdf): last accessed 15 March 2017, Guidelines D.3.5 & D.3.7

<sup>58</sup> Additional Protocol on Transplantation of Organs and Tissues of Human Origin, *supra* fn.26

<sup>59</sup> *Ibid*, *IASC Guidelines* D.3.5, D.3.6 & D.3.7.

### **10. To record the location of burial and to respect and maintain gravesites**

The right of families under Article 8 of the ECHR to know where a relative has been buried requires that the grave is marked and recorded. International humanitarian law [Article 130(1) of the fourth Geneva Convention] provides that States should ensure that ‘graves are respected, properly maintained, and marked in such a way that they can always be recognized’.

*The UN Guidelines* recommend that ‘[F]amily members should be fully informed about the location of grave sites, and have full access to them. They should be given the opportunity to erect memorials and conduct religious ceremonies as needed’.<sup>60</sup>

### **11. To respect equal treatment and non-discrimination in all these actions**

Most if not all States address the issues of treatment of the dead in national legislation. At a minimum, human rights must be protected without unlawful discrimination [ECHR Article 14]. Consistent with the principle of non-discrimination, the rights of those at heightened risk of human rights abuses, such as refugees, irregular migrants, women and children must be ensured at all times.

### **12. To give special protection to children**

Under general international human rights law children are entitled to special protection.<sup>61</sup> All States parties, including all states in Europe, have duties under the 1989 United Nations Convention on the Rights of the Child [‘CRC’]<sup>62</sup>. The CRC provides that States Parties “recognize that every child has the inherent right to life” and that states must “ensure to the maximum extent possible the survival and development of the child”. States have a duty to ensure that laws, policies and procedures are enacted “to promote the full enjoyment of all rights in the Convention by all children” without discrimination [CRC Article 2].

States thus have a duty to anticipate and prevent harm, including with respect to the triggers of child migration and to invest in robust search and rescue operations to avert harmful migration outcomes. The fact that a large proportion of those crossing the Mediterranean are children will require States to take additional measures when searching for and conducting rescue operations of children and families in peril on or missing at sea in order to fulfill their treaty obligations. This would require, for example, support to bereaved children, or children who are unaccompanied or have become separated from their parents or adult carers, to ensure that their special vulnerabilities are identified and met as a priority.

The CRC [Article 3] requires the best interests of the child to be a primary consideration in all actions concerning children. States are under an additional duty [Article 8] to preserve a child’s identity, including nationality, name and family relationships; this would encompass giving priority to tracing missing parents and other relatives, where – for example - a child was travelling or living with a relative other than a parent, and to the identification of the dead.<sup>63</sup> Where parents or relatives are missing and separation, including through death, results from action initiated by the

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<sup>60</sup> Ibid. IASC *Guidelines* D.3.9.

<sup>61</sup> ‘Every child is entitled to ‘such measures of protection’ as are required by their status as minors [ICCPR Art. 24]. ‘Special measures of protection and assistance should be taken on behalf of all children’ [CESCR Art. 20].

<sup>62</sup> Ratified by all UN member states save the USA, [http://www.ohchr.org/Documents/HRBodies/CRC/OHCHR\\_Map\\_CRC.pdf](http://www.ohchr.org/Documents/HRBodies/CRC/OHCHR_Map_CRC.pdf): accessed 15 March 2017.

<sup>63</sup> The African Charter on the Rights and Welfare of Children (adopted 11 July 1990, entered into force 29 November 1999, Organisation of African Unity, CAB/LEG/24.9/49 (1990) ) 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’, Article 25.

## APPENDIX A [Last Rights proposed legal statement]

State (which could include during rescue and recovery of bodies), CRC Article 9 requires the state to provide the child with information concerning the whereabouts of the absent relatives, provide all necessary assistance to restore family unity as soon as possible and ensure appropriate alternative care pending such reunification, including measures to enable the child's psychological recovery and reintegration [CRC Article 39], measures to ensure that as separated children outside their country of origin they have the benefit of guardianship and legal assistance to assist with all legal procedures, family reunification etc.<sup>64</sup>

There is a duty on states to ensure the accurate identification of children and therefore a need to collect and preserve essential data on children individually as they arrive, and to collate all such data on these children generally, including how many are bereaved, and have lost parents, siblings or other relatives. This will require establishing common standards of data collection and recording.<sup>65</sup>

Article 4 CRC requires that the implementation of the rights set out in the Convention should be "within the framework of international cooperation".<sup>66</sup> This would include - for example - collating data of children who have died, and assistance with tracing such as exists under the Hague Conventions.<sup>67</sup>

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<sup>64</sup> See *in extenso* CRC General Comment No. 6 (2005) 'Unaccompanied and Separated Children Outside their Country of Origin', UN Doc. CRC/GC/2005/6; in particular para 33 -38

<sup>65</sup> CRC measures apply to "all children" not just the individual child and states' duties under Article 4 require systemic implementation of CRC rights, including "data collection" – see especially CRC General Comment No.5 (2003) 'General Measures of Implementation', UN Doc. CRC/GC/2003/5, para. 9

<sup>66</sup> *Ibid* para. 63. "The Committee encourages States to provide and to use, as appropriate, technical assistance in the process of implementing the Convention. The United Nations Children's Fund (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR) and other United Nations and United Nations related agencies can provide technical assistance with many aspects of implementation'.

<sup>67</sup> Eg the Hague Convention on the Civil Aspects of International Child Abduction, (adopted 25 October 1980, entered into force 1 December 1983, 1343 UNTS 89) where designated central authorities in each country cooperate in tracing.