The Mediterranean Sea and the Right to Know About the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants

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Irregular migration by sea is not a new phenomenon. In recent times, however, numbers have grown, border controls have tightened and migrants’ routes have become longer and more dangerous. This combination of factors has resulted in a significant known loss of life, as well as unknown numbers of missing migrants. In this Article, the main argument is that modern technology could allow for the creation of an international database of missing migrants, permitting their families to determine their whereabouts. The Article also argues that the use of biometric technology is restricted for security purposes and border control. This partial use of biometric data completely curtails the rights of the family and their access to justice, understood as their right to information regarding the whereabouts of missing relatives. The right of the family to know the fate of missing relatives has been largely recognised in situations of emergency and in times of war. Unfortunately, the same consideration has not been accorded to missing migrants, despite the frequency and magnitude of the tragedies in the Mediterranean Sea.

I. INTRODUCTION

This Article addresses the issues of unknown deaths in the Mediterranean Sea, the right to an identity and the right of the family to know the whereabouts of missing relatives. It is argued that Europe, through its current use of biometric data for security purposes and border controls, could extend this capability to the documentation of missing migrants, thereby providing improved information to the families of the missing. Moreover, the Article argues that despite the systematic verification of deaths in armed conflicts and humanitarian disasters, European states do not attribute the same importance to the loss of life of migrants.

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Section I analyses the phenomena of both causes of migration and border control policies, and the problems that the latter are causing to migrants’ entitlement to fundamental human rights. Moreover, it explores the specific condition of illegal migrants who are legally ‘invisible’, underlining that the invisibility that characterises these persons is one of the main challenges in tracing, acknowledging, and accounting for their deaths. It further explains all the other reasons behind the substantial amount of missing and lost persons as a result of the migration phenomenon and border control policies.

Section II analyses the ‘right to identity’ and the ‘right to know’ and the links that both of these rights have with customary International Humanitarian Law (IHL) and International Human Rights Law (IHRL). It examines international jurisprudence in different cases of missing persons and the right of the family to know their fate. The jurisprudence is taken from cases of enforced disappearance, both in the European Court of Human Rights (ECtHR) and in the Inter-American Court of Human Rights (IACtHR), drawing comparisons between the two procedural approaches. The fact that the same rights have no legal enforceability in situations of missing migrants, despite the similarities of the situations, is highlighted.

The last Section deals with biometric data, its nature, and its use in the European context. The argument is that the European Union does not use the same data in order to guarantee the right to an identity of missing migrants and the right of the family to know the whereabouts of the missing, instead implementing biometrics largely for security purposes. The section continues with examples taken from the work conducted by the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP). It concludes with recommendations on how to optimally implement an international database which could provide all the necessary information to families in order to promote their right to know.

By way of illustration, the ICRC defines a missing person as:

an individual of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of armed conflict, whether international or non-international, internal violence, natural disaster or other humanitarian crises.¹

More broadly, the International Commission on Missing Persons adds that a missing person is also someone who went missing because of human rights

abuses, such as in the case of enforced disappearance, or ‘as a result of trafficking, drug related violence and migration.’

The disappearance of a close relative, and the uncertainty of identifying whether this person is still alive, causes different trauma within the family, both psychological and legal. People can react in a number of different ways: they struggle within the limbo of puzzlement, they suffer from depression or a sense of guilt; they might curtail social relations in order to dedicate their time and energy to childcare, or they may be compelled to take up new responsibilities within the family. The family of a missing person can also be stigmatised within the community because of a lack of ‘recognised social identity’ within the community itself: this can happen, for example, to the wives of missing men who have to take up traditionally masculine roles. Stigmatisation can also occur in communities where religion plays a major role, the lack of a specific missing person’s status leads the family to struggle in feeling part of a specific group because they are not formally recognised. An example is that of a family that cannot properly mourn and grieve as they are unable to properly undertake rituals such as funeral commemorations or visiting the burial site of the deceased family member. The lack of legal recognition for the missing places families in uncertain legal situations concerning their rights to property, inheritance, guardianship of children and remarriage. As aforementioned, the ambivalence in the situations that these families face can have different consequences. They are definitely as much victims as their missing relatives are, and are therefore entitled to the right to know the whereabouts of the missing in order to try to obtain closure from a clarified situation and to move on from the limbo of ambiguity.

This Article will examine the loss of identity produced by irregular migration and tightened border controls in the Mediterranean Sea; the effect of the consequences of this human rights issue on the families and their right to know the whereabouts of the missing; and a proposed solution for addressing this situation through the use of biometric data.

**II. SECTION ONE**

*Migrant frontier deaths and violations of migrants’ rights at frontiers have tended to be seen as a “tragic by-product” and as “unintended side*

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3 ICRC (n 1) 8.
4 ibid 11.
"effects" of state action to control national borders, prevent irregular migration, and combat international crime.\(^5\)

2.1 The Phenomenon of Irregular Migration

The 2008 memorial built on the Island of Lampedusa, Italy, was dedicated to all those migrants who went missing or lost their lives trying to reach Italian soil. The memorial, which has the shape of a door facing the Mediterranean Sea, represents the ‘gateway to Europe’. It lists neither their names nor their nationalities, symbolising both the unknown identity of these people and the State’s lack of will to identify them.\(^6\) Additionally, all the burial places of dead migrants in southern European countries consist of unmarked graves, another symbol of their loss of identity.\(^7\) The specific status of migrants, whether they be asylum seekers, refugees or economic migrants, is beyond the remit of this Article; the aim is to take into consideration irregular migrants who cross the Mediterranean Sea at a broader level, underlying the specific status of vulnerability and invisibility of this category.\(^8\) Despite the aforementioned point, the UN High Commissioner for Refugees (UNHCR) has stated that ‘most of the people arriving by sea in Europe are refugees, seeking protection from war and persecution.’\(^9\)

Irregular migrants are those who have no valid permit to enter a state, or to remain in the territory of the state; the majority of those who enter the borders of the state in question will have had no choice but to leave their own countries. Host states often regard their presence as illegal and require their removal as soon as possible. Despite this dichotomy, it is important to underline that, under international law, migrants are entitled to protection regardless of their status under national law. The irregularity of the status of migrants depends on national jurisdiction and irregularities emerge for different reasons: the lack of a valid visa or passport, overstaying in a country, or an entry effected through


\(^7\) ibid.


trafficking.\textsuperscript{10} The most accurate data in Europe is provided by UNITED, an international non-governmental organisation (NGO) based in Amsterdam.\textsuperscript{11} Work began in 1993 in order to record the deaths of migrants and refugees as a result of the so-called ‘Fortress Europe’. The latest publication lists 22,396 frontier deaths since 1993.\textsuperscript{12} It is worth noting that UNITED adopt a broad definition of ‘frontier-deaths’, which includes people who die in detention centres, victims of racially-motivated attacks, and those who die attempting to cross borders within the EU; it is the most reliable source of data on border-related deaths.\textsuperscript{13}

In recent years, there has been a significant increase in the number of such deaths; the figures from Human Rights Watch estimate that 3,500 people died in 2014, with 479 refugees having drowned or gone missing between January and March 2015. In April 2015 the situation worsened: 1,308 migrants died in shipwrecks, representing an unprecedented tragic loss of lives. Although these events are alarming, they are not isolated incidents. Moreover, these figures fail to represent the true number of fatalities because of the uncertain nature of frontier-deaths, especially in cases where bodies are never found.

2.1.1 Migration Flows: Push Factors

Over the past two decades immigration has increased enormously. It is a general phenomenon that arises from migratory ‘fault-lines’ between wealthier, more secure states and poorer, more unstable states.\textsuperscript{14} In summary, ‘increased emigration is ‘pushed’ across these fault-lines by poverty, persecution, insecurity and conflict, and immigration is ‘pulled’ by labour demand, economic opportunity, and the need for protection and personal security.’\textsuperscript{15}

\begin{itemize}
\item[13] Last and Spijkerboer (n 11) 96.
\item[15] Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6) 137.
\end{itemize}
Migrants often have strong legitimate reasons for undertaking their desperate journeys. According to the UNCHR, the latest wave of migration to Europe comes from Syria, Somalia, Afghanistan, Eritrea, and Libya: countries plagued by war and human rights violations. In Syria, government forces and pro-government militias continue to carry out indiscriminate attacks on civilian areas, enforced disappearances, arbitrary arrests, and torture. Non-state armed groups working with the terrorist organisation ISIS continue claiming responsibility for a multitude of crimes and human rights abuses. In Afghanistan, the Taliban and other insurgent groups have frequently perpetrated attacks on civilians causing massive displacement within the state. In Eritrea, the majority of the violence is carried out by military forces using conscription, forced labour, arbitrary arrests, detention, and restrictions on the freedom of expression and religion. In Somalia’s longstanding conflict, military groups continue to carry out public executions and beatings, sexual abuse, and indiscriminate attacks. Finally, in Libya, a state of political turmoil has existed since the 2011 overthrow of Muammar Gaddafi, and a new outbreak of disorder between the two major political alliances has brought a new wave of violence, abuse and lawlessness.

These situations of continuing human rights abuses and insecurity, coupled with economic globalisation – one of the major pull factors – are driving factors for people to leave their countries. Even when freedom of movement is obstructed by border policies, people are still willing to take the risk and leave because any situation is sure to be an improvement compared to the turmoil in their home country.

2.2 Consequences of Tightened Border Controls

According to Jorge Bustamante, the increased number of border-related deaths is a consequence of tightened border controls. As can be demonstrated by the number of irregular migrants who leave their home countries, tightened border-controls do not function as an effective deterrent for these persons to prevent them from leaving. Causes of migration, as outlined supra, do not disappear with border closures; consequently, migrants face longer and more dangerous routes in order to reach Europe.

For irregular migrants, sea borders are still the only viable means of entering

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17 ibid.
18 UNHCR (n 14).
Europe; however, the high seas represent a potentially fatal barrier to overcome. ‘Hence, the specific nature of the (sea) border, coupled with the fact that irregular migrants follow illegal and non-conventional channels, increases the risk of deadly incidents.’ Securitisation of borders and enforcement of border control policies through coastguard patrols are arguably responsible for the increase in the number of fatalities, especially because their mandates do not cover the rescuing of migrants in danger. More funds are now allocated for border controls and ‘the intended and unintended effects of such activities should be publicly known if these activities are to maintain democratic legitimacy.’ It is believed that in not doing so, civil society and policymakers’ lack of engagement with these deaths results in the normalisation of the issue; and Europe seems to have turned a blind eye to the problem.

Border-related deaths are often seen as a side-effect of tightened border controls and states fail to account for these deaths. A related issue is the lack of an international definition of border-related deaths; therefore, a problem arises as to how to, or who to, include in the definition of border-related deaths. De-territorialisation of borders for security reasons subsequently implies that national borders are increasingly being detached from sovereign territory; taking the name of ‘functional-borders’, which include every space where a State performs functions. This raises some legitimate questions: if every state has a positive obligation to prevent deaths on its territory, why are states not taking action within their functional borders, where they should have an indirect jurisdiction, as a consequence of restricted border policies? Moreover, what are the implications of tightened border controls? If the majority of migrants are refugees, why are European states unable to grant them protection?

The EU’s response to the recent increased migration phenomenon has been a primary focus on departure prevention. However, this approach is likely to fail because it ‘overlooks the reasons people are willing to risk their lives to attempt such deadly sea-passage.’ As a matter of fact:

19 Simon Robins, Iosif Kovras, and Anna Vallianatou, ‘Addressing Migrant Bodies on Europe’s Southern Frontier’ (Queen’s University Belfast and The University of York Centre for Applied Human Rights 2014).
21 Last and Spijkerboer (n 11) 86.
22 ibid.
23 Grant (n 5).
24 Last and Spijkerboer (n 11) 31.
25 UNHCR (n 9).
26 ibid 15.
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‘States’ policies in promoting immigration restrictions and reducing opportunities for regular migration have not been effective in preventing migration. Rather, they have created a market of irregular migration, through trafficking and smuggling of people.27

Furthermore, the enforcement of these policies is expected to violate migrants’ human rights, forcing many asylum seekers to take dangerous routes in the absence of legal alternatives, often at the mercy of smugglers and traffickers. Smugglers take the most dangerous routes to avoid detection by patrols, people have to disembark during the night and they are forced to swim ashore. Smugglers are notorious for their brutality towards migrants: migrants are forced to remain still in the same position, boats are overcrowded, and people have to sit on top of each other. Migrants have little or no water, no food, and deaths during boat journeys are common because of the extreme conditions. People are brutally beaten and thrown overboard alive – those who do not know how to swim die.28 A recently reported case that attests to the brutality of smugglers concerns the death of a diabetic girl, who died because a smuggler threw her insulin syringe into the sea.29 Finally, trafficking and smuggling increase the difficulty of obtaining accurate data on migration and deaths: some migrants disappear during their journeys under assumed names, nationalities, and crossing dangerous borders. ‘There is a humanitarian imperative and a moral and legal responsibility to attempt to identify the dead and inform relatives.’30

There are a number of reasons why it is important to account for and identify the missing. First of all, to resolve the tension between preventing the arrival of new migrants and protecting them from violations of their human rights, such as their right to life and freedom from inhuman and degrading treatment. Both are essential in order to prevent new tragedies from occurring and to protect migrants from smugglers and traffickers.31 Secondly, states have to fulfil their

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30 Robins, Kovras, and Vallianatou (n 19) 2.
31 Stefanie Grant, ‘International Migration and Human Rights’ (Global Commission on International Migration 2005).
positive obligation in protecting everyone within their jurisdiction; therefore, European states should account for the number of deaths as a consequence of tightened border control policies. Thirdly, establishing a relationship between mortality and security frontier policies and practices would at least assist in alleviating human rights concerns. Finally, it is imperative to grant families the right to know the whereabouts of missing relatives, and in order to do so it is necessary to restore their right to an identity.

In order to reduce the number of deaths, the EU should start providing safe and legal channels of migration, increase the number of refugee resettlements — as repeatedly called for by the UNHCR — as well as adopt broader usage of humanitarian visas for the purposes of family reunification. This should be implemented in order to give those entitled to international protection the possibility of travelling lawfully within EU borders.

Despite the frequency and magnitude of these tragedies, European states do not regard migrant death and loss in the same way as deaths in armed conflict and humanitarian disaster which require systematic identification, nor do they recognise that migrants’ families have a right to know the fate of missing relatives.

The next section analyses the international jurisprudence in situations of human rights violations and in times of war related to missing people. Although cases are different, one point of commonality remains: the disappearance of a relative, unresolved situations, and unknown whereabouts are likely to be very similar.

III. SECTION TWO

International law provides a broad jurisprudence and set of principles that states should take into consideration as the foundation their responses to migrant frontier deaths. This section will analyse both the right to an identity and the right to truth as a basis for demonstrating the fundamental importance of restoring the identities of missing or dead migrants, and the implications of the violations of both of these rights on the surviving family of the deceased.

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32 Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6).
33 UNHCR, ‘UNHCR Projected Global Resettlement Needs’ (UNHCR 2016).
Neither of these rights are found in either of the examined Conventions (ECHR/IACHR) as ‘stand-alone rights’, but they have been created through the elaboration of jurisprudence, thus giving rise to legally enforceable rights. Both violations are examined in light of enforced disappearance as a means of demonstrating that, if in these cases family rights are violated, the same principles should apply in situations of missing migrants.

3.1. **Right to an Identity**

If identity is seen as a right and migrants and their families are seen as right holders, the points of departure for an informed discussion are more easily defined.\(^{35}\)

3.1.1 **International Law**

The right to an identity is not a new concept, although it still lacks a comprehensive definition. Under International Law the right to an identity appears both explicitly and implicitly in several international instruments: the most relevant being the Convention on the Right of the Child (CRC). Article 8(1) imposes the responsibility on:

states… to undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognised by law without unlawful interference.\(^{36}\)

The term ‘including’ implies that the identity goes beyond the three factors enumerated, and article 8(2) adds an obligation to rapidly restore the identity of those deprived of their identity illegally. The drafting history of Article 8 suggests a multi-dimensional concept of identity – personal, legal, and familial – and its travaux préparatoires were born out of the Argentinean delegation’s response to the country’s experience with the children of disappeared persons.\(^{37}\) The International Covenant on Civil and Political Rights, the CRC, and the Hague Convention on Intercountry Adoption require the collection of vital information; and several anti-trafficking conventions impose a duty on states to take positive steps, as well as negative restraints, in order to restore, promote and develop identities.\(^{38}\)

\(^{35}\) Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6).


\(^{37}\) ‘Right to Identity’ (International Human Rights Law Clinic, University of California, Berkeley School of Law 2007).

\(^{38}\) ibid.
3.1.2 The Concept of Identity and the Right to an Identity

The aim of this discussion is not to create a new right, but rather to (re)interpret an existing right. On one hand, the ‘cultural dimension’ of the right to an identity protects language, property, and other specific rights related to ‘cultural identity’; on the other, this right relates to name, nationality, and family, which can be defined as the ‘identity dimension.’ While there is no clear interpretation, legal scholars and those of other related subjects interpret the right in a dynamic manner, relating it to both social and personal realities. ‘This “social context” understanding defines identity in terms of the individual’s uniqueness vis-à-vis others’.39 Having explored the various dimensions of the right to an identity, we must now examine if it is an independent right, or if it exists only in relation to other existing rights?

The Inter-American Committee of Jurists states that the right to an identity is autonomous, non-derogable, fundamental, and part of human dignity. States have the obligation to respect an individual’s identity and to refrain from actively interfering with it. This obligation to protect means that states have to also prevent others from interfering with a person’s identity. The purpose of this analysis of the right to an identity is to underline the fact that, although it is considered an independent right, one of its many facets relates to the right to family life, a component of the former. If an individual’s right to an identity protects both the individual’s personal attributes, as well as their social ties, families are therefore entitled to know the whereabouts of missing relatives due to this symbiotic relationship.

3.2. The Right to Truth

3.2.1 Origins

The Preamble of the Inter-American Charter asserts that ‘the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society,’40 establishing a link between democracy and human rights. Unfortunately, the history of South American countries is representative of the repeated breakdown of democracy in favour of totalitarian regimes, internal armed conflicts, and civil war. Within these scenarios, massive human rights violations have been perpetrated, inter alia, and enforced disappearances have been carried out as a tactic of war. Thus, the Organisation of American States (OAS) has recognised the importance to respect and guarantee the right to

39 ibid 13.
truth:

the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred.\(^{41}\)

The right to truth is a new right that emerged out of the systematic violation of human rights and the failure of states to investigate, prosecute and punish the perpetrators.\(^{42}\) Moreover, it is a legally enforceable right in that it provides for the ability to obtain reparations for the families of the victims. The right to truth is a form of public acknowledgment of the facts and a way to recognise the value of a person as an individual and a right holder.\(^{43}\)

### 3.2.2 Development

The right to truth within the Inter-American system was initially established in response to the phenomenon of enforced disappearance; it has been recently adopted by the ECTHR in the El-Masri judgment.\(^{44}\) The right to truth is also recognised in the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (2006),\(^{45}\) by the General Assembly, Right to Truth (2014),\(^{46}\) and the reports of the Advisory Committee of the Human Rights Council on Best Practices and Missing Persons (2010). Further, it is now commemorated on 24 March on the occasion of the International Day for the Right to the Truth of Victims of Gross Human Rights Violations and for the Dignity of Victims.

Yet, the right to truth can be traced back to IHL.\(^{47}\) During armed conflicts, whether they are international or civil, each state party to a conflict needs to take ‘all feasible measures to account for persons reported missing’ and to

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\(^{41}\) OAS General Assembly, ‘The Right to the Truth’ (adopted at the fourth plenary session, held on June 6 2006) AG/RES 2175 (XXXVI-O/06).


\(^{44}\) El-Masri v the Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25.


\(^{47}\) IAC (n 43) 165.
provide to families with all relevant information. Moreover, Article 32 of the First Protocol Additional to the Geneva Conventions grants the right to families to know the fate of missing relatives. The right to family life is also established under IHL in that ‘family life must be respected as far as possible.’ Enshrined in this principle is a provision which establishes the right of the family to have information on the whereabouts of missing relatives. Furthermore, there are impositions on states to collect, respect and identify bodies and belongings, and to return them to the family. These rules are also applicable in cases of enforced disappearance. As seen, the search for missing family members is a well-established principle in times of war or state-sponsored violence, and the persistent violation of this right has to be considered to amount to inhuman and degrading treatment of the families of victims.

Deaths in the course of irregular migration journeys share some characteristics with other large-scale and violent deaths – whether in major accidents, in armed violence, in violent displacement, in conflict or in humanitarian disasters – and give rise to some broadly equivalent protection issues.

3.3. Enforced Disappearance

Enforced disappearance is used as a tool for political repression and the terrorisation of the opposition. People are kidnapped, transferred to secret locations, held incommunicado, interrogated, tortured and, in many cases, thrown into the ocean or buried in mass graves. It is a multiple and continuous violation of different human rights, such as the right to life, the right to liberty, and the right to humane treatment; it is also a violation of the right to an identity for the victims and their next of kin. In fact, the act of kidnapping disrupts an individual’s social identity, especially with regard to family ties. When held in secret prisons, the interrogation techniques used are aimed at

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50 Henckaerts and Doswald-Beck (n 48).
51 ibid; Rules 112, 113, 114, 115, and 116.
52 ibid; Rule 98.
54 Grant (n 5) 142.
55 Velázquez Rodríguez v Honduras (1988) IACHR Series App No 792.
disrupting the psychological identity of the individual,\textsuperscript{57} while executions and the subsequent disposal of the remains work to completely destroy the identity of disappeared persons.\textsuperscript{58}

In the case of 	extit{Velásquez Rodríguez v Honduras}, one of the first judgments of the IACtHR, it was held that:

> The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared... The State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains [in order to bury the victim in accordance with their customs and beliefs].\textsuperscript{59}

The right to truth also applies to the relatives of victims of enforced disappearance. In 	extit{Bámaca Velásquez v Guatemala}, the Court recognised that State organs have an obligation to clarify the events involved in the investigation and prosecution which give rise to the right to truth. Moreover, IACtHR jurisprudence has recognised that the right to truth encompasses the right to judicial guarantees and judicial protection. Furthermore, determining the truth in the event of cases of enforced disappearance will ease the pain of missing relatives,\textsuperscript{60} and the denial of truth amounts to the inhuman and degrading treatment of close family members.\textsuperscript{61} In 1990, the United Nations Human Rights Committee (UNHRC) established that the relatives of a victim of forced disappearance fall into the category of victims of human rights violations.\textsuperscript{62} ‘Determining that the relatives of the disappeared may be indirect victims of an enforced disappearance recognises the universal nature of human rights and the effect that disappearances have on relatives.’\textsuperscript{63} Lastly, the IACtHR held that having access to information about the location and identification of the victim honours both their dignity and that of the family, and will ultimately reconstruct the cultural identity of disappeared persons.\textsuperscript{64}

Although our focus is Europe, the reason for examining IACtHR jurisprudence

\textsuperscript{57} McCombs and Gonzalez (n 37) 3.

\textsuperscript{58} ibid.

\textsuperscript{59} Rodríguez (n 52) [181].

\textsuperscript{60} Ticona Estrada et al v Bolivia (2008) IACHR Series C No 191 [155].

\textsuperscript{61} Trujillo Oroza v Bolivia (2000) IACHR Series C No 64 [114].

\textsuperscript{62} Maria del Carmen Almeida de Quinteros et al v Uruguay (1990) IACHR Communication No 107/1981, UN Doc CCPR/C/OP/2 [138].


\textsuperscript{64} Río Negro Massacres v Guatemala IACHR (2012) Series C No 250 [265].
relates to the fact that its jurisprudence on enforced disappearance is particularly developed, and therefore could not be left out of the discussion. The ECtHR has relied upon the IACtHR’s jurisprudence in a number of judgments on enforced disappearance. Moreover, IACtHR jurisprudence is supported by various reports and instruments developed by the United Nations. In order to conclude the section, a comparison of the approaches of the two courts in considering the family as a victim in cases of enforced disappearance is presented.

3.3.1 The Different Approaches of the IACtHR and ECtHR

Both the IACtHR and the ECtHR have established that the family of the victim can be considered a victim of inhuman and degrading treatment, although both courts, under their respective conventions, have developed criteria, through which cases are examined and judged, that have varying degrees of importance.

There are three elements taken into account by the two Courts: the relationship status between the victim and the relative, the relative’s efforts to find the victim, and the State’s response to the relative’s efforts. The IACtHR has accorded greater importance to the relationship status criteria because of the impact that a case of enforced disappearance can have on relatives due to the nature of the relationship. In contrast, the ECtHR differentiates between the level of proximity between the victim and the relative. A significant ECtHR example is the Kotu case, where, although the applicant was the brother of the disappeared person, they were living in two different countries, and therefore he could not be considered a victim just because he was the victim’s next of kin. The second element to take into account is the effort made by relatives. This means that the applicant has to demonstrate that they brought the case before the attention of a state authority and waited for a response. Nevertheless, in many cases the family’s efforts to locate their relatives can be obstructed by the corruption of state officials. Both the Inter-American Court and the European Court have frequently highlighted the efforts made by victims’ relatives. However, the ECtHR, in a number of cases, has highlighted that there was no violation of Article 3 of the Convention because the relatives did not ‘bear the brunt’ of the search. In summary, in order to find a violation of

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66 Murray (n 63).
67 Blake v Guatemala (1999) IACHR Series C No. 48, [57].
68 Kotu v Turkey (2005) ECHR App No 27305/95 [171].
69 Pueblo Bello Massacre v Colombia (2006) IACHR Series C No 140 [156].
70 Baysagova v Russia (2007) ECHR App No 74237/01 [141].
71 ibid.
Article 3 rights, the applicant needs to have shown that they have actively taken steps prior to seeking the assistance of state authorities.

The third and most controversial element regarding the respective approaches of the courts concerns the state’s response. Both courts recognise that state officials can actively or passively obstruct the search efforts of relatives. However, for the ECtHR, the state’s response is the crucial aspect, while for the IACtHR, it is secondary. In the Inter-American system, a state’s actively impeding or passively obstructing the investigation constitutes a violation of the relatives’ rights. As at the European level, as the state’s response is a key factor, it appears to be very restrictive inasmuch as it fails to take into account the family’s suffering.

As elaborated supra, the jurisprudence on which to rely upon to start building a common practice to investigate cases of missing migrants is broad and consistent. The right to family life, the right to (know the) truth, and the right to an identity are largely recognised under IHL and IHRL, whether the ‘victim’ is the missing person or their family, who are entitled to know the whereabouts of their relatives. These same rights should also be legal enforceability in situations concerning missing migrants. Thus, it is imperative to realise the creation of a database through which families can access information about their relatives. The next section will explain how this can be achieved with modern technology.

IV. SECTION THREE

The issue of missing persons is as old as mankind itself. Yet there is virtually no understanding of the global dimension or the true scale of the problem. There are no guidelines regarding the responsibility of states to address this problem in all its facets.

The previous section explored both the right to an identity and the right to truth in cases of serious human rights violations, or in times of war. This section will now draw a connection between the right to an identity, biometric data (an essential part of personal identity), and the use of biometrics in a European context for security purposes. The main argument is that biometric data should

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also be used for humanitarian purposes in order to guarantee and respect the right to truth of families, and to enable them to know the whereabouts of missing relatives.

4.1 Biometric Data and the European Context

Biometric data is defined as an ‘automated means of identifying an individual through the measurement of distinguishing physiological or behavioural traits.’

Biometric data is either used to verify a person’s identity or to search for one’s identity. The main techniques for identification or verifications are: fingerprints, iris scanning, hand geometry, voice recognition, signature verification, and DNA samples.

After the 9/11 attacks, states’ approach towards border security has changed completely; affecting both the perspective from which they approach it and the management of international migration. On one hand, information systems and technology have been used by migrants to maintain contact with their families and to reduce social isolation. On the other hand, governments have progressively used them for managing and controlling illegal entry and asylum seekers. Though arguably the use of biometrics was exceptional some years ago, it has now become common practice. It is used as a tool for control and security purposes. In Europe, there are three migration databases used for border security and illegal migration control: the Schengen Information System (SIS), the European Dactyloscopy of Fingerprint Identification (Eurodac), and the Visa Information System (VIS). Some argue that the aim of the database can be compared to that of Foucault’s Panopticon, an image that validates the main argument of this work. Foucault imagined the Panopticon as a building with a tower at the centre from which it was possible to see every cell in which prisoners was incarcerated, without the prisoners being able to tell if they were being observed at that particular moment. The Panopticon produces a sense of permanent visibility that ensures the functioning of power. Foucault describes the Panopticon as a repressive tool used in order to establish discipline and security.

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77 Redpath (n 75).
‘Panopticon Europe’ has lost its implications regarding Foucauldian security, focusing instead on the exclusionary element. Since Panopticon Europe’s ultimate aim is to habituate migrants to their status of exclusion, it has been used as an instrument of isolation. Yet, the elements of correction and discipline are now found within the social network and institutional surroundings of migrants. Indeed, they are taught to perceive irregular migration as a threat to national security, and thus migrants are seen as people to be excluded.78

Our focus is on irregular immigration via dangerous routes such as the Mediterranean Sea and, consequently, on the Eurodac System because it incorporates both irregular migrants and asylum seekers.79 Nevertheless, the two other systems will be briefly discussed. The SIS database was introduced in the Treaty of Amsterdam, which entered into force in 1999, with the purpose of maintaining order and security. The SIS database works in cooperation with the Supplementary Information Request at the National Entries (SIRENE), which supplements its functions; other than the storage of data, SIRENE can exchange complementary information, such as fingerprints or ‘softer’ data, for criminal intelligence with Europol or other organisations.80 While the SIS database stores data on migrants found irregularly in participating territories, VIS instead registers people illegally present in territories as a consequence of expired visas. The Eurodac database was created in order to assist the application of the 1990 Dublin Convention (the Dublin Regulations) in deciding which state has the responsibility of examining asylum applications. The convention was established in order to harmonise the European asylum-seeking system and prevent ‘asylum shopping’ – the practice of claiming asylum in more than one European state – and ‘orbit situations’, in which states would repeatedly pass on applications to other member states; precluding proper examination of asylum claims in doing so. Moreover, asylum seekers who have their application refused in one member state are not permitted to apply in any other state due to the Eurodac system.81 It stores fingerprints for anyone over 14 years of age claiming asylum in Europe; these fingerprints are then stored and matched in the Central Unit Database.82 The practice of recording fingerprints has been extended to illegal migrants through an additional Protocol, which

80 Broeders (n 78).
81 Ajana (n 78).
was later incorporated into the main Eurodac Regulations. In 1997, the Schengen Executive Committee concluded that states could record, transfer, and match the fingerprints of irregular border-crossers whose identity had not been established. The impetus on securitisation and the ‘fight against illegal immigration’ is explicit, and biometric data is used for these purposes.

4.2 Biometrics and Humanitarian Goals

Given the current situation of missing migrants, the state should have a dual objective: to ensure that tightened border controls do not produce more deaths, and to restore the right to an identity to those who have died through the creation of an international database for families to access when searching for a family member. In 2007, the Council of Europe’s Commissioner for Human Rights stated that it is imperative to account for those deaths; this statement was supported by the Stockholm Declaration, stressing the importance of better recording and identification of migrants. The 2010 annual report of the UNHCR concerning human rights and biometrics storage also recognised the importance of promoting forensic genetics, given the massive human rights violations present, and recommended cooperation between states and organisations on the matter. Moreover, it established that international standards on the use of forensic genetics are crucial in order to:

> ensure that national genetic databanks apply methodologies that are accepted by the scientific community and that they abide by those legal principles... for the protection and confidentiality of the data and outcome information, and for restricting access thereto.

The 2012 Council of Europe Parliamentary Assembly, after systematically failing to save lives in the Mediterranean, declared that it is imperative to:

> respect the families’ right to know the fate of those who lose their lives at sea by improving identity-data collection and sharing. This could include the setting-up of a DNA file of the remains of those retrieved from the Mediterranean Sea.

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83 Broeders (n 78).
84 Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6).
85 Grant ‘Lampedusa Deaths: Identification and Families’ Right to Know’ (n 34).
Both the ICRC and the ICMP have extensive experience in identifying missing people on the basis of international humanitarian law. In the 2003 report ‘The Missing and Their Families’, the ICRC elaborated the general principle on biometric data in situations of armed conflict or humanitarian crisis. Information needs to be systematically collected when events result in deaths, all human remains have to be preserved and – whenever possible – returned to families; families have the right to be informed of the death of a relative, and personal effects need to be collected. Methods of identification through genetic data include DNA samples: families have to be informed and involved during the identification process, whilst preserving the cultural identity of the dead through funeral and mourning rites according to tradition.\(^8\) The ICRC has developed an advanced ante- and post-mortem database where samples of families’ DNA are crossed-identified and matched with samples of DNA from human remains, which is now also used in situations of irregular migration.\(^9\) The ICRC Central Tracing Agency is a Geneva-based division which acts as an intermediary between separated people in order to renew or maintain contact in situations of war or natural disaster.\(^10\) The ICMP started its work in Bosnia identifying the missing during the Balkans War in the 1990s. Families were asked to provide DNA samples which were later stored in a genetic database which they could access to check for matches. They were able to identify 70 per cent of 40,000 missing persons. This type of testing is very cheap and effective, and could be suitable in cases of missing migrants. In 2013, the ICMP also signed a cooperation agreement with the International Organisation for Migration in order to cooperate on cases of missing migrants and human trafficking.\(^11\) Italy has set an important precedent regarding the use of DNA samples (ante-mortem data). In 2013, the Italian government established a special inquiry commission to identify bodies in the aftermath of two ships sunk in Lampedusa. The work was carried out by Laboratorio di Antropologia e Odontologia Forense (LABANOF), the Forensic and Odontology Laboratory and with the cooperation of families, who were asked to provide ante-mortem data. This kind of investigation was a first amongst European states.

\(^8\) ICMP (n 74).


\(^10\) Henckaerts and Doswald-Beck (n 48).

4.3 Family’s Access to Justice: Barriers to Identifying Missing Migrants

4.3.1 Unknown Identities

Irregular migration is by nature clandestine, and this factor represents a dual problem: on one hand, this ‘invisibility’ increases vulnerability because migrants may not be able to fully exercise their rights and are consequently exploited. On the other hand, it becomes more difficult to collect reliable data on their numbers, to identify fatalities, and to implement a database where families may access information regarding missing persons.92

The main reason behind the difficulty of obtaining exact numbers of deaths is because illegal migrants want to avoid detection, especially in Europe, largely due to the Dublin Regulations. Yet, their desire to enter undetected does not reflect a wish for the total breakdown of family ties. Interviews with survivors showed how important it was to ‘leave words behind’. Indeed, it is perceived as comforting, hoping that, should they die, their relatives would eventually be informed. Secondly, for the majority of asylum seekers, the only way to reach another country is through the use of false documentation and with the help of smugglers. Some do not have valid passports, while the passports of others are either stolen or destroyed by the smugglers themselves. Moreover, if illegal migrants are smuggled on boats – as a consequence of the illegality of transportation – there are no passenger logbooks; therefore, should a boat sink, then details of the exact number of people on board and their nationalities will remain largely unknown. In most cases the majority of information is given by survivors, when not afraid of apprehension by the authorities.93 A further problem is presented by the fact that the deaths of missing migrants are transnational: journeys involve different countries and there is often no link with their country of origin. Migrants who die outside of the jurisdiction of the state that finds them often have no relation to the shores where they are found; and depending on the provisions of national law, their deaths will be either investigated or ultimately buried with the anonymous ‘NN’ – no name.94 Many deaths occur in remote areas – these are likely to remain unknown.95 Furthermore, because of the different quality and comprehensiveness of data-collection between states, it is reasonable to conclude that, at a global level,

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92 Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6).
94 Grant ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ (n 6).
95 Brian and Laczko (n 93).
deaths are likely underestimated.96

4.3.2 Lack of Tools

A number of problems were identified during a conference held at the University of Milan (under the auspices of the ICRC) regarding the information deficit on missing migrants. Information deficit has been related specifically to biometric data: variable forensic capacity in different areas, lack of ante-mortem data to compare against samples from corpses, lack of data collected from non-identified bodies, or inaccessibility of existing databases. ‘These findings reflect general shortcomings in national forensic procedures, death management and death registration, both inside and outside Europe.’97

The same problem arises when collecting data: what sources are to be used for data collection, and (as previously discussed) who qualifies for border-related deaths? National statistics are based on the reports of media, the authorities, or international organisations; and therefore include only those cases that are publicly reported. Others are based on anecdotal evidence from survivors, bodies found in the proximity of a border, and missing persons or presumed deaths.98

4.3.3 Lack of Standard Procedure and International Regulations

States, international organisations and civil society do understand that the scale of deaths has enormously increased however, remains the fact that there is scarce information on the actual number of loss of lives.99

Over the last two decades there have been significant developments as to how best to address the issue of missing persons. The problem has become better known and more widely discussed, new policies and guidelines have been advanced and implemented, and scientific developments and the availability of information now make it possible to locate a missing person. Unfortunately, these developments have been generally confined to the domains of armed conflict and natural disasters, excluding one major phenomenon: migration. The major problem in tracing deaths is in no small part due to the lack of

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96 ibid.
98 Brian and Laczo (n 93).
99 Grant ‘International Migration and Human Rights’ (n 31).
protocols setting out international standards. Indeed, each state has its own practice of investigation and recording fatalities. As a result, within EU borders, dead migrants’ bodies are sometimes not handled with the obligations that state law requires for its dead citizens. Moreover, every southern EU country (Spain, Greece, Italy and Malta) independently decides on the procedure to follow in order to account for these deaths and the initiation of investigations upon the finding of a dead body. When an investigation is opened, the Court of Instruction (Spain), public prosecutors (Italy and Greece), or magistrates (Malta), have access to police reports, coroners reports and orders or registers of burial; these can be important resources for investigating border-related deaths. However, two major problems exist. Firstly, these files are not properly archived in a special category and are destroyed after the passage of 5-15 years. Secondly, these documents are confidential and require special permission in order to access them, and in their present form they cannot be used to obtain information on migrants’ bodies. DNA samples are now compulsory in all four countries, but the comparatively small number of samples raises questions regarding the efficacy with which this procedure is followed. All dead bodies found on the shores of national territories must be entered into civil registries, but this data cannot be used for acquiring information on dead migrants. Furthermore, there are no specific laws dealing with the burial of dead migrants: even though tracing all of the cemeteries would be a possible and workable approach, the fact-finding involved in investigating negotiations between local authorities and communities, and the occasional interference from national and regional authorities, make the task more difficult. A common practice in many burial places is to create more space without documenting whose remains have been removed. Moreover, there is no obligation to keep records on causes or locations of death. The major problem appears to be, firstly, the lack of national or European legislation on how to systematically record deaths; and secondly, if deaths are considered a non-public issue, privacy and data protection impede the collection of information by NGOs and humanitarian organisations. Also, if missing migrants are irregularly present in a country, their family may be unwilling to resort to state authorities for forensic assistance because in fear of the problems that their relatives will incur if they are still alive. Finally, at a European level, the border agency Frontex is not tasked with the systematic verification of dead migrants’ bodies; on the contrary, its main goal is to secure borders.  

100 Last and Spijkerboer (n 11) 8.
101 ibid 8.
As demonstrated, there is a lack of an international – or even regional – common practice or databases to store biometric data in order to make information accessible to the families of the missing. Moreover, the lack of tools and the problem of clandestinity further complicate the issue of tracking deaths. These three aspects, coupled with lack of political will, represent barriers in the access to justice of the families of missing migrants, particularly obstructing the family’s right to know the whereabouts of their next of kin.

V. CONCLUSION

This Article has explored a major human rights concern: the loss of identity and the disappearance of migrants whilst undertaking dangerous voyages in order to escape politically unstable countries due to war, violence and systemic human rights violations. These situations are enough to drive people to undertake potentially life-threatening journeys; therefore, the response of tightened border-controls cannot constitute a powerful enough deterrent to stop migration. On the contrary, this approach leads to the negotiation of more dangerous routes, resulting in even more deaths, trafficking, smuggling and to an alarming number of people going missing during multi-state journeys. It has been clearly demonstrated that in situations of war, or major human rights violations, IHRL and IHRL grant the right to know to families with missing relatives, and the missing are entitled to the restoration of their right to an identity in all respects. As a consequence, it has been argued that, in the European context, migrants’ deaths are not treated with the same importance, and are not properly or systematically investigated. It has also been argued that technological developments with regards to biometric data would allow states – in this context, the states of the European Union – to create an international database for the families of the missing; unfortunately, however, the use of such data is channelled for security purposes and border control instead. Moreover, the lack of an international framework establishing procedures for the information that should be shared and collected – such as fingerprints and DNA samples for example – makes it even more difficult to account for these deaths.

In order to minimise the number of migrants who go missing, a practical approach should entail the retrieval of bodies whenever found, the matching and collection of ante and post-mortem data, and the creation of an international biometric database. This approach needs an international standard of procedure and protocols which could be built on the work and experiences of the ICRC and the ICMP. Moreover, in order to ensure correlation between ante- and post-mortem data, it is necessary to work towards greater cooperation and outreach with both communities within the European Union but also to
communities in Africa and in the Middle East. This can be done through cooperation with agencies already present on the concerned territories, such as the ICRC.\(^\text{103}\) Furthermore, humanitarian visas are also an important step for enabling identification: this type of ‘emergency visa’ would enable the families of missing migrants to travel for a limited period of time in order to provide ante-mortem data, facilitating the identification process and the mourning of the deceased.\(^\text{104}\)

Ultimately, the creation of an international database would facilitate the creation of a system to centralise and record all data, to which families could have easy and protected access. This database would accord the families their right to know the whereabouts of missing relatives, and could also be used for the restoration of their right to an identity in all respects. The database should also be administered by an impartial human rights international body, which would guarantee the right to privacy of all persons entered into the registry, respecting the purpose of the database itself. The privacy aspect goes beyond the remit of this work, although it is very much a hotly debated aspect as it could potentially create complications for already vulnerable people.\(^\text{105}\) For this reason it is imperative to maintain a strict division between records for border control and the information provided to the families of the deceased in order to protect their right to know.

‘The families have a right to know. The principles and technology for identification exist. The need is for resources and political will’\(^\text{106}\) in order to create a reliable, accessible and sustainable database that protects privacy rights and familial rights to know. It is incomprehensible how the European Union – which already stores extensive biometric data – does not make migrant deaths public, and does not use the same data collected through Eurodac, SIS and VIS for purposes beyond security.\(^\text{107}\) It is therefore imperative to start looking at the issue from a human rights perspective in order to expand access to justice to the families of migrants, and to enhance political participation in a global effort to reduce human vulnerability and violations of human rights; guaranteeing the right to an identity and the right to family life.

\(^{103}\) ICMP (n 74).

\(^{104}\) Robins, Kovras and Vallianatou (n 19) 12.


\(^{106}\) Grant ‘Lampedusa Deaths: Identification and Families’ Right to Know’ (n 34).

\(^{107}\) ibid.
BIBLIOGRAPHY

BOOKS

JOURNAL ARTICLES
Grant S, ‘Recording and Identifying European Frontier Deaths’ (2011) 13 European Journal of Migration and Law 135

INTERNATIONAL LAW SOURCES AND TREATIES
Additional Protocol I Geneva Convention (entered into force 8 June 1977) 1125 UNTS 3
Inter-American Democratic Charter (entered into force September 2001) OAS OEA/SerP/AG/Res1
International Convention for the Protection of all Persons from Enforced Disappearance (entered into force 20 December 2010) 2716 UNTS 3

CASES
Blake v Guatemala (1999) IACHR Series C No 48
El-Masri v the Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25
Koku v Turkey (2005) ECHR App no 27305/95
Kurt v Turkey (1998) ECHR App no 24276/94
María del Carmen Almeida de Quinteros et al v Uruguay (1990) IACHR Communication No 107/1981, UN Doc CCPR/C/OP/2
Río Negro Massacres v Guatemala IACHR (2012) Series C no 250
Trujillo Oroza v Bolivia (2000) IACHR Series C no 64
Velasquez Rodriguez v Honduras (1988) IACHR App no 792

REPORTS
Grant S, ‘International Migration and Human Rights’ (Global Commission on International Migration 2005)
International Committee of the Red Cross, ‘Ante and Post Mortem Data Database’ (Publication Ref 4155, ICRC 2014)
—— ‘Living with Absence: Helping the Families of the Missing’ (Publication Ref 4152, ICRC 2014)
McCombs T and González J S, ‘Right to Identity’ (International Human Rights Law Clinic, University of California, Berkeley School of Law 2007)
Medecins Sans Frontieres, ‘No choice: Somali and Ethiopian Refugees, Asylum Seekers and Migrants Crossing The Gulf of Aden’ (MSF 2008)
Robins S, Kovras L, and Vallianatou A, ‘Addressing Migrant Bodies on Europe’s Southern Frontier’ (Queen’s University Belfast and The University of York Centre for Applied Human Rights 2014)
130 The Mediterranean Sea and the Right to Know About the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants


United Nations High Commissioner for Refugees, ‘UNHCR Projected Global Resettlement Needs’ (UNHCR 2016)

—— ‘The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees’ (UNHCR 2015)

WEBSITES AND OTHER SOURCES


‘Fingerprints & Other Biometrics’ (The Federal Bureau of Investigation)


Grant S, ‘Lampedusa Deaths: Identification and Families’ Right to Know’ (OpenDemocracy, 20 December 2013)

<https://www.opendemocracy.net/stefanie-grant/lampedusa-deaths-identification-and-families%E2%80%99-right-to-know> accessed 5 August 2015

—— ‘Migrant Deaths at Sea: Addressing the Information Deficit’ (Global Diversity Exchange, 9 June 2015)


‘The Mediterranean Migration Crisis’ (HRW, 19 June 2015)


International Commission on Missing Persons, ‘The Missing’ (ICMP, 22 May 2014)

<http://www.icmp.int/the-missing/> accessed 8 August 2015


United Nations High Commissioner for Refugees, ‘Mediterranean Crisis 2015 at Six Months: Refugee and Migrant Numbers Highest on Record’ (UNHCR, 1 July 2015)