

# Missing Migrants and the Right to Identification

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## Abstract

Building on the body of literature that calls for a human-rights-based approach to the tragic phenomenon of the loss of identities of migrants who go missing on their journeys, this article aims to provide a legal conceptualization of the ‘right to identification’ that may serve as the backbone of a normative framework defining state obligations regarding the missing in this context. It takes as a prompt the statement that ‘human beings have the right not to lose their identities after death’ in the preamble to Interpol Resolution No. AGN/65/RES/13 concerning disaster victim identification, and examines the rights to dignity and identity, including how they operate and interact with each other and with the right to truth. Recognizing that both the missing themselves and their loved ones may be regarded as victims of involuntary disappearance, a central argument here is that dignity is the right of the dead as well as the living, that dignity serves to protect identity as an integral aspect of personhood, and that the right to identification is exercisable by next of kin via the right to truth. The article’s final section outlines the state obligations incorporating identification, as derived from human rights and humanitarian law. The author hopes that this inquiry into the right to identification can spur further action on the part of states to fulfil their humanitarian duties.

## Keywords

Identification, identity, human dignity, right to truth, missing migrants.

## Missing Migrants and the Right to Identification

*'But, Medon, what then possessed my boy to leave me? He had no need to go aboard one of those rapid ships that serve as chariots across the sea for men who speed over the wide waters. Does he wish that not even his name should be left on earth?'*<sup>1</sup>

### I. Introduction

On New Year's Day 2021, the body of a 15-month-old child was found on the shore off the coast of Norway, several months after the boat carrying him and his Iranian Kurdish family across the English Channel sank. Forensic scientists in Norway were able to retrieve matching DNA profiles to identify the child, Artin, who had been listed as missing, and his remains were flown back to Iran for burial.<sup>2</sup>

Identification in such circumstances is not always possible, as demonstrated by just one of many contrasting examples: in 2015, bodies found washed ashore in southern Tunisia were being deposited directly in mass graves.<sup>3</sup> According to data provided by the Missing Migrants Project of the International Organization for Migration (IOM), more than 64,000 migrants perished between 2014 and early 2024, with the central Mediterranean route being the most deadly.<sup>4</sup> The precise figure is unknown, in part due to the practical challenges associated with registering migrants' deaths, especially when hundreds of individuals go missing in a single incident. Irregular migrants often have no identification documents or personal effects, sometimes having surrendered them to smugglers, and bodily decomposition may lead to the loss of physical attributes.<sup>5</sup> Many of the missing therefore simply become a number, if indeed they are counted at all.

The preamble to Interpol Resolution No. AGN/65/RES/13 concerning 'disaster victim identification' recognizes that 'for legal, religious, cultural and other reasons, human beings have the right not to lose their identities after death, and that the identification of disaster

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<sup>1</sup> Homer, *The Odyssey*, Translated by Walter Shewring (OUP 1980) 51, 4: 704-707.

<sup>2</sup> Kevin Rawlinson, 'Body found in Norway of 15-month-old boy who died crossing Channel', *The Guardian* (7 June 2021).

<sup>3</sup> Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, A/HRC/36/39/Add.2 (28 July 2017) para. 45, also noting that: 'mass graves unearthed along the borders between Thailand, Malaysia and Indonesia contained the remains of hundreds of migrants.'

<sup>4</sup> Missing Migrants Project website, <<https://missingmigrants.iom.int/data>> (last accessed 16 October 2024).

<sup>5</sup> Tara Brian and Frank Laczko (eds), *Fatal Journeys*, Volume 2, Identification and Tracing of Dead and Missing Migrants (IOM, 2016) 34-36.

victims is often of vital importance for police investigations'.<sup>6</sup> While the Resolution applies in the specific context of disaster response, the direct reference to a 'right not to lose one's identity after death' that belongs to all human beings makes it a fitting prompt for an inquiry into the genesis of the connected notion of a 'right to identification'. Indeed, its suggestion is that identification is not merely a duty or responsibility of states, or a remedy for the next of kin of the missing, but a human right attaching to individual victims of disasters and their families. Referring to the Resolution, the International Committee of the Red Cross (ICRC) has noted that 'identification represents the fulfilment of the right of human beings not to lose their identities after death and, overall, the right of families to know what has happened to their relatives in all circumstances'.<sup>7</sup> Despite this repeated assertion of a right, however, the human rights framework for identification of the missing remains underdeveloped.

As Grant states, the loss of identity of irregular migrants 'is a phenomenon—and a tragedy—which should be understood in rights terms'.<sup>8</sup> Building on Grant's work and her argument for a rights-based approach to identification,<sup>9</sup> this article aims to provide a conceptualization that may serve as the backbone of a normative framework defining state obligations regarding missing migrants, in view of the relatively limited attention paid to this category. Formulating such a conceptualization additionally supports Sarkin's call for doing more to respect and protect the lives of migrants and identify the missing by adopting a human rights approach.<sup>10</sup> From a forensic angle, Cattaneo and others have likewise drawn attention to deficiencies in the protective regime for missing migrants, insisting that

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<sup>6</sup> Interpol Resolution No. AGN/65/RES/13, Disaster victim identification (1996). See also Preamble to Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys (The Mytilini Declaration) (11 May 2018).

<sup>7</sup> The Handling of Human Remains and Information on the Dead in Situations relating to Armed Conflicts or Internal Violence and involving Missing Persons, Contribution from the International Committee of the Red Cross, 16th Meeting of the Standing Committee on Disaster Victim Identification, Lyon, France (5-7 May 2004) 3. See also Cristina Cattaneo and others, 'The forgotten tragedy of unidentified dead in the Mediterranean' (2015) 250 *Forensic Science International* e1-e2, referring to the 'fundamental right' not to lose one's identity after death.

<sup>8</sup> Stefanie Grant, 'Irregular Migration and Frontier Deaths, Acknowledging a Right to Identity', in Marie-Benedicte Dembour and Tobias Kelly (eds), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge, 2011) 48, 60.

<sup>9</sup> *Ibid.*, 64-65. See also Stefanie Grant, 'Recording and Identifying European Frontier Deaths' (2011) 13 *European Journal of Migration and Law* 135; and Stefanie Grant, 'Dead and Missing Migrants: The Obligations of European States under International Human Rights Law', IHRIL Briefing, *Mediterranean Missing* (September 2016).

<sup>10</sup> Jeremy Sarkin, 'Respecting and protecting the lives of migrants and refugees: the need for a human rights approach to save lives and find missing persons' (2018) 22(2) *The International Journal of Human Rights* 207.

identification of those who have disappeared in this ongoing humanitarian catastrophe is not being adequately prioritized.<sup>11</sup>

This article begins by examining the right to dignity and its application to the dead, before discussing the aspects of the right to a legal identity that arguably persist after death. The article finds that it is legitimate to speak of a ‘right to identification’ that has its roots in the notions of human dignity and identity and is enforceable as a component of the right to truth. While recognition of a *right* to identification of missing migrants does not guarantee the *result* of identification, it is hoped that this inquiry can help compel states and institutions to take further action as part of their humanitarian activities, alongside identifications carried out in relation to criminal investigations.<sup>12</sup> Accordingly, the article highlights the need for an ongoing complementary examination of the forensic difficulties associated with identifying people who perish on their migration journeys, and international support for efforts to name even those who are lost in deep ocean cemeteries.<sup>13</sup>

## II. The right to dignity

Human dignity underlies the core international treaties concerned with human rights and may be ‘perceived to be the basis for human rights’.<sup>14</sup> The United Nations Charter opens with the promise ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’.<sup>15</sup> The Universal Declaration of Human Rights proclaims that ‘recognition of the inherent dignity

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<sup>11</sup> Cristina Cattaneo and others, ‘The rights of migrants to the identification of their dead: an attempt at an identification strategy from Italy’ (2023) 137(1) *International Journal of Legal Medicine* 145, 145-146.

<sup>12</sup> Identification on humanitarian grounds is a central concern for the relatively new field of ‘forensic humanitarianism’. See e.g. Claire Moon, ‘Human rights, human remains: forensic humanitarianism and the human rights of the dead’ (2014) 45 *International Social Science Journal* 49, referring to ‘forensic humanitarianism’ as a variant of humanitarianism that ‘entails the exhumation of mass graves in the effort to establish, forensically, the individual and collective identities of the dead victims of mass atrocity, and the causes of their deaths’. See also Stephen Cordner and Morris Tidball-Binz, ‘Humanitarian Forensic Action – Its Origins and Future’ (2017) 279 *Forensic Science International* 65, referring to a field of study developed by the ICRC and dedicated to the use of forensic science for humanitarian purposes rather than in criminal trials and including ‘managing and identifying deceased migrants’ in this field.

<sup>13</sup> On developments in forensic science, see e.g. Erik J. Bartelink and others, ‘Stable Isotope Forensics as an Investigative Tool in Missing Persons Investigations’, in Stephen J. Morewitz and Caroline Sturdy Colls (eds.), *Handbook of Missing Persons* (Springer International Publishing, 2016) 443, 444, arguing that stable isotope analysis ‘can provide new investigative leads that may aid in a missing persons case by narrowing down the geographic region from which a person traveled or previously lived’. See also Huma Ali and others, ‘Recovery and identification of the missing after disaster: case studies, ethical guidelines and policy recommendations’ (Ethics, History and Public Policy Project Course, 2011) <<https://www.cmu.edu/dietrich/ehpp/documents/2011-Recovery-and-Identification-of-the-Missing-after-Disaster.pdf>> (accessed 16 October 2024) 35-41 on different forensic techniques.

<sup>14</sup> George Kateb, *Human Dignity* (Harvard University Press, 2011) 1.

<sup>15</sup> Charter of the United Nations (24 October 1945), Preamble.

and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.<sup>16</sup> It has been suggested that the provisions of the Declaration that follow are in 'bare essence [...] an attempt to make the cardinal concept of "human dignity" operational'.<sup>17</sup> Article 1 of the EU Charter of Fundamental Rights affirms that: 'Human dignity is inviolable. It must be respected and protected.'<sup>18</sup> The link between human dignity and other human rights is expressed in the UN Declaration on the Protection of All Persons from Enforced Disappearance of 1992, which states that the practice of forced disappearance is 'a violation of the right to the respect of human dignity, the right to liberty and security of the person, and the right not to be subjected to torture, and is a grave threat to the right to life'.<sup>19</sup>

In the 1998 *Furundžija* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), the Trial Chamber observed that: 'The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law.'<sup>20</sup> It has been noted, however, that despite its asserted status as the rationale for human rights law, dignity tends to be 'pushed to the margins' of debates about rights, being 'seen either as synonymous with humanity and hence a starting point for elaborating a theory of rights, or as the ultimate expression of rights realized'.<sup>21</sup> The idea that 'we have human rights because we have dignity; and we have dignity because we possess some special intrinsic capacity or feature' is widespread.<sup>22</sup> Dignity is interwoven with the quality of being human and while its role in international human rights law is complex, an inextricable link between dignity and rights tends to be accepted even if its precise nature is subject to debate.<sup>23</sup>

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<sup>16</sup> UN General Assembly, Universal Declaration of Human Rights (10 December 1948), Preamble.

<sup>17</sup> Antoon De Baets, 'A Declaration of the Responsibilities of Present Generations Toward Past Generations', (2004) *History and Theory* (Theme Issue 43) 130, 132.

<sup>18</sup> European Union, Charter of Fundamental Rights of the European Union (26 October 2012), 2012/C 326/02.

<sup>19</sup> UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, E/CN.4/RES/1992/29 (28 February 1992), Article 1.

<sup>20</sup> *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, Judgment (Trial Chamber), (10 December 1998), para. 183. See also *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-T, Judgment (Trial Chamber), (25 June 1999), para. 54: 'It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle.'

<sup>21</sup> Eleni Coundouriotis, 'The Dignity of the "Unfittest": Victims' Stories in South Africa', (2006) 28(4) *Human Rights Quarterly* 842, 843.

<sup>22</sup> Suzanne Killmister, *Contours of Dignity* (Oxford University Press, 2020) 129.

<sup>23</sup> See generally, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', (2008) 19(4) *European Journal of International Law* 655, who attempts to identify a basic minimum content of human

Human rights instruments do not specify whether human dignity remains inviolable and must be respected and protected after death. Many domestic systems recognize desecration of a corpse as a crime, although various justifications for the offence have been put forward.<sup>24</sup> The principles of humanity underlying international humanitarian law,<sup>25</sup> including the dignified treatment of the dead and their families, have been applied to migrants by the ICRC, which understands the term ‘missing persons’ as referring to individuals whose whereabouts are unknown to their relatives and/or who have been reported missing as a result of one of various situations, including migration.<sup>26</sup> As part of its recommendations to states in relation to missing migrants, the ICRC has stated that:

Dignified burial and traceability of remains fulfil important humanitarian functions. They restore the dignity of the dead—whether identified or not—and ensure they are not forgotten, by leaving the possibility of identification open. A burial site is also important in helping the family cope with its grief. This is especially true if a body is identified but not repatriated, which is the case for many dead migrants.<sup>27</sup>

The reference to ‘restoring the dignity of the dead’ points towards the inviolability of dignity after death. In linking dignity with identification, the ICRC’s statement also suggests that one aspect of dignity is leaving open the hope of attributing a name to the deceased person. It is unclear whether this means that the dead themselves have a right to dignity, as the language

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dignity also with reference to judicial interpretation of human rights texts, citing the right to know the identity of one’s parents as an example of dignity being used to justify the extension of rights.

<sup>24</sup> E.g. Section 195, Penal Code of Norway, Desecration of a corpse, *Lov om straff (straffeloven)* (Penal Code), (LOV-2005-05-20-28, <<https://lovdata.no/dokument/NLE/lov/2005-05-20-28>> (accessed 16 October 2024)); Article 225-17, Criminal Code of the French Republic (1994, as amended 2020). See generally Imogen Jones, ‘A Grave Offence: Corpse Desecration and the Criminal Law’, (2017) *Legal Studies* 599, 606-611. See also Suhad Daher-Nashif, ‘Colonial Management of Death: To be or not to be dead in Palestine’, (2021) 69(7) *Current Sociology* 945, 947: ‘the Israeli Supreme Court has ruled that human dignity applies to the remains of deceased persons just as it applies to the living, and it extends to the families of the dead.’

<sup>25</sup> See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (18 October 1907), Preamble, referring to the ‘laws of humanity, and the dictates of the public conscience’; *Corfu Channel* case (UK v. Albania), Merits, I.C.J. Reports 1949, 4, 22, referring to ‘elementary considerations of humanity, even more exacting in peace than in war’. See also Last Rights, ‘Extended Legal Statement and Commentary: The Dead, The Missing and the Bereaved at the World’s Borders’, Statement of the International Legal Obligations of States together with Commentary (30 January 2019) 2.

<sup>26</sup> ICRC Policy Paper, *Missing Migrants and their Families, The ICRC’s Recommendations to Policy Makers* (2017) 8.

<sup>27</sup> *Ibid*, 20.

of ‘restoring’ dignity and not being ‘forgotten’ might suggest, or whether any violation is experienced exclusively by the living.<sup>28</sup>

The scope of legal rights of deceased individuals is disputed, as is indeed the question of whether the dead have rights at all.<sup>29</sup> Lomasky has defended the argument that the dead have rights by ‘giving reasons for believing that the interests of persons that ground their claims to rights while they are alive are not extinguished by their death, and confronting the charge that it is nonsensical to conceive of the dead as rights holders’.<sup>30</sup> De Baets, by contrast, argues that the dead do not possess rights ‘but that the living nevertheless have some definable core responsibilities to them’.<sup>31</sup> He refers to ‘posthumous dignity’ and respect owed to the dead as extending the ‘central idea of human rights [...] that the living possess dignity and therefore deserve respect’, as well as the belief held by the living that the dead also have dignity and deserve respect.<sup>32</sup>

Common Article 3 of the 1949 Geneva Conventions, designed ‘to uphold and protect the inherent human dignity of the individual’ and to prescribe humane treatment on a non-discriminatory basis,<sup>33</sup> prohibits ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’.<sup>34</sup> The war crime of committing an outrage upon personal dignity consists of ‘unlawfully attacking the body or [...] humiliating and debasing the honour, the self-respect or the mental well being of a person’.<sup>35</sup> Not only the living may be victims of such an outrage, but also the dead. This understanding can be traced back to the post-Second World War case of Max Schmid, where one of the charges against the accused was that he did ‘wilfully, deliberately and wrongfully encourage, aid, abet and participate in the

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<sup>28</sup> It has not yet been determined whether the right to dignity in Article 1 of the EU Charter of Fundamental Rights ‘can be extinguished at death or whether it can extend beyond’. Tobias Lock, ‘Article 1 CFR’, in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019) 2100. Some domestic constitutional systems, for example that of Germany, recognise that the dead are entitled to human dignity both in terms of the body of the deceased and the memory of that person. See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015) 239. The European Court of Human Rights, noting that ‘respect for human dignity forms part of the very essence of the Convention’ has accepted that: ‘In the special field of organ and tissue transplantation [...] the human body must still be treated with respect even after death.’ *Elberte v. Latvia*, Application no. 61243/08, Judgment (13 January 2015), para. 142.

<sup>29</sup> See e.g. Kirsten R. Smolensky, ‘Rights of the Dead’, (2009) 37 *Hofstra Law Review* 763.

<sup>30</sup> Loren E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford University Press, 1990) 213.

<sup>31</sup> De Baets (n.17) 132.

<sup>32</sup> *Ibid*, 130.

<sup>33</sup> *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-T, Judgment (Trial Chamber), (25 June 1999), para. 49.

<sup>34</sup> Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), Article 3(c).

<sup>35</sup> *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, Judgment (Trial Chamber), (10 December 1998), para. 183.

maltreatment of a dead unknown member of the United States Army'.<sup>36</sup> The accused was a medical officer alleged to have 'severed the head from the body, boiled it and removed the skin and flesh and bleached the skull which he kept on his desk for several months'.<sup>37</sup> He was found guilty and sentenced to ten years' imprisonment. The usage relating to the protection of the dead was found to have originated in Grotius' *De Jure Belli ac Pacis* (1625) and later embodied in Articles 3 and 4 of the 1929 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick of Armies in the Field. The UN War Crimes Commission's official Notes on the *Schmid* case approve the verdict and point out that: 'Military courts of various nations have found prisoners guilty of offences against the dead and sentenced them.'<sup>38</sup> The international recognition of these 'offences against the dead' supports the idea that human dignity and protection from inhumane treatment persist after death. Such offences are also concerned with the impact on the living, in the sense that mutilation of a corpse in armed conflict may be a tactic to terrorize civilian populations.

According to the Elements of Crimes accompanying the Rome Statute of the International Criminal Court, 'outrages upon personal dignity, in particular humiliating and degrading treatment', which constitute a war crime in both international and non-international armed conflict, can be committed against the dead.<sup>39</sup> Indeed, a footnote to the description of the elements states that "'persons" can include dead persons'.<sup>40</sup> The ICC regime therefore recognizes a corpse as still being 'the person'. This understanding facilitates attribution of the right to dignity to the dead. Including a person's remains in the notion of personhood allows a dual understanding of the harm to the dead and the living constituted by a violent attack on dignity. Thus the deceased person retains a right to dignity, and the violation of this right also impacts the living.

Moon's reframing of the question as one that can be assessed sociologically and empirically is attractive in this context, as it involves asserting '*that the dead have human rights insofar as people act as though they have rights*'.<sup>41</sup> Moon recognizes that the dead are

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<sup>36</sup> Case No. 82, Trial of Max Schmid, United States General Military Government Court, Dachau, (19 May 1947), XIII *Law Reports of Trials of War Criminals* (London, 1949) 151.

<sup>37</sup> *Ibid*, 151.

<sup>38</sup> *Ibid*, 152.

<sup>39</sup> International Criminal Court, Elements of Crimes (2011), Article 8(2)(b)(xxi) and Article 8(2)(c)(ii).

<sup>40</sup> *Ibid*, footnotes 49 and 57. The footnotes add: 'It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.' See also ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (2nd edition, 2016) § 668-669.

<sup>41</sup> Moon (n 12) 58, emphasis in the original.



unable to claim rights, but suggests this problem can be resolved if the ‘living behave as if they have obligations towards the dead, treat them as if they have rights, and confer rights upon them *in practice*’.<sup>42</sup> This argument that the dead have rights as a matter of practical reality, grounded in the principles of respect and dignity underlying international humanitarian and human rights law, relies on evidence such as the Interpol Resolution. Moon concludes that international humanitarian law protocols ‘require that the dead be treated as if they have rights—or at least, and more specifically, as if they have the right to dignity—and they require that the living act in ways that are concordant with this belief’.<sup>43</sup> Further, she finds that the right to be treated with dignity is the one ‘residual’ human right that the dead, at a minimum, retain.<sup>44</sup> Indeed, the jurisprudence and practice on the war crime of outrages upon personal dignity provide ample support for the notion that certain conduct is recognized as an affront to the dignity of the dead, separately and in addition to any associated affront to the dignity of the living. There is support for this notion outside the specialized context of war crimes. Reflecting on the wider issues raised in the case of *Bland*, which concerned the core question of whether medical treatment should cease for someone in a persistent vegetative state with no hope of recovery, Hoffman LJ commented that: ‘We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not.’<sup>45</sup> Whether the dead can be understood on this basis to have human rights in a technical, legal, or philosophical sense or not, there appears little doubt that the dead body—the remains of the rights-holding human person—has dignity.

This does not fully answer the question of whether respecting the dignity of the dead necessarily requires identification, in other words, recognition of the once living person’s identity. There is clearly a wide gap between the type of conduct envisaged by the crime of outrages upon personal dignity and the failure to afford someone a name. Yet the ICRC seems to accept that dignity as such may be restored through a proper burial and traceability of remains. It is therefore necessary to examine more closely the components of ‘identity’ underlying the premise that ‘human beings have the right not to lose their identities after death’ which suggests a continuation of the right to identity enjoyed by the living.

### III. The right to identity

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, 59.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Airedale NHS Trust v. Bland* [1993] 1 All ER 821, 854.

Article 24 of the International Covenant on Civil and Political Rights (ICCPR) provides that every child shall have a name and the right to acquire a nationality.<sup>46</sup> The right to a name is seen as giving the child ‘both legal status and an identity and sense of self’.<sup>47</sup> One group credited with playing a key role in introducing the notion of a ‘right to identity’ into the Convention on the Rights of the Child (CRC) was the ‘Grandmothers of the Plaza de Mayo’, who initiated the process of redress in respect of children who disappeared or were unlawfully adopted during the ‘Dirty War’ in Argentina in the late 1970s and early 1980s.<sup>48</sup> Article 8 of the CRC requires state parties 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’ and to take steps towards ‘re-establishing speedily his or her identity’ in the event of a child being illegally deprived of any element of that identity.<sup>49</sup> The CRC does not define identity, and it remains open to different interpretations, although the key ‘instances or components’ of identity are clearly stated and include nationality, name, and family relations.<sup>50</sup> The Committee on the Rights of the Child has found a violation of Article 8 of the CRC in a case in which the Spanish authorities failed to give probative value to the birth certificate or to carry out a proper assessment of the certificate of a migrant arriving in a small boat and claiming to be an unaccompanied minor.<sup>51</sup> In this context the Committee considered that ‘a child’s age and date of birth form part of his or her identity’.<sup>52</sup>

The American Convention on Human Rights (ACHR) recognizes the right of every person to a name.<sup>53</sup> While not expressly included in the European Convention on Human Rights (ECHR), the case law of the European Court of Human Rights (ECtHR) references the right to a name and links it to respect for a person’s private and family life ‘as a means of

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<sup>46</sup> International Covenant on Civil and Political Rights (ICCPR), (6 December 1966).

<sup>47</sup> Adem Arkadas-Thibert and Gerison Lansdown, ‘Article 7: The Right to a Name, Nationality, and to Know and Be Cared for by Parents’, in Ziba Vaghri and others, *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer, 2022) 51, 55.

<sup>48</sup> See Rita Arditti, *Searching for life: the grandmothers of the Plaza de Mayo and the disappeared children of Argentina* (University of California Press, 1999) 178. See also Lisa Avery, ‘A Return to Life: the Right to Identity and the Right to Identify Argentina’s “Living Disappeared”’, (2004) 27 *Harvard Women's Law Journal* 235, 238.

<sup>49</sup> Convention on the Rights of the Child (CRC), GA res 44/25 (20 November 1989). See also African Charter on the Rights and Welfare of the Child (11 July 1990), Article 6(1): ‘Every child shall have the right from his birth to a name.’

<sup>50</sup> George A. Stewart, ‘Interpreting the Child’s Right to Identity in the U.N. Convention on the Rights of the Child’, (1992) 26(3) *Family Law Quarterly* 221, 224.

<sup>51</sup> Committee on the Rights of the Child, CRC/C/81/D/16/2017, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 16/2017, (10 July 2019), para. 12.10.

<sup>52</sup> *Ibid.*

<sup>53</sup> American Convention on Human Rights (22 November 1969), Article 18.

personal identification and a connection with the family'.<sup>54</sup> It has been argued that the 'right to one's *own* name' (as opposed to the 'right to *a* name') is the central component of the right to identity; 'an identity which brings together the strands of ancestry, community, culture, language, and history'.<sup>55</sup> Stewart suggests four categories for interpreting identity: familial, tribal, biological and political.<sup>56</sup> The tribal and biological categories notably encompass, respectively, 'ethnic, cultural and religious identity' and 'medical and genetic information' about the person, their ancestors, and blood relatives in addition to time and place of birth and 'records of events important to the person'.<sup>57</sup> Thus, as Edkins puts it, 'the person is always more than the formal name can encompass'.<sup>58</sup>

The Inter-American Juridical Committee has found that the nature of the right to identity is consubstantial with human dignity.<sup>59</sup> 'Without a specific identity, one is not a person,'<sup>60</sup> asserted Judge A. A. Cançado Trindade, who went on to explain that:

The right to identity reinforces the protection of human rights, protecting each individual against the denigration or violation of his 'personal truth.' The right to identity, which encompasses the attributes and characteristics that individualize each human being, seeks to ensure that the individual is faithfully represented in his projection towards his social environment and the outside world.<sup>61</sup>

These considerations highlight the importance of human rights standards requiring respect for identity, especially in environments of intolerance and exclusion that may cause migrants to conceal their true identities.<sup>62</sup>

The Interpol Resolution points to a right to be identified which persists in some form after death. Although the right to identity is primarily relevant to the living, explaining its content assists in determining what is required in terms of identification for the missing or dead. In this sense, identification is not simply a matter of making an official record of an

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<sup>54</sup> See e.g. *Stjerna v. Finland*, Application no. 18131/91, Judgment, (25 November 1994), para. 37.

<sup>55</sup> Fernand de Varenes and Elżbieta Kuzborska, 'Human Rights and a Person's Name: Legal Trends and Challenges', (2015) 37(4) *Human Rights Quarterly* 977, 980 and 1022.

<sup>56</sup> Stewart (n 50) 226.

<sup>57</sup> *Ibid.*

<sup>58</sup> Jenny Edkins, 'Missing Migrants and the Politics of Naming: Names without Bodies, Bodies without Names', (2016) 83(2) *Social Research*, 359, 361.

<sup>59</sup> Inter-American Juridical Committee, Opinion on the Right to Identity presented by Dr. Mauricio Herdocia Sacasa, CJI/doc.276/07 rev.1, (10 August 2007), para. 12.

<sup>60</sup> Dissenting Opinion of Judge A. A. Cançado Trindade, Inter-American Court of Human Rights, *Serrano-Cruz Sisters v. El Salvador*, (Judgment of 1 March 2005), para. 15.

<sup>61</sup> Dissenting Opinion of Judge A. A. Cançado Trindade, *ibid.*, para. 19.

<sup>62</sup> de Varenes and Kuzborska (n 55), 1022.

individual death, rather ‘identification and the potential return of the remains to the family reinstate another form of personhood, one that survives physical death: being (or non-being) in relation to other beings’.<sup>63</sup> What family members and friends seek through the process of identification is a reinstatement of the ‘singular, irreplaceable person, embedded in relations’, even if that person chose anonymity in life as a migrant.<sup>64</sup> Identity involves connectedness: although it is individual, it does not operate in isolation from families or communities who are impacted by the death of a loved one.

#### **IV. The right to truth**

The right to truth is explicitly mentioned in the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), which states in Article 24(2) that: ‘each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.’<sup>65</sup> The ICPPED defines enforced disappearance in terms of action by state agents or ‘persons or groups of persons acting with the authorization, support or acquiescence of the State’ to arrest, detain, abduct, or otherwise deprive persons of their liberty ‘followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’.<sup>66</sup> Considered a serious human rights violation amounting to a crime against humanity when committed as part of a widespread or systematic practice,<sup>67</sup> the conduct is closely tied to the deprivation of other fundamental rights such as the right to life and the right not to be subjected to torture or other forms of ill-treatment, which in turn forms the basis of the human rights violation suffered by the family members of the disappeared.

These aspects permit parallels to be drawn in the specific context of missing migrants, even though the core element of state action or acquiescence required to establish the offence of enforced disappearance is generally absent. An element of involuntariness is associated with many migrant journeys, whereby the individual escapes from a situation of armed conflict and/or a repressive regime, only to be compelled to rely on profit-driven smugglers

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<sup>63</sup> Edkins (n 58), 380.

<sup>64</sup> Ibid, 359.

<sup>65</sup> UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), (20 December 2006).

<sup>66</sup> ICPPED, *ibid*, Article 2. See also Inter-American Convention on Forced Disappearance of Persons, Organization of American States (OAS), Inter-American Convention on Forced Disappearance of Persons (9 June 1994), Article 2.

<sup>67</sup> ICPPED, *ibid*, Article 5; Rome Statute of the International Criminal Court (17 July 1998), Article 7(i).

and organized criminal gangs to attempt transit to a secure place which they may never reach or be permitted to enter. These circumstances ‘may constitute practices tantamount to disappearances or may facilitate disappearances because they render the finding or identification of missing persons very difficult’.<sup>68</sup>

The most significant parallel relates to the definition of victims and recognition of the suffering of those left in uncertainty about a loved one’s fate. The ICPPED defines victims as ‘the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance’.<sup>69</sup> Thus, the individual who is missing, and who may be dead, is a direct victim of the offence and incorporated human rights violations,<sup>70</sup> while the next of kin or close associate of the direct victim is independently a victim and entitled separately to a remedy.<sup>71</sup> By definition, then, enforced disappearances affect not only the disappeared but also family members who are ‘kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty’.<sup>72</sup> This type of suffering is commonly termed ‘ambiguous loss’,<sup>73</sup> which has been described as ‘one of the least visible humanitarian problems’.<sup>74</sup> In a 1983 case, the UN Human Rights Committee accepted the ‘anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts’ and considered both mother and daughter to be victims of a violation of

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<sup>68</sup> Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration (n 3), para. 44. See also Bernard Duhaime and Andréanne Thibault, ‘Protection of migrants from enforced disappearance: A human rights perspective’, (2017) 99(2) *International Review of the Red Cross* 569.

<sup>69</sup> ICPPED (n 65), Article 24(1).

<sup>70</sup> See Report submitted by Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71 (8 January 2002), para. 75, referring to a ‘multiple human rights violation’.

<sup>71</sup> *Ibid.*, para. 85: ‘The concept of victims in cases of enforced disappearance encompasses, as the case law clearly shows, the disappeared persons as well as their relatives.’

<sup>72</sup> Grazyna Baranowska, *Rights of Families of Disappeared Persons, How International Bodies Address the Needs of Families of Disappeared Persons in Europe*, (Intersentia, 2021) 1.

<sup>73</sup> Pauline Boss, *Ambiguous Loss: Learning to Live with Unresolved Grief* (Harvard University Press, 2000). Boss coined the phrase ‘ambiguous loss’ in the broad context of unresolved losses that lack finality and the possibility of closure. In relation to missing persons, and in particular those marked ‘MIA’ (missing in action) on war memorials, the author notes at p. 26: ‘Most people need the concrete experience of seeing the body of a loved one who has died because it makes loss real. Most families of missing persons never find such verification of death and thus face greater challenges in shifting their perceptions about absence or presence.’ See also Eric Stover and Rachel Shigekane, ‘Exhumation of mass graves: balancing legal and humanitarian needs’, in Eric Stover and Harvey Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004), 85, 95-98, for examples of how ambiguous loss may be experienced in different cultures when family members are unable to carry out funeral rites for the missing as a result of mass atrocities.

<sup>74</sup> Vincent Bernard, ‘The Disappeared and their Families: when suffering is mixed with hope’, (2017) 99(2) *International Review of the Red Cross* 475.

Article 7 of the ICCPR.<sup>75</sup> In similar circumstances, the ECtHR has found a violation of Article 3 of the ECHR, prohibiting inhuman and degrading treatment, noting that the violation in essence ‘lies in the authorities’ reactions and attitudes to the situation when it has been brought to their attention’.<sup>76</sup>

While no specific reference is made to identification in the ICPPED, the requirement to identify follows from the definition of victims and the obligation to investigate in Article 24(3), including to locate, respect, and return any remains of victims.<sup>77</sup> The obligation to uncover the interlinked human rights abuses associated with an enforced disappearance via an effective investigation that recognizes ambiguous loss as harm suffered by close associates of the disappeared thus appears to be grounded in the notion of a right to truth.

Identification itself is grounded in the rights of an individual missing person to respect for dignity and personhood. When such respect is denied, family members and next-of-kin are impacted. UN General Assembly Resolution 3220 (XXIX) (1974) states that ‘the desire to know the fate of loved ones lost in armed conflicts is a basic human need’. This need aligns identification with the notion of a right to truth.<sup>78</sup> The IACtHR has recognized the right of a victim’s next of kin ‘to identify the whereabouts of their disappeared ones’ and to bury their remains according to their beliefs in order to bring closure to an often lengthy grieving process.<sup>79</sup> The Inter-American Commission on Human Rights has echoed these principles specifically in the context of disappeared migrants, recognizing that ‘victims’ family members have a right to the truth’ and that this generates state obligations.<sup>80</sup>

Noting that identification may not always be legally relevant, Laqueur argues that it is nonetheless ‘emotionally, hence rhetorically, and hence politically exigent’.<sup>81</sup> He advocates

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<sup>75</sup> Human Rights Committee, *Quinteros v. Uruguay*, Communication No. 107/1981, Views, (21 July 1983), para. 14.

<sup>76</sup> *Varnava and Others v. Turkey*, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment, (18 September 2009), para. 200.

<sup>77</sup> ICPPED (n 65), Article 24(6), requires State parties to take appropriate steps regarding the ‘legal situation of disappeared persons whose fate has not been clarified and that of their relatives’. See also Report submitted by Manfred Nowak (n 70), para. 86: ‘restitution includes the exhumation and identification of the body and the restoration of the mortal remains to the next of kin for the purpose of a decent burial in accordance with the religious practices of the victim and the family.’

<sup>78</sup> See generally Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’ (2006) 88(862) *International Review of the Red Cross* 245; Melanie Klinkner and Howard Davis, *The Right to Truth in International Law* (Routledge, 2020).

<sup>79</sup> *Gelman v. Uruguay*, Judgment (Merits and Reparations), (24 February 2011), para. 258.

<sup>80</sup> Inter-American Commission on Human Rights, Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, (30 December 2013), para. 195.

<sup>81</sup> Thomas W. Laqueur, ‘The Dead Body and Human Rights’, in Sean T. Sweeney and Ian Hodder (eds), *The Body* (Cambridge University Press, 2002), 75, 77.

for a ‘body-by-body, name-by-name’ standard of truth,<sup>82</sup> while also distinguishing ‘truth in the interest of political advantage or prosecution (justice) and truth in the interests of memory, of narrative closure, of healing, or reconciliation’.<sup>83</sup> His analysis is based on the deceased being a victim of a crime or serious human rights abuse, which is not always, or even commonly, the case for missing migrants. It is therefore precisely the latter form of truth that may be most relevant. At a practical level, identification is a prerequisite for the assertion of related aspects of the right to truth, such as receipt of death certificates, return of remains, and knowledge of gravesite location.<sup>84</sup> Assertion of the right in the second form highlighted by Laqueur goes beyond these practical aspects, however.

The reason for acknowledging a right to truth has been described as existential, in the sense that it is ‘necessary for the continued existence of the survivors’, which in turn reflects survivors’ suffering due to an absence of truth and the consequent need to know.<sup>85</sup> The idea that the right to truth is also owed to groups, societies, or even the international community has gained traction.<sup>86</sup> The 1997 Joinet Principles described the ‘right to know’ as going beyond the right to truth held by the victim and close associates to constitute a collective right.<sup>87</sup> The Inter-American Commission of Human Rights has held that the right to truth has both a collective nature, referring to the right of society to ‘have access to essential information for the development of democratic systems’, and a particular nature, referring to the right of victims’ next of kin to ‘know what happened to their loved ones’.<sup>88</sup> According to the IACtHR, the collective dimension involves establishing a complete historical record and identifying perpetrators.<sup>89</sup> In practice a truth-finding process may be complicated if, for

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid, 81.

<sup>84</sup> Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, A/72/335, (15 August 2017), para. 72.

<sup>85</sup> Klinkner and Davis (n 78) 9.

<sup>86</sup> Ibid, 11. See also Marloes van Noorloos, ‘A Critical Reflection on the Right to the Truth about Gross Human Rights Violations’, (2021) 21 *Human Rights Law Review* 874, 887-891, discussing some of the difficult questions related to the idea that societies have a right to the truth.

<sup>87</sup> United Nations, E/CN.4/Sub.2/1997/20/Rev.1, Set of principles for the protection and promotion of human rights through action to combat impunity (‘Joinet Principles’), (2 October 1997), para. 17.

<sup>88</sup> See *Bámaca-Velásquez v. Guatemala*, (Judgment of November 25, 2000 (merits)), para. 197, where the IACtHR included a section headed ‘right to the truth’ in its judgment and noted the Commission’s findings as to the collective nature of the right to truth.

<sup>89</sup> *Gelman v. Uruguay* (n 109), para. 192. See also Inter-American Commission on Human Rights, ‘The Right to Truth in the Americas’, OEA/Ser.L/V/II.152, Doc. 2, (13 August 2014), paras 81-82.

example, undue emphasis is placed on criminal investigations,<sup>90</sup> exhumations prove too traumatic for those affected,<sup>91</sup> or the official narrative is at odds with personal experience.<sup>92</sup>

The right to truth gives force to the idea of identification as the crucial starting point in an investigation. Without identifying the body of a deceased person, the next of kin cannot themselves be identified to claim the person's remains for burial. Where the next of kin come forward in search of the missing, identification ensures that the correct parties are recognized as victims and enabled to exercise their right to truth and claim a remedy. However, in the case of missing migrants, the family members seeking the truth may be newly arrived migrants, unable to access the relevant authorities and themselves identified only by a number,<sup>93</sup> which means it is the state authorities' responsibility proactively to seek truth on their behalf. Even where identification by name is impossible, determining the geographical origin of the missing may be important in fulfilling communities' collective right to know. What's more, a missing individual can be a direct victim of enforced disappearance, even if presumed dead, and consequently benefit independently from a right to be identified whether or not the right to truth is activated by the living next of kin and/or impacted communities.

## **V. The obligation to identify**

The most important and concrete obligation to identify the missing in international human rights law is derived from the right to life and is closely tied to the right to truth. With reference to Article 6(1) of the ICCPR protecting the right to life, the UN Human Rights Committee has explained that in the event of an unlawful death: 'States parties need to take [...] appropriate measures to establish the truth relating to the events leading to the deprivation of life, including [...] identifying bodies of individuals who had lost their lives.'<sup>94</sup> These obligations are reiterated in the Minnesota Protocol on the Investigation of Potentially Unlawful Death (Minnesota Protocol), which highlights, among other international standards,

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<sup>90</sup> For example, the forensic work carried out by the ICTY, involving the exhumation of mass graves and identification of victims, has been commended. The risk that legal proceedings become the focus at the expense of the humanitarian purpose of identification has also been noted, however. See Adam Rosenblatt, 'International Forensic Investigations and the Human Rights of the Dead', (2010) 32(4) *Human Rights Quarterly* 921, 923.

<sup>91</sup> Exhumations can be traumatic for families of the missing, some of whom may even wish to prioritise the identification and trial of perpetrators over the identification of victims. Ewa Domanska, 'Toward the Archaeontology of the dead body', (2005) 9(4) *Rethinking History* 389, 401.

<sup>92</sup> Edkins (n 58) 362.

<sup>93</sup> It was reported that migrants accommodated in overcrowded conditions in the Manston asylum processing centre in the UK in the autumn of 2022 were known only by a number consisting of the number of the boat they arrived on followed by their queue number on disembarkation. See 'Inside Story of Asylum Centre Anguish', *The Sunday Times* (6 November 2022) 2.

<sup>94</sup> Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018), para. 28.



that: ‘Investigations must, at a minimum, take all reasonable steps to: (a) Identify the victim(s) [...]’.<sup>95</sup> The category of ‘potentially unlawful deaths’ is understood by the Protocol to cover deaths occurring ‘where the State may have failed to meet its obligations to protect life’, including ‘for example, any situation where a state fails to exercise due diligence to protect an individual or individuals from foreseeable external threats or violence by non-State actors’.<sup>96</sup> This understanding is broad enough to encompass migrant deaths in certain circumstances. The Minnesota Protocol states as a general principle that: ‘In any death investigation, the identification of the body or bodies is a major priority. It also meets humanitarian, human rights, and other social and cultural needs.’<sup>97</sup>

The IACtHR has noted in the context of the obligation to investigate under Article 4 of the ACHR, which protects the right to life, that: ‘International standards require that the remains be returned only when the victim is clearly identified; that is, when a positive identification has been obtained.’<sup>98</sup> Referring to the Minnesota Protocol, the Court has indicated that ‘the body must be identified by reliable witnesses and other objective methods’.<sup>99</sup> The case law of the IACtHR reveals a readiness to find a violation of the right to humane treatment under Article 5 of the ACHR in certain instances of ineffective or traumatic investigations into disappearances in view of the impact on the immediate victim’s next of kin, where ‘the lack of diligence in determining the identity of the remains’ may be a relevant factor.<sup>100</sup> This possible impact on the next of kin is also recognized under the African Charter on Human and Peoples’ Rights (ACHPR), where in the context of violations of the right to life under Article 4, and the prohibition of torture and inhuman treatment under Article 5, the African Commission has stated that a remedy should include ‘identification and reburial of victims’ bodies in accordance with the expressed or presumed wishes of the victims or affected families; official declaration or judicial decision restoring the dignity, reputation and rights of the victims and of persons closely connected with the victims’.<sup>101</sup>

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<sup>95</sup> Office of the United Nations High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), *The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (New York and Geneva, 2017), para. 25.

<sup>96</sup> *Ibid*, para. 2(c).

<sup>97</sup> *Ibid*, para. 115.

<sup>98</sup> *González et al. ('Cotton Field') v. Mexico*, Judgment, (16 November 2009), para. 318.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*, para. 424.

<sup>101</sup> African Commission on Human and Peoples’ Rights, General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights, (23 February to 4 March 2017, Banjul, The Gambia), para. 44.

The ECtHR has elaborated on the scope of the first sentence of Article 2(1) of the European Convention on Human Rights (ECHR), which states: ‘Everyone’s right to life shall be protected by law.’ This provision obliges states ‘to refrain from the intentional and unlawful taking of life’ and ‘to take appropriate steps to safeguard the lives of those within its jurisdiction’.<sup>102</sup> It also places a positive obligation on states in certain circumstances to take preventive action to protect those whose lives may be at risk from the criminal conduct of others.<sup>103</sup> A state may consequently be held responsible for failing to carry out an effective investigation when individuals have been killed as a result of the use of force.<sup>104</sup> State obligations in this context extend to ensuring that an autopsy is carried out where an individual’s remains are recovered to ensure identification and as part of an effective investigation.<sup>105</sup> There is an obligation to investigate ‘when individuals have gone missing in life-threatening circumstances’,<sup>106</sup> which is actionable independently from the ‘substantive limb’ of Article 2, ‘concerned with State responsibility for any unlawful death or life-threatening disappearance’.<sup>107</sup> This procedural obligation ‘is not confined to cases where it is apparent that the disappearance was caused by an agent of the State’.<sup>108</sup>

In *Sabanchiyeva and Others v. Russia*, the ECtHR considered a claim by the applicants that the ‘circumstances of identification of their deceased family members had been inhuman and degrading and that the decision not to return the bodies of these persons to their families had been unlawful and disproportionate’.<sup>109</sup> This conduct was alleged to be in breach of various provisions of the ECHR, including Article 3, prohibiting torture or inhuman or degrading treatment or punishment, Article 8(1), concerning respect for private and family life, and Article 9(1), protecting freedom of thought, conscience, and religion.<sup>110</sup> The ECtHR did not find a violation of Article 3 in the circumstances of the case, but it did find an interference with family life in that the applicants were unable to arrange for the burial of

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<sup>102</sup> *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, (28 March 2000), para. 85.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Çakici v. Turkey*, Application no. 23657/94, Judgment, (8 July 1999), para. 86; *McCann and Others v. UK*, Application no. 18984/91, Judgment, (27 September 1995), para. 161.

<sup>105</sup> *Tepe v. Turkey*, Application no. 31247/96, (9 May 2003), para. 181. See also para. 151 where the Court, commenting on the view of one of the witnesses that a post-mortem examination showed an ordinary drowning, stated that it ‘cannot accept the witness’ suggestion that it was unnecessary to conduct a systematic autopsy in a case where the body belonged to an unknown person, without any identification, money or keys, who had drowned at 4 a.m.’

<sup>106</sup> *Varnava and Others v. Turkey*, (n 76), para. 136.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Sabanchiyeva and Others v. Russia*, Application no. 38450/05, Judgment, (6 June 2013), para. 3. See also *Gatsalova v. Russia*, Application no. 41318/10, Judgment, (20 April 2021), para. 43.

<sup>110</sup> *Sabanchiyeva and Others v. Russia*, *ibid.*

their relatives' remains or determine the location of the gravesite.<sup>111</sup> In these circumstances, withholding the body was connected to identification and constituted the main basis for a violation of rights, suggesting identification should be understood as a process of which naming the victim is a part.<sup>112</sup> Notably, the impacted rights are to be afforded to all without distinction, in accordance with the general principles of non-discrimination and equality.<sup>113</sup>

International humanitarian law contains corresponding obligations to identify the dead in armed conflict, from which a more general obligation to identify the missing in disaster situations can be derived, reflecting the broader humanitarian concept of dignified treatment. For the first time in an international treaty, the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field codified the obligation to search for, protect, and identify the wounded and dead, including by the creation of reports and the transmission of certificates of death and identity discs, and by ensuring that 'the dead are honourably interred, that their graves are respected and marked so that they may always be found'.<sup>114</sup> According to the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, applicable in international armed conflicts, state parties must 'take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled'.<sup>115</sup> Moreover, they 'shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification'.<sup>116</sup> The remains of the dead are to be respected and whenever possible returned to relatives.<sup>117</sup> If they cannot be returned, the dead are to be 'honourably interred' in marked graves.<sup>118</sup> Special

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<sup>111</sup> Ibid, paras 117 and 122.

<sup>112</sup> See also Daher-Nashif (n 24), presenting an empirical study of the impact on families of Israel's policy of withholding the bodies of killed Palestinians in 2015.

<sup>113</sup> See e.g. Universal Declaration of Human Rights (10 December 1948), Article 2.

<sup>114</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. (Geneva, 27 July 1929), Articles 3 and 4.

<sup>115</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. (Geneva, 12 August 1949), Article 15.

<sup>116</sup> Ibid, Article 16. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8 June 1977), Article 34.

<sup>117</sup> See Customary International Humanitarian Law, Rule 114, ICRC Database, Customary IHL, <<https://ihl-databases.icrc.org/en/customary-ihl>> (accessed 16 October 2024).

<sup>118</sup> Geneva Convention (I) (n 115), Article 17. The law applicable to non-international armed conflicts is less comprehensive, but the duty to search for the dead and 'decently dispose of them' is nonetheless stipulated in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (8 June 1977), Article 8.

protection is afforded to children affected by armed conflict, including by provisions aimed at facilitating their identification.<sup>119</sup>

In view of the number of migrants who go missing at sea, it is additionally relevant to remember that state obligations under conventional regimes governing search and rescue—the duty to rescue those in distress—is ‘one of the most ancient and fundamental features of the law of the sea’.<sup>120</sup> This duty has limitations both in terms of its scope and enforcement,<sup>121</sup> however, and there is no explicit reference to identification of the bodies of those who are not rescued. It has been argued that the duty to render assistance has an underlying humanitarian basis tied to an individual right to survival, which links it back to duties flowing from the right to life and international humanitarian law.<sup>122</sup>

Thus, state obligations incorporating identification are derived from and associated with a network of human rights, including first and foremost the right to life and complemented by respect for private and family life and the right not to be subjected to torture, inhuman, or degrading treatment or punishment. The process of identification, which includes naming a deceased individual, is not only a prerequisite for the return of a person’s remains but an integral requirement of an effective investigation grounded in the right to truth. International humanitarian law has long incorporated similar requirements in situations of armed conflict and the humanitarian basis for these obligations, with its emphasis on human dignity, encompasses categories of the missing beyond those missing in action, including migrants. Even though many migrants lose their lives by tragic accident rather than directly at the hands of state authorities, states may be responsible for aiding or assisting extraterritorial deprivation of life, through ‘policies based on deterrence, militarization and extraterritoriality’ and for failing to prevent or punish smuggling or trafficking that may lead

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<sup>119</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, (12 August 1949), Article 24 (children under 12 to wear identity discs); Article 50 (identification of children by Occupying Power). See also Additional Protocol I (n 116), Article 78(3) (identification of evacuated children).

<sup>120</sup> Richard Barnes, ‘Refugee Law at Sea’, (2004) 53(1) *International and Comparative Law Quarterly* 47, 49. See Convention on the Law of the Sea, 1982, Article 98; International Convention for the Safety of Life at Sea, (1974); International Convention on Maritime Search and Rescue, 1979 (amended, 2004), para. 2.1.10: ‘Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.’

<sup>121</sup> Barnes, *ibid*, 51-52.

<sup>122</sup> See General Comment No. 36 (n 94), para. 63: ‘States parties are also required to respect and protect the lives of [...] those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.’ See also Seline Trevisanut and Jessica Schechinger, ‘Search and Rescue Operations at Sea’ in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law*, (Cambridge University Press, 2017), 426, 447-448.

to loss of life.<sup>123</sup> States must also acknowledge their role in increasing the risk of migrant deaths through exclusionary and punitive policies aimed at deterring migrants and controlling borders, while failing to provide safe legal routes.<sup>124</sup> Ensuring that recognition is given to missing migrants' right to identification in construing state obligations depends on coordination, cooperation, and a shared responsibility of all concerned actors, including those engaged in search-and-rescue operations.

## VI. Conclusion

Isolating the right to identification from a network of related rights has uncovered its conceptual basis and centrality, in turn helping to frame appropriate responses. This conceptual basis consists of four connected elements. The first two—the rights to dignity and identity—attach to the missing person, including the dead. The third, constituted by the right to truth, attaches primarily to next of kin and communities, while also, by analogy with enforced disappearance, making the missing person a direct beneficiary of the restoration of identity. The fourth element encompasses the duty of states to uphold the first three elements by carrying out their obligations to identify the missing under what remains a fragmented body of international norms as it applies in the context of missing migrants.

Identification is a right anchored in the first instance to dignity. If dignity means being respected and remembered in death, identifying the deceased emerges as a paramount consideration. Without an identity, a body is unable to serve as a witness to a life, a human rights abuse, a disaster, or a migrant journey gone badly wrong. Killmister argues that '[t]o be human is to be *grievable*' and suggests that 'the mass grave is the antithesis of this'.<sup>125</sup> Mass graves denote atrocities and in their depths deaths are treated as insignificant.<sup>126</sup> Identification restores their significance. Without identification the human corpse loses its grievability while next of kin lose the ability to grieve. Evoking William Shakespeare's question 'What's in a name?' the authors of an article on the missing in the context of apartheid in South Africa answer: "'everything", as a name—identification—enables the

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<sup>123</sup> Agnes Callamard, 'Unlawful Death of Refugees and Migrants, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions', (2017) 29(4) *International Journal of Refugee Law* 668, paras. 10, 36-49.

<sup>124</sup> *Ibid*, para. 10.

<sup>125</sup> Killmister (n 22) 133. See also Laqueur (n 81) 86: 'A passion to remember, a need to mourn and to heal a psychic trauma and a social wound seem to demand that each, and every, body be accounted for by name.'

<sup>126</sup> Killmister, *ibid*. See also Stover and Shigekane (n 73) 85, who cite Wislawa Szymborska: 'History counts its skeletons in round numbers. A thousand and one remain a thousand as though the one never existed.'

return of *this* person'.<sup>127</sup> Laqueur also reminds us that a *corpus delicti* belongs to 'the human genus, which names its members and makes these names a central element of identity, memory and commemoration'.<sup>128</sup> According to the protagonists in Homer's *The Odyssey*, human beings share three main attributes corresponding to the author's notion of humanity: they need the gods, they are all mortal, 'and everyone, however lowly, has a name'.<sup>129</sup> Thus, 'to deny someone a name, and to instead to refer to them by a number, or other anonymizing marker, has come to symbolize a failure to see that person as human. To be human, we might say, is to be entitled to a name.'<sup>130</sup> When assessing the implementation of protocols concerning the treatment of the dead in practice, Moon notes: '*The practice of identification must be singled out here: in a sense, it can be seen to restore personhood in death.*'<sup>131</sup>

The right to dignity belongs to the dead insofar as identity forms an integral aspect of personhood that is protected by the inviolability of dignity. This does not amount to a claim that the dead have rights beyond accepting that 'the dead retain a special moral status through their enduring individuality, value as former individuals, and continued relationships with the living'.<sup>132</sup> It is this continued relationship with the living that allows the voices of the missing to be heard via an activation of the right to truth, recognizing that both the missing themselves and their loved ones may be regarded as victims of a disappearance. The right to dignity permits the missing person, most often in this context a deceased person, to be seen as a 'direct beneficiary' of a restoration of identity, alongside the goals of identification associated with the rights of the living.<sup>133</sup> Indeed, it has been said that: 'The right to human dignity belongs to the deceased. It is exercised by his relatives.'<sup>134</sup> Identification thus emerges as a core aspect of the right to truth, which may extend beyond individual loved ones to impacted communities. Just as the right to dignity does not endure forever, so must the

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<sup>127</sup> Nicky Rousseau, Riedwaan Moosage and Ciraj Rassool, 'Missing and Missed: Rehumanisation, the Nation and Missing-ness', *Kronos*, No. 44, Special Edition: Missing and Missed Subject Politics Memorialisation, (November 2018) 10, 17.

<sup>128</sup> Laqueur (n 81) 77.

<sup>129</sup> Siep Stuurman, *The Invention of Humanity: Equality and Cultural Difference in World History* (Harvard University Press, 2017) 38.

<sup>130</sup> Killmister (n 22) 132.

<sup>131</sup> Moon (n 12) 59 (emphasis in original).

<sup>132</sup> Ali and others (n 13) 27.

<sup>133</sup> C.f. Rosenblatt (n 90) 923: 'For the most part, in the contemporary dialogue on forensics, the dead body is an avenue towards some ethical or political goal meant to benefit living people: the end of uncertainty for families of the missing (who may not even know if their loved ones are dead or alive), the prosecution of war criminals, or political stability. The dead body is, in other words, an "object of study" or "object of mourning," sometimes even an object of political negotiation. But rarely is it described as a direct beneficiary of the activities forensic teams carry out in mass graves.'

<sup>134</sup> Barak (n 28) 239.

right to identification be exercised while it is meaningful to those loved ones and communities: ‘As the memory of the deceased fades, so fades his right to human dignity.’<sup>135</sup>

The idea of a temporally limited right to dignity places further pressure on states to strengthen and comply with obligations and processes aimed at respecting the right to identification of the missing, including missing migrants. In this respect, the principle of non-discrimination suggests that missing migrants have the right to be identified on an equal basis with the missing in natural disasters or armed conflict.<sup>136</sup> The lack of state enforcement of the right to identification of missing migrants is due, among other factors, to the absence in many cases of a direct link of attribution of the loss of life to a state so as to make a remedy under human rights law available,<sup>137</sup> inadequate international coordination and cooperation (for example, in search and rescue operations), gaps in domestic law,<sup>138</sup> resource issues, and the political climate surrounding irregular migration. The European Parliament has noted the problem of identifying those who die while attempting to cross the Mediterranean and placed emphasis on the need to ensure prompt and effective identification processes via a coordinated European approach and the establishment of a database.<sup>139</sup> In the humanitarian sphere, this may reasonably require outsourcing to missing persons institutions specifically mandated to focus on identification.

A humanitarian investigation acknowledges the practical implications of the absence of an identification or death certificate for relatives of the missing, especially those seeking asylum, such as inheritance or the exercise of marital and parental rights.<sup>140</sup> However, identification is an obligation of means, and the forensic capacity of states and relevant organizations will often be limited. The ECtHR has recognized this problem with respect to a continuing violation of Articles 2 and 3 of the ECHR resulting from disappearances in the

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<sup>135</sup> Ibid.

<sup>136</sup> Cattaneo and others (n 11) 147.

<sup>137</sup> See further, Thomas Spijkerboer, ‘Moving Migrants, States, and Rights. Human Rights and Border Deaths, (2013) 7(2) *Law and Ethics of Human Rights* 213.

<sup>138</sup> Cattaneo and others (n 11) 148, noting that: ‘The Italian system is characterised by a legal vacuum on the issue of the recovery and the identification of dead migrants.’

<sup>139</sup> European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy, (2020/2116(INI)), para. 20.

<sup>140</sup> See e.g. the process commenced in Italy in 2014 through the National Commission for Missing Persons to identify migrants who had died in two shipwrecks in October 2013. *Fatal Journeys* (n 5) 1 and 43. See also Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, (n 3), para. 67, note 93, referring to the adoption of the Migration Code in Guatemala, envisaging the creation of a procedure to assist families of missing migrants; and Bernard (n 74), 484, describing efforts by the ICRC to identify missing migrants, including via the ‘Trace the Face’ service aimed at identifying human remains found along West African migration routes.

Northern Caucasus since 1999, where it referred to a ‘pressing need’ to allocate the ‘resources required to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites; the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks’.<sup>141</sup> Referring to deceased migrants, the Council of Europe Commissioner for Human Rights has called on states to ‘step up their efforts to track the missing, [and] to identify those whose death is ascertained’, acknowledging the problem of ‘legislative voids’ and ‘a consequent lack of resources’.<sup>142</sup>

Tidball-Binz observes that ‘by helping fulfil the obligations towards the dead, we reassert our own humanity’.<sup>143</sup> It is perhaps the function of identification in reinstating personhood that underlies Cattaneo’s observation that identification reduces the distance between migrants and ‘us’ (non-migrants) and is a means of defending their rights while treating ‘their’ victims as ‘ours’.<sup>144</sup> Anyone who is not identified remains a missing person and the number of missing migrants is steadily increasing. Their dignity should not be permitted to fade due to a lack of political will and commitment by states to return their identities.

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<sup>141</sup> *Aslakhanova and Others v. Russia*, Applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment, (18 December 2012), para. 226.

<sup>142</sup> Council of Europe, Commissioner for Human Rights (Dunja Mijatović), Human Rights Comment, ‘For the rights of the living, for the dignity of the dead – Time to end the plight of missing migrants in Europe’, (29 September 2022).

<sup>143</sup> ‘Using forensic science to care for the dead and search for the missing: In conversation with Dr Morris Tidball-Binz’, (2017) 99(2) *International Review of the Red Cross* 689, 695. See also Oran Finegan, ‘Dignity in Death: Remembrance and the Voice of the Dead’, ICRC *Humanitarian Law and Policy blog*, (1 November 2017): ‘the dead continue to play an important role in people’s lives, whether that be in ensuring that they are afforded the necessary dignity in death or in the process of giving someone back their identity.’

<sup>144</sup> Cristina Cattaneo, *Naufragé sans visage, Donner un nom aux victimes de la Méditerranée* (Albin Michel, 2019) 210-211.