

# Out of sight, out of mind? Migrant deaths and disappearances at sea and the interplay between the law of the sea and human rights obligations

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## Abstract

The increasing number of migrant deaths and disappearances in the Mediterranean Sea exposes profound failures and inconsistencies in international law to ensure accountability and uphold fundamental human rights. Despite well-established obligations under the law of the sea and human rights, the lack of a coordinated framework for searching for missing migrants at sea, recovering bodies and investigating these tragedies remains a grey area. Jurisdictional ambiguities and inconsistencies in the interpretation of States' obligations further undermine search and rescue activities, particularly in cases where migrants remain unaccounted for. This contribution focuses on the relatively neglected topic of human rights at sea by examining the interplay between the existing legal instruments and highlighting the jurisdictional and legal challenges that hinder effective protection. The article underscores the urgent need for

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legal clarity, enhanced accountability, and stronger enforcement mechanisms to address the humanitarian crisis of migrant deaths and enforced disappearances at sea.

**Keywords:** Missing migrants, enforced disappearances, right to life, law of the sea, procedural obligations, search and rescue.

## 1. Introduction

The International Organization for Migration (IOM) estimates that since 2014, more than 31,287 migrants – many believed to be victims of human trafficking – have died or gone missing in the Mediterranean trying to reach their destinations. These figures account only for deaths for which there is some record.<sup>1</sup> One of the most pressing concerns regarding migrants who go missing at sea is their invisibility, coupled with a systemic lack of accurate documentation and the absence of accountability. The information regarding shipwrecks in the Mediterranean is arguably scarce and inconsistent, as there is no official system for systematically collecting and publishing accurate data on human tragedies at sea.<sup>2</sup> Consequently, migrant disappearances have been insufficiently investigated compared to other populations,<sup>3</sup> raising serious human rights concerns

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1. Tara Brian and Frank Laczko (eds), *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants* (IOM 2016).

2. This poses an acute challenge that has also been acknowledged under Objective 8 of the Global Compact for Safe, Orderly and Regular Migration, also reflected in the UN's General Assembly Resolution on the protection of migrants, December 2019.

3. Laczko, Frank, Ann Singleton and Julia Black (eds), *Fatal Journeys Volume 3: Part I: Improving Data on Missing Migrants* (IOM 2017).

and questions about States' obligations to protect migrants' rights.<sup>4</sup>

The international law of the sea and human rights law establish clear obligations for States to protect persons found in distress at sea along with obligations emanating from the application of the right to life. However, these obligations, along with established international standards on missing persons, are not adequately upheld in the context of irregular migration by sea, particularly concerning responsibility for deaths and disappearances along Europe's external borders.<sup>5</sup>

Despite growing international attention to the fate of migrants<sup>6</sup> who die or go missing while attempting to cross sea borders in search of safety, gaps in legal frameworks and enforcement mechanisms remain. Situated within the broader discussions of *Humanity across the waves: Rethinking the law of the sea through a human rights lens*, this contribution will critically examine the challenges in the application of established norms, the jurisdictional ambiguities that hinder accountability, and the systemic shortcomings that have resulted in an increasing number of preventable migrant deaths and unresolved disappearances.

In light of these challenges, the Parliamentary Assembly of the Council of Europe, through its Resolution, "Missing migrants, refugees, and asylum seekers: a call to clarify their fate" (2024), urged the Committee of Ministers to affirm the Council's commitment to addressing this issue

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4. States have repeatedly affirmed their collective responsibility to preserve the lives of all migrants and take action to prevent loss of migrant lives e.g. see, Global Compact for Safe, Orderly and Refugee Migration (para 24). See, also, Progress Declaration of International Migration Review Forum (para 14).

5. The words 'disappearances' and 'missing' are used interchangeably herein.

6. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), a migrant is "any person who is outside a State of which she or he is a citizen or a national, or, in the case of a stateless person, his or her State of birth or habitual residence". Migrants thus may be persons on the move, or persons of foreign origin established regularly or irregularly in a country, OHCHR, 'Recommended Principles and Guidelines on Human Rights at International Borders' (2014).

by working alongside international partners.<sup>7</sup> In line with the Council of Europe's values and standards, the Assembly calls for continued support to member States in strengthening and expanding the efforts initiated in recent years to address the issue of missing migrants, refugees, and asylum seekers, as there is no effective search mechanism established. This Resolution underscores a fundamental challenge in resolving migrant disappearances at sea: the difficulty of ensuring accountability and upholding human rights obligations beyond sovereign territory. This is particularly pronounced when considering the legal constraints of human rights jurisdiction at sea, where traditional applications of human rights treaties are often limited by territorial boundaries, including their territorial sea and on vessels where they exercise jurisdiction.

Clear instances where human rights obligations will arise in this context include, *inter alia*, cases where a person dies or goes missing in a State's territorial waters, their body is recovered by the State, or a family member of the deceased or missing is within the State's jurisdiction. However, the territorial scope of application of human rights treaties leaves out of the ambit migrants disappearing or dying at sea, as most, if not all maritime incidents occur in areas beyond the jurisdiction of any sovereign State, that is, the high seas.<sup>8</sup> For this reason, the allocation of authority over activities (or perhaps non-activities) carried out on the

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7. Parliamentary Assembly, 'Missing migrants, refugees and asylum seekers – A call to clarify their fate' (Doc. 16037, 13 September 2024), available at <<<https://rm.coe.int/as-mig-2024-11-draft-report-missing-migrants-refugees-and-asylum-seeke/1680b090c3>>>.

8. It is vital to stress that distress incidents, border controls and maritime interceptions occur not only on the high seas, which is the area beyond the 200 nautical miles from a State's coastal baseline but from just outside the 12 nautical miles territorial sea; this is known as the Exclusive Economic Zone (EEZ). Briefly, in the EEZ, States have sovereign jurisdiction over the exploration and exploitation of marine resources and certain economic activities, but for the purposes of SAR, this area is treated as if it is the high seas. Article 58(2) UNCLOS is important in this respect as it sets out the continuance of high seas freedoms in the EEZ, insofar as they are not incompatible with the EEZ regime.

high seas centres around the principle of flag State jurisdiction and violations of international responsibilities can easily go unnoticed.<sup>9</sup> Arguably, this is one of the most complex areas of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>10</sup> as the legality of the high seas character is rather controversial, where the ambiguity of jurisdiction exacerbates challenges in ensuring accountability and where duties and rights are susceptible to mismanagement.

Who, then, bears the obligation to prevent, search and investigate migrant deaths and disappearances on the high seas, given the jurisdictional challenges that exist beyond sovereign territory? The absence of human rights jurisdiction *ipso facto* means that individuals cannot claim protection against a State to secure their human rights, as the extraterritorial application of human rights treaties is premised on the exercise of jurisdiction by the State.<sup>11</sup> For this reason, jurisdiction presents the *Achilles' heel* of human rights applicability beyond sovereign territory.

Against this background, the core principle of saving the lives of persons in distress at sea under international law of the sea is of critical importance in upholding the obligation to protect life. Historically speaking, providing assistance to persons in distress at sea was a traditional hallmark of maritime law, arising out of a moral obligation, for the purposes of maintaining safety of life at sea given the inherent dangers of the oceans. This humanitarian norm is incorporated as a legal duty of the search and rescue (SAR) system under Article 98 UNCLOS.<sup>12</sup> Im-

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9. Douglas Guilfoyle, 'The High Seas' in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 208.

10. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

11. See, *inter alia*, Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006) 45.

12. UNCLOS, Article 98.

portantly, the duty imposed upon flag States to ensure that the master of a ship flying its flag renders assistance to those in distress at sea,<sup>13</sup> serves to safeguard the right to life, which includes both positive and negative obligations. Negative obligations require the State not to abstain from taking human life, while positive obligations include substantial and procedural obligations, such as conducting independent and transparent investigations into deaths,<sup>14</sup> identifying the deceased, and providing information to their families. Moreover, coastal States are also required to provide for SAR services and to cooperate with States nearby for the purpose of maritime safety. Notwithstanding these obligations, there remain numerous gaps and inconsistencies with regard to questions of State jurisdiction and State responsibility to search for those unaccounted for when a SAR incident occurs.

The incident of the *Pylos* shipwreck on 14 June 2023 exemplifies not only the severity of the situation and the reluctance of States to take responsibility for the protection of migrants, but also the unwillingness of authorities to bring those responsible to account. Of the migrants aboard, only 104 individuals survived, while 82 bodies were recovered, of which merely 58 have been identified, leaving over 500 persons unaccounted for.<sup>15</sup>

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13. It is clear that the duty applies to *all* other maritime zones, notwithstanding the absence of explicit wording to this effect. In particular, Article 58(2) UNCLOS, which sets out the rights and duties of other States in the Exclusive Economic Zone (EEZ) (the EEZ extends up to 200 nautical miles from the baseline), confirms that the duty to render assistance falls within the rules of international law that apply also to the EEZ. See Efthymios Papastavridis, 'European Convention of Human Rights and the Law of the Sea: The Strasbourg Court in Uncharted Waters?' in Maglosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and application of the European Convention of Human Rights: Legal and Practical Implications* (Queen Mary Studies of International law 2013).

14. *Cyprus v. Turkey*, Application No. 25781/94, (ECtHR, 10 May 2001); *McCann and Others v. The United Kingdom*, Application No. 18984/91 (ECtHR, 27 September 1995), *Mahmut Kaya v. Turkey*, Application No. 22535/93 (ECtHR, 28 March 2000).

15. Alice Autin, 'In Their Words: Pylos Survivors Speak up for Justice' (HRW, 13 December 23), available at <<<https://www.hrw.org/news/2023/12/13/their-words-pylos-survivors-speak-justice>>>.

Serious allegations implicate the Hellenic Coast Guard in actions that may have precipitated the vessel's capsizing, exacerbating the humanitarian catastrophe, as they have explicitly refused to conduct an internal disciplinary investigation.<sup>16</sup>

Evidently, the normalisation of 'dying in anonymity' in the Mediterranean region highlights the persisting lack of accountability and transparency. Still, under the international law of the sea, searching for and recovering bodies is not normally considered to be part of SAR operations, but solely that "handling of human remains may at times be necessary".<sup>17</sup> Subsequently, some missing migrants could be victims of disappearance and, in certain circumstances, be legally characterised as enforced disappearance in accordance with the definition set out in the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED).<sup>18</sup> This was highlighted by the Committee on Enforced Disappearances, which posited that "the principal distinctive element between a migrant going missing and a migrant becoming a victim of disappearance is the commission of a crime against a migrant."<sup>19</sup> This has

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16. Nektaria Stamouli, 'Greece – the country that lets people escape justice' (Politico, 26 August 2024), available at <<<https://www.politico.eu/article/greece-justice-democracy-corruption-scandals-tempe-train-crash-migrant-shipwreck-predator-spyware/>>>.

17. 'IAMSAR Manual: International Aeronautical and Maritime Search and Rescue Manual 2016 Edition' (Vol. III, 2016) at 2-41.

18. Article 2 of the ICPPED reads: "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, 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".

19. Committee on Enforced Disappearances, 'CED/C/GC/1: General comment No. 1 (2023) on enforced disappearance in the context of migration' (26 October 2023), available at <<<https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedc-gc1-general-comment-no-1-2023-enforced>>>.

brought to the fore the absence of a clear international normative framework which governs migrant deaths and missing at sea, as well as broader structural deficiencies in State responses, which are largely determined by national legislation and practice, though in principle should align with international standards.

The article examines this neglected human rights at sea issue by, first, sketching the legal challenges in addressing migrant deaths and missing at sea, and, second, identifying the international legal obligations that flow from the international law of the sea and the ways in which European State outsource SAR responsibilities. Following an analysis of the human rights implications of these practices on the ground, the next section delves into the international legal obligations stemming from an application of the right to life. It critically evaluates the obligations endowed on States as well as their capability of being secured on the high seas, addressing the gaps in enforcement that contribute to impunity and ongoing violations of the right to life while emphasising the need for clarity.

## **2. Legal challenges in addressing migrant deaths and missing at sea**

The requirement of treating the dead with respect and dignity has been a core human value long before efforts were made to define and codify international law. This principle is especially relevant in the context of missing persons, where the legal and moral obligation to account for individuals remains central. International humanitarian law, unlike international human rights law, provides a substantial body of rules and legal principles related to missing persons during



wartime.<sup>20</sup> However, persons can also go missing outside the context of armed conflict, including, *inter alia*, situations of violence, organised crime, or migration.

The situation of missing migrants was only highlighted for the first time by the UN General Assembly in 2014, which, reporting to the UN Secretary General, pointed to similarities between missing persons in situations of conflict, disaster and migration, and urged States to recognise migrants as particularly *vulnerable*.<sup>21</sup> Building upon this recognition, the death and disappearance of migrants at sea presents a distinct human rights challenge that occurs in peacetime, thereby involving different international frameworks, including international human rights law – safeguarding the right to life; the law of the sea – mandating SAR obligations; refugee law – providing *non-refoulement* obligations; and criminal law, which can hold individuals or State agents accountable for actions such as human trafficking, pushbacks, or failure to prevent enforced disappearances.

In the context of maritime cross-border migration, smugglers and traffickers play an integral role in facilitating the transit of migrants,<sup>22</sup> often via ‘flagless’ or ‘stateless’ vessels, thereby rendering the whole experience even more treacherous. The facilitation of movement and irregular border crossings provided by smugglers, some of which may involve exploitative

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20. For relevant rules in customary IHL, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross (ICRC) and CUP 2005, rev'd 2009) (ICRC Study), rule 98 (‘Enforced disappearance is prohibited’) rule 117 (‘Accounting for Missing Persons’ International Committee of the Red Cross).

21. United Nations General Assembly, ‘Missing Persons: Report of the Secretary-General’ (UN Doc. A/69/293, 11 August 2014) available at <<<https://documents.un.org/doc/undoc/gen/n14/501/44/pdf/n1450144.pdf>>>.

22. Report of the Special Rapporteur on the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/72/335: Unlawful death of refugees and migrants - Note by the Secretary-General - Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions (15 August 2017) at [43], available <<<https://www.ohchr.org/en/documents/thematic-reports/a72335-unlawful-death-refugees-and-migrants-note-secretary-general>>>.

practices that constitute human trafficking,<sup>23</sup> serves to meet this demand.<sup>24</sup> International legal instruments explicitly address State obligations in this domain. The 2000 *Protocol Against the Smuggling of Migrants by Land, Sea and Air* makes clear in Article 16(1) that States are required to take:

[A]ll appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol [smuggling] as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>25</sup>

Within this framework, it is assumed that the majority of irregular migrants use the services of smuggling networks at some point in their journey.<sup>26</sup> The Mediterranean Sea is today the deadliest route for migrants seeking refuge in Europe,<sup>27</sup> as the risk of death is especially high due to

23. An individual may fall victim to human trafficking even if they cross international borders through regular means. In contrast, human smuggling inherently involves the irregular crossing of borders. See Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 32.

24. Vladislava Stoyanova, 'The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 *German Law Journal* 437.

25. Resolution adopted by UN General Assembly on 15 November 2020, by resolution 55/25, United Nations Convention against Transnational Organized Crime, <<[https://www.unodc.org/pdf/crime/a\\_res\\_55/res5525e.pdf](https://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf)>>.

26. UNDOC, 'Issue Paper: Smuggling of Migrants by Sea' (2011) 11, <<[https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf)>>.

27. In this article, the term 'migrants' is used as employed in the International Organization for Migration (IOM) definition as there is no universally accepted definition at the international level. The IOM provides that the term migrant is "[a]n umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.' IOM, 'International Migration Law No 34, Glossary on Migration' (2019), available at <<[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)>>.

drowning, malnourishment, suffocation, dehydration, starvation, unsanitary conditions and violence,<sup>28</sup> all of which are intensified by rigid migration policies. Arguably, over the past decade, attention has shifted from preventing deaths at sea to prioritising border protection, particularly through policies increasingly focused on external border management and remote surveillance aimed at controlling migration flows at *all* costs.<sup>29</sup>

The conditions for migrants attempting to cross the sea continuously deteriorated, amidst a drastic reduction of SAR capacity by the European States, delayed responses and growing barriers to humanitarian rescue initiatives, preventing NGOs from conducting proactive SAR, leaving many to drift, drown, or disappear.<sup>30</sup> Adding to this, a worrisome increased reliance on aerial assets, such as surveillance drones, in order to enhance country-of-origin authorities' capacity to prevent exit and intercept migrant boats (pull-back practice) at EU external borders. In particular, direct and/or indirect pushbacks intensify the risk of migrant disappearances<sup>31</sup> and have been identified as aggravating factors contrib-

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28. OHCHR, "‘Lethal disregard’: Search and rescue and the protection of migrants in the central Mediterranean Sea" (26 May 2021), <<<https://reliefweb.int/report/libya/lethal-disregard-search-and-rescue-and-protection-migrants-central-mediterranean-sea>>>; and Noemi Magugliani and Jean-Pierre Gauci, 'Migrant Crossings in the Channel: Non-Assistance, Securitisation, and Accountability Under International Law' (21 December 2021) *Opinio Juris*, <<<http://opiniojuris.org/2021/12/21/migrant-crossings-in-the-channel-non-assistance-securitisation-and-accountability-under-international-law/>>>.

29. Thomas Spijkerboer, 'Moving Migrants, States, and Rights: Human Rights and Border Deaths' (2013) 7(2) *Law and Ethics of Human Rights* 213.

30. UNHCR, 'Distress at sea: a call for a humanitarian and precautionary approach' (2024), available at <<<https://www.unhcr.org/sites/default/files/2024-12/joint-statement-on-distress-at-sea.pdf>>>.

31. Migrants may also be victims of enforced disappearance which mean that they are victims of a crime perpetrated by States or non-state actors as defined in Articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearances. In 2017, the Working group on Enforced or Involuntary Disappearances outlined "the direct link between migration and enforced disappearance, either because individuals leave their country as a consequence of a threat or a risk of being subject to enforced disappearances there, or because they disappear during their journey or in the country of destination" - UN Working Group on Enforced or Involuntary Disappearances, "2017 Report" (A/HRC/36/39 and addendum A/HRC/36/39/Add.2), 1 August 2017. See also analysis by Delphine Rodrik, arguing that pushbacks constitute an enforced disappearance, <<<https://eumigrationlawblog.eu/rightlessness-in-melilla-pushbacks-as-violations-of-the-right-to-recognition-before-the-law/>>>.

uting to cases of missing migrants.<sup>32</sup> In this regard, when drones are deployed to monitor movement across the sea, the information collected from drones plays a crucial role in enabling States to carry out enforced disappearances. The Border Violence Monitoring Network has provided that “data collected by EU surveillance drones at sea is sometimes not shared with SAR teams closest to the migrants in distress, thus hindering rescue operations and potentially endangering life”.<sup>33</sup> Such practice is a blatant contravention of SAR obligations and challenges efforts to prevent future deaths and disappearances, leaving vulnerable individuals in peril and perpetuating a cycle of unaccountability.<sup>34</sup>

Apart from cases of enforced disappearance, it should be noted that human rights treaties do not contain specific provisions addressing missing persons. Nonetheless, various treaty provisions have been interpreted by UN treaty bodies and regional courts as imposing State obligations relevant to missing persons, particularly in clarifying their fate and whereabouts. Such developments in legal interpretation highlight the responsibility of States to uphold the right to life and ensure accountability in cases of disappearances. Notably, the UN Human Rights Committee (HRC) – an independent expert body established to monitor the implementation of the 1966 International Covenant on Civil and Political Rights (ICCPR) – stated in its *General Comment No. 36* on the right to

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32. Parliamentary Assembly, Doc. 16037 (n 7) at 9.

33. Border Violence Monitoring Network, EU Member States’ use of new technologies in enforced disappearances (02 February 2023) at 2, available at <<[https://borderviolence.eu/app/uploads/Input-for-the-thematic-study-on-new-technologies-and-enforced-disappearances\\_version-2.pdf](https://borderviolence.eu/app/uploads/Input-for-the-thematic-study-on-new-technologies-and-enforced-disappearances_version-2.pdf)>>; Nikolaj Nielsen, ‘NGO rescue boats do not receive Frontex alerts’ (03 February 2020), available at <<<https://euobserver.com/migration/147331>>>.

34. On SAR obligations in particular, see, para 2.1.1. of the SAR Convention. On November 29, the European Center for Constitutional and Human Rights (ECCHR) filed a complaint before the International Criminal Court (ICC) arguing European responsibility for crimes against humanity committed against migrants and refugees in Libya. Available at <<<https://www.ecchr.eu/en/case/interceptions-of-migrants-and-refugees-at-sea/>>>.

life that enforced disappearance:

[C]onstitutes a unique and integrated series of acts and omissions representing a grave threat to life.<sup>35</sup> The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.<sup>36</sup> It thus results in a violation of the right to life as well as other rights recognized in the [ICCPR], in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law).<sup>37</sup>

In this context, a related legal development can be traced in the UN Committee on Enforced Disappearances' Guiding Principles for the search of disappeared persons, which are grounded in the ICPPED. According to Principle 1, "[t]he search for a disappeared person should be conducted under the *presumption* that he or she is alive".<sup>38</sup> Additionally, Article 24 of the Convention acknowledges families as indirect victims of enforced disappearances, thereby placing an obligation on State authorities to provide effective support and reparations mechanisms.

However, as of 2024, only a limited number of States have ratified the ICPPED, thus limiting its legal reach and effectiveness in addressing disappearances.<sup>39</sup> Notwithstanding this limitation, the Convention further mandates that States must adopt all necessary measures to search for, locate, and release disappeared persons, as well as investigate cases of en-

35. *Bousroual v. Algeria*, Communication No. 992/2001 (CCPR/C/86/D/992/2001) para 9.2.

36. *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013) para 7.5.

37. OHCHR, 'Guiding principles for the search for disappeared person' (28 August 2019) CED/C/7, at para 58.

38. *Ibid.*

39. 77 of the 193 UN Member States have ratified the Convention.

forced disappearance and hold those responsible accountable. This framework aligns with, and is reinforced by, the established practice of human rights bodies, including the European Court of Human Rights (ECtHR) under the European Convention on Human Rights (ECHR),<sup>40</sup> which requires States to protect life, investigate violations, and ensure accountability for preventing and addressing disappearance or death.<sup>41</sup> However, the consequences of disappearance or death during maritime migration for the families of migrants have not been systematically explored, and the right to know the truth about the circumstances of a migrant's death at sea is ostensibly also hindered for family members and relatives.

### 3. The duty to render assistance at sea under the law of the sea framework

As already touched upon in section 1, the specific obligations to preserve the safety of life against the risks of sea travel are addressed through the general framework set out in Article 98 UNCLOS, and are further detailed in the International Convention for the Safety of Life at Sea (SOLAS)<sup>42</sup> and the International Convention on Maritime Search and

**40.** Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.

**41.** E.g., *McCann and Others v. the United Kingdom*, Application No. 18984/91 (ECtHR, 27 September 1995); *Osman v. the United Kingdom*, Application No. 87/1997/871/1083 (ECtHR, 28 October 1998) Reports of Judgments and Decisions 1998-VIII. On the search for missing persons, see particularly: *Cyprus v. Turkey*, Application No. 25781/94 (ECtHR, 10 May 2001, ECHR 2001-IV); *Varnava and Others v. Turkey*, Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), *Aslakhanova and Others v. Russia*, Application Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10 (ECtHR, 18 December 2012).

**42.** International Convention for the Safety of Life at Sea, 1974, as amended, 1184 UNTS 278 (adopted 1 November 1974, entered into force 25 May 1980).

Rescue (SAR Convention).<sup>43</sup> These instruments establish a robust framework for rendering assistance to persons in distress at sea, which is central in upholding the obligation to protect human life and addressing the issue of migrant deaths and disappearances. Notwithstanding the existence of this legal framework under the law of the sea and its standing as a customary law obligation, human rights abuses at sea are often not reported, enforced, or remedied due to the challenging nature of the maritime environment.<sup>44</sup> They can easily go unnoticed on the high seas, which has been described, quite starkly, as a “place where anyone can do anything because no one is watching... a dystopian place, home to dark inhumanities”.<sup>45</sup> Despite this, the vast and largely unregulated expanse of the sea, occupying over seventy per cent of the terrestrial surface, should not serve as a space for impunity.

Against this backdrop, the delineation of the world’s oceans into 13 national SAR regions by the International Maritime Organization (IMO) provides a mechanism for identifying which State is primarily *responsible* for ensuring that distress at sea calls are received and responded to within their respective Search and Rescue Regions (SRRs).<sup>46</sup> For instance, if a boat in distress finds itself within a State’s SRR (e.g., Italy),

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43. International Convention on Maritime Search and Rescue, 1979, with annexes, 1405 UNTS 97 (adopted 27 April 1979, entered into force 22 June 1985).

44. Natalie Klein, ‘Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law’ (2022) 53(2)-(3) *Ocean Development and International Law*.

45. Ian Urbina, ‘Stowaways and Crimes Aboard a Scofflaw Ship’ *New York Times* (New York, 17 July 2015), <<<https://www.nytimes.com/2015/07/19/world/stowaway-crime-scofflaw-ship.html>>>; Richard Collins, “‘Outlaw Oceans’ and “‘Lawless Sea’”? Revisiting the High Seas as a Regulatory Space Under (and After) UNCLOS 1982’ in Kristina Siig, Birgit Feldtmann and Fanella MW Billing (eds), *The United Nations Convention on the Law of the Sea: A System of Regulation* (Routledge 2023) 26.

46. Tanja E. Aalberts and Thomas Gammeltoft-Hansen, ‘Sovereignty at Sea: the Law and Politics of Saving Lives in Mare Liberum’ (2014) 17 *Journal of International Relations and Development* 445.

it is the *responsibility* of that coastal State (Italy) to coordinate the search operation and ensure that assistance is rendered. Notably, the IMO has stressed that the boundaries of SAR areas should not be perceived by coastal States as barriers to rendering assistance to persons in distress.<sup>47</sup> Ergo, the SAR Convention becomes a critical instrument in supporting the operational fulfilment of the duty to rescue at sea, as it provides the international system underpinning SAR operations.<sup>48</sup> However, the SAR regime has arguably contributed to a form of ‘territorialisation’ of the high seas, where the principle of *mare liberum* is increasingly intertwined with State responsibility.<sup>49</sup>

By delineating SAR regions and assigning primary responsibility for SAR coordination, the SAR framework serves as a mechanism to govern the high seas while ensuring that humanitarian obligations remain at the *forefront* of maritime operations. Nonetheless, the overlapping SAR areas between Italy, Malta, and Libya have often caused delays or inadequate responses in handling distress information.<sup>50</sup> In particular, the island of Lampedusa is part of both the Italian and Maltese SAR areas. Truly, questions of shared responsibility are genuinely difficult, as there is a lack of clarity in the wider responsibility framework of international law and obligations are insufficiently developed. As Gammeltoft-Hansen convincingly contends, this might lead to “jurisdiction shopping”,<sup>51</sup> as

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47. Felicity Attard, *The Duty of the Shipmaster to Render Assistance at Sea under International Law* (Brill Nijhoff 2020) 57.

48. International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, in force 22 June 1985) 1405 UNTS 119.

49. Aalberts and Gammeltoft-Hansen (n 46) 458.

50. Silvia Dimitrova, ‘Rethinking “Jurisdiction” in International Human Rights Law in Rescue Operations at Sea in the Light of *AS and Others v. Italy* and *AS and Others v. Malta*: A New Right to be Rescued at Sea?’ (2023) 56 *Israel Law Review* 127.

51. Thomas Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 142f.



it arguably creates a legal basis for destination States to shift both procedural and substantive asylum and refugee protection obligations to the neighbouring coastal State.

Consequently, the delineation of SAR regions has inevitably created overlapping responsibilities between coastal States, flag States and the State of nationality of individuals that find themselves in distress at sea, leading to inconsistent implementation of the duty to render assistance to those in danger at sea. Certainly, when the duty was formulated, the drafters of the UNCLOS did not have in mind the massive migration movements we are witnessing today. Instead, this duty was predominantly thought to safeguard the safety of life at sea against the inherent dangers of the sea *in those instances* where something has gone ‘wrong’. Nonetheless, in such situations, all ships are required to have plans and procedures in place to recover casualties from the sea.<sup>52</sup>

Moreover, the SOLAS Convention imposes obligations on contracting governments by requiring States to establish SAR facilities to effectively render assistance to those in distress and around their coasts.<sup>53</sup> The provision provides that upon the communication of distress information, governments should ensure that the necessary arrangements are made to locate the persons in distress and assist them, either by State-owned vessels (e.g., coastguards) or by other vessels (e.g., merchant vessels) that navigate in the area.<sup>54</sup> In line with Article 98(2) UNCLOS, coastal States have authority over their respective SAR zone and hold an obligation of due diligence to provide adequate and effective SAR

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52. International Chamber of Shipping, ‘Large Scale Rescue Operations at Sea: Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons’ (2<sup>nd</sup> ed, 2015) 4.

53. Attard (n 47) 57; SOLAS, Annex Ch V, Reg 7.

54. SOLAS, Ch V, Reg 7.1; See also further discussion in Irini Papanicolopulu, *International Law and The Protection of People at Sea* (OUP 2018) 499.

services in their SAR zone.<sup>55</sup> In fact, this is a critical duty, which can give rise to the accountability and responsibility of a State, if proven that they failed or delayed in offering or cooperating in the provision of such assistance.

While the SAR regime does not require that coastal States conduct SAR for every vessel in distress in the respective SAR zone, States are under a due diligence obligation to ensure the adequacy and effectiveness of the SAR services, particularly when they know or ought to have known in the circumstances that persons were in distress. Moreover, under the SAR Convention, a national Rescue Coordination Centre (RCC) is a unit responsible for promoting the efficient organisation of SAR activities within its SRR and must be capable of objectively assessing a situation and acting on the basis of relevant information. Crucially, RCCs are the cornerstones of the operability of the SAR system, as they provide *instructions* to shipmasters upon the receipt of distress communication.<sup>56</sup> In addition to this, RCCs are required to take immediate action to assist and to inform the responsible RCC if they receive *information* about an emergency that is beyond its SAR zone. If the latter refuses to intervene, then that primary State would remain responsible for the coordination and management of the SAR services.<sup>57</sup> It is imperative to note that individuals within a SAR zone do not *ipso facto* fall within the jurisdiction of the respective coastal State, as there must be some additional factual element that will link the persons and the coastal State

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55. Seline Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View' (Questions of International Law, Zoom-In, 23 June 2014) <<<http://www.qil-qdi.org/is-there-a-right-to-be-rescued-at-sea-a-constructive-view/>>>.

56. Attard (n 47) 68.

57. Article 4.3 of the Annex SAR Convention; See also Lisa-Marie Komp, 'The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?' in Violeta Moreno-Lax and Efthymios Papastavridis, (eds), *'Boat refugees' and Migrants at Sea: A Comprehensive Approach, Integrating Maritime Security with Human Rights* (Brill Nijhoff 2016) 229-30.

concerned, such as receiving information about people in danger at sea.<sup>58</sup>

The HRC decision in the *A.S. and Others v. Italy*<sup>59</sup> is particularly relevant in this context. The case involved the deaths of 63 migrants whose boat capsized in international waters while attempting to cross the Mediterranean. Despite numerous distress calls alerting both the Italian and Maltese authorities to the perilous situation, no timely SAR action was undertaken, which could have prevented the loss of life. Truly, the ambiguities that can arise from diplomatic (and legal) quarrels between State governments can have fatal consequences for migrants. *In casu*, both the Italian and the Maltese authorities failed to properly cooperate as to who would undertake the rescue operation. As a result, assistance arrived approximately seven hours after the initial distress call. Manifestly, the principal reason for the human tragedy was the reluctance of *both* States to reach a timely agreement and to coordinate the rescue with due diligence; an omission that could have significantly reduced the risk to the lives involved. This incident illustrates the difficulties in implementing rescue obligations, particularly when incidents occur near the boundaries of overlapping SRRs or in areas where jurisdiction remains contested. These legal and operational gaps within the SAR framework continue to result in preventable deaths and leave families without answers or closure.

It is further pivotal to comprehend that duty to rescue under the law of the sea is not contingent upon a State's *de jure* or *de facto* control over the individual. Jurisdiction, in this context, is not a prerequisite,

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58. Patricia Vella de Fremeaux (Mallia) and Felicity G. Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I' (3 March 2021) OpinioJuris, <<<http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i/>>>.

59. *A.S. and Others v. Italy*, 27 January 2021, UN Doc CCPR/C/130/D/3042/2017.

unlike the duties that flow from the right to life under human rights law. Reconciling these legal frameworks is therefore crucial, as it may inform and shape the interpretation and application of human rights obligations, including the duty to prevent foreseeable deaths and disappearances, to search for missing persons, to recover bodies, and to conduct effective investigations into such incidents.

### 3.1 Outsourcing SAR responsibilities and human rights implications

Beyond legal and jurisdictional complexities, SAR operations also pose a significant security and safety challenges for the crew and shipmaster, particularly when merchant vessels are called upon to assist migrants in distress. For instance, in the case of *The M/V King Jacob*, a container ship was called to respond to a distress call from a migrant vessel carrying over 800 people.<sup>60</sup> During the rescue attempt, however, the two vessels collided, resulting in the deaths of several hundred people. The inherent risks of SAR operations are further exacerbated when rescued migrants face the prospect of forced return to the country from which they fled. A stark example is *The Lady Sham* incident, whereby a cargo ship, upon rescuing 140 migrants in the Mediterranean, was instructed by Italian authorities to disembark them at the port of Misrata, Libya, where they were then taken to a detention centre.<sup>61</sup> Upon their rescue, the crew (misleadingly) told the migrants that they would be disembarked in Germany. This is believed to have been done because of fears of protests by migrants should they have realised they were being taken back to

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**60.** Julian Miglierini, 'Migrant tragedy: Anatomy of a shipwreck' (24 May 2016) BBC, available at <<<https://www.bbc.com/news/world-europe-36278529>>>.

**61.** Marion MacGregor, 'Migrants Rescued by "Lady Sham" Detained in Libya' (23 January 2019) InfoMigrants, available at <<<https://www.infomigrants.net/en/post/14678/migrants-rescued-by-lady-sham-detained-in-libya>>>.

Libya.<sup>62</sup> Notably, the actors involved in SAR operations bear high risks when conducting a large-scale rescue, as they are exacerbated by the political standoffs regarding the identification of a disembarkation port.<sup>63</sup> The incident illustrates the critical complexities of the legal framework surrounding the duty to rescue at sea, highlighting concerns about States that are increasingly outsourcing SAR responsibilities to avoid accountability for migrant deaths and disappearances as well as any subsequent investigation obligations.

Another illustration of the increased risks migrants face when crossing the sea is when European States opt for pushbacks by a proxy third actor instead of conducting SAR operations. This is arguably the case when a State endeavours to avoid any associated responsibility for migrant deaths and disappearances and diverts SAR activity to third-country authorities in an apparent effort to avoid any direct physical contact that would place the individuals under a State's jurisdiction. The case of *S.S. and Others v. Italy* (communicated)<sup>64</sup> is a paradigmatic example of this practice. It concerned an interception of a migrants' vessel carrying around 150 migrants on the high seas by the Libyan Coast Guard and

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62. In particular, domestic courts have found that actions by rescued persons amidst fear of being return back to their countries (e.g. Libya) e.g. pressuring shipmasters, were justified under the principles of self-defense. For more, see Jean-Pierre Gaudi, 'When Private Vessels Rescue Migrants and Refugees: A mapping of Legal Considerations' (British Institute of International and Comparative Law, 24 November 2020) at 13, available at <<[https://www.biiicl.org/documents/124\\_private\\_vessels\\_research.pdf](https://www.biiicl.org/documents/124_private_vessels_research.pdf)>>. Moreover, for similar incidents, see, Aphrodite Papachristodoulou, 'The Principle of Saving Lives at Sea: Just a Fool's Hope' (International Law Blog, 27 June 2019), available at <<<https://internationallaw.blog/2019/06/27/the-principle-of-saving-lives-at-sea-just-a-fools-hope/>>>>>; Aphrodite Papachristodoulou, *Protection of Human Life at Sea in International Law: Rescuing Maritime Migrants* (Routledge 2025) 72-81.

63. For instance, see Guglielmo Mangiapane, 'Italian Political Standoff Keeps Rescued Migrants Stranded at Sea' (Reuters, 19 December 2019), available at <<[>>">https://www.euronews.com/2019/08/16/italian-political-standoff-keeps-rescued-migrants-stranded-at-sea](https://www.euronews.com/2019/08/16/italian-political-standoff-keeps-rescued-migrants-stranded-at-sea)>>.

64. App no 21660/18 (ECtHR, communicated on 26 June 2019).

Navy (LCGN); the migrants' vessel had begun to capsize soon after its embarkment from Tripoli.<sup>65</sup> The first distress call was received by the Italian Maritime Rescue Coordination Centre (MRCC), which thereafter communicated to all ships "transiting in the area" to assist the vessel.<sup>66</sup> Various actors were in close proximity to the vessel (Operation *Sophia*, Operation *Mare Sicuro*, a French warship, and an Italian navy helicopter) at the time of the distress call, and an hour later, the NGO Sea Watch 3 (SW3) and the LCGN arrived at the scene.<sup>67</sup> The NGO assumed on-scene coordination after the LCGN objected (and did not have the necessary equipment to carry out the rescue). The applicants maintained that before the NGO had arrived at the scene, the LCGN authorities physically abused them, threw objects at them, and tried to prevent the SW3 from reaching the scene.<sup>68</sup> Without going into extensive detail of the contested orders, it appears to be the case that a communication was made by the Italian authorities to the LCGN to take charge of the rescue, which the LCGN later accepted. In the end, some of the individuals managed to get rescued by the SW3; some, including a child, drowned amidst the unravelling of this chaotic situation, and some were taken by the LCGN back to a camp in Libya where they were reportedly abused for a month.<sup>69</sup>

The case was brought before the ECtHR in 2018 by an application made by the Global Legal Action Network (GLAN) against Italy alleging violations of Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 4 of Protocol 4 (pro-

65. Ibid., 388.

66. Papastavridis (n 13) 417.

67. Violeta Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model" (2020) 21(3) *German Law Journal* 389.

68. Ibid.

69. Ibid., 390.

hibition of collective expulsions) of the ECHR. Importantly, by taking into account human rights law, the law of the sea, and refugee law, the counsels argued that Italy, by way of exercising its jurisdiction – operating through the MRCC – has the obligation *not* to transfer coordination of the rescue to the authority of another State “unless they are satisfied that the other State will ensure rescue, treatment and disembarkation in full respect of the obligation not to expose a person to a risk of serious violation of human rights”.<sup>70</sup> This case clearly manifests an example of State practice that contributes to migrant deaths and enforced disappearances and prevents accountability mechanisms from addressing these violations. However, as this is a pending case, it is difficult to predict with confidence how the ECtHR will address some of the most complex challenges before it, which are novel in many ways and have never been challenged before.

#### **4. The right to life under international human rights law**

The ECHR and other international human rights treaties impose both substantive and procedural obligations on States to ensure the protection of the right to life for everyone under their jurisdiction through exercising best efforts. On the one hand, international institutions have sought to interpret positive obligations arising under the right to life in a manner that broadens the scope of application of the right. On the other hand, States appear to adopt a differential treatment in securing the right to life according to the *group* of people they are called upon to save. For instance, Thomas Spijkerboer has rightly observed that “states

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70. Ibid., 8.

have assumed far-reaching positive obligations to protect the right to life for regular travellers, but recognize only limited obligations vis-à-vis irregularized travellers”.<sup>71</sup>

#### 4.1 Duty to conduct effective investigations

The obligation to conduct an effective investigation upon reasonable allegations that harm has materialised or into suspicious deaths, also referred to as the procedural limb of Article 2, has been emphasised by the ECtHR in the seminal case of *Varnava and Others v. Turkey* with reference to the failure of the authorities to investigate the disappearance of nine men in Cyprus in 1974. *In casu*, the ECtHR established that enforced disappearances represent a continuing violation of human rights, persisting until the fate of the disappeared person is determined.<sup>72</sup> Although the *Varnava* case occurred during armed conflict, this arguably applies to disappearances at sea, where States fail to conduct effective investigations into maritime tragedies or conceal the fate of victims. Specifically, the Court *in casu* made the following declaration:

A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred [...] This situation is very often drawn out over time, prolonging the torment of the victim’s relatives [...] the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite

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71. Thomas Spijkerboer, ‘Wasted Lives: Borders and the Right to Life of People Crossing Them’ (2017) 20 *Nordic Journal of International Law*.

72. *Varnava* case at para 194.



investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed.<sup>73</sup>

This statement gave a necessary clarification previously missing from the ECtHR jurisprudence. While enforced disappearances on land have been recognised as ongoing violations, disappearances at sea remain legally ambiguous due to national laws on search operations that might be inconsistent with international standards or apply incompletely at sea. For instance, the *modus operandi* of the Hellenic Coastguard when searching for missing and deceased persons at sea is defined by internal orders, which are classified as confidential and not publicly accessible, thereby limiting external scrutiny of their actions.<sup>74</sup> More specifically, a three-day period is designated for the search for missing persons at sea following a shipwreck, in accordance with standard operational procedures. However, this timeframe has proven problematic, as numerous bodies have been discovered well beyond this limited window. Such an arbitrary cut-off risks undermining the effectiveness of search efforts and perpetuates a situation where those lost at sea are never found or identified, disregarding the right of families to know the fate of missing migrants. On the contrary, the SAR Convention assigns responsibility to the rescue coordination centre or sub-centre responsible to decide as to when to discontinue SAR operations.<sup>75</sup> Therefore, while a fixed duration for search efforts (e.g., the three-day period in Greece) is not explicitly stated in the maritime SAR Convention, the general principle is that search efforts should continue as long as there is a reasonable chance of

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73. Ibid., para 148.

74. Vassilis Kerasiotis and Maria Spiliotakara, 'Missing and Dead Migrants at Sea: The Legal framework in Greece' (September 2016), Missing Migrants Project, IOM, 5, available at <<<https://missingmigrants.iom.int/sites/g/files/tmzbdl601/files/publication/file/Mediterranean-Missing-Greek-legal-memo.pdf>>>.

75. SAR Convention, 4.8.2.

finding survivors.<sup>76</sup>

The connection between the lack of effective investigation and a violation of the right to life is consistent with the legal prohibition on arbitrary killing, as the latter will be rendered vain if there is no procedure for reviewing the lawfulness of the use of force by the State and its agents.<sup>77</sup> Moreover, another significant development emphasising the scope of the obligation to undertake an effective investigation is the *Khavara and Others v. Italy and Albania* case,<sup>78</sup> brought in the context of migrant interceptions at sea. *In casu*, fifty-eight migrants drowned due to their vessel being struck by an Italian navy vessel. The ECtHR held that the Italian authorities were under an obligation pursuant to Article 2 of the ECHR to instigate an effective investigation into the deaths of the victims, underlining the procedural duty to investigate deaths resulting from State actions. The established ECtHR's case law consistently confirms that a State has an obligation to investigate its own omissions. The procedural obligation arises when harm occurs – whether due to a natural disaster, an accident, or harm inflicted by a non-state actor, either intentionally or unintentionally – if the State's failure to act could have arguably prevented the harm.<sup>79</sup> This principle was applied in *Ribcheva and Others v. Bulgaria*,<sup>80</sup> where a police officer was killed during

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76. See also IMO Guidelines for the Development of Plans and Procedures for the Recovery of Persons from the Water (MSC.1/Circ.1447).

77. Fionnuala Ní Aoláin, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life' (2001) 19(1) *Netherlands Quarterly Human Rights* 33; The HRC confirmed this as well in *Amirov v. Russian Federation*, Communication No 1447/2006, 2 April 2009, UN Doc CCPR/C/95/D/1447/2006.

78. *Khavara and Others v. Italy and Albania*, Application No. 39473/ 98 (ECtHR, 11 January 2001).

79. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP 2023) 134.

80. *Ribcheva and Others v. Bulgaria*, Application Nos. 37801/16, 39549/16, 40658/16 (ECtHR, 30 June 2021).

an operation against a dangerous individual. The ECtHR ruled that the procedural limb of Article 2 is engaged when lives are lost in circumstances that may implicate State responsibility due to alleged negligence in fulfilling its positive obligations.<sup>81</sup> In such cases, the State is arguably required to investigate its own omissions if they have “directly contributed” to causing the death.

Analogously, the Greek Ombudsman’s recent report on the *Pylos* shipwreck exemplifies the critical need for effective investigations behind negligent actions. The report identified significant omissions in the Hellenic Coast Guard’s SAR operations, suggesting that eight senior officers may have neglected their duties, thereby endangering the lives of migrants aboard the vessel.<sup>82</sup> The findings highlight the procedural duty of States to investigate unlawful or suspicious deaths within their jurisdiction, including those occurring at sea. In particular, the Ombudsman’s investigation was initiated after the Hellenic Coastguard declined to conduct an internal inquiry, underscoring the necessity for independent oversight in such cases. It follows, then, that there is a duty to investigate migrant deaths both in the course of coastguard operations and in the course of smuggling operations.<sup>83</sup>

The above argument aligns with the ECtHR’s stance in *Cyprus v. Turkey*,<sup>84</sup> which established that States have a positive obligation to investigate suspicious deaths, particularly when authorities “had known or

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81. Ibid., para 129.

82. The Greek Ombudsman, The Ombudsman’s Report on the Pylos Shipwreck, available at <<<https://www.synigoros.gr/en/category/default/post/press-release-or-the-ombudsman's-report-on-the-pylos-shipwreck>>>.

83. Stefanie Grant, ‘Dead and Missing Migrants: The Obligations of European States under International Human Rights Law’ (2016), Missing Migrants Project, IOM, available at <<<https://missingmigrants.iom.int/sites/g/files/tmzbd1601/files/publication/file/Mediterranean-Missing-Legal-Memo-290816.pdf>>>.

84. *Cyprus v. Turkey*, App no 25781/94 (ECtHR, 10 May 2001).

ought to have known” of a threat to life.<sup>85</sup> This judgement provides an important precedent for cases of migrant fatalities at sea, reinforcing that States must not only fulfil their duty to render assistance to those in distress at sea, but also investigate when deaths or disappearances result from *knowledge* of a reasonably foreseeable outcome that the authorities could have prevented. Thus, the failure of States to provide timely assistance or instigate an investigation on migrant deaths at sea might constitute a violation of both their obligations under the law of the sea and the right to life under international human rights law.<sup>86</sup>

The obligation to conduct an effective investigation pursuant to Article 2 is further reinforced by the specific obligations set forth in a number of international and regional instruments, including, in particular, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, insofar as States Parties are concerned.<sup>87</sup> In this regard, the ECtHR has accepted that not every investigation will necessarily be *successful*, “however, it should in principle be capable of leading to the establishment of the facts of the case”.<sup>88</sup>

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**85.** The positive obligation was later also confirmed in *Eshenov v. Uzbekistan*, CCPR, Comm. No. 1225/2003 (2010).

**86.** HRC, *CCPR General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, adopted 29 March 2004, CCPR/C/21/Rev.1/Add.13, para 80.

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

**88.** *Aslakhanova and Others v. Russia*, Application Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECtHR 29 April 2013) para 144.

## 4.2 Duty to provide arrangements to secure legal accountability

Procedural obligations are central to ensuring that States meet their duty to protect the right to life, especially in cases where State agents may be involved. The ECtHR has established in its case law that there is a duty to provide arrangements to secure legal accountability for those responsible for a violation of the right to life. This was exemplified in *Kaya v. Turkey*,<sup>89</sup> where the Court found a violation of Article 2 on the basis of an ineffective investigation into the death of the applicant's brother following the exercise of lethal force. In holding so, it highlighted the positive nature of the obligations arising under the provision by prescribing that States need to ensure accountability for deaths occurring under the responsibility of a State's agents for acts they did or did not do. Simplified, a lack of accountability for the circumstances of the death will arguably constitute a violation of Article 2 under the ECHR.<sup>90</sup>

In addition to this, both *Cyprus v. Turkey* and *Varnava* cases represent continuing procedural violations of Article 2 due to Turkey's subsequent failure to account for the whereabouts and fate of the missing persons, giving rise to a continuing situation. Certainly, non-compliance with this duty undermines both human rights and the rule of law in Europe. Arguably, the procedural obligation will persist as long as the fate of the missing persons remains unaccounted for, even where death is presumed. This aligns with the ECtHR's view that the failure to clarify the fate of missing persons constitutes an ongoing violation of the right to life under Article 2. This is highly relevant in the context of migrant deaths and missing

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89. *Kaya v. Turkey*, Application No. 22729/93 (ECtHR, 19 February 1998).

90. See, also, Christof Heyns and Thomas Probert, 'Securing the Right to Life: A cornerstone of the human rights system' (11 May 2016) *EJIL: Talk!*, available at <<<https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/>>>.

at sea, as the failure to investigate or respond to distress information can prolong the violation of the right to life, leaving families in uncertainty.

In the *Varnava* case, the ECtHR emphasised that the duty incumbent on States includes “... determining the facts surrounding the deaths of the missing persons who have been identified or in collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution”.<sup>91</sup> In terms of accountability, the ECtHR has clarified that the primary purpose of an investigation is to ensure responsibility for any ill-treatment occurring under the State authorities’ control. This entails that the investigation must not only establish the relevant facts but also identify and prosecute those responsible.<sup>92</sup> Consequently, only an official criminal investigation is regarded as fulfilling the procedural obligation in cases of harm caused by State agents.<sup>93</sup>

To contextualise the discussion, it is essential to look again at the *A.S.* case. In particular, the individual Opinion of the HRC Member Gention Zyberi highlighted that, in cases of failed SAR operations that result in lives lost, the State has a procedural obligation under Article 6 of the ICCPR to start *ex officio* a prompt and effective investigation into allegations to find out what happened and, where necessary, hold those responsible to account. *Ergo*, a State’s obligation to conduct an effective investigation, including the recovery of bodies, identification of the deceased, and determination of the cause of death, does not end at its borders. States must take all necessary and available steps as soon as they become aware of such incidents, and this duty is not contingent upon a formal complaint by the victims’ relatives. As a result, States should secure relevant evidence, including from other States, an obligation that is particularly relevant in the context of migrant deaths, the vast ma-

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91. *Varnava* case, para 192.

92. *Labita v. Italy*, Application No. 26772/95 (ECtHR, 6 April 2000) para 131.

93. *Stoyanova* (n 79) 131.

jority of which have transboundary implications.<sup>94</sup> It should be noted that although the primary responsibility for investigating a death lies with the State where the victim has died or the body has been found, all States Parties to the *European Convention on Mutual Assistance in Criminal Matters* are under a corollary obligation to render assistance to the investigating State where a legal request has been sought by that State, not least when evidence is located within its jurisdiction.<sup>95</sup> Given the transnational nature of migrant sea journeys, this cooperative framework ensures that States fulfil their procedural obligations to investigate deaths, uncover the circumstances surrounding them, and hold those responsible accountable, even when evidence spans multiple jurisdictions.

#### 4.3 Duty to prevent a violation of the right to life

Continuing, the HRC in *A.S.* reaffirmed that the right to life imposes positive obligations on States to protect life from *all reasonably foreseeable* threats; such due diligence requirement involves taking “reasonable, positive measures that do not impose disproportionate burdens on State parties in response to reasonably foreseeable threats to life”.<sup>96</sup> The same rationale can be traced in the ECtHR’s jurisprudence, providing that the right to life prescribes a duty to prevent a violation from occurring, encompassing a due diligence standard in international human rights law, in circumstances where it is foreseeable or known that life is exposed to danger.<sup>97</sup> Stoyanova in this regard posits that the more foreseeable the risk to life, the more reasonable it is to anticipate the State to take

94. *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (ECtHR, 10 May 2010) at 241.

95. *Ibid.*, 245.

96. *A.S.* case (against Italy) (n 59) 8.3.

97. For example, see *Opuz v. Turkey*, App no 33401/02 (ECtHR, 9 June 2009) para 144. For further discussion see Maria Monnheim, *Due Diligence Obligations in International Human Rights Law* (CUP 2021).

measures to prevent the loss of life.<sup>98</sup> Certainly, as foreseen, the European Union and its Member States have adopted policies which, to a certain *foreseeable* extent, negatively affect the lives of individuals who are trying to cross borders. It is in this context that positive obligations to protect the right to life might be triggered, encompassing not only substantive obligations, but also procedural obligations, including the duty to search for missing persons and to investigate deaths.

Consequently, the HRC, *in casu*, reasoned that “the individuals on the vessel in distress were *directly affected* by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable”.<sup>99</sup> This was even though Malta had formally assumed primary responsibility for coordinating the rescue operation, as the vessel was in its SAR zone. The existence of multiple duty-bearers does not preclude a finding that more than one State exercised concurrent jurisdiction (shared responsibility) over the same individuals and the same situation,<sup>100</sup> if their acts or omissions impact the lives of individuals in a direct and reasonably foreseeable manner.

Emphatically it can be concluded that where migrant deaths and missing are closely linked to harm resulting from negligent omissions by the State, this will also trigger the procedural obligation under the right to life. The above reasoning is echoed in the recent ECtHR seminal decision of *Safi and Others v. Greece*,<sup>101</sup> also known as the *Farmakonisi*

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98. Vladislava Stoyanova, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’ (2020) 21(3) German Law Journal 448.

99. *A.S. case (against Italy)* (n 59) 8.5; *A.S. and Others v. Malta*, 27 January 2021, UN Doc CCPR/C/128/D/30423/2017 (*A.S. case (against Malta)* 6.7. Emphasis added.

100. This follows the ECtHR’s jurisprudence in the context of asylum e.g. in the *M.S.S. v. Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011), where both respondent States were found internationally responsible for the treatment of the applicant, an asylum-seeker returned from Belgium to Greece.

101. Application No. 5418/15 (ECtHR, 7 July 2022).



*shipwreck* case. The Court in this case tackled for the first time the right to life in SAR operations in the Aegean Sea and unanimously found a violation of both the procedural and the substantive limbs of Article 2 of the ECHR by virtue of the Hellenic Coastguard's actions. The former limb was violated by the failure of the Greek authorities to carry out an exhaustive and effective investigation into the sinking of the vessel, namely the initiation of criminal proceedings against coastguard personnel, whilst the latter was violated on account of the failure of Greece to take all reasonably expected measures to adequately respond to the risk to the applicants' lives.<sup>102</sup>

The sinking in question occurred as a result of two high-speed towing attempts (to push back the migrants' boat), which led to water entering the vessel, causing it to capsize and resulting in the deaths of 11 out of the 27 migrants on board. Several upshots of the case are important to fathom from the judgement. The ECtHR stressed the absence of meaningful accountability and the lack of transparency in judicial enquiries that highlighted systemic deficiencies in addressing violations of the right to life by Greece. It noted that the authorities "did not take, within the framework of their powers, the measures that could be considered, reasonably, capable of preventing the danger".<sup>103</sup> Apart from this case, the lack of case law at the European level dealing specifically with death and disappearances during migration proves to be an obstacle for families who wish to take cases to the ECtHR, as they must identify the State responsible for the violation as well as surmount

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**102.** For analysis, see also Mariana Gkliati, Danai Angeli, Elizabeth Mabropoulou and Niovi Vavoula, 'Greece Boat Disaster: Questions of International Law' (5 August 2023) *OpinioJuris*, <<<http://opiniojuris.org/2023/08/05/greece-boat-disaster-questions-of-international-law/>>>.

**103.** Ekathimerini, 'Ombudsman finds "reprehensible omissions" in coast guard's handling of Pylos shipwreck' (03 February 2025), available at <<<https://www.ekathimerini.com/news/1260535/ombudsman-finds-reprehensible-omissions-in-coast-guards-handling-of-pylos-shipwreck/>>>.

practical and legal obstacles which include distance, cost and often their own irregular status.

Lastly, in *Safi*, the ECtHR reinforced the principle that time is of the essence in cases where drowning is reasonably foreseeable, and placed importance on the considerable delays of rescue efforts, in particular, over an hour after the boat had completely sunk, a practice that has become the norm in the Mediterranean.<sup>104</sup> More recently, the EU Fundamental Rights Agency has reported systematic delays and non-assistance practices in the Central Mediterranean. For example, Malta has been accused of postponing rescue efforts for over 38 hours in one instance, demonstrating the persistent failures in the implementation of SAR obligations and associated human rights responsibilities.<sup>105</sup>

Furthermore, the case of *Öneryıldız v. Turkey* establishes that a State's failure to prevent and investigate deaths, despite being aware of life-threatening risks, constitutes a violation of Article 2 of the ECHR. A clear parallel can be drawn between this precedent and deaths or disappearances occurring during perilous sea crossings, where a documented history of shipwrecks demonstrates that States are aware of the risks in migration routes in the Mediterranean Sea yet often fail to take adequate preventative action or investigate loss of life. The Italian Mare Nostrum mission was one example of preventive action by the State, which had as its core mandate the rescue of migrants travelling on vessels in distress in the Central Mediterranean between Italy and North Africa. The humanitarian operation lasted only one year, even though it was estimated to have saved at least 130,000 people during its operation. Indeed, the

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**104.** Hannah Katz and Itamar Mann, 'From Farmakonisi to Pylos at the ECtHR' (12 July 2023) *EJIL: Talk!*, available at <<<https://www.ejiltalk.org/from-farmakonisi-to-pylos-at-the-ecthr/>>>.

**105.** European Union Agency for Fundamental Rights, 'Fundamental Rights Report–2024', available at <<[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2024-fundamental-rights-report-2024\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2024-fundamental-rights-report-2024_en.pdf)>>.

mission has been applauded from many quarters, including the IOM,<sup>106</sup> but at the European level, it remained controversial and, for this reason, short-lived.

Substantiating the above line of argumentation, scholars like Spijkerboer have rightly posited that border controls are among the contributing factors that cause fatalities at sea, but other factors might play a leading role, such as adverse weather conditions, as was seen in the Crotone incident in 2023.<sup>107</sup> In particular, *in casu*, bad weather and sea conditions caused large quantities of water to flood the overcrowded migrants' boat that became in distress and in need of assistance.<sup>108</sup> Despite clear indications of peril from surveillance technology, Italian authorities failed to launch a timely SAR operation, exacerbating the disaster that led to the death of 79 lives, including 33 minors, with approximately 20 migrants still missing. Given the history of casualties taking place across the semi-enclosed area of the Mediterranean Sea, coupled with pre-existing knowledge of the Mediterranean migration routes, States are reasonably expected to apprehend that such information manifested a certain *risk* to the life of migrants that was foreseeable. Respectively, the obligation to protect the right to life in international human rights law encompasses a duty to *prevent* loss of life according to a due diligence standard. Relatedly, the ECtHR in the *Osman* case identified a "reason-

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**106.** International Organization for Migration, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (IOM 2014), available at <<<https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor>>>.

**107.** I have analysed this incident earlier in a blogpost, see, Aphrodite Papachristodoulou, 'The Crotone Migrant Shipwreck: A Cat-and-Mouse Blame Game and the Role of Technologies at External Borders' (12 April 2023) *EJIL:Talk!*, available at <<<https://www.ejiltalk.org/the-crotone-migrant-shipwreck-a-cat-and-mouse-blame-game-and-the-role-of-technologies-at-external-borders/>>>.

**108.** Aphrodite Papachristodoulou, 'Shipwreck after Shipwreck: Frontex Emergency Signals and the Integration of AI systems' (11 March 2024) *Verfassungsblog*, available at <<<https://verfassungsblog.de/shipwreck-after-shipwreck/>>>.

able knowledge” condition which provided that the preventive positive obligation arises if the State’s authorities knew or should have known of a *real and immediate risk* to the life of an identified individual(s).<sup>109</sup>

To be clear, the duty to prevent loss of life is not an absolute one, as there are boundaries in delimiting the preventive measures a State would need to take, even though these are not clear-cut in the ECtHR’s jurisprudence. In the *A.S.* case, the HRC highlighted that failing to respond in a due diligent manner to distress situations will amount to an exercise of human rights jurisdiction by the State. *In casu*, the issue was not whether the shipwreck occurred within the State party’s territory; it *clearly* did not. The subject matter to decide was whether the alleged violations of the right to life could be considered to have been *within the power or effective control* of the State, even though it took place outside its territory.<sup>110</sup> In this regard, the HRC grasped the opportunity to adopt its views enshrined in its latest *General Comment No. 36* on the right to life, where it observed that a State has an obligation to protect and ensure the right to life for all persons over whom it exercises power or effective control and “[t]his includes persons *located outside any territory* effectively controlled by the State, whose right to life is nonetheless *impacted by its military or other activities* in a *direct and reasonably foreseeable manner*”.<sup>111</sup> Fundamentally, the ECtHR, in *Güzelyurtlu and Others v. Cyprus and Turkey*, affirmed that the obligation to investigate has “evolved into a separate and autonomous obligation” and “[i]n this sense it can be

**109.** *Osman* (n 41) paras 116–117.

**110.** *A.S.* case (against Italy) (n 59) 7.7.

**111.** HRC, *CCPR General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, adopted 30 October 2018, CCPR/C/GC/36, para 63 (emphasis added); See also Paolo Busco, ‘Not all that Glitters Is Gold: the Human Rights Committee’s Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations’ (2 March 2021) *OpinioJuris*, <<<https://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/>>>.

considered to be a detachable obligation arising out of Article 2 [of the ECHR] and capable of binding the State even when the death occurred outside its jurisdiction”.<sup>112</sup>

A crucial final remark is in order. A striking paradox can further be observed in the phenomenon of migration by sea and its ‘inherent’ invisibility. While, as underscored in the introduction of this paper, migrants who go missing in the Mediterranean often remain invisible, this anonymity (presence) is, in fact, highly visible to the authorities. European States and agencies, including Frontex, have long used advanced surveillance technologies to monitor and control mobility from the moment an individual attempts to leave their country to ‘prevent’ irregular arrivals.<sup>113</sup> However, rather than being utilised primarily as a means of preventing perilous journeys and mitigating loss of life, these technological advancements are largely deployed to reinforce the border securitisation paradigm.<sup>114</sup> This contradiction underscores a fundamental failure in the implementation of international legal obligations: while States possess real-time spatial knowledge of migration routes, they routinely neglect their duty to prevent foreseeable harm and ensure prompt rescue operations. As such, migrants at sea are deliberately subjected to enforced disappearance through various mechanisms employed by the EU and its member States to endanger them and prevent their arrival.

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**112.** *Güzelyurtlu and Others v. Cyprus and Turkey*, Application No. 36925/07, (ECtHR, 29 January 2019) at para 189.

**113.** Aphrodite Papachristodoulou, ‘The Exercise of State Power Over Migrants at Sea Through Technologies of Remote Control: Reconceptualizing Human Rights Jurisdiction’ (2024) 73(4) *International & Comparative Law Quarterly* 945-947.

**114.** See Francesca Romano Partipilo, ‘Getting rescued by RoboCop? Legal and ethical challenges of the use of extended reality in Frontex’s search and rescue operations at sea’, and Giorgia Bevilacqua, ‘Managing migration in the Mediterranean Sea: From mythology to remote surveillance, the compatibility of the Italian strategy with international law of the sea’, in Pierandrea Leucci and Ilaria Vianello, *ASCOMARE Yearbook on the Law of the Sea. Volume 3—Maritime Security, New Technology and Ethics* (Luglio Editore 2024).

The centrality of surveillance technologies to contemporary border governance cannot be overstated. By generating spatial knowledge, these systems afford States significant power to control remotely the passage and entry of irregular migrants, effectively transforming maritime spaces into sites of selective intervention. This is important to comprehend, as the increased visibility of migration routes and the timely knowledge of potential distress situations afford States the power to strategically affect an outcome or course of events.<sup>115</sup> The exercise of such power, together with the foreseeability of the risk to life, is capable of triggering both substantive obligations to safeguard the right to life and procedural obligations to search for missing migrants, recover bodies, and instigate an investigation into deaths. Arguably, such a human-rights-based approach is justified by the need to redress the situation of migrants' vulnerability at sea.<sup>116</sup>

## 5. Conclusion

There are myriad situations in which a State is factually perfectly capable of violating the rights of individuals without directly controlling the actual area or persons, as traditionally interpreted by the ECtHR. The challenges posed by jurisdictional limitations on the high seas, alongside the absence of effective enforcement mechanisms and clear legal interpretations, exacerbate the plight of those lost or stranded. Apart from the case of *Safi*, the absence of case law at the European level specifi-

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115. Ibid., 937.

116. On 14 March 2023, the UHCHR published its training guide No. 26 'Towards a Human Rights-Based Approach to Migration' available at <<<https://www.ohchr.org/sites/default/files/documents/publications/Towards-Human-Rights-Based-Approach-Migration-Training-Guide.pdf>>>.

cally addressing death and disappearances during migration highlights a significant gap in the protection of fundamental rights. International obligations to prevent, search for, and investigate migrant deaths and missing persons in the Mediterranean, along with providing information about their whereabouts to their families, remain one of the most current and complex topics. The case of the *Pyllos* shipwreck serves as a stark reminder of the failures in ensuring timely assistance and accountability and underscores the need for a more robust, comprehensive international framework to safeguard the rights of migrants at sea. Undoubtedly, strengthening the integration of human rights obligations within the SAR framework is essential for minimising the loss of life and ensuring greater accountability for migrant fatalities at sea.