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**Missing Migrants: Legal Obligations and Psychosocial
Implications for Families**

A Thesis Submitted in Partial Fulfilment of the Requirements of
Bournemouth University for the Award of Degree of

Doctor of Philosophy

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Abstract

Missing Migrants: Legal Obligations and Psychosocial Implications for Families

This thesis is an analysis of the responses and obligations of states towards missing migrants and their surviving families from a legal, policy and psychosocial perspective in the context of the Europe migrant crisis. Governed by the UK migration policies in relation to missing migrants and employing multi-theoretical premises drawn from the jurisprudence of the New Haven School of International Law and the works of Giorgio Agamben, Hannah Arendt and Pauline Boss, five principal lines of inquiry are pursued in the study: (a) what the appropriate legal and policy responses of states to missing migrants should be; (b) why migrants die and go missing in migration; (c) what obligations states have towards missing migrants and their families; (d) how transnationally effective the UK migration policies in relation to missing migrants are; and (e) how psychosocially responsible the UK migration policies in relation to missing migrants are. Utilising a combination of two methodologies—the New Haven School Jurisprudence and Thematic Analysis of Secondary Narrative Interviews, the study finds *inter alia* that the legal and policy responses of states to missing migrants are inadequate and not effective enough such as to achieve the international community's goal of securing a *safe, orderly and regular* migration world based on human dignity. The study also finds that existing EU and UK migration policy frameworks were not specifically designed with missing migrants and needs of their families in mind.

The study's main contribution rests on three central arguments. Firstly, states play a crucially dominant role in the dialectic relationship between them and migrants and their families and as such, they have the primary responsibility to account for missing migrants and respect the rights and needs of their families. Secondly, since states play the most dominant role, they are under a higher order obligation under international law to *protect, fulfil and respect* migrants' values of human dignity and right to have rights. Thirdly, states can demonstrate that they accept their obligations to missing migrants, and are politically willing to implement them, by making their national migration policies more transnationally effective and psychosocially responsible. In developing these arguments, the study makes original and significant contributions to knowledge in a number of ways. Firstly, the study contributes to existing knowledge by considering what the legal and policy responses of states to missing migrants have been at the international, regional and national levels, and what normative claims for the legitimacy of current and future decision trends would be required. Secondly, this study contributes to literature by including theory grounded evidence to explain the phenomenon of migrant deaths at sea and borders and the failure of state responsibility towards migrants. Thirdly, the study makes practical contribution to knowledge by drawing up a responsibility-based argument that theorises how responsibility may be allocated to multiple states in practice. Fourthly, this study bridges a UK specific knowledge gap as to the *transnational effectiveness* and *psychosocial responsibility* of the UK national migration policies in relation to missing migrants.

TABLE OF CONTENTS

Title Page	i
Copyright	ii
Abstract	iii
Table of Contents	iv
List of Tables and Figures	ix
Acknowledgement	x
Declaration	xi
Declaration as to Publications and Presentations	xii
Dedication	xiii
List of Abbreviations and Acronyms	xiv

Chapter 1: Introduction and Overview of the Research 1

1.1	Introduction and Background.....	1
1.2	Research Context and Perspectives.....	6
1.3	Broader Policy Relevance of the Inquiry for the UK.....	13
1.4	Research Questions	16
1.5	Scope and Focus of the Study	17
	1.5.1 Subject Matter and Geography.....	17
	1.5.2 The Legal and Policy Frameworks.....	18
	1.5.3 Actors.....	18
1.6	Conceptual Clarifications of the Key Terms Used	19
	1.6.1 Migrants and Refugees	19
	1.6.2 Family	21
1.7	Research Contributions.....	22
1.8	The Structure of the Thesis	24

Chapter 2: Theoretical Framework and Methodology 27

2.1	Introduction	27
2.2	Theoretical Premises: New Haven School, Agamben, Arendt and Boss	27
2.3	Beyond Concept Mapping of the Multi-Theories: Further Philosophical Rationale for the Multi-Theoretical Framework.....	33
2.4	Research Methodology and Approach.....	34
	2.4.1 The New Haven School Policy-Oriented Methodology	34
	2.4.2 Thematic Analysis of Secondary Narrative Interviews Data with Families of Missing Migrants	36
	2.4.3 Ethical Issues	40
2.5	Conclusion	41

Chapter 3: Responsibility for a Growing Crisis: Settling Initial Fundamental Questions of Responsibility in Relation to Missing Migrants42

3.1	Introduction	42
3.2	<i>Who</i> Are the Responsible Agents?.....	44
3.3	Responsible for <i>What</i> ?.....	53
3.4	Responsible to <i>Whom</i> ?	54
3.5	Responsible for <i>Actions and Events</i> in ' <i>Where</i> '?	56
3.6	Conclusion	58

Chapter 4: Review of the Relevant Literature on Missing Migrants59

4.1	Introduction	59
4.2	The Legal and Policy Responses of States to Missing Migrants	61
4.2.1	<i>Humanitarianism</i> Response.....	61
4.2.2	<i>Securitisation</i> Response	62
4.2.3	<i>Externalisation</i> Response.....	63
4.2.4	<i>Solidarity</i> Response	64
4.3	Why Migrants Die and Go Missing in Transnational Migration	65
4.3.1	<i>Humanitarian-Oriented</i> Narrative	65
4.3.2	<i>Deterrence-Oriented</i> Narrative	67
4.4	The Obligations of States Towards Missing Migrants	67
4.5	Transnational Effectiveness of State Migration Policies in Relation to Missing Migrants	69
4.6	The Psychosocial Implications of Migrants Going Missing for their Families through the Lens of Loss, Mourning, Grief and Bereavement	69
4.6.1	Psychosocial Research on Grief and Mourning from the Early 20 th Century Beginnings: <i>Freud on Mourning and Melancholia</i>	70
4.6.2	Psychosocial Research on Grief and Mourning in the <i>Inter-War Period</i>	72
4.6.3	Psychosocial Research on Mourning and Grief in the <i>Post-War Period</i>	73
4.6.4	A New Dawn of Contemporary Ambiguous Loss Research on People Missing in Transnational Migration: <i>Pauline Boss and Beyond</i>	77
4.7	Summary of the Review and Spotting the Knowledge Gaps.....	81

Chapter 5: The Legal and Policy Frameworks and Responses of States to Missing Migrants: A New Haven School Policy-Oriented Perspective83

5.1	Introduction	83
5.2	Delimitation of the Transnational Problem of Missing Migrants that the Law Seeks to Address	86
5.2.1	The <i>Practical Problem</i>	86
5.2.2	The <i>Legal Problem</i>	89
5.2.3	The <i>Policy Problem</i>	90
5.3	Clarification and Specification of Goals	92
5.4	Conflicting Claims, Claimants and their Bases of Power	94

5.4.1	States and Their Value Claims Against Migrants and Their Families	95
5.4.2	Migrants and Their Families and Their Value Claims Against the State	96
5.4.3	States' Value Claims <i>Inter-se</i>	99
5.5	Past Trends in Decisions and their Conditioning Factors	102
5.5.1	International Legal Responses and Decisions at UN Level	103
5.5.2	Specific International Legal Responses and Decisions Through Soft Laws	113
5.5.3	Regional Legal and Policy Responses and Decisions at EU Level	117
5.6	Forecasting Future Trends in Decisions in the Light of Changed and Changing Conditioning Factors	125
5.7	Appraisal, New Alternatives and Recommendation of Solutions	126
5.7.1	Appraisal	126
5.7.2	New Alternatives and Recommendation of solutions	127
5.8	Conclusion	128

Chapter 6: Why Migrants Die and Go Missing in Transnational Migration: Agamben, State Responsibility and the *Bare Life* of Migrants

6.1	Introduction	129
6.2	The Biopolitics of Irregular Migration and Everyday Struggles of Migrants at Sea and Borders: What Does Agamben Tell Us?.....	130
6.2.1	The <i>Bare Life</i> of Migrants.....	133
6.2.2	Migrants in the <i>State of Exception</i> and <i>Spaces of Exception</i>	138
6.2.3	States, Migrants and <i>Forms of Resistance</i> in the State of Exception.....	141
6.3	The Biopolitical Control and Governance of the Migrant Dead	143
6.4	The Theory of 'Right to Have Rights': Hannah Arendt's Critical Response to the Biopolitical Human Condition and Everyday Struggles of Migrants	145
6.5	Conclusion	147

Chapter 7: The Specific Obligations of States Towards Missing Migrants and Their Families

7.1	Introduction	149
7.2	Identifying and Examining the Specific Obligations of States	149
7.3	Implementing and Operationalising the Obligations in Practice: How Should We Share, Allocate and Distribute Responsibilities to States.....	154
7.4	The Shared Responsibilities of States.....	156
7.4.1	Forward-Looking Responsibility Attribution Approach.....	158
7.4.2	Backward-Looking Responsibility Attribution Approach.....	159
7.4.3	Outcome Responsibility Attribution Approach.....	162
7.4.4	The Conditions for Attributing Outcome Responsibility.....	165
7.5	Conclusion.....	169

Chapter 8: Transnational Effectiveness of the UK Migration Policies in Relation to Missing Migrants: A Transnational Law Perspective170

8.1	Introduction	170
8.2	Transnational Law and the Transnational Problem of Missing Migrants	171
8.3	What Do We Mean by a Transnationally Effective National Migration Policy? Towards a Theory of Transnational Effectiveness	173
8.4	The UK National Migration Policy in Relation to Missing Migrants and the Question of its Transnational Effectiveness: What We Know So Far	177
8.5	So, Why National Migration Policies with Transnational Effects?	181
8.5.1	Transnational Nature of Migration	181
8.5.2	Extraterritorial Jurisdiction and Effects of the Positive Human Rights Obligations of States	183
8.5.3	Externalisation of Migration Policies and Border Controls	184
8.6	Conclusion	186

Chapter 9: ‘Those that Never Arrived’—How Psychosocially Responsible are the UK Migration Policies in Relation to Missing Migrants and their Families?188

9.1	Introduction	188
9.2	Thematic Analysis of the Secondary Narrative Interviews	189
9.3	<i>Theme I: Clouds of Ambiguity Over the Status of the Missing: Alive or Dead?</i>	190
9.4	<i>Theme II: Freezing of the Process of Mourning, Grief and Closure</i>	191
9.5	<i>Theme III: Hope and Despair Pull in Opposite Directions</i>	193
9.6	<i>Theme IV: Systemic Effects of Ambiguous Loss on Affected Families</i>	194
9.7	<i>Theme V: Legal-Psychosocial Needs of Families</i>	198
9.7.1	Need to Know the Fate of the Missing	199
9.7.2	Need for Access to the Human Remains	199
9.7.3	Psychosocial Need (Well-Being) of Families.....	201
9.8	<i>Theme VI: Coping and Resilience Mechanisms of Families</i>	203
9.9	Situating the Interviews Within the Broader Theoretical Frameworks	204
9.9.1	The New Haven School	205
9.9.2	Agamben’s Biopolitics Theory	205
9.9.3	Arendt’s Theory of Right to Have Rights	206
9.10	Towards Defining More Value-Based, Value-Dependent and Psychosocially Responsible UK Migration Policy in Relation to Missing Migrants	208
9.11	Finding New Hope in the Law and UK Policy.....	210
9.12	Conclusion	212

Chapter 10: Summary, Recommendations and Conclusion.....214

10.1	Introduction	214
10.2	The Subject and Problem of Missing Migrants Matters	214

10.3	Critical Reflections on the Legal, Policy and Psychosocial Perspectives of the Research and the Synergies	219
10.3.1	The Legal Perspective.....	219
10.3.2	The Policy Perspective	221
10.3.3	The Psychosocial Perspective	223
10.4	Reflections on the Theoretical and Methodological Approaches	224
10.5	Research Findings and Discussions.....	225
10.6	Legal and Policy Implications of the Findings and Arguments.....	229
10.6.1	Summary of Central Arguments in the Thesis	230
10.7	Highlights of the Research Contributions	231
10.7.1	<i>Contributions to General Body of Knowledge</i>	231
10.7.2	<i>Practical Contributions</i>	232
10.7.3	<i>Interdisciplinary Contribution</i>	232
10.7.4	<i>Theoretical Contribution</i>	233
10.8	Recommendations	233
10.9	Limitations of the Research and Directions for Future Research	236
10.10	Conclusion and Final Comments	237
Bibliography		239
Appendices		301
Appendix I: Transcribed Secondary Interviews with Families of Missing Migrants		301
Appendix II: Table Keys Showing the Interview Participants and the Missing Migrants		325
Appendix III: Table Showing the Compositions of the Interviews		326
Appendix IV: Key Themes that Emerged from the Secondary Narrative Interviews		326
Appendix V: Bournemouth University Ethics Checklist Approval		327

List of Tables and Figures

List of Tables

Table 1: Main Origin States of Migrants/Refugees Worldwide	7
Table 2: Number of Migrant Arrivals and those Dead and Missing (2014-2021)	9
Table 3: Key Themes that Emerged from the Secondary Narrative Interviews	190

List of Figures

Figure 1: Images of Refugees' Life Jackets in Parliament Square London	211
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Declaration

This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at Bournemouth University, United Kingdom. I declare that this thesis is based on my original work except for quotations and citations which have been duly acknowledged. I also declare that this thesis has not been previously or concurrently submitted, either in whole or in part, for any other qualification at Bournemouth University or other institutions.

Luke Nwibo Eda

March 2021

Author Declaration as to Publications and Presentations

To date, the following journal articles that are directly derived from this PhD thesis have been published and/or accepted for publication:

1. L.N. Eda, 'How Transnationally Effective are the UK Migration Policies in Relation to Missing Migrants? A Transnational Law Perspective', (2021) *Vanderbilt Journal of Transnational Law* Vol. 54 No. 2 pp. 343-412—The contents of this article are reproduced in Chapters 1, 3, 4, (parts of chap 5) and 8 of the thesis.
2. L.N. Eda, 'The Legal and Policy Frameworks and Responses of States to Missing Migrants: A New Haven School Perspective'—The contents of this article are reproduced in Chapter 5 of the thesis.

In addition, the research findings were also presented at a number of international and national conferences:

3. L.N. Eda, 'How Transnationally Effective are the UK Migration Policies in Relation to Missing Migrants', *Justice for Transnational Human Rights Violations International Conference, 19 Jun 2019, University of Oxford, United Kingdom.*
4. L.N. Eda, 'Does Bare Life Become Bare Bodies Upon Death? On the Biopolitics of Migrant Deaths in the Mediterranean and Drawing of Lines Between Mournable and Unmournable Psychosocial Bodies', *Association of Psychosocial Studies International Conference, 9 July 2021, University of Essex, United Kingdom.*
5. L.N. Eda, 'Sorry but the UK is Full to Capacity: Comprehending the UK Policy Approach to Tackling the Europe Migrant Crisis', *FMC PGR Conference, 17 Nov 2017, Bournemouth University.*

Furthermore, research findings were also presented in one of the Department of Humanities and Law INFOSOC Research Seminar Series, Bournemouth University.

6. L.N. Eda, '*Missing Migrants: Is Missing Data the Missing Link and Can Potentials of the Big Data Regime be Leveraged to Bridge Information Gaps?*', 20 Mar 2019, INFOSOC Seminar Series, Bournemouth University.

Dedication

DEDICATED TO THE BLESSED MEMORY OF MY VERY TREASURED FATHER

CHIEF DAVID ELOM EDA (MINI-ASO-ASOSO)

Who left us to be with the Lord on 28 February 2018 after a prolonged and protracted illness. Dear Dad, words are not enough to describe the incredible level of pain and grief the family have been through since you left. Nevertheless, we take solace in the fact that you served God with tremendous passion, dedication and integrity in your lifetime. We will continue to miss you but will certainly meet together again in triumph on the resurrection morning. Until then, continue to rest peacefully in the bosom of the Lord. Amen!

List of Abbreviations and Acronyms

Acronym		Full Description
CFREU	-	Charter of fundamental rights of the European Union
DDBM	-	Digital Dead Body Management
ECHR	-	European Convention on Human Rights
ECtHR	-	European Court of Human Rights
EU	-	European Union
Frontex	-	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU
GCM	-	UN Global Compact on Safe, Orderly and Regular Migration
GCR	-	Global Compact for Refugees
GDPR	-	European General Data Protection Regulation
IACtHR	-	Inter-American Court of Human Rights
ICMP	-	International Commission on Missing Persons
ICRC	-	International Committee of the Red Cross
IHL	-	International Humanitarian Law
IHRL	-	International Human Rights Law
IOM	-	International Organisation for Migration
UNHCR	-	United Nations High Commissioner for Refugees

Chapter 1

Introduction and Overview of the Research

1.1 Introduction and Background

This thesis is an analysis of the responses and obligations of states towards missing migrants and their surviving families from a legal, policy and psychosocial perspective in the context of the Europe migrant crisis. Using multi-theoretical lenses provided by the New Haven School theory of international law, Giorgio Agamben's Biopolitics Theory, Hannah Arendt's theory of Right to Have Rights and Pauline Boss Ambiguous Loss Theory, the study considers, in general, the legal and policy frameworks and specific responses of states to the transnational problem of missing migrants at the international (UN), regional (EU) and national (UK) levels. All over the world, several thousands and maybe millions of people go and subsequently remain missing.¹ Migrants mostly go missing at sea and borders when they attempt to escape from war and 'generalised violence',² repressive regimes, systematic human right abuses etc.³

Generally, over the last three decades, international migration has increased at an unprecedented level; far more than E.G. Ravenstein, widely believed to be the principal pioneer of migration studies, could have imagined in 1885.⁴ In 2010, it was estimated that around 214 million people (representing about 3.1% of the total world population)⁵ resided outside their home states;⁶ an increase of 35 million from 2000 and 58 million since 1990.⁷ In 2017, the number reached 258 million, up from 248 million in 2015 and 191 million in 2005.⁸ With the number hitting

¹ Speech by Her Majesty Queen Noor, ICMP Commissioner, at the Hague Conference on Missing Persons, entitled *Missing Persons: An Agenda for the Future*, 29 Oct-1 Nov 2013, The Hague, The Netherlands, p. 4 (defining who a 'missing person' is).

² Volker Türk, 'Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence', Paper Delivered at the 60 years Anniversary of the 1951 Refugee Convention pp. 1-8 p. 1.

³ Human Rights Watch, 'The Mediterranean Migration Crisis, Why People Flee, What the EU Should Do' (June 2015) pp. 2-3.

⁴ E.G. Ravenstein, 'The Laws of Migration' (1885) *Journal of the Statistical Society of London* Vol. 48 No. 2 (Part I); E.G. Ravenstein, 'The Laws of Migration' (1889) *Journal of the Statistical Society of London* Vol. 52 (Part II).

⁵ UN Department of Economic and Social Affairs, Population Division (2011) 'International Migration Report 2009: A Global Assessment' (United Nations: ST/ESA/SER.A/316) p. 1.

⁶ Pia Oberoi *et al*, *International Migration, Health and Human Rights* (Geneva: IOM, 2013) p. 11.

⁷ UNDESA, Population Division, (2011) 'International Migration Report 2009' pp. 1-7.

⁸ UNDESA, (2017) 'International Migration Report 2017: Highlights' (ST/ESA/SER.A/404) p. 4.

272 million in 2020,⁹ it is now estimated that if migration continues at the same rate as it has been in the last 20 years, the number could be as high as 405 million by 2050.¹⁰ Thus, large flows of migrants and refugees across external borders of states are not a new phenomenon.¹¹ They constitute a “significant feature of political life in western liberal democracies”¹² and are likely to increase both in scope, complexity and impact.¹³ Migrants move in search of food to survive and also to move away from armed conflicts, threats to life, and death.¹⁴

With the high seas open, several thousands of migrants have died while making deadly sea crossings and thousands more remain missing. The watershed moment came in October 2013 when a boat carrying around 500 migrants capsized off the Italian coast of Lampedusa killing at least 366 migrants on board.¹⁵ This tragic incident marked a turning point in what has become known as the ‘European Migrant Crisis’.¹⁶ The chilling images of desperate and stranded migrants making the perilous journeys through the Mediterranean Sea since 2015 have particularly shocked the conscience of humanity, exposed the vanity of man and attracted worldwide media coverage.¹⁷ The unseaworthy and overcrowded boats packed with young people, women and children seeking safety sink in deadly shipwrecks¹⁸ with many others dying in hot deserts and at external borders of states. Yet others die from devastating effects of dehydration, hypothermia or similar illnesses, injury, suicide, murder, violent attacks, accidents or medical complications during their journeys.¹⁹ In many cases, states of departure are unwilling or

⁹ Marie McAuliffe and Binod Khadria, ‘Report Overview: Providing Perspective on Migration and Mobility in Increasingly Uncertain Times’ in Marie McAuliffe and Binod Khadria (eds.) *World Migration Report 2020* (Geneva: IOM, 2020) p. 10.

¹⁰ Pia Oberoi *et al* note 6 p. 13.

¹¹ Migration stretches back to the earliest times of human history. See Khalid Koser, *International Migration: A Very Short Introduction* (Oxford: Oxford University Press, 2007) p. 1.

¹² D Miller ‘Immigrants, Nations, and Citizenship’ (2008) *Journal of Political philosophy* Vol. 16 No. 4 p. 371.

¹³ UN Department of Economic and Social Affairs, Population Division, ‘International Migration’, Expert Symposium on International Migration and Development, 26 February 2019.

¹⁴ Lynette M Parker, *The Ethics of Migration and Immigration, Key Questions for Policy Makers* Markkula Centre for Applied Ethics, Santa Clara University, available at: <https://www.scu.edu/ethics/focus-areas/more/resources/the-ethics-of-migration-and-immigration/> (accessed 10/6/2017).

¹⁵ Marie Martin, *Prioritising Border Control Over Human Lives: Violations of the Rights of Migrants and Refugees at Sea* (2014) Policy Brief, Euro-Mediterranean Network (EMHRN) p. 1.

¹⁶ Eugene Quinne, ‘The Refugee and Migrant Crisis: Europe’s Challenge’ (2016) *An Irish Quarterly Review* Vol. 105 No. 419 pp. 275-285; Heaven Crawley, ‘Managing the Unmanageable: Understanding Europe’s Response to the Migration Crisis’ (2016) *Human Geography* Vol. 9. No. 2 pp. 13-21.

¹⁷ Mike Berry *et al*, ‘Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries’ (2015) Report Prepared for the United Nations High Commission for Refugees, available at: <https://www.unhcr.org/56bb369c9.pdf> (accessed 14/12/2019).

¹⁸ Tamara Last and Thomas Spijkerboer, ‘Tracking Deaths in the Mediterranean’ in Tara Brian and Frank Laczko, *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva: IOM, 2014) p. 96.

¹⁹ Williams Lacy Swing, ‘Forward’ to the Book *Fatal Journeys: Tracking Lives Lost During Migration* Tara Brian and Frank Laczko (eds.) (Geneva: IOM, 2014) p. 5.

genuinely unable to offer protection.²⁰ Similarly, transit and receiving states often refrain from engaging with the problem, not until migrants reach their territory.²¹

Worldwide, the International Organisation for Migration (IOM) estimates that since the year 2000, at least 40,000 migrants have died while making these risky journeys.²² A more recent report puts the figure at more than 60,000 deaths since 2000.²³ Out of these figures, more than 18,500 were believed to have died crossing the Mediterranean since 2014,²⁴ with the latest IOM data putting the figure at 20,000 deaths as of April 2020.²⁵ Between 2017 and 2018, more than 4,100 were known to have died crossing the Central Mediterranean route, making it the world's deadliest migration route (accounting for about 77% of total deaths in the Mediterranean).²⁶ The actual death toll is likely higher as many migrant fatalities also happen in isolated parts of the world and are never recorded.²⁷ For many of the dead or feared dead migrants, their bodies are never recovered, no story is told about their whereabouts; and where bodies have been recovered, they are often buried in unmarked graves with no proper identification.²⁸ The net identification rate of migrant bodies between 1990 and 2013 stands at just about 22%.²⁹

In these situations of deaths and loss, international law places obligations on states derived from human rights treaties to not only search for missing migrants but also investigate migrant deaths and respect the rights of their families.³⁰ For example, the newly adopted United Nations Global Compact for Safe, Orderly and Regular Migration³¹ calls on states to “save lives and establish coordinated international efforts on missing migrants”.³² The Global Compact, which

²⁰ V.P Tzevelekos and E.K Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect Extraterritorially' (2017) *Nordic Journal of International Law* Vol. 86 pp. 427-469 p. 428.

²¹ *ibid* p. 427.

²² F.B. Attia *et al*, 'Report of the Mediterranean Missing Migrants Project: Understanding the Needs of Families (2016), Summary Report p. 1.

²³ IOM Data Migration Portal 2018, available: <https://missingmigrants.iom.int/latest-global-figures> (1/3/20).

²⁴ Simon Robins, 'Analysis of Best Practices on the Identification of Missing Migrants: Implications for the Central Mediterranean' Central Mediterranean Route Thematic Report Series (Geneva: IOM, 2019) p. 6.

²⁵ IOM Global Migration Data Analysis Centre, 'Towards Safer Migration in Africa: Migration and Data in Northern and West Africa: Focus on the Central Mediterranean' *GMDAC Briefing Series* (2020) p. 3.

²⁶ Simon Robins note 24 p. 6.

²⁷ F.B Attia *et al* note 22 p. 1.

²⁸ Simon Robins note 24 p. 6.

²⁹ Tamara Last *et al*, 'Deaths at the Borders Database: Evidence of Deceased Migrants' Bodies Found along the Southern External Borders of the European Union' (2017) *Journal of Ethnic and Migration Studies* Vol. 43 No. 5 pp. 693-712.

³⁰ Stephanie Grant, 'Dead and Missing Migrants: The Obligations of European States under International Human Rights Law' (2016) *IHLR Briefing* pp. 8, 13.

³¹ UN Global Compact for Safe, Orderly and Regular Migration, 2018 (hereinafter the 'GCM').

³² GCM, Objective 8 (a-f) para. 24.

is a complementarity instrument built on the framework of global partnerships and solidarity, enjoins states to commit to the prevention of migrant deaths and injuries through individual and joint search and rescue of migrants,³³ collection and exchange of information in a standardised way,³⁴ as well as identification of the dead³⁵ and family outreach.³⁶

Despite such legal provisions and the EU adopting a 'Resolution'³⁷ and the 'European Agenda on Migration'³⁸ pledging to save lives at sea, European and other states sometimes deny that they have legal obligations to search and rescue, recover, identify and in the case of death, repatriate bodies of dead migrants to their families.³⁹ This is reflected in migration policy agendas of many states. Such denial or non-compliance comes with severe psychosocial consequences for missing migrants and their family members. Families are often unaware of what has become of their missing loved ones. Thus, missing migrants are defined by the fact that their families do not have any knowledge of their whereabouts, or whether they are dead or alive.⁴⁰ In principle, this thesis refers to seven categories of people as missing migrants:

- (1) migrants who died and their bodies were never recovered,
- (2) migrants who died and their bodies were recovered but no identification was possible due to the advanced decomposed state of the dead bodies (the benefits of possible identification through forensic ante-mortem data notwithstanding),
- (3) migrants who died but were buried in unmarked graves with no proper identification from any source—families, friends or governmental authorities and as a result, who they are or where they came from remain unknown,
- (4) migrants who are alive but who cannot be found because they lost their way either before, during or so soon after completing their journeys including 'unaccompanied children',⁴¹

³³ GCM, Objective 8(a).

³⁴ GCM, Objective 8(e).

³⁵ GCM, Objective 8(f).

³⁶ GCM, Objective 8(c) & (d).

³⁷ EU Parliament, 'Migratory Flows in the Mediterranean, with Parliament Attention to the Tragic Events off Lampedusa' European Resolution (2013/2827(RSP)), (2016/C/208/13), P7_TA(2013)0448, (2013).

³⁸ European Commission, 'A European Agenda on Migration' (2015) European Commission Brussels, COM (2015) 240 Final, pp. 1-22 at p. 2.

³⁹ Simon Robins, 'Missing in Migration: From Research to Practice' (2018) *Practicing Anthropology* Vol. 40 No. 2 p. 24.

⁴⁰ Stephanie Grant, 'Migrant and Refugee Border Deaths: Defining A Human Rights Framework' (2018) *LSE Law Review* Vol. 3 p. 129.

⁴¹ J. Bhabha, 'Legal Obligations of States with Regard to Child Migrant Death and Disappearances' in Frank Laczko *et al*, (eds.) *Missing Migrant Children, Fatal Journeys* Vol. 4 (Geneva: IOM, 2019) pp. 73-83; Serap

- (5) migrants who went missing due to the actions of others, e.g., migrants who are victims of human trafficking, robbery, migrant smuggling, abductions or homicide,⁴²
- (6) migrants who may have been arrested and detained without access to means of communication, insofar as the circumstances of their detention remain unknown to their relatives followed by a denial of such detention by state authorities (enforced disappearance)⁴³ and finally,
- (7) migrants who may have entered the territory of a particular state through irregular channels, and therefore choose as a safety precaution to remain missing and avoid detection by state and immigration authorities.

In the same vein, for the purposes outlined in this study, the understanding of the term 'psychosocial' is guided by the definition in the Report of the Roundtable on the Demography of Forced Migration Committee on Population approved by the National Research Council, USA.⁴⁴ It defines the term 'psychosocial' as the underlining close connection between the psychological aspects of our human experiences (e.g. our thoughts, emotions, behaviour, memory and perceptions) and our wider social experiences (e.g. our relationships, traditions, culture, values, families and communities).⁴⁵

Two key aspects of this broad definition prove vitally important for this study: (a) the psychosocial implications of migrants going missing on the well-being and emotions of families as expressed through the diagnostic lens of '*ambiguous loss*', '*mourning*' and '*grief*' and (b) the *psychosocial needs* of families as expressed through their search for information about the whereabouts of their missing relatives. In the latter case, as this work will demonstrate later in its interview analysis of ambiguous loss experiences of families, three key needs of families prove essential to the study: (1) need to know the fate of the missing (2) need for access to the human remains, (3) legal-psychosocial support for resilience and coping mechanisms of families. According to Pauline Boss (the principal theorist of ambiguous loss), ambiguous loss "where a

Yasar (Rapporteur), 'Missing Refugee and Migrant Children in Europe' (2007) Parliamentary Assembly of the Council of Europe Report Doc. 14417, Reference 4343 of 24 November 2017.

⁴² 'Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico' Inter-American Commission on Human Rights (IACHR) Rapporteurship on the Rights of Migrants, OEA/Ser.L/V/II. Doc. 48/13 30 December (2013) pp. 50-69.

⁴³ Ariel E. Dulitzky, 'The Latin-American Flavour of Enforced Disappearances' (2019) *Chicago Journal of International Law* Vol. 19 No. 2 pp. 423-486 p. 425; G.A. Res. 61/177; and ICRC 'Missing Migrants and their Families: The ICRC's Recommendations to Policy Makers', *Policy Paper*, p. 4.

⁴⁴ Maryanne Loughry and Carola Eyber (eds.) "*Psychosocial Concepts in Humanitarian Work with Children: A Review of the Concepts and Related Literature*" (Washington: National Academies Press, 2003) p. 1.

⁴⁵ Maryanne Loughry and Carola Eyber *ibid* p. 1.

family member is psychologically present but physically absent is the most stressful kind of loss in that it creates boundary ambiguity that defies resolution and creates confused perceptions about who is in or out of a particular family”.⁴⁶ There is a marked difference between a situation where a family member dies in normal circumstances and where they die or go missing in ambiguous circumstances. In the former, “there is official certification of loss and mourning rituals allows one to say goodbye”.⁴⁷ In the latter, “none of these markers exists”.⁴⁸ The “persisting ambiguity blocks cognition, coping, and meaning-making and freezes the grief process”.⁴⁹ In light of these realities, the issue of missing migrants remains a pressing transnational social problem⁵⁰ with vast areas of conflicting interests, but relatively little is known about migrants who die and go missing at sea and borders, what happens to them while they are missing, who is responsible for their going missing and in what ways migrant deaths and disappearances can be prevented.⁵¹

Governed by the foregoing and taking the ‘state’⁵² as my primary unit of analysis, the main aim/focus of this research is to conduct an analysis of the legal and policy frameworks and specific responses and obligations of states towards missing migrants and their families from a mutually reinforcing legal, policy and psychosocial perspective. While the legal element of the research is conducted from an international law perspective, the policy and psychosocial elements are conducted from a UK migration policy perspective, specifically, how transnationally effective and psychosocially responsible the UK migration policies in relation to missing migrants are in light of international law. These propositions or lines of inquiry are what the thesis explores throughout.

1.2 Research Context and Perspectives

The legal, policy and psychosocial background of this research revolve around people who died and went missing making transnational journeys across perilous seas and state borders; and so, to have a better grasp of the context of the research and the perspectives that shaped it, it will be appropriate to know more precisely who they are that are the focus of this research—where are

⁴⁶ Pauline Boss, ‘Ambiguous Loss Research, Theory, and Practice: Reflections After 9/11’ (2004), The Burgess Award Lecture, *Journal of Marriage and Family* Vol. 66 p. 553.

⁴⁷ Pauline Boss, *Loss, Trauma and Resilience: Therapeutic Work with Ambiguous Loss* (New York: W.W. Norton, 2006) p. xvii.

⁴⁸ *ibid* p. xvii.

⁴⁹ *ibid* p. xvii.

⁵⁰ Gabriella Citroni, ‘Clarifying the Fate and Whereabouts of Missing Migrants: Exchanging Information Along Migratory Routes’ (2019) *Workshop Report* 15-16 May 2019, Antigua, Guatemala p. 2.

⁵¹ Tara Brian and Frank Laczko, (eds.) *Fatal Journeys: Tracking Lives Lost During Migration* (IOM) p. 11.

⁵² The rationale for selecting the ‘state’ as the primary unit of analysis are stated in Chapter 3. Also, in this thesis, the term ‘state’ is used as against ‘country’ or ‘nations’ as it is less ambiguous.

they from, why are they making the risky journeys, where are they headed and how many have died and/or gone missing making such journeys?

Who Are They, Where Are They From, and Why Are They Making the Risky Journeys?

The UNCHR estimates that worldwide by end of 2018, more than 70.8 million people around the world were forced to flee their homes as a result of persecution, violence, conflicts or human rights abuses, out of which 25.9 million were refugees.⁵³ Most of the migrants are fleeing armed conflict⁵⁴ in the Middle East mainly the Syrian civil war and also armed conflicts in different parts of Africa⁵⁵ mainly those triggered by the Arab spring uprisings⁵⁶ and regime crisis in the Horn of Africa and Libya.⁵⁷ The UNCHR further estimates that overall on the global level, more than two-thirds of all refugees/migrants come from just five origin states.⁵⁸ The table below shows a breakdown of the top five origin states that produced the highest number of migrants worldwide as at 2018.

Table 1: Main Origin States of Migrants/Refugees Worldwide

S/N	Origin States	Number of Migrants/Refugees
1	Syrian Arab Republic	6.7 million
2	Afghanistan	2.7 million
3	South Sudan	2.3 million
4	Myanmar	1.1 million
5	Somalia	0.9 million

SOURCE: Compiled by Author from the UNCHR Operational Data Portal.⁵⁹

⁵³ UNCHR, 'Figures at a Glance', report entitled 'Global Trends: Forced Displacement in 2018' (2019), available at: <https://www.unhcr.org/5d08d7ee7.pdf> and here: <https://www.unhcr.org/uk/figures-at-a-glance.html> (accessed 8/2/2020).

⁵⁴ Vanessa Holzer, 'The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (2012) *Legal and Protection Policy Series*, (PPLA/2012/05) UNCHR p. 1, available at: <https://www.unhcr.org/504748069.pdf> (accessed 10/4/2020).

⁵⁵ Helen Obrego'n Gieseken, 'The Protection of Migrants under International Humanitarian Law' (2017) *International Review of the Red Cross* Vol. 99 Issue 1 p. 122.

⁵⁶ Martina Tazzioli, 'Spaces of Governmentality: Autonomous Migration and the Arab Uprisings' (USA: Rowman and Littlefield International, Ltd.) pp. 1-33.

⁵⁷ European Commission, 'The EU and the Migration Crisis' (2017) European Commission, available at: <https://op.europa.eu/webpub/com/factsheets/migration-crisis/en/> (accessed 20/12/2019). See generally Christine Aghazarm *et al*, *Migrants Caught in Crisis: The IOM Experience in Libya* (Geneva: IOM, 2012) p. 5, available at: https://publications.iom.int/system/files/pdf/migrationcaughtincrisis_forweb.pdf (18/1/2020).

⁵⁸ UNCHR 'Global Trends: Forced Displacement in 2018' (2019) p. 3.

⁵⁹ UNCHR Operational Data Portal, available at: <https://www.unhcr.org/uk/figures-at-a-glance.html>, here: <https://www.unhcr.org/uk/data.html> and here: <https://www.unhcr.org/globaltrends2018/> (8/2/2020).

The above table gives us an indication of the magnitude of the problem but also the wider context in which migration takes place. These top five migrant/refugee producing states are those that have been battling with perennial armed conflicts for many years now. According to a research project (EVI-MED) carried out at Middlesex University London, of the total number of migrants arriving in Greece, Sicily and Malta by the end of 2015, war was the main driver for migration, at 48.7%, 23.6% and 52.8% respectively.⁶⁰ These figures are corroborated by the findings of another research project (MEDMIG) led by the Centre for Trust, Peace and Social Relations at Coventry University which found that by the end of 2015, out of the total number of people making the perilous journeys, about 77% of them mentioned conflicts in states neighbouring Europe as a reason for making the irregular journeys.⁶¹ According to Grandi, the UN High Commissioner for Refugees, “what we are seeing in these figures is further confirmation of a longer-term rising trend in the number of people needing safety from war, conflict and persecution”.⁶² So, where exactly are the migrants headed in search of safety and how many have died and/or gone missing making the journeys?

Where Are They Headed and How Many Have Died or Gone Missing Making the Journeys?

Between 2015 and 2016, Europe was at the receiving end of what is widely believed to be the most unprecedented influx of migrants/refugees into any region since World War II, with over one million arrivals.⁶³ While research has investigated the problem of missing migrants in many other regions of the world including the Americas,⁶⁴ the migratory context of this research is focused on those seeking to enter Europe and the UK through the sea and EU external borders, in what has been described as the ‘Europe migrant crisis’ marked by increased deaths at sea. Table 2 below shows a breakdown of the number of migrant arrivals in Europe as well as those dead and missing

⁶⁰ Allesio d’Angelo *et al*, ‘Mapping Refugee Reception in the Mediterranean’ (2017) First Report of the EVI-MED Project p. 3.

⁶¹ Heaven Crawley *et al*, ‘Destination Europe? Understanding the Dynamics and Drivers of Mediterranean Migration in 2015’, Unravelling the Mediterranean Migration Crisis (MEDMIG), Final Report November 2015, p. 8; Heaven Crawley *et al*, ‘Unpacking a Rapidly Changing Scenario: Migration Flows, Routes and Trajectories Across the Mediterranean’ *MEDMIG Research Brief No. 1*, March 2016, pp. 1-10.

⁶² Filippo Grandi, United Nations High Commissioner for Refugees, quoted in UNCHR ‘Global Trends: Forced Displacement in 2018’ (2019) p. 4; Filippo Grandi, ‘Managing the Refugee and Migrant Crisis: The Role of Governments, Private Sector and Technology’ (2016) *PWC Global Crisis Centre* pp. 2-31.

⁶³ Jonathan Clayton and Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015* (2015) UNCHR, available at: <https://www.unhcr.org/uk/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> (accessed 7/2/2020). See also Philippe Fargues and Sara Bonfati, ‘When the Best Option is a Leaky Boat: Why Migrants Risk their Lives Crossing the Mediterranean and What Europe is Doing About It’ (2014) *Migration Policy Centre Brief* p. 2.

⁶⁴ Gabriella Citroni ‘The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants’ (2017) *International Review of the Red Cross* Vol. 99 Issue 2 pp. 735.

between 2014 and March 2021 as reported in the operational data portal of three international organisations or agencies—the UNCHR, IOM and Frontex).

Table 2: Numbers of Migrant Arrivals and those Dead/Missing (2014-2021)

Number of Years Covered (2014-2021)	Arrivals by Sea and Land (UNCHR)	Arrivals by Sea and Land (IOM)	Arrivals by Sea and Land (Frontex)	Number of Dead and Missing (UNCHR)	Number of Dead and Missing (IOM)
2021 (as of Mar 2021)	11,398	11,470	N/A	311	290
2020	95,031	99,475	47,250	1,401	1,419
2019	83,339	127,639	141,846	1,098	1,317
2018	138,882	144,166	150,114	2,275	2,299
2017	172,301	186,768	204,750	3,139	N/A
2016	362,753	390,456	511,146	5,096	N/A
2015	1,015,078	N/A	1,822,177	3,771	N/A
2014	216,054	N/A	282,962	3,538	N/A

SOURCE: Compiled by Author from the UNCHR Operational Data Portal,⁶⁵ IOM Missing Migrants Project Portal⁶⁶ and Frontex Risk Analysis Data on Irregular Migration to the EU.⁶⁷

As seen in Table 2, the number of migrants arriving the EU by sea and land since 2014 continues to fluctuate due to a variety of factors⁶⁸ (recording increases between 2014 and 2015 and then

⁶⁵ UNCHR Missing Migrants Data Portal—available at: <https://data2.unhcr.org/en/situations/mediterranean> (accessed 7/1/2020) and here: <https://data2.unhcr.org/en/dataviz/95?sv=0&geo=0> (accessed 15/2/2020). See also UNCHR 'Refugee and Migrant Arrivals to Europe in 2019' (Mediterranean), available at: <https://data2.unhcr.org/en/documents/download/72161> (accessed 7/2/2020).

⁶⁶ IOM Missing Migrants Data Portal—available at: <https://missingmigrants.iom.int/region/mediterranean> and here: <https://migration.iom.int/europe?type=arrivals> (accessed 20/1/2020).

⁶⁷ Frontex Risk Analysis Data is based on its own detections of illegal migrant crossings into the EU through sea and land routes. For the risk data analysis of Frontex for the years 2016 and 2019, see here: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2019.pdf and here: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

⁶⁸ For a detailed highlight of the factors responsible for variations in figures or fluctuations in the numbers of migrant deaths and arrivals to Europe, see Elias Steinhilper and Rob Gruijters, 'Border Deaths in the

started to fall thereafter). The numbers of those dead and missing for the periods covered have also been fluctuating (rising sharply between 2014 and 2016 before it started to fall slowly). What is however common and striking in both cases is that despite the fluctuations in figures, the number of deaths and those missing at sea and borders remains relatively high and is likely to increase.⁶⁹ A corroboration to the UNCHR, IOM and Frontex figures is another round of data on the high number of migrant fatalities collected/recorded by a group of non-governmental and civil society organisations, journalists and small group of researchers, in particular, those of *United Against Refugee Deaths*,⁷⁰ *Fortress Europe Blog*,⁷¹ *Deaths at the Borders Database*,⁷² *Migrant Files*,⁷³ *List of Deaths*,⁷⁴ *Watch The Med Initiative*,⁷⁵ *Mixed Migration Monitoring Mechanism Initiative (4Mi)*,⁷⁶ and similar initiatives outside of Europe.⁷⁷ These figures all underline the

Mediterranean: What Can We Learn from the Latest Data' (2017) *Border Criminologies Blog*. Cf. Emma Wallis, 'Frontex: Fluctuating Trends for Migrant Arrivals to Europe' (2018) INFO MIGRANTS.

⁶⁹ IOM Global Migration Data Analysis Centre (GMDAC) Briefing Series, *Towards Safer Migration in Africa: Migration and Data in Northern and West Africa* p. 3; IOM *Shipwreck off Coast of Libya Pushes Migrant Deaths on the Mediterranean Past 20,000 Mark* (2020), available at: <https://www.iom.int/news/shipwreck-coast-libya-pushes-migrant-deaths-mediterranean-past-20000-mark> (accessed 28/4/2020).

⁷⁰ *United Against Refugee Deaths* is a European network against nationalism, racism, fascism and in support of migrant and refugees that has been recording data on migrant deaths since 1993. See UNITED: 'Death by Policy: Time for Change', available at: <http://unitedagainstreugeedeaths.eu/> (accessed 21/9/2019).

⁷¹ *Fortress Europe Blog* operated by Fortress Europe provides data and information generated from the media on the location, date and cause of death of migrants. Its operation lasted from 1988-Feb 2016. For details, see here: http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html (accessed 24/1/2020).

⁷² *Death at the Borders Database* operated by VU University Amsterdam provides data and information on the location, date, nationality, gender, age and cause of migrant deaths. Their data is derived primary from death certificates and official records. The organisation operated from 1990-2013. For details, see here: <http://www.borderdeaths.org/> (accessed 24/1/2020).

⁷³ The *Migrant File* operated by various media organisations records data and information on the location, date and cause of migrant deaths. Its operation lasted from 2000-June 2016. For details, see here: <http://www.themigrantsfiles.com/> (accessed 24/1/2020).

⁷⁴ *List of Deaths* operated by 'United for Intercultural Action' provides data and information on the location, date, cause of death and nationality of migrants. Its operation lasted from 1993-2015. For details, see here: <http://www.unitedagainstracism.org/wp-content/uploads/2019/07/ListofDeathsActual.pdf> and here: <http://www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/> (accessed 24/1/2020).

⁷⁵ *Watch the Mediterranean Sea (Watch the Med for short)* is an online mapping platform and observatory of the EU maritime borders set up to monitor deaths and violations of migrants' rights at the maritime borders of the EU. See here: <http://watchthemed.net/>, and here: <https://www.ecre.org/interview-watchthemed-alarm-phone-a-response-for-rescue-and-a-call-for-change/> and here: <http://watchthemed.net/index.php/page/index/10>. See Stephan Liebscher and Ina Fisher 'Mapping Safe Passages: Real-Time Interventions at the Maritime Borders of Europe', available at: <https://www.degruyter.com/downloadpdf/books/9783839445198/9783839445198-006/9783839445198-006.pdf> (accessed 3/3/2020).

⁷⁶ The *Mixed Migration Monitoring Mechanism Initiative (4Mi)* conducts structured interviews with migrants and refugees along various migration routes globally especially those originating from North Africa to Europe. See here: <http://www.mixedmigration.org/4mi/> (accessed 5/3/2020).

⁷⁷ In addition to these initiatives/projects documenting migrant deaths and other migration issues within the European frontiers, compare also similar projects that documents migrant fatalities in other regions such

humanitarian imperatives of tackling migrant deaths and disappearances at sea, borders and other migration spaces whilst also facilitating the search, investigation, identification and repatriation of those already reported dead to their families.⁷⁸

And now, with the recent outbreak of the COVID-19 pandemic marked by increased border closures, city lockdowns and tightened immigration measures across the world,⁷⁹ experts fear that a significant number of migrants trapped in COVID-19 hotspots across European borderlines face real threats to their security, health, dignity and survival,⁸⁰ and could compound families' search for their missing relatives.⁸¹ Thus, the increasing number of migrant arrivals, drownings and deaths in the Mediterranean and at EU external borders represents a major European concern that has played and continues to play a critical role in framing EU and EU states' legal and policy responses to the problem of missing migrants. For many of the migrants entering or seeking to enter Europe in search of safety and protection, the UK is their preferred final destination⁸² but not all arrive. For example, a 2016 study by the IOM about the top destination states for migrants moving across the Central Mediterranean route showed that the UK (6%), Italy (55%), Germany (9%) and France (3%) are among the top destination states for migrants fleeing wars and seeking refuge in Europe.⁸³ In terms of migrant flows by nationality, Eritreans fleeing conflicts in their own

as: *The Australian Border Deaths Database*—see here: <https://www.monash.edu/arts/border-crossing-observatory/research-agenda/australian-border-deaths-database> (accessed 5/3/2020) which maintains record of all known deaths associated with Australian borders since January 2000; and *Migrant Death Mapping*—see here: <https://humaneborders.org/migrant-death-mapping/> (accessed 5/3/2020) created by Humane Borders, an organisation that track where each migrant body was found on the US-Mexico border.

⁷⁸ Boats 4 People, *Dead and Missing at Sea, Information Guide for Families and their Supporters: Italy and Central Mediterranean* (2017) pp. 1-27.

⁷⁹ For example, recently Italy in response to the COVID-19 outbreak passed a law it called 'Inter-Ministerial Decree n. 150 of 7 April 2020' which is targeted at preventing migrants rescued by NGO vessels flying non-Italian flag from landing at Italy ports. See Andrea Maria Pelliconi 'COVID-19: Italy is not a 'Place of Safety' Anymore: Is the Decision to Close Italian Ports Compliant with Human Rights Obligations' (2020) *EJIL Talk, Blog of the European Journal of International Law*.

⁸⁰ Lorenzo Guadagno, 'Migrants and the COVID-19 Pandemic: An Initial Analysis' (2020) IOM Migration Research Series No. 60 pp. 3 & 9; Erol Yayboke 'Five Ways COVID-19 is Changing Global Migration' (2020) Centre for Strategic and International Studies, 25 March 2020; Erol Yayboke *et al*, 'Seeking Path to Europe, Refugees and Migrants Ultimately Turned Back by COVID-19' (2020) Centre for Strategic and International Studies, 2 April 2020; Priya Pillai, 'COVID-19 Symposium: COVID-19 and Migrants—Gaps in the International Legal Architecture?' (2020) *Opinio Juris*, In Association with the International Commission of Jurists, 4 April 2020.

⁸¹ Marta Sánchez Dionis *et al*, 'COVID-19 Compounds Families' Painful Search for Missing and Disappeared Migrants' Reliefweb, IOM, available at: <https://reliefweb.int/report/world/covid-19-compounds-families-painful-search-missing-and-disappeared-migrants> (accessed 11/9/2020).

⁸² Oxford Migration Observatory, 'Calais and Clandestine Migration into the UK: Concerns and Context' (2014), *Commentary*.

⁸³ IOM, 'Mixed Migration Flows in the Mediterranean and Beyond: Flow Monitoring Data Analysis', reporting period (May 2016 to September 2016) p. 9.

state of origin mentioned the UK (26%) as their intended destination and just 18% for Germany.⁸⁴ Another study also showed that the UK is a priority destination target for many migrants from Africa and Middle East states.⁸⁵ Only recently, the rising number of migrants attempting to cross the English Channel in small boats and dinghies into the UK⁸⁶ was declared a ‘major incident’ by the Home Secretary,⁸⁷ prompting the House of Commons Home Affairs Committee to take oral evidence on the migrant crisis in the Channel from different national authorities and groups.⁸⁸ In March 2021, Home Secretary Priti Patel in a latest response to migrant flows into the UK outlined the government’s plan to introduce a new two-tier immigration system that will allow it to remove at any time migrants who enter the UK through illegal routes.⁸⁹ The increasing flows of migrants through the Channel are a clear indication that the EU migrant crisis has reached British soil.⁹⁰

Thus, in the light of the foregoing, the context and perspectives of this research comprise legal, policy and psychosocial elements. The research is *interdisciplinary*: combining analysis of international law with policy and psychosocial studies interlaced together into a unified whole. It should be read and understood in that light, even though what emerged predominantly in the end

⁸⁴ *ibid* p. 9.

⁸⁵ Gabriella Sanchez *et al*, ‘A Study of Communication Channels Used by Migrants and Asylum Seekers in Italy with a Particular Focus on Online and Social Media’ (2018) European Commission p. 17.

⁸⁶ David Woods, ‘Controlling Britain’s Borders: The Challenge of Enforcing the UK’s Immigration Rules’ (2019) *CIVITAS* pp. 5-7; Megan Specia, ‘Migrants Crossing the English Channel to the UK Increased Six-fold in 2019’ *The New York Times* 3 Jan 2020.

⁸⁷ BBC News of 28 December 2018, available at: <https://www.bbc.co.uk/news/uk-46705128> (accessed 28/12/2018); Melissa Macdonald, *Migrants Crossing the English Channel* (2019) House of Commons Library, available at: <https://commonslibrary.parliament.uk/home-affairs/immigration/migrants-crossing-the-english-channel/> (accessed 17/11/2019).

⁸⁸ House of Commons, *Oral Evidence: English Channel Migrant Crossing*, HC, 1900, Tuesday 22nd January 2019, evidence given by Maddy Allen, Field Manager, Olivia Long, Project Coordinator, Help Refugees, Judith Dennis, Policy Manager, Refugee Council, Clare Moseley, Founder, Care4Calais, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-channel-crossings/oral/95434.html> (accessed 4/2/2020); House of Commons, *Oral Evidence: English Channel Migrant Crossing*, HC, 1900, 26 February 2019, Evidence given by Alan Pughsley QPM, Chief Constable of Kent Police, Steve Rodhouse, Director General of Operations, National Crime Agency, Julie-Anne Wood, Head of Maritime Operations, Maritime and Coastguard Agency, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-channel-crossings/oral/97246.pdf> (accessed 4/2/2020). See Written Evidence by Rossella Pagliuchi-Lor, UNCHR Representative to the United Kingdom Submitted by UNCHR (ECM0006), available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-channel-crossings/written/98632.pdf> (accessed 2/4/2020); Written Evidence Submitted by Care4Calais (ECM0002), February 2019; Supplementary Evidence From the National Crime Agency (ECM0003), February 2019.

⁸⁹ Enver Solomon ‘Priti Patel’s Two-tier Asylum Plan Treats Refugees with Cold Indifference’, *The Guardian*, 24 March 2021.

⁹⁰ Joint Action Plan Between the UK and France on Combating Illegal Migration Involving Small Boats in the English Channel, Agreed in London on 24 January 2019. Also, Joint Action Plan Between the UK and France on Combating Illegal Migration Involving Small Boats in the English Channel, Addendum Sept 2019.

is a 'law thesis'. Methodologies, theories and norms across disciplines will be mutually and dynamically combined to build bridges across the legal, policy and psychosocial spaces in order to make real-world connections when analysing the problem of missing migrants. *Theoretically*, the research combines the New Haven School Policy-Oriented Theory of International Law with Agamben's Biopolitics Theory, Arendt's theory of Right to Have Rights and Boss Ambiguous Loss theory. Important concepts drawn from the works of these theorists provide us with unique insights into the transnational problem of missing migrants. *Methodologically*, the thesis employs a two-tiered methodological approach namely—the 'New Haven School Methodology' and 'Thematic Analysis of Secondary Narrative Interviews' obtained from families of missing migrants to address the main research questions. Together, the research methods and approaches and the theoretical premises that underpin them combine uniquely to generate new knowledge, understandings and approaches that can be explored to address the issue of missing migrants.

1.3 Broader Policy Relevance of the Inquiry for the UK

Given that the policy angle of the research is explored through the lens of UK migration policies in relation to missing migrants, questions may be raised about the relevance of UK policy for the study given that the UK may be seen as geographically located far away from the Mediterranean Sea (the epicentre of the Europe migrant crisis). In this work, I argue that the problem of missing migrants is a transnational one⁹¹ requiring a transnational response and policies with transnational effects, and this has been acknowledged by states in their recent declaration in the GCM,⁹² of which the UK was one of the earliest of the European states to endorse.⁹³ Although the UK government had previously argued that it would not participate in any future EU plans to assist or rescue migrants in the Mediterranean Sea, the government later reversed this stance.⁹⁴ Before the reversal, experts and critics had feared that this UK policy approach could worsen the negative public perception about migrants worldwide; a perception often expressed in phrases like "sorry but the UK is full to capacity"⁹⁵ or "let the migrants drown; we have lost our sense of common

⁹¹ A.J. O'Daniel and K.E. Latham, 'Beyond Local Jurisdictions: Science in a Global Web of Relations (Introduction)' in A.J. O'Daniel and K.E. Latham (eds.), *Sociopolitics of Migrant Death and Repatriation: Perspectives from Forensic Science* (Springer, 2018) pp. 3-12.

⁹² Objective 8 of the GCM.

⁹³ Stefano Fella, 'United Nations Global Compact for Migration' (2019) *House of Commons Briefing Papers CBP-8459*.

⁹⁴ House of Commons Home Affairs Committee, *Migration Crisis, 7th Report of Session 2016-17*, July 2016 p. 26.

⁹⁵ Andy Beckett, 'Is Britain Full? Home Truths about the Population Panic' *the Guardian*, Tuesday 9 February 2016.

humanity”.⁹⁶ According to Teather, the UK Liberal Democrat Chair of the All-Party Parliamentary Committee on Refugees:

“...we cannot pretend that this problem has nothing to do with us and wash our hands as people die. It is the policies we are pursuing, attempting to turn Europe into a fortress with no safe routes in, that is forcing migrants into risking their lives. We are forcing people to choose between dying in their own war-torn country and drowning in the sea”.⁹⁷

Similarly, affirming the UK’s responsibility to respond to transnational human problems occurring outside the territory of the UK, former Prime Minister Tony Blair stated thus;

“...but what of the situations we know about, but we are not proximate to? What of the murder distant from us, the injustice we cannot see, the pain we cannot witness but which we nonetheless know is out there? We know what is happening, proximate or not. In that case, we are not bystanders either. If we know and we fail to act, *we are responsible*”.⁹⁸

There is no doubt that the UK knows about the migrant crisis and the transnational problem of missing migrants and has the responsibility to act. Interestingly, the UK through the Royal Navy has played and continues to play a leading role in carrying out the EU’s ‘*Operation Sophia*’,⁹⁹ the EU’s naval policy operation implemented by Frontex¹⁰⁰ which was set up in 2015 at the height of the migrant crisis to disrupt the business model and activities of migrant human traffickers in the Southern Central Mediterranean.¹⁰¹ The Royal Navy’s presence on the world stage and its participation in Frontex operations implies UK’s extraterritorial jurisdiction under international law

⁹⁶ The Guardian, ‘Let the Migrants Drown in the Mediterranean: We Have Lost Our Sense of Common Humanity’, Tuesday 28 October 2014.

⁹⁷ Sarah Teather, the UK Liberal Democrat Chair of the All-Party Parliamentary Committee on Refugees quoted by Rowena Mason in the Guardian ‘Outcry as the UK opts Out of Migrant Rescue—As it Happened’ 28 October 2014; David Miller, *Strangers in Our Mist: The Political Philosophy of Immigration* (Cambridge, Massachusetts: Harvard University Press, 2016) p. 158 (quoting Sarah Teather’s statement).

⁹⁸ Tony Blair, *A Journey* (London: Hutchinson, 2010) p. 61.

⁹⁹ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia) OJ L 122, 19.5.2015, p. 31–35. For more on the *Operation Sophia* policy, see Niklas Nováky, ‘The Road to Sophia: Explaining the EU’s Naval Operation in the Mediterranean’ (2018) *European View* Vol. 17 Issue 2 pp. 197–209. The UK consistently expresses its support for the EUNAVOR MED Operation to fight migrant smugglers from Libya across and in the Mediterranean. See UK-France Foreign Policy and Development Compact, Sandhurst, 18 Jan 2018.

¹⁰⁰ On the genealogy of Frontex and its works in the EU, see Nina Perkowski, ‘A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex’ (2012) *Refugee Studies Centre Oxford Working Paper Series* No. 81, pp. 3–32.

¹⁰¹ Royal Navy, ‘Operation Sophia Mediterranean’, available at: <https://www.royalnavy.mod.uk/news-and-latest-activity/operations/mediterranean-and-black-sea/operation-sophia> (accessed 2/12/2019).

and it “sends a powerful message that the UK is committed to global affairs and provides a stabilising influence”.¹⁰² Moreover, there is a relationship between sovereign autonomy and international responsibility of the UK and irregular migrants at sea and other spaces of migration governance and control.¹⁰³

Through analysis into the UK’s policy towards missing migrants fulfilling international legal obligation whilst seeking to be psychosocially aware, this project addresses a pressing societal challenge that comes from population movements sparked by repressive regimes and violence in the Middle East and different parts of Africa. By examining international obligations of states in relation to missing migrants and their families, individual human rights and interests immediately come to the fore in the UK context but also in the wider European Union human rights context. Although the UK has left the European Union on 31 January 2020 citing national resolve to take back control of its borders, money and laws,¹⁰⁴ the government has said it still wants to continue close cooperation on irregular migration with its European partners after Brexit.¹⁰⁵ Such political commitment as reaffirmed in the 2018 UK-France Sandhurst Treaty¹⁰⁶ and the 2019 Post-Brexit Political Declaration reached between the EU and UK,¹⁰⁷ and most recently in the 2020 UK-EU Trade Deal¹⁰⁸ demonstrates that migration is a key state interest for the UK and will remain so for most of the future; meaning that the transnational effects of its migration policies will continue to be keenly felt by migrant populations worldwide.

¹⁰² Royal Navy, available at: <https://www.royalnavy.mod.uk/what-we-do/preventing-conflict> (accessed 2/12/2019). See also House of Lords European Union Committee 14th Report of Session 2015-16 entitled ‘Operation Sophia, the EU’s Naval Mission in the Mediterranean: An Impossible Challenge’ HL Paper 144, 3 May 2016.

¹⁰³ James Souter, ‘Why the UK Has a Special Responsibility to Protect its Share of Refugees’ (2015) *The Conversation*.

¹⁰⁴ HM Government, ‘EU Exit: Taking Back Control of our Borders, Money and Laws while Protecting our Economy, Security and Union’, Presented to Parliament by the Prime Minister (2018), Cm 9741 pp. 3-13.

¹⁰⁵ Foreign and Commonwealth Office (ERM0006) paras. 29 and 64, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/finding-a-diplomatic-route-european-responses-to-irregular-migration/written/97127.html> (accessed 4/2/2020). See also House of Commons, ‘Responding to Irregular Migration: A Diplomatic Route’, First Report of Session 2019, Report Together with Formal Minutes Relating to the Report p. 7.

¹⁰⁶ Treaty Between the Government of the United Kingdom and Great Britain and Northern Ireland and the Government of the French Republic Concerning the Reinforcement of Cooperation for the Coordinated Management of their Shared Border, 2018. See also the United Kingdom-France Summit Communiqué, Royal Military Academy Sandhurst, 18 January 2018.

¹⁰⁷ See Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom para. 116.

¹⁰⁸ UK-EU Trade and Cooperation Agreement, Summary Explainer, December 2020 p. 29, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/95769/4/TCA_SUMMARY_PDF_V1.pdf (accessed 14/2/2021).

It is therefore paramount that the UK policies are analysed, understood and reflected upon with an eye on Europe's present and future, ensuring its international legal compliance and psychosocial awareness in order to avoid future policy vacuums. The subject of migration will continue to be a critical challenge for the UK.¹⁰⁹ It links the UK to global events such as armed conflicts and systematic human rights abuses in the territory of its former colonies that have triggered unprecedented migrant flows into Europe and the UK.¹¹⁰ Thus, the fate of migrants who die and go missing while attempting to cross the Mediterranean Sea is not only geographically linked to Europe but also politically and legally linked to the UK as a European state. With global migration governance now at a crucial stage in its institutional development, Alexander Betts argues "there is a strong case for the UK to develop a coherent global migration governance policy"¹¹¹ that as I argue takes the issue of missing migrants into account. Against this backdrop, this study considers the examination of the UK national migration policies as to their 'transnational effectiveness' and 'psychosocial awareness' in relation to missing migrants central to this inquiry.

1.4 Research Questions

The main aim of this thesis is to plot a roadmap towards substantially addressing the problem of missing migrants and to investigate the responses and obligations of states in a legal, policy and psychosocially effective way. Framed by UK policies in relation to missing migrants, the thesis specifically seeks to understand what has been the legal and policy responses of states to the problem of missing migrants; why migrants go missing in transnational migration and the factors responsible; to then identify and clarify what obligations, in terms of allocation and distribution of responsibilities, states have towards missing migrants and their families under international law. It further seeks to understand how transnationally effective and psychosocially responsible UK national migration policies in relation to missing migrants are. In line with these objectives, this thesis seeks to address five core research questions:

1. What, from a policy-oriented international law perspective, should be the appropriate legal and policy response of states to the problem of missing migrants?

¹⁰⁹ Georgina Sturge, 'Migration Statistics' (2020) House of Commons Library, Briefing Paper Number CBP06077 pp. 8-13.

¹¹⁰ Josephine Liebl *et al*, 'A Safe Haven? Britain's Role in Protecting People on the Move' (2016) Joint Agency Briefing Note, Published by Oxfam GB on 14th April 2016, pp. 1-13.

¹¹¹ Alexander Betts, 'The UK and Global Migration Governance' (2011) *Policy Primer, The Migration Observatory, Centre on Migration, Policy and Society, University of Oxford* p. 6.

2. Why, from a theory grounded perspective, do migrants die and go missing in transnational migration, and what factors give rise to their going missing?
3. What specific obligations do states have towards missing migrants and their families; and how, in practice, should we assign them to states under international law?
4. From a transnational law perspective, how transnationally effective are the UK migration policies in relation to missing migrants?
5. From a psychosocial perspective, how psychosocially responsible are the UK migration policies in relation to missing migrants and their families?

Drawing on evidence derived from academic and empirical sources, this study will address these questions and significantly contribute to knowledge in the field of study.

1.5 Scope and Focus of the Study

Whilst previous research has sought to understand the impact on families when their relatives are reported missing in transnational migration in Greece and Italy,¹¹² this project focuses on the legal and policy responses and responsibilities of states (and the international community) with regard to missing migrants and their surviving families. As such, the project will attempt to cover a lot of ground. However, guided by my philosophical understanding that every research aims at building an argument, not a library, this thesis like any other work excludes some elements. Some themes, despite direct or indirect links, are absent such as climate-change induced migration and internal migration and how these types of migration might perhaps lead to migrants going missing. My thesis, careful not to beg too many questions, sets them aside in order to focus more on the core claim which I seek to develop and defend. The scope of the study is more specifically delimited using the themes below:

1.5.1 Subject Matter and Geography

The topic of missing migrants is itself a self-defined one despite the interdisciplinarity of questions around it. This project focuses on migrants who went missing attempting to enter Europe and the UK through the sea and EU external borders regardless of their departure points—Africa, the

¹¹² F.B. Attia *et al*, note 22.

Middle East or elsewhere.¹¹³ This will include migrants who successfully entered the EU and the UK and subsequently went missing. By necessary implications then, the study does not address cases of migrants who went missing attempting to enter other territories other than Europe and the UK. Although the problem of missing migrants is a global one given the increasing cases of migrant deaths and going missing in the Americas, of which the migrant crisis in the US-Mexico border is a reference point, this study does not consider them. While generalised references will be made to cases outside Europe, it will be just to emphasise the global scale of the problem.

1.5.2 The Legal and Policy Frameworks

The study focuses on analysis of the legal and policy responses and obligations of states towards missing migrants derived from different international, regional and national legal frameworks as well as customary international law. The primary sources of international law considered derive from Article 38(1) of the ICJ Statute which enshrines sources of international law.¹¹⁴ Specifically, the study draws on an exploratory survey of norms of international human rights and humanitarian law, international refugee laws, law of the sea, data protection laws, the ILC Draft Articles on the Responsibility of States¹¹⁵ as well as soft laws relating to missing migrants at international (UN), regional (EU) and national (UK) levels. In terms of the policy frameworks, it focuses on the EU and UK migration policies in relation to missing migrants. The policy frameworks at the EU level are quite complex but it draws specifically on the Common Foreign and Security Policy (CFSP) inclusive of the Common Security and Defence Policy (CSDP) and the migration policies (non-CSFP) as well as other areas of the EU external relations legal frameworks.

1.5.3 Actors

This study focuses on the responsibilities and conduct of states in relation to missing migrants. Under general principles of international law and specifically international law of state

¹¹³ For detailed description of the various Mediterranean Sea routes that migrants follow to attempt to reach Europe, see Christopher Horwood, 'Deaths en Route from the Horn of Africa to Yemen and Along the Eastern Corridor from the Horn of Africa to South Africa' in Tara Brian and Frank Laczko (eds.), *Fatal Journeys: Tracking Lives Lost during Migration* (Geneva: IOM, 2010) pp. 139-140.

¹¹⁴ Article 38(1) of the ICJ Statute identifies the main sources of international law to include: (a) *international conventions*; (b) *international custom*, as evidence of a general practice accepted as law; (c) the *general principles of law* recognised by civilized nations; (d) *judicial decisions* and the *teachings of the most highly qualified publicists* of the various nations.

¹¹⁵ See the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, in *Yearbook of the International Law Commission* (2001), available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 28/4/2020).

responsibility, a state is responsible for its conduct and any conduct of its organs which may constitute a breach of an international obligation of that state.¹¹⁶ Thus, I will examine the conduct of states that has structural links to migrant deaths and going missing at sea and borders, and the resultant international legal obligations that it gives rise to. The project does not consider the conduct and/or role and responsibility of non-state actors and quasi-state entities regardless of any connection between their activities and migrant deaths and disappearances during migration. Leaving out non-state and/or quasi-state actors is justified by the need to avoid theoretical and methodological problems (I have detailed this argument in Chapter 3) that may arise when attempting to allocate responsibility to multiple agents in relation to missing migrants.

1.6 Conceptual Clarification of the Key Terms Used

This thesis recognises that some key concepts central to this study have been a subject of debate as to their meaning in the current literature. It is therefore important that the concepts used in this study are clearly defined for two reasons: first, to provide semantic clarity and second, to provide consistency in terms of how they are deployed throughout the thesis. Key concepts such as ‘migrants/refugees’ and ‘family’ are the most critical ones and I offer some clarifications below.

1.6.1 Migrants and Refugees

It has been argued that the terminologies used to describe ‘migrants’ and ‘refugees’ could be the difference between life and death.¹¹⁷ At the international level, no universal consensus exists as to who a ‘migrant’ or a ‘refugee’ is.¹¹⁸ In public debates and media discourses nationally and internationally, the terms ‘migrants’ and ‘refugees’ are frequently used interchangeably.¹¹⁹ This is not only significant for government policy but also public understanding and consistency in policy debates about migration. In the UK, the official government estimate of migration by the Office for

¹¹⁶ ILC Draft Articles on State Responsibility, Article 2.

¹¹⁷ J.I Goldenziel, ‘Checking Rights at the Border: Migrant Detention in International and Comparative Law (2019) *Virginia Journal of International Law* Vol. 60 Issue 1 p. 161.

¹¹⁸ Bridget Anderson and Scott Blinder, ‘Who Counts as Migrant: Definitions and their Consequences’ (2017) The Migration Observatory University of Oxford Fifth Revision pp. 1-6, available at: http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Who_Counts_Migrant.pdf (accessed 11/8/2017).

¹¹⁹ Ricklef Beutin *et al*, ‘Migration and Public Perception’ (2006) Bureau of European Policy Advisers (BEPA) European Commission, Brussels, pp. 7, 25. See also Baker *et al*, ‘A Useful Methodological Synergy? Combining Critical Discourse Analysis and Corpus Linguistics to Examine Discourses of Refugees and Asylum Seekers in the UK Press’ (2008) *Discourse and Society*, Vol. 19 pp. 273-306.

National Statistics (ONS) and Long-Term International Migration (LTIM) include migrants/asylum seekers in counting refugees entering the UK. Generally, for some states, defining ‘migrants’ and ‘refugees’ as the same set of people will deny states the power to treat refugees as people in *need* of humanitarian protection as against migrants who *want* protection. They often base their arguments on some grounds: Firstly, using the terms ‘migrants’ and ‘refugees’ interchangeably in public debates creates confusion, insofar as refugees are defined and specifically protected under international refugee law¹²⁰ while migrants are at best protected under ‘international human rights law’ (IHRL).¹²¹ Secondly, refugees are mostly people fleeing feared persecution, conflict and violence and as a result need international protection,¹²² while migrants are mostly people moving for economic reasons; not facing any imminent threat to their lives and can still get protection in their home states.¹²³

However, in this thesis, I contend that even though ‘migrants’ and ‘refugees’ may refer to distinct categories,¹²⁴ the more compelling case is that under international law, the obligations of states towards the missing whether ‘refugees’ or ‘migrants’ are the same. For Sarkin, migrants and refugees are to be dealt with on the ‘understanding that while these groups are different, legally speaking, what happens to both of these categories of people while they migrate is the same’.¹²⁵ Long argues that ‘recognising that refugees and migrants are often the same people, and developing legal alternatives to their irregular migration, is likely to prove vital’.¹²⁶ For Cantat, using ‘refugees’ and ‘migrants’ interchangeably “reflects the belief that although state authorities will eventually separate between these mobilities to establish which are ‘refugees’ and which are ‘migrants’, they hold more in common than they have differences”.¹²⁷ Similarly, Carlin maintains that “the two kinds of people rhetoric is troubling on many levels...it undermines the humanitarian

¹²⁰ UNHCR, ‘Refugees’ and ‘Migrant’—Frequently Asked Questions (FAQs), March 2016 available at: <http://www.unhcr.org/en-us/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html> (accessed 11/8/2017).

¹²¹ See for e.g., Section Article 14 United Nations Universal Declaration of Human Rights (UDHR), 1948.

¹²² UNHCR, *supra* note 120; Scalettaris Giulia, ‘Refugees or Migrants? The UNHCR’s Comprehensive Approach to Afghan Mobility into Iran and Pakistan’ in Geiger M and Pécoud A. (eds.), *The Politics of International Migration Management. Migration, Minorities and Citizenship* (London: Palgrave Macmillan, 2010) p. 252.

¹²³ UNHCR, *supra* note 120.

¹²⁴ Ben Attia, F. *et al*, ‘Mediterranean Missing Migrants Project’ *Greece Country Report* p. 10.

¹²⁵ 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) *International Journal of Human Rights* Vol 22 No 2 p. 208.

¹²⁶ Katy Long, *From Refugee to Migrant: Labour Mobility’s Protection Potential* Transatlantic Council on Migration, (Migration Policy Institute, 2015) pp. 1-18 p. 3.

¹²⁷ Celine Cantat, ‘Rethinking Mobilities: Solidarity and Migrant Struggles beyond Narratives of Crisis’ *Intersections. East European Journal of Society and Politics* Vol. 2 Issue 4 p. 12.

principles that should guide our response to emergencies...when people drown at sea or suffocate in lorries, our first question should not be, so which kind were they, refugees or migrants?"¹²⁸ G.K Bhambra also suggests that attempts to address the refugee crisis which draws on distinction between migrants and refugees are in fact part of the problem.¹²⁹ The distinction not only "blurs in practice"¹³⁰ but is also "relatively arbitrary"¹³¹ and suffers from "sedentary bias".¹³² Therefore, for these reasons, the terms 'refugees' and 'migrants' are used interchangeably in this thesis.

1.6.2 Family

Families are the chief information seekers when it comes to finding answers to the disappearance of their relatives. Governments or their agencies often have to define what a family is in order to determine who benefits from their programs and social services and who does not; and in relation to dead migrants, who should be the "appropriate recipient of mortal remains".¹³³ This is important because ambiguous loss theory which underpins the psychosocial aspect of this research assumes that a psychological family exists in the minds of family members and that the "perceived construction of one's family may differ from the physical or legal family" structure.¹³⁴ So, how should a 'family' be defined in our context? Definitions abound but no consensus exists.¹³⁵ In literature, the family has been viewed from both structural and functional perspectives. Whereas structural definitions "specify who is in the family and who is out according to certain characteristics of family members; functional definitions specify the functions family members

¹²⁸ Jørgen Carlin 'Refugees are also Migrants: All Migrants Matter', *Border Criminologies Blog*, 9 September 2015, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also> (accessed 7/4/2021).

¹²⁹ Gurminder K Bhambra, 'The Refugee Crisis and Our Connected Histories of Colonialism and Empire' *Sicherheits Politik-Blog*, 2015.

¹³⁰ Katy Long, 'When Refugees Stopped being Migrants: Movement, Labour and Humanitarian Protection (2013) *Migration Studies* Vol. 1 Issue 1 pp. 2-26 p. 4.

¹³¹ *ibid* p. 5.

¹³² *ibid* p. 5. Cf. Mawuna Remarque Koutonin, 'Why are White People Expats When the Rest of us are Immigrants', *The Guardian*, March 2015, available at: <https://www.theguardian.com/global-development-professionals-network/2015/mar/13/white-people-expats-immigrants-migration> (accessed 25/8/2018).

¹³³ Melanie Klinkner and Ellie Smith, 'The Bournemouth Protocol on Mass Grave Protection and Investigation' (2020), p. 5.

¹³⁴ Pauline Boss, 'Ambiguous Loss Theory: Challenges for Scholars and Practitioners' (2007) *Family Relations* Vol. 56 No. 2 p. 106.

¹³⁵ P.R Ghandhi and E. Macnamee, 'The Family in UK Law and the International Covenant on Civil and Political Rights 1966' (1991) *International Journal of Law, Policy and Family* Vol. 5 Issue 2 (abstract part).

perform”.¹³⁶ In the UK, the Office for National Statistics (ONS) has provided a working definition of a family¹³⁷ based on the structural perspective. It defines a family as “a married or cohabiting couple, with or without their never-married child or children (of any age), including couples with no children and lone parents with their never-married child or children...a family could also consist of a grandparent or grandparents with grandchild or grandchildren if the parents of the grandchild or grandchildren are not usually resident in the household”.¹³⁸ This ONS definition is quite comprehensive and beneficial because it leaves enough room for an expansive interpretation of a family in such a way that the domestic meaning of families across jurisdictions covered by this research can easily be inferred. Given that the policy context of this study is UK focused, this study adopts this ONS UK family definition in progressing the analysis.

1.7 Research Contributions

The theoretical and methodological premises of this research will combine uniquely with the legal analysis of state responses and obligations towards missing migrants, along with empirical analysis of secondary interview data, to generate new knowledge and understandings that can be explored to effectively address the issue of missing migrants. The research makes original and significant contributions to knowledge in the four ways set out below:

1. *Contributions to General Body of Knowledge*

Firstly, from a policy-oriented international law perspective, this study will contribute to knowledge by considering what the legal and policy responses of states to missing migrants have been at the international, regional and national levels, and what normative claims for the legitimacy of current and future trends in decisions would be required. Previous studies have largely analysed state responses to missing migrants from the angle of legal positivism, viewing law as a body of rules for which the independent moral value of obedience is assumed, whereas a policy-oriented approach where law becomes a theory for making social choices is highly neglected. Secondly, building on Agamben’s concept of *bare life*, this study will contribute to socio-legal literature on missing migrants by including theory grounded evidence to explain the phenomenon of migrant deaths at sea and borders. Previous studies largely attribute migrant deaths at sea and borders

¹³⁶ Karen Bogenschneider *et al*, (eds.), ‘Building Policies that Puts Families First: A Wisconsin Perspective’ Wisconsin Family Impact Seminars Briefing Report, First Edition (1993) p. 2.

¹³⁷ Roma Chappell (ed.), Office for National Statistics, *Focus on Migration and People* (Palgrave: Palgrave Macmillan, 2005) p. 210.

¹³⁸ *ibid* p. 210.

to the deterrence-oriented policies of states based on empirical statistics and figures whereas there is little or no inclusion of theory grounded evidence to understand the phenomenon.

2. *Practical Contributions*

Firstly, while some attempts have been made in the existing literature to develop a legal protocol that outlines the core obligations of states towards missing migrants and their families' in particular the *Last Rights Project*,¹³⁹ there are fewer studies on how those obligations may be assigned, shared and allocated to states in practice. Therefore, through a combination of and close dialogue with the law, political philosophy and political theory methods of framing responsibility and in order to progress theory and practice, this thesis will contribute to bridging this gap in knowledge by drawing up a responsibility-based argument that focuses on how responsibility may be distributed, shared or allocated to multiple states in practice in relation to missing migrants.

3. *Interdisciplinary Contributions*

By adopting an innovative interdisciplinary approach that ensures that law, policies, practice and psychosocial aspects of missing migrants are analysed for compatibility, this study adds a novel 'policy and psychosocial' interdisciplinary dimension to the legal analysis of missing migrants by considering the specific question of whether the UK migration policies in relation to missing migrants are psychosocially responsible. Through the thematic analysis of secondary narrative interviews about the experiences of families of dead and missing migrants and evaluating the psychosocial implications of that experience through the lens of loss, grief and mourning, this project ensures that on a micro-level, previously unobserved factors in past studies are made visible in the present study.

4. *Theoretical Contribution*

While legal scholarship has examined the domestic effectiveness of state migration policies in relation to migration generally, there is no research in the UK context to explain the transnational effectiveness of national migration policies in relation to missing migrants.¹⁴⁰ This research will

¹³⁹ Last Rights Project, available at: <http://lastrights.net/> (accessed 7/1/2020); see Catriona Jarvis, 'Last Right: Cross-Border Deaths—Towards a New Framework' (2017) *Journal of Immigration, Asylum and Nationality Law* Vol. 31 pp. 131-150 p. 131; Stefanie Grant *et al*, 'Last Rights Project, Cross-Border Deaths on the Journey to Europe: Towards a Legal Framework' (2016) Report of Legal Consultation (CSHR) p. 3.

¹⁴⁰ With exception of partial references to the UK context by Simon Robins, See Simon Robins *et al*, note 113 p. 14; Simon Robins, 'Migrant Bodies in Europe: Routes to Identifying the Dead and Addressing the Needs of the Families of the Missing' in Frank Laczko *et al*, (eds.) *Fatal Journeys Volume 3 Part 1* (Geneva: IOM, 2017) p. 72.

contribute to bridging this gap in the literature by considering how transnationally effective UK national migration policies are in relation to missing migrants. The project attempts to draw up on the basic level a new theory of transnational effectiveness of national migration policies using the example of the UK national migration policies in relation to missing migrants.

1.8 The Structure of the Thesis

In this section, I provide an outline of the contents of the rest of the thesis, chapter by chapter, making the structure of my arguments and presentation more transparent, drawing mutual links between the different chapters to guide readers. In total, the thesis is comprised of ten chapters which began with this chapter 1. The rest of the thesis unfolds as follows:

Chapter 2: this chapter details the theoretical underpinnings and methodological positions of the research and how they have been deployed to answer the research questions. The chapter defines how the multi-theoretical framework, along with mixed methods and approaches, benefit the research and help to generate new knowledge.

Chapter 3: this chapter resolves some initial central questions of responsibility in relation to missing migrants in view of the fact the theoretical premises outlined in the preceding chapter 2, as well as the subsequent literature review in chapter 4, put states at the centre of international responsibility in relation to migrants. Amidst the growing crisis of migrant deaths and migrants going missing at sea and EU states' borders, there have been arguments by scholars as to who in particular among the multiplicity of agents of responsibility (states, international organisations, UN refugee agency etc) is the primary agent of responsibility under international law in relation to missing migrants. Four initial questions of responsibility are resolved: (1) *who* are the responsible agents; (2) responsible for *what*; (3) responsible to *whom*; (4) responsible for actions and events in *where*? Following on from resolving these questions of responsibility, the scene is set and there is now a foundational basis to review the relevant literature in the next chapter.

Chapter 4: as hinted above, this chapter reviews previous research on missing migrants. The literature review is framed around five core themes that are carefully delimited by the topic of the research. The themes covered include (a) the legal and policy responses of states to missing migrants; (b) why migrants die and go missing in transnational migration; (c) obligations of states towards missing migrants; (d) the transnational effectiveness of state migration policies in relation to missing migrants; and (e) the psychosocial implications of migrants going missing for their

families through the lens of grief, mourning and loss. The gaps in knowledge found in the literature guided the framing of the five research questions and specific objectives of this study. Those five research questions which dovetail the five research gaps identified then form the next five substantive chapters of the thesis and proceed as follows:

Chapter 5 (addresses RQ1): In addressing RQ1, the chapter analyses the legal and policy frameworks and responses of states to the problem of missing migrants from the theoretical and methodological perspective of the New Haven School. The chapter first delimits the bounds of the problems of missing migrants that international law and states seek to address; to then assess the conflicting interests or claims, scrutinise the previous legal responses in light of the elements that shaped them, forecast future trends and develop new alternatives and recommend solutions that fit in line with public order and human dignity.

Chapter 6 (addresses RQ2): In addressing RQ2, this chapter presents through the lens of Agamben's biopolitical concept of *bare life*, a theory grounded analysis of why migrants die and go missing in migration, critically considering the factors that contribute to migrant deaths and migrants going missing at sea, borders and other liminal spaces. It focuses on the relationship between irregular migrants and the state and what connection this relationship has with migrant deaths and migrants going missing at sea and borders using the *left-to-die boat case*¹⁴¹ as a tool of analysis. The chapter also presents an analysis of Hannah Arendt's theory of right to have rights as a critical response to migrants' condition of *bare life* and *rightlessness* and argues that, on the one hand, Arendt's thoughts offer migrants a redemptive pathway to overcoming *bare life* and on the other hand, offer states a pathway to realising their obligations to migrants.

Chapter 7 (addresses RQ3). In this chapter, I delve into the important task of identifying and examining the specific obligations of states towards missing migrants and their families. Here I explicate my views on the shared obligations states have towards migrants and their families, each state's share of responsibility and conditions for sharing obligations. What results primarily from my analysis is a responsibility-based argument that theorises how the responsibility of states for generating 'bad migration outcomes'¹⁴² (bad outcomes understood here as 'migrant deaths',

¹⁴¹ Tineke Strik, 'Lives Lost in the Mediterranean Sea: Who is Responsible', Parliamentary Assembly of Council of Europe, Report of the Committee on Migration, Refugees and Displaced Persons, 29/03/2012.

¹⁴² Most scholars use the terms 'bad' or 'harmful' outcome as a defining element of shared responsibility; and this choice finds expression in the notion of 'outcome' as a basis for assigning responsibility in legal theory. See Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) *Michigan Journal of International Law* Vol. 34 Issue 2 p. 367. See also David Miller,

‘migrants going missing’ and the ‘psychosocial consequences’ that families face as a result) may be shared, distributed, allocated or assigned to multiple states in practice. The chapter concludes by pointing out that for states to fully realise their legal obligations towards missing migrants, their national migration policies relating to migrants must become more transnationally effective. This claim is what I defend in the next chapter using the example of the UK national migration policies in relation to missing migrants.

Chapter 8 (addresses RQ4): as hinted above, this chapter analyses the ‘transnational effectiveness’ of the UK migration policies in relation to missing migrants from a transnational law perspective. I attempt to draw up on the basic level a new theory of transnational effectiveness of state migration policies using UK migration policies in relation to missing migrants as a test case.

Chapter 9 (addresses RQ5). This chapter sets out to broadly examine how psychosocially responsible the UK migration policies are in relation to missing migrants. The chapter analyses six key narrative themes that emerged from the secondary narrative interviews with families of missing migrants whilst also clarifying the meaning of a psychosocially responsible national policy. It then proceeds to conduct ‘needs analysis’ intended to capture the dynamic connection between the law, UK migration policies and the psychosocial experiences and well-being of families of missing migrants. It sheds light on what a value-based, value-dependent and psychosocially inclusive UK policy in relation to missing migrants should look like.

Finally, Chapter 10 wraps up the discussion. Here, I outline the summary of the research findings, on the basis of which recommendations were made; an evidence-based conclusion is drawn, limitations of the research highlighted and directions for future research suggested.

National Responsibility and Global Justice (Oxford: Oxford University Press, 2007) pp. 84 & 383; and Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999) pp. 7 & 27.

Chapter 2

Theoretical Framework and Methodology

2.1 Introduction

This chapter defines the theoretical framework that underpins the thesis and the methodology adopted to address all the research questions outlined in Chapter 1. First, I begin by outlining the theoretical framings. Generally, theories, it is often said, are mobile and have their ways of travelling across time, space and boundaries, traversing even, interdisciplinary lines and cutting through historical periods and cultural-political contexts.¹⁴³ The theoretical framework is the most critical component of any research in that it underpins the rationale upon which a study's findings and results could be based on. According to Grant and Osanloo, the theoretical framework serves as a guide that undergirds a study and provides the structure to define the epistemological and methodological/analytical approach to a research.¹⁴⁴ This chapter attests to this philosophical understanding and demonstrates how far theories can travel even through the most difficult of temporal and spatial terrains, to guide and underpin a study in which the lived but harrowing experiences of migrants, often ending in deaths or going missing at sea, borders and other liminal spaces are narrated, told and reflected upon from a legal, policy and psychosocial perspective.

2.2 Theoretical Premises: New Haven School, Agamben, Arendt, Boss

The theoretical premises of this thesis have been drawn from the jurisprudence of the New Haven School of International Law and the works of Giorgio Agamben, Hannah Arendt and Pauline Boss. The writings of these theorists provide us with unique insights into the lived experiences and everyday struggles of migrants on the perilous journeys across high seas and borders and the psychosocial implications of migrants going missing during such journeys for their families. Given the multiplicity of important concepts drawn from the works of these theorists and used to define the theoretical framework, the conceptual starting point and epistemological bounds need to be clear from the outset in order to understand the syllogism that they present and how and why that

¹⁴³ Edward Said, 'Travelling Theory' in *The World, the Text, and the Critic* (Harvard: Harvard University Press, 1983) pp. 226, 230.

¹⁴⁴ Cynthia Grant and Azadeh Osanloo, 'Understanding, Selecting and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for your House' (2014) *Administrative Issues Journal: Connecting Education, Practice, and Research* Vol. 4 Issue 2 p. 13.

sylogism works well as a theoretical underpinning for the thesis. Firstly, at the start of this project, my understanding of the life-long struggles of migrants who died or went missing fleeing wars and persecution and seeking protection in Europe drew largely on the biopolitics theory of Giorgio Agamben,¹⁴⁵ and before him, Michel Foucault.¹⁴⁶ Especially how Agamben's concept of *bare life*, embodied in the figure of the *homo sacer* of ancient Roman law and operationalised in the *state of exception*,¹⁴⁷ reflects the biopolitical human condition of migrants when their lives are wagered, and sovereign power identified with the state begins to pivot around human life as a referent object or target of political governance.¹⁴⁸ For Agamben, state sovereign power establishes itself through the production of a biopolitical order by inclusion of *bare* biological human life into the mechanisms and calculations of state power.¹⁴⁹ *Bare life* he argues is life that has been stripped of legal protection and reduced to biology after a person's *political life* is withdrawn by the state who has the ultimate sovereign power to determine who should be included or excluded from legal protection as worthy or not worthy human beings.¹⁵⁰ However, as the research progressed, it became clear to me that in order to fully understand the effects of *bare life* in Agamben's theory, we have to first understand what it means for human beings to live a life vested with shared values of human dignity. The New Haven School theory of international law offers us the crucial

¹⁴⁵ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Roazen (trans) (Stanford: Stanford University Press, 1998) p. 3; Giorgio Agamben, 'Introduction to Homo Sacer: Sovereign Power and Bare Life' in T. Campbell and A. Sitze (eds.) *Biopolitics: A Reader* (London: Duke University Press, 2013).

¹⁴⁶ Michel Foucault, *History of Sexuality, Volume 1: An Introduction*, Robert Hurley (Trans) (Pantheon Books, 1978); Michel Foucault, *The Birth of Biopolitics*, Graham Burchell (trans.) (New York: Palgrave Macmillan, 2008); Michel Foucault, *The Political Technology of Individuals*, in James Faubion (ed.) *Power: Essential Works of Foucault, 1954–1984* Vol. 3 (New York: New Press, 2000b) p. 403; Michel Foucault, 'Confronting Government: Human Rights' in James Faubion (ed.) *Power: Essential Works of Foucault 1954–1984*, Vol. 3 (New York: The New Press, 2000c) p. 474.

¹⁴⁷ Giorgio Agamben note 145 p. 3.

¹⁴⁸ Michel Foucault note 146 p. 143; Jen Pylypa, 'Power and Bodily Practice: Applying the Work of Foucault to An Anthropology of the Body' (1998) *Arizona Anthropologist* Vol. 13 p. 21. It is important to mention that the relation of life and politics in Agamben's arguments is unlike what obtained in Aristotelian philosophy where life and politics were considered separate. See Nick Vaughan-Williams, 'The Generalised Biopolitical Order? Re-conceptualising the Limits of Sovereign Power' (2009) *Review of International Studies* Vol. 35 p. 734; N. Parker and N.V Williams, 'Critical Border Studies: Broadening and Deepening the Lines in the Sand Agenda' (2012) *Geopolitics* Vol. 17 pp. 727-733; Giorgio Agamben note 145 p. 3; Cf. Michael Hardt and Antonio Negri, *Empire* (Cambridge, Massachusetts: Harvard University Press, 2000) p. 24.

¹⁴⁹ O.W Lembcke, 'Giorgio Agamben's Political Theory' (2018) *Oxford Research Encyclopedias*.

¹⁵⁰ O.W Lembcke *ibid*; Leila Whitley, 'The Disappearance of Race: A Critique of the Use of Agamben in Border and Migration Scholarship' (2017) *Borderlands e-Journal* Vol. 16 No 1 p. 9; and Anthony Downey 'Zones of Indistinction: Giorgio Agamben's Bare Life and the Politics of Aesthetics' (2009) *Third Text* Vol. 23 Issue 2 pp. 112-113. Cf. Decha Tangseefa, 'Imperceptible Naked-Lives and Atrocities: Forcibly Displaced Peoples and the Thai-Burmese in-Between Spaces' (2003) PhD Thesis, University of Hawai'i USA pp. 20 & 31-32.

opportunity to first understand what is life vested with shared values of human dignity;¹⁵¹ the kind of life that Agamben described as *political life* in society. For New Haven School, empowering human beings to maximise and have greater access to the shared values of human dignity (*power, enlightenment, well-being, wealth, skills, affection, rectitude and respect*)¹⁵² is the primary duty of states and international law. Thus, while the New Haven School theory of law unveils to us the meaning of life vested with values of human dignity, Agamben's *bare life* unveils to us the reverse opposite of it; life divested of human values.

Consequently, this thesis takes as its conceptual starting point and as a unifying conceptual frame, the New Haven School *shared values of human dignity* in progressing its analysis. Then, reasoning clearly and consistently from this unifying conceptual starting point, the thesis then proceeds to examine Agamben's biopolitical concept of *bare life* and uses it to analyse and understand the perilous journeys of migrants across the sea and border spaces and their everyday struggles for safety/protection. I probe deeply into the migrant conditions, their lived experiences and anecdotes using the *bare life* concept. I particularly situate and locate migrants within those exceptionalised seas and border spaces where, at the threshold of states, they are placed "outside the pale of the law",¹⁵³ put in a 'state of exception'¹⁵⁴ with their status labelled as either 'illegal' or 'irregular'. These labels/markers of unprotection, I argue, contribute (not least, as an unintended side effect of biopoliticised state policies) to the rise in violence against migrants at sea and EU borders often leading to migrant deaths in those liminal seas and border spaces.

Using the example of the *left-to-die boat case*¹⁵⁵ in which 63 out of 72 migrants on board a boat fleeing fighting in Libya died in the Mediterranean Sea as an explication tool, I unveil how migrants fleeing wars and human rights abuses reflect the *bare life* condition in Agamben's theory.¹⁵⁶ It will be shown how biopolitical migration policies of states that ignore migrants' shared

¹⁵¹ M.S McDougal *et al*, 'Human Rights and World Public Order: Human Rights in Comprehensive Context' (1978) *Northwestern University Law Review* Vol. 72 No. 2 pp. 227-307; W.M Reisman *et al*, 'The New Haven School: A Brief Introduction' (2007) *Yale Journal of International Law* Vol. 32 pp. 575, 576.

¹⁵² M.S McDougal *et al* *ibid* pp. 227-307.

¹⁵³ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace, New York, 1973) pp. 277, 283, 286; Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (London and New York: Routledge, 2016) pp. 7-8.

¹⁵⁴ See generally Giorgio Agamben, *State of Exception* (University of Chicago Press, London, 2005).

¹⁵⁵ Tineke Strik note 141. See also Tamara Last, 'Deaths Along Southern EU Borders' PhD Thesis (2018) Vrije Universiteit Amsterdam, p. 2. For a detailed study on the left to die incident, see Charles Heller *et al*, 'Report on the Left-to-Die Boat', *Forensic Oceanography*, available at: <https://www.fidh.org/IMG/pdf/fo-report.pdf> (accessed 5/10/2019). See also 'Left to Die' *Forensic Architecture*, available at: <https://forensic-architecture.org/investigation/the-left-to-die-boat> (accessed 5/10/2019).

¹⁵⁶ See Chapter 6 of this thesis for details of this analysis.

values of human dignity have structural links to migrant deaths and migrants going missing at sea and borders. In other words, Agamben's theory allows one to have a deeper understanding of the profound ways in which migrants' shared values of human dignity are ruptured and/or punctured by the extreme exercise of state and governmental powers against irregular migrants in the spaces of exception. Spaces of exception are liminal spaces politically enacted to perpetuate the state of exception under which states may suspend the normal juridical legal order and rights of human beings.¹⁵⁷

Analysing the relationship between the state and migrants in transnational journeys through the lens of Agamben, I show how depriving and stripping migrants of those New Haven School shared values of human dignity by states dehumanises them and produces as an effect, *bare life*. For migrants, empowerment to have greater access to those shared values of human dignity is key for their life and survival. Thus, Agamben's interweaving of sovereign power, human life and governmental practices is enviably effective in enabling one to construct a theoretical space to locate and situate the difficult story of missing migrants and the factors that give rise to their going missing. It also serves to detect and recognise how sovereign power, which Agamben essentialises, manifests to rule over the lives of conflict fleeing migrants crossing the risky Mediterranean Sea and European border zones in the wake of the EU migrant crisis. Through the lens of Agamben, I also show how states' biopolitical control of the living (live migrants) as objects of political interest appears to be not reflected in the management of the dead (migrant dead bodies); thus, migrant dead bodies could be "hypothesised as the limit of biopolitics".¹⁵⁸

However, it is important to point out that Agamben's interlacing relation of human life and sovereignty has prompted criticism in terms of what his main critic, Thomas Dumm, described as "terrifying passivity"¹⁵⁹ that could result from Agamben's analysis; or Hardt's contention that the result of Agamben's analysis was not passivity as such but "powerlessness";¹⁶⁰ or even Connolly's protest that Agamben's conjunction of sovereignty, *homo sacer* and biopolitics takes us through

¹⁵⁷ N. Vaughan-William, *Border Politics: The Limits of Sovereign Power* (Edinburgh University Press, 2009).

¹⁵⁸ Simon Robins, 'The Affective Border: Missing Migrants and the Governance of Migrant Bodies at the EU's Southern Frontier' (2019) *Journal of Refugee Studies* Vol. 0 No. 0 p. 4; Iosif Kovras and Simon Robins, 'Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU's Mediterranean Frontier' (2016) *Political Geography* Vol. 55 p. 43.

¹⁵⁹ Michael Hardt and Thomas Dumm, *Sovereignty, Multitudes, Absolute Democracy: A Discussion between Michael Hardt and Thomas Dumm about Hardt and Negri's Empire* (Harvard: Harvard University Press, 2000); *Theory and Event* (2000) Vol. 4 Issue 3.

¹⁶⁰ Michael Hardt and Thomas Dumm note 159 *ibid*.

a “historical impasse”.¹⁶¹ Nonetheless, in this thesis, I argue that Agamben’s oeuvre provides a useful theoretical lens through which the politics of illegalised migration and the deaths and going missing of migrants at high sea and borders that it necessarily leads to, can be studied and understood in detail. It offers powerful insights into the lifeworld of migrants; how in their ongoing struggles for survival and recognition, they attempt to enact themselves as ‘political subjects’ worthy of *political life* and entitled to shared values of human dignity as against a dehumanising condition of *bare life*. Thus, by examining the New Haven School concept of *shared values of human dignity* and Agamben’s concept of *bare life*, we are able to see both sides of the coin; the valued and humanised versus the devalued and dehumanised forms of life. This allows us to analyse the different but equally important sides of the problem at hand, weigh the options open to us for a solution and to make prescriptions.

In weighing any options open for a solution to the problem and in making any prescriptions to strengthen and maximise migrants’ access to the shared values of human dignity in order to overcome *bare life* condition, I find some glimmer of hope and direction in the human rights theory of Hannah Arendt who proposed her theory of *Right to Have Rights* as a critical response to the biopolitical human condition and everyday struggles of migrants. In their respective analyses of the plights and lived experiences of migrants, both Arendt and Agamben reject the notion that values of human dignity and rights of migrants can be viable outside the confines of membership of the nation-state.¹⁶² They both agree that the “most unprotected figure of our time is the migrant” since a lack of legal protection by the state renders him *bare life*. Arendt’s theory of right to have rights holds that in order to be truly a bearer of rights, one must have a *place* in the world¹⁶³ which

¹⁶¹ W.E Connolly, *Democracy, Pluralism and Political Theory*, S.A. Chambers and Terrel Carver (eds.) (London and New York: Routledge, 2008) p. 109. Other scholars have also criticised Agamben’s analysis of the relationship between life, politics and sovereign power. See for e.g., E.P. Ziarek, ‘Bare Life on Strike: Notes on the Biopolitics of Race and Gender’ (2008) *South Atlantic Quarterly* Vol. 107 No. 1 p. 93; Achille Mbembe ‘Necropolitics’ (2003) *Political Culture* Vol. 15 No 1 pp. 16-18, 21-21, 38; Achille Mbembe, ‘Necropolitics’ in Stephen Morton & Stephen Bygrave (eds.), *Foucault in an Age of Terror: Essays on Biopolitics and the Defence of Society* (Palgrave-Macmillan, 2008) pp. 160-163; Derek Gregory ‘The Black Flag: Guantánamo Bay and the Space of Exception’ (2006) *Geogr. Ann.*, 88B (4) pp. 405–427.

¹⁶² Hannah Arendt note 153 pp. 293 & 297. For Arendt, human right is political, not metaphysical. See J.D Ingram, ‘Right to Have Rights’? Three Images of the Politics of Human Rights (2008) *The American Political Science Review*, Vol. 102, No. 4 p. 402; Giorgio Agamben, *Agamben Beyond Human Rights* (2000) p. 16. However, more recently, a collection of Arendt essays that emphasises the human rights of migrants from a ‘humanity’ rather than ‘citizenship’ or ‘membership’ of a state perspective have emerged. See Anja Matwijkiw and Bronik Matwijkiw. See Anja Matwijkiw and Bronik Matwijkiw, ‘Illiberal versus Liberal State Branding and Public International Law: Denmark and the Approximation to Human(itarian) Rightlessness’ in *The Global Yearbook of International Law and Jurisprudence*, Giuliana Ziccardi Capaldo (ed.) (Oxford: Oxford University Press, 2018) p. 209.

¹⁶³ Hannah Arendt note 153 p. 296; Serena Perekh ‘A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights’ (2004) *Journal of Human Rights* Vol. 3 No. 1 pp. 41-53 p. 41.

allows one's actions and opinions to become significant.¹⁶⁴ In this work, it will be argued that in order to tackle the inadequate legal protection of migrants, Arendt's theory of *right to have rights* ought to be conceived of as a productive and emancipatory pathway to migrants overcoming *bare life* and empowering them to gain deeper access to the *shared values of human dignity*.

However, even though Arendt's thoughts have the potential to offer migrants a glimmer of hope of secure international protection in the future ahead, it is also a stark reality that total prevention of migrant deaths and migrants going missing in transnational migration in a world that is constantly facing new threats of conflicts and violence daily is unrealistic. Many migrants are already dead and missing; many more are going to die and go missing, sadly.¹⁶⁵ Affected families will continue to face the psychosocial implications of ambiguous loss of their relatives in migration. Therefore, the Pauline Boss *ambiguous loss theory* helps us to fully understand the psychosocial implications of migrants going missing in migration for their families.¹⁶⁶ Ambiguous loss theory seeks to explain the psychosocial effects of the marked difference that exists where a family member dies in normal circumstances and there is a dead body to mourn and where they die or go missing in ambiguous circumstances. While in the former, there is 'official certification of loss' and so, mourning rituals and grief for the dead can take place unimpeded; in the latter, there is unresolved ambiguity about the loss which 'freezes the grief process'.

Through the lens of *ambiguous loss* and *mourning* for the dead; the analysis of which in this thesis is then robustly supported by a large body of early literature on grief, mourning and bereavement, this research brings to the fore the grave impact of ambiguous deaths of migrants during migration on the psychosocial *well-being* of the waiting families. Ambiguous loss prevents the start of mourning and closure that families desperately need, and therefore, it can undermine the right to shared values of human dignity since it brings about mental torture that severely impacts the psychological and mental *well-being* of those affected. Human *well-being* is a key shared value of human dignity without which the quality and worth of human life are hugely diminished. Thus, the New Haven School/Agamben/Arendt/Boss conceptually mapped together in a reinforcing order of mutual supplementarity and complementarity defines the interdisciplinary multi-theoretical framework that underpins this study. By creating this multi-theoretical model and

¹⁶⁴ Hannah Arendt note 153 p. 296; Hannah Arendt 'We Refugees' (1943) *Menorah Journal* 31, No. 1 pp. 69-77; Hannah Arendt 'We Refugees' in Marc Robinson (ed.) *Altogether Elsewhere, Writers on Exile* (Boston, London: Faber and Faber, 1943) pp. 110-119.

¹⁶⁵ Australian Government, 'Report of the Expert Panel on Asylum Seekers' August 2012 p. 13 available at: <https://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf> (accessed 29/5/2020).

¹⁶⁶ Pauline Boss note 46 p. 553; Pauline Boss note 47 p. xvii.

using it to paint a clear picture of what the research is all about, my readers will have a basic idea of the key 'concepts' and 'figures' I have used to establish my ideas and approaches to my thesis, the interlinks between them and their practical contributions to the aims and objectives of the study.

2.3 Beyond Concept Mapping of the Multi-Theories: Further Philosophical Rationale for the Multi-Theoretical Framework

I should point out here that I am not oblivious of the possible questions that may arise in the mind of readers as to whether the number of theories selected to underpin this study is appropriate, or too many. Not least because the theoretical framework lays the foundation that supports the rest of the thesis' analysis,¹⁶⁷ and therefore, it is crucial that the theoretical trajectory that defines the analytical and methodological approach to the research is right from the outset. So, in addition to the concept mapping of the theories, some philosophical rationales also justify the multi-theoretical framework upon which the superstructure of the work is built. Firstly, as argued by Massey *et al*, no single grand theory or tools of one discipline or single level of analysis can provide a complete understanding of the migration processes.¹⁶⁸ Instead, it requires a multi-theoretical framework that draws together theories and methods of frame; and incorporates a wide variety of perspectives, levels and assumptions; what Sven Modell described as "theoretical pluralism".¹⁶⁹

As Brettel and Hollifield point out, migration is itself an intrinsically interdisciplinary subject drawing mutual links across disciplines.¹⁷⁰ The subject of missing migrants is one example of a project where no monolithic disciplinary theory can fully explain its multi-faceted dimensions. Thus, the aims and specific objectives of the research requires that I draw up a conceptually rich framework of interdisciplinary legal analysis that brings together concepts, ideas and insights across disciplines. I knit the concepts into a mutually animating and configurative tapestry that ensures that the project's message is delivered in a transparent way. Secondly, employing these multi-theoretical lenses in the study allows for cross-validation of findings in that the strengths of

¹⁶⁷ Cynthia Grant and Azadeh Osanloo, 'Understanding, Selecting and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for your House' p. 13.

¹⁶⁸ D.S. Massey *et al*, 'Theories of International Migration: A Review and Appraisal' (1993) *Population and Development Review*, Vol. 19 No. 3 p. 432.

¹⁶⁹ Sven Modell, 'Theoretical Triangulation and Pluralism in Accounting Research: A Critical Realist Critique' (2015) *Accounting, Auditing and Accountability Journal* Vol 28 Issue 7 p. 1138.

¹⁷⁰ Caroline B. Brettel and James F. Hollifield, *Migration Theory: Talking Across Disciplines*, English Book Edition, (London; New York: Routledge, 2000) pp. 1-22 p. 4.

one theory are used to address the limitations of others. For Kovras and Robins, no monolithic or simplistic biopolitical lenses can sufficiently provide grand theoretical insights into the fluid and complex phenomenon of missing migrants.¹⁷¹ Instead, there is a need to provide a multi-theoretical cover by drawing ideas from a variety of works and bringing together concepts in order to gain deeper insight into the pressing issue of missing migrants.

2.4 Research Methodology and Approach

The underpinning theoretical framework and the type of research questions that guide a thesis determine the type of research methodology that would be adopted to progress the research. In this study, taking into account the interdisciplinarity of the questions of missing migrants, this study adopts a two-tiered mix of methodological approaches namely—the New Haven School method and thematic analysis of secondary narrative interviews with families of missing migrants.

2.4.1 The New Haven School Policy-Oriented Methodology

The New Haven School Policy-Oriented Methodology (known as the ‘New Haven School’) was developed by professors Myres McDougal (a lawyer) and Harold Lasswell (a political scientist) both of the Yale Law School.¹⁷² The New Haven School (which also doubles as a theory of international law considered above) was selected for this study because the research addresses a contemporary global and societal problem of missing migrants for which the use of the traditional method of doctrinal legal analysis is inadequate. Although the traditional doctrinal method of legal analysis “deploys critical conceptual analysis of all principles of law including legislations and case laws to reveal a statement of the law relevant to the matter under investigation”,¹⁷³ it does not extend its analytical tool to external inquiry into the meaning and function of law, neither does it investigate the social context in which the law operates. While it puts the law into context and describes how the inadequacies in the law have shaped the current problem, it does not offer practical tools to finding solutions to legal problems. Interestingly, the New Haven School method

¹⁷¹ Iosif Kovras and Simon Robins, note 158 p. 43.

¹⁷² Myres McDougal & Michael Reisman, ‘International Law in Policy-Oriented Perspective’ in Ronald St. J. MacDonald & Douglas Johnston (eds.) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983); Reisman, ‘Theory About Law: Jurisprudence for a Free Society’ (1999) *Yale Law Journal* Vol. 108 p. 939; Michael Reisman, ‘The Vision and Mission of The Yale Journal of International Law’ (2000) *Yale Journal of International Law* Vol. 25 pp. 263, 264.

¹⁷³ Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock, *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) pp.28-29.

does both of those. The New Haven School lends itself to addressing human problems by allowing a clear delimitation of the bounds of the problems that the law seeks to address; to then assess the conflicting interests or claims, scrutinise the previous legal responses in light of the elements that shaped them, forecast future trends and develop new alternatives and recommend solutions that fit in line with public order and human dignity.¹⁷⁴

Therefore, the New Haven School approach is both a problem-revealing and problem-solving methodology. It views law as a tool of responding to societal problems through the “process of authoritative and controlling decision making designed to promote human dignity and world order”.¹⁷⁵ It deploys insights derived from natural law, legal realism and sociological jurisprudence focusing on interaction between the social process and rules in the creation of law to develop a complete framework of interdisciplinary legal analysis.¹⁷⁶ It postulates a focus on the law as being more than rules but also “how decisions made from those rules affect human beings”.¹⁷⁷ In other words, relying solely on the doctrinal rules-based approach of legal formalism and legal positivism without focus on solving human problems is incomplete, irrelevant, inappropriate and inapplicable to a modern world.¹⁷⁸ As such, the New Haven School lends itself to five intellectual commitments in the study of human problems: (i) commitment to *interdisciplinarity*; (ii) commitment to the study of *process*; (iii) commitment to *normative values*; (iv) commitment to the study of the *connection between law and policy*; and (v) commitment to *transnational law*.¹⁷⁹

The School’s commitment to *transnational law* and *interdisciplinarity* is particularly important for this research given the transnational nature of the problem of missing migrants as well as the thesis’ overall interdisciplinary remit. It postulates that international law should not be studied in isolation of other disciplines.¹⁸⁰ As a methodology, it adapts the analytical methods of the social sciences to the “prescriptive purposes of the law”¹⁸¹ by recounting its application to real world problems using a manifold set of approaches and tools to engineer changes in public order and policies which constantly reminds us of the real purpose of international law. That is to say,

¹⁷⁴ W. M Reisman *et al*, note 151 pp. 575-576.

¹⁷⁵ W. M Reisman *et al* *ibid* pp. 575, 576.

¹⁷⁶ R. A Falk, ‘Casting the Spell: The New Haven School of International Law, 1991, 1997’ (1995) *Yale Law Journal* p. 104.

¹⁷⁷ Myres McDougal, ‘Jurisprudence for a Free Society’ (1961) *Georgia Law Review* Vol. 1 p. 2.

¹⁷⁸ Siegfried Wiessner, ‘Professor Myres Smith McDougal: A Tender Farewell’ (1998-1999) *St Thomas Law Review* Vol. 11 pp. 203-204.

¹⁷⁹ Harold Hongju Koh, ‘Commentary: Is There a ‘New’ New Haven School of International Law’ (2007) *The Yale Journal of International of Law* Vol. 32 pp. 562-564.

¹⁸⁰ Harold Hongju Koh *ibid* p. 565.

¹⁸¹ W. M Reisman *et al*, *supra* note 151 p. 576.

transnational human problems should not be addressed through the lens of the law alone; rather, international law should see deeper/farther by applying insights from other fields of knowledge.¹⁸² The School conveys a thought-provoking interdisciplinary viewpoint that is realistic about the actions of authoritative decision-makers and the extrapolations of the content of international standards applicable in the everyday state of affairs.¹⁸³ It views policy as an integral part of the law which credits it with a transformative, illustrative and analytical force.¹⁸⁴ It simply scrutinises state policies, methods, approaches and procedures of international law by recounting their application to societal problems.¹⁸⁵ Analysing the problem of missing migrants can hugely benefit from this intellectual-tasks based methodology of international law.

2.4.2 Thematic Analysis of Secondary Narrative Interviews with Families of Missing Migrants

This thesis seeks to extract ‘themes’ that emerged from secondary narrative interviews about the experiences of families of missing migrants and use them to analyse the psychosocial implications of that experience through the diagnostic lens of ‘loss’, ‘mourning’ and ‘grief’. The interview analysis also aligns with the normative visions of the New Haven School which has accepted that empiricism does have a role to play in the study of the law.¹⁸⁶ Below, I provide some context to the analysis in terms of the source, number and credibility of the interviews and the approach adopted in analysing them.

i. The Source of the Interview Data

The secondary interview data were collected from the official public website of the ‘Missing at the Borders Project’.¹⁸⁷ Missing at the Borders comprises activists from a group of international organisations working together on the transnational issue of missing migrants on both sides of the Mediterranean Sea.¹⁸⁸ Their work with families of missing migrants is well recognised, thus,

¹⁸² Harold Hongju Koh, *supra*, note 179 p. 565.

¹⁸³ D’Amato Anthony, ‘*Jurisprudence: A Descriptive and Normative Analysis of Law*’, (Leiden: Martinus Nijhoff, 1984) p. 189.

¹⁸⁴ Molly Land, ‘Reflections on the New Haven School’ (2013) *New York Law School Law Review* Vol. 58 p. 919.

¹⁸⁵ Steven Ratner and Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) *American Journal of International Law* Vol. 93 No. 2 pp. 291-302.

¹⁸⁶ Michael Heise, ‘The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism’ (2002) *University of Illinois Law Review* Vol. 2002 No. 4 pp. 819-850.

¹⁸⁷ ‘Missing at the Borders Project’ see here: <https://missingattheborders.org/en/testimonials> (7/11/2019).

¹⁸⁸ The Missing at the Borders project is composed of members of the following organisations: *Milano senza Frontiere*, *Palermo senza Frontiere*, *Como senza Frontiere*, *Carovane Migranti*, *Association des*

the interview data collected from their work is credible.¹⁸⁹ The group 'joined forces with families of the migrants who died or were victims of enforced disappearance during their journey to Europe'. Together, they set up this webpage to assist families tell their stories. The project is dedicated to collecting multi-cited narrative interviews from families of missing migrants in Tunisia and Algeria, two of the states most affected by large-scale migration through the Mediterranean Sea to Europe.

ii. *The Number (Sample Size) and Value of the Interview Data*

A total of twelve (12) secondary narrative interviews with families of missing migrants were collected and analysed. While the number of interviews is relatively small, it does not necessarily affect the credibility of findings derived from their analysis as results are extrapolated and deemed to be a fair reflection of the psychosocial implications that families of the missing undergo when their relatives go missing in migration. The small sample size of the data however demonstrates the difficulty often faced by researchers when investigating sensitive human problems like missing migrants, not least because migration may sometimes be labelled 'crime' by states and may also be perceived as a source of shame. While it may be argued that doing new primary fieldwork could have increased the number or amount of data to enhance the quality of the analysis, it is not necessarily a prerequisite for the present research because in studying the actual relationship between the law and other social science fields, the "distinction between primary and secondary data is merely theoretical".¹⁹⁰ Thus, legal scholarship as such is not necessarily "concerned with empirical investigation"¹⁹¹ because secondary data used in subsequent research also themselves transform into primary data when viewed in light of new interpretation, knowledge or context.¹⁹² Overall, the essence of injecting analysis of the interview data into the research is to add credibility to the research findings and to ensure that the research goes beyond document-based analysis to venture into the social context in which the law operates. With regard to the implications of applying examples and themes taken from interview data generated abroad to a UK policy context, I have argued that the problem of missing migrants is a transnational social problem that

Travailleurs Maghrébins de France, Alarm Phone and Watch the Med. See here: <https://missingattheborders.org/en/about> and here: <https://missingattheborders.org/en/sitiutili> (14/1/2020).

¹⁸⁹ See 'Missing at the Borders Mission Statement', available at: <https://missingattheborders.org/en/> (accessed 5/09/2020).

¹⁹⁰ F.C Hicks, *Materials and Methods of Legal Research* (New York: The Lawyers Co-operative Publishing Company, 1942) p. 24.

¹⁹¹ Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds.) *Advanced Research Methods in the Built Environment* (United Kingdom: Wiley-Blackwell Publishing, 2008) p. 37.

¹⁹² F.C Hicks, note 190 p. 23.

transcends borders, and therefore, the problem of missing migrants abroad can produce strong effects here in the UK.

iii. *Thematic Analysis of the Secondary Narrative Interviews Data*

Thematic analysis is among a diverse range of qualitative analytical methods that offer different kinds of insights that can be used to analyse interview data. Thematic analysis will enrich analysis of secondary interview data obtained from families of missing migrants in a way that “elaborate, supplement, correct or modify the limited insights gained from each single method”.¹⁹³ Thematic analysis is understood to be a method for “identifying, analysing and reporting patterns (themes) within data”.¹⁹⁴ What counts as a ‘theme’ implies something important within a dataset, and “represents some level of patterned response or meaning within the data set”.¹⁹⁵ Narrative analysis on the other hand is one of the “meaning-making interpretative frameworks”¹⁹⁶ in the social sciences in which individual stories told in a plotted sequence¹⁹⁷ are used to recount or explain “how individuals make sense of events and actions in their lives with themselves as agents of their lives”.¹⁹⁸ According to Elliot, from a naturalist perspective, narrative analysis asks “what experience has this person had and what do these experiences mean to the individual”.¹⁹⁹ Thus, using narrative interviews to collect data is empowering to families of missing migrants because, although it can be a psychologically demanding process given the traumatic experiences of the interviewees,²⁰⁰ the participant families nonetheless have the opportunity to tell and narrate their own stories first-hand and share their experiences. Examples of individual narratives and experiences that people have encountered in life such as Hannah Arendt’s first-hand experience

¹⁹³ Lucy Yardley and David F Marks, ‘Introduction to Research Methods in Clinical and Health Psychology’ in D.F Marks and Lucy Yardley (eds.) *Research Methods for Clinical and Health Psychology* (London: SAGE, 2004) p. 14.

¹⁹⁴ Virginia Braun and Victoria Clarke, *Using Thematic Analysis in Psychology* (2006) Vol. 3 Issue 2 p. 79; Jennifer Attride-Stirling, ‘Thematic Networks: An Analytic Tool for Qualitative Research Tool’ (2001) *Qualitative Research* Vol. 1 Issue 3 pp. 385-405

¹⁹⁵ Virginia Braun and Victoria Clarke, *Using Thematic Analysis in Psychology* (2006) Vol. 3 Issue 2 p. 82.

¹⁹⁶ Giorgia Doná, *The Marginalised in Genocide Narratives* (Abington-on-Thames: Routledge, 2019).

¹⁹⁷ Jerry Floersch *et al*, ‘Integrating Thematic, Grounded Theory and Narrative Analysis: A Case Study of Adolescent Psychotropic Treatment’ (2010) *Qualitative Social Work* Vol. 9 Issue 3 pp. 408 & 411.

¹⁹⁸ Lynn McAlphine ‘Why Might you Use Narrative Methodology? A Story About Narrative’ (2016) *Eesti Haridusteaduste Ajakiri, nr = Estonian Journal of Education* 4(1) p. 34.

¹⁹⁹ Jane Elliott, *Using Narrative in Social Research: Qualitative and Quantitative Approaches* (London: Sage, 2005) pp. 20-21; E.G Mishler ‘Models of Narrative Analysis: A Typology’ (1995) *Journal of Narrative and Life History* Vol. 5 Issue 2 pp. 87-123.

²⁰⁰ Mireille Hebing, ‘Refugee Stories in Britain: Narratives of Personal Experiences in a Network of Power Relations’ (2009) PhD Thesis (Unpublished), City University London p. 48.

as a refugee culminating in her ‘right to have rights’ thesis²⁰¹ and Giorgia Doná’s experience about the psychological impact of living and working in a post-conflict environment in Rwanda already tell us how powerful and effective narratives can be when they are communicated first-hand.²⁰² Thus, families of missing migrants telling their stories first hand can be empowering for them, not least because it is an indication that their voice matter and is being taken seriously.²⁰³ It restores the affected families’ sense of agency and recognises and respects their ‘right to be heard’.²⁰⁴ Interestingly, the right to be heard is itself the very pride of the law. Thus, by combining insights from narratives and the law together, my analysis is geared towards how the law and national migration policies speak to those themes, especially the psychosocial needs of families of missing migrants. Although the law is a unique field of knowledge that is often inclined to the use of its own traditional doctrinal legal methodology,²⁰⁵ contemporary legal research increasingly views the law as a narrative.²⁰⁶ The idea is that viewing legal texts as narratives situated within the broader social sciences, allows for addressing critical human problems such as the issue of missing migrants more “critically and constructively, in the process of overstepping artificial boundaries...[that] champions law reform...and is of practical utility”.²⁰⁷

iv. *Reliability, Validity and Credibility of the Narrative Interview Analysis*

Whether in law or within the broader social sciences, research generally advocates reliability, validity and credibility as criteria for evaluating the quality and value of qualitative interviews²⁰⁸

²⁰¹ Lyndsey Stonebridge, *Placeless People: Writing, Rights and Refugees* (Oxford: Oxford University Press, 2018) p. 29 (writing on Arendt’s experience of escaping in 1933, from Germany through the Czech border into Czechoslovakia as a stateless refugee); Hannah Arendt, ‘The Perplexities of the Rights of Man’ in T. Campbell and A. Sitze (eds.) *Biopolitics: A Reader* (London: Duke University Press, 2013) pp. 82-97.

²⁰² Giorgia Doná, ‘The Psychological Impact of Working in Post-Conflict Environments: A Personal Account of Interpersectional Traumatization’ (2014) *Intervention: International Journal of Mental Health, Psychosocial Work and Counselling in Areas of Armed Conflict* Vol. 12 No. 1 pp. 91-94.

²⁰³ Julia Powles, ‘Life History and Personal Narrative: Theoretical and Methodological Issues Relevant to Research and Evaluation in Refugee Contexts’ (2004) *Working Paper No 106 in New Issues in Refugee Research*, UNCHR Evaluation and Analysis Unit pp. 17-20 p. 18.

²⁰⁴ Julia Powles, *ibid* p. 18.

²⁰⁵ Dame Hazel Genn *et al*, *Law in the Real World: Improving Our Understanding of How Law Works* (London: The Nuffield Foundation, 2006) para. 94.

²⁰⁶ Peter Brooks, ‘The Law as Narrative and Rhetoric’ in Peter Brooks and Paul Gewirtz (eds.) *‘Law’s Stories: Narrative and Rhetoric in the Law’* (Yale: Yale University Press, 1996) pp. 14-22; R.R French, ‘Of Narrative in Law and Anthropology’ (Review Essay) (1996) *Law and Soc’y Rev.* Vol. 30 pp. 417-434; G.A Martinez, ‘Philosophical considerations and the Use of Narratives in Law (1998) *Rutgers Law Journal* Vol. 30 pp. 683-706.

²⁰⁷ F.C Hicks note 190 p. 30.

²⁰⁸ Robin Wittemore *et al*, ‘Validity in Qualitative Research’ (2001) *Qualitative Health Research* Vol. 11 No. 4 pp. 522-537; Nahid Golafshani, ‘Understanding Reliability and Validity in Qualitative Research (2003) *The Qualitative Report* Vol. 8 No. 4 pp. 597-606.

and more specifically, in relation to research that uses individual narratives in interviews as key units of analysis.²⁰⁹ *Reliability* generally relates to measurements of consistency, repeatability, precision and trustworthiness of a research.²¹⁰ By applying a robust and measurably consistent methodological strategy that brings together insights from law, narrative and thematic analysis to evaluate the experiences of families of missing migrants and how they make meaning out of their loss, the reliability of the research findings can be guaranteed. The *Validity* on the other hand is about how truthful and accurate the findings and results of the research are.²¹¹ I addressed the issue of research validity by further analysing and situating the interviews within the broader theoretical framework that underpin the research which allowed the research findings to be cross-validated using multi-theoretical lenses. In the same vein, *credibility* relates to whether the research findings reflect fairly and believably the experiences of the interview participants. When the themes are extracted from the narrative interviews and further evaluated in light of the totality of the large body of literature reviewed on the psychosocial implications of migrants going missing for their families, the credibility of the findings can be supported.

2.4.3 Ethical Issues

This research was conducted in line with Bournemouth University Ethics Policy and Procedures. An ethics review was conducted, and approval was given by the Bournemouth University Ethics Champion. The principles of Beneficence (do positive good), Non-Maleficence (do no harm intentionally), Autonomy (respect people's right to make choices, hold views and take actions based on personal values/beliefs) and Justice (treat others equitably, distribute burdens/benefits fairly) were all adhered to. The research is principally desk-based research that is unlikely to cause serious harm to others or to pose a significant ethical risk. Although it included analysis of secondary interview data that touch on sensitive issues about migrant lives and the psychosocial well-being of their families, this poses no ethical risks as I had no direct contact with the interview participants involved and the secondary data are already in the public domain.

²⁰⁹ Jane Elliot, note 199 p. 6.

²¹⁰ Mohammad Zohrabi, 'Mixed Method Research: Instruments, Validity, Reliability and Reporting Findings' (2013) *Theory and Practice in Language Studies* Vol. 3 No. 2 pp. 259-260.

²¹¹ Jeff Rose and C.W Johnson, 'Contextualising Reliability and Validity in Qualitative Research: Toward More Rigorous and Trustworthy Qualitative Social Science in Leisure Research' (2020) *Journal of Leisure Research* Vol. 51 No. 4 pp. 434-436.

2.5 Conclusion

This chapter has outlined the theoretical, methodological and ethical positions of this research. A mixed-method approach was adopted because not only are the methods practically underpinned by the selected theories, they also help to gain a deeper understanding of how different disciplines interact with the law to address transnational human problems like missing migrants in ways that transcend the conceptual and theoretical bounds of the traditional doctrinal legal methodology. Building on this theoretical and methodological framework, I now turn attention to the next chapter which seeks to resolve some initial methodological and fundamental questions of responsibility in relation to missing migrants.

Chapter 3

Responsibility for a Growing Crisis: Settling Initial Fundamental Questions of Responsibility in Relation to Missing Migrants

3.1 Introduction

The theoretical framework and methods adopted in this thesis put the state at the epicentre of international legal responsibility. However, in light of the growing crisis of migrant deaths in the Mediterranean Sea and at state borders, there have been arguments among scholars as to who in particular among a multiplicity of agents is the primary agent of responsibility in relation to missing migrants.²¹² The arguments extend even to the role played by regional organisations like the EU through its member states and institutions.²¹³ It, therefore, raises fundamental questions as to whether ‘states’ are the primary agents of responsibility in relation to missing migrants. Resolving these questions is imperative because they constitute a backdrop to the thesis’ broader analysis of obligations of states towards missing migrants as well as the literature review which deals significantly with states’ conducts and policies in response to transnational migration.

Before I outline all the questions in full, it is important to state how the term ‘responsibility’ is understood and used in this thesis. Not least because responsibility has proven to be an enigmatically elusive term in the lexicon of the law. It is actually a concept that law shares with political philosophy,²¹⁴ ethics,²¹⁵ political theory²¹⁶ and other related fields. Etymologically, the term ‘responsibility’ used interchangeably with ‘obligation’ and ‘duty’ in this work for legal and practical reasons²¹⁷ denotes answerability; a kind of obligation requiring answers to questions like ‘why did you do it?’ or ‘why did you not do something about it?’²¹⁸ We often find ourselves making

²¹² Ana Srovin Coralli and Irene Manganini, ‘International Legal Obligations of States Concerning the Search for Missing Migrants: A Possible Way Forward’ (2019) *International Law Blog*.

²¹³ Thomas Spijkerboer, ‘Are European States Accountable for Border Deaths?’ in Satvinder S. Juss (ed.) *The Ashgate Research Companion to Migration Law, Theory and Policy* (London: Routledge, 2012) p. 74.

²¹⁴ David Miller note 142 p. 82.

²¹⁵ See generally Hans Jones, *The Imperative of Responsibility: In Search of Ethics for the Technological Age* (Chicago: University of Chicago Press, 1984).

²¹⁶ Volker Roeben ‘Responsibility in International Law’ (2012) *Max Planck Yearbook of United Nations Law* Vol. 16 p. 102.

²¹⁷ This approach is supported by the consistent use of ‘duty’ and ‘responsibility’ to refer to ‘obligations’ in many international treaties, many of which will be referred to in this work. See ILC Draft Articles 2001, with annexed commentaries (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 33, para. 3.

²¹⁸ J.R Lucas, *Responsibility* (Oxford: Oxford University Press, 1995) p. 5.

hasty claims against one another and the state and society all in the name of responsibility without “thinking what we are doing”.²¹⁹ However, following Honoré, we can always locate at least three main sources of responsibility in any case: first, responsibility for one’s own conduct or actions; second, responsibility for things and events that we choose to undertake in life; and third, responsibility that society ascribes to us either through the law or informally, e.g., responsibility to one’s own community.²²⁰ According to Kurtz Bayertz, from whatever perspective we choose to look at and understand responsibility, it will certainly involve some multidimensional relationship between (a) the subject of responsibility, that is, the responsible agent; (b) the person to whom responsibility is owed, that is, the person who is entitled to hold any agent responsible; (c) the object of responsibility, that is, the specific actions and events whose authorship is the ground of responsibility attribution; and (d) a system of criteria for evaluation, that is, the criteria in normative terms for establishing the relationship between the subject and object of responsibility.²²¹ Alexa Zellentin²²² suggests that since we have some methodologically linked questions of responsibility that require normative evaluation of the criteria for understanding responsibility, it would be more appropriate to break down Bayertz’s criteria into distinct sets of criteria stated below (except for item (d) which is not part of Bayertz’s criteria but added for our context):

- (a) *Who* is the responsible agent, that is, who can be the subject of responsibility of the relevant kind; and why, in the relevant context, should that agent be the rightful agent of responsibility?
- (b) Responsible for *what*: that is, what kind of specific conducts, behaviours, actions and/or events can be objects of responsibility and why?
- (c) Responsible to *whom*: that is, to which person or group of persons is the relevant agent responsible and why?
- (d) Responsible for actions and events in *where*: that is, in what ‘places and territories’ may the responsibility of the responsible agent be invoked and exercised?

²¹⁹ The phrase ‘thinking what we are doing’ was taken from Hannah Arendt’s book *The Human Condition*. See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) p. 5.

²²⁰ Tony Honoré, *Being Responsible and Being a Victim of Circumstance* Maccabaeen Lecture in Jurisprudence (1998) p. 173.

²²¹ Kurtz Bayertz (1995), Grenzen der Verantwortung, in: Kurtz Bayertz (ed.) *Verantwortung: Prinzipoder Problem? Darmstadt* cited in Alexa Zellentin ‘Outcome Responsibility: Fallible Beings Acting in an Uncertain World’ (2018) *SPIRe Working Paper* WP07 p. 4.

²²² Alexa Zellentin *ibid* p. 4.

In the next sections below, I settle these questions in relation to missing migrants using legal and policy materials and backed by normative, theoretical and philosophical rationales.

3.2 Who Are the Responsible Agents? On the 'State' as the Primary Agent of Responsibility in Relation to Missing Migrants.

As hinted above, from the study background and theoretical framework advanced in this study, one may already infer that this thesis takes the 'state'²²³ as the primary agent of responsibility in relation to missing migrants. However, it is important to recognise that the basis for accepting the state as the primary agent of responsibility in migration contexts is not without critical objection in the literature. Not least because other agents of responsibility can also be responsible for the same kind of obligations that this thesis is seeking to establish and attribute to states. Such agents as individuals,²²⁴ families,²²⁵ international organisations,²²⁶ NGOs,²²⁷ the UN refugee agency²²⁸ and non-state or quasi-state actors²²⁹ may all be considered important agents of responsibility in the context of migration. Given the multiplicity of these agents and their individual and collective contributions to modern migration events giving rise to responsibility attribution, we are often faced with the controversial legal and methodological question: *who* in particular among these actors is the primary bearer of the obligations created by international law in relation to missing

²²³ Under international law 'states' are usually considered the primary agent of responsibility. See Volker Roeben, *Responsibility in International Law* p. 101; Cedric Ryngaert, 'Non-State Actors: Carving out a Space in a State-Centred International Legal System' (2016) *Netherlands International Law Review* Vol. 63 p. 183-185.

²²⁴ The responsibility of 'individuals' in international law is recognised in literature. See Andrew Clapham, 'The Role of the Individual in International Law' (2010) *European Journal of International Law* Vol. 21 No. 1 pp. 25-30.

²²⁵ Issues linked to migrant deaths such as the role played by families implies that families can be agent of responsibility. See Mediterranean Missing Migrants Project entitled 'Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis' (2016) *Summary Report* p. 3.

²²⁶ The responsibility of 'international organisations' for internationally wrongful acts is well recognised in international law. See UN Draft Articles on the Responsibility of International Organisations 2011, adopted by the International Law Commission at its Sixty-Third Session, in 2011 para. 87. See also Jan Klabbers 'Reflections on Role Responsibility: The Responsibility of International Organisations for Failing to Act' (2017) *European Journal of International Law* Vol. 28 No. 4 pp. 1133-1161.

²²⁷ The influence of 'NGOs' on the development of international law is recognised in literature. See Steve Charnovitz, 'Nongovernmental Organisations and International Law' (2006) *The American Journal of International Law* Vol. 100 No. 2 pp. 348-372.

²²⁸ The UN Refugee Agency is saddled with the responsibility of seeking permanent solutions to problems of refugees in the world. See G.S Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasiyeh *et al*, (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies*, (Oxford: Oxford University Press, 2014) pp. 1-14.

²²⁹ On international responsibility of non-state actors under international law, see Williams Thomas Worster, 'Relative International Legal Personality of Non-State Actors' (2016) *Brooklyn Journal of International Law* Vol. 42 Issue 1 pp. 207-271.

migrants. With reference to human rights duties, some human rights theorists have argued that 'states' remain the sole bearers of human rights duties.²³⁰ For example, frontline human rights theorist Henry Shue in his influential book *Basic Rights* argues that human rights obligations would be more realisable if they are assigned to world's most powerful actors: 'states'.²³¹ Other writers and experts, however, kick against the state-centric approach to classifying human rights duty-bearers, expanding instead the scope of duty-bearers beyond the state to include international institutions²³² and private actors.²³³

Taking this multiplicity of views regarding these agents of responsibility together, we can assume that on the basic, theoretical and methodological level, there are at least three possible approaches that can be adopted to assign obligations to any relevant agent(s) in relation to missing migrants. The first approach would be to assign obligations to each and every one of the identified agents based on their respective contributions in bringing about the problem of missing migrants being considered. The second approach would be to assign obligations collectively to all the agents, in which case, the agents are jointly responsible for the problem of missing migrants at hand. And the third approach would be to assign obligations to only one out of all the relevant agents and try to account for the actions of other agents through that one agent. However, in this work, I argue that while all the agents identified herein truly figure into our lives in some ways throughout the migration process, not all of them can be helpful and fit for assigning obligations in the context of missing migrants. If we attempt to share, distribute or allocate responsibilities to each of these agents on the basis of their actions and contributions to the problem at hand, then, for all practical purposes, we will encounter serious theoretical and methodological difficulties. Theoretically, the biggest problem would be what experts call "diffusion of responsibility"²³⁴ or

²³⁰ C.R Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) pp. 109-110, 113-117, 122-125 and 160-174; and Joseph Raz, 'Human Rights Without Foundation' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) pp. 321-337. See also Joseph Raz, 'Human Rights Without Foundation' (2007) *University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 14/2007* p. 9.

²³¹ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd edition (Princeton: Princeton University Press, 1996) p. 52; Henry Shue, 'Mediating Duties' (1988) *Ethics* Vol. 98 No. 4 pp. 687-704 p. 697.

²³² J.W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987) pp. 38-41.

²³³ John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) *Current Legal Problems* Vol. 65 pp. 1-30; T. Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms*, 2nd edition (Cambridge: Polity Press, 2008) cited in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* p. 245. Cf. David Miller 'Distributing Responsibilities' (2001) *Journal of Political Philosophy* Vol. 9 No. 4 pp. 453-471; Henry Shue, *Basic Rights*, 2nd edition (Princeton: Princeton University Press, 1996) p. 157.

²³⁴ André Nollkaemper & Ilias Plakokefalos, *Principles of Shared Responsibility in International Law: An Appraisal of State of the Art*, Nollkaemper & Plakokefalos (eds.) (Cambridge: Cambridge University Press,

“problem of many hands”.²³⁵ By diffusion of responsibility, it is meant that rather than responsibility resting squarely on one person, it is instead spread over several actors (many hands). The involvement of many hands will obscure where exactly to locate agency. There is bound to be agency collision in that the many hands involved come from a ‘wide range of addresses’,²³⁶ thereby making it difficult to know who is responsible for what. This is more so, given that under the current international law of responsibility, the principle upon which responsibility is allocated to a multiplicity of agents remains quite ‘indistinct’,²³⁷ provides ‘no clear guidance’²³⁸ and is largely ‘underdeveloped’.²³⁹ Methodologically, the main difficulty, especially with regard to duty-bearers of human rights, remains the risk of conflating responsibility as a general concept under the wider notion of global justice with the more specific question of human rights duties.²⁴⁰

Consequently, I submit that only the ‘state’ in theoretical and methodological terms can fit into the context in which I want to assign responsibility in relation to missing migrants. This is so because states possess not only the legal but also the moral features of agency that can ground the kind of responsibility that this work is seeking to establish. Therefore, for good and practical but also critical reasons, the ‘state’ is selected as my unit of analysis and the primary agent I wish to hold responsible and assign obligations to. I assume that through the state we are able to account for the activities and contributions of other non-state/quasi-state agents. This is so because those other agents stand in some contingent, subsidiary, secondary, indirect or residual relationship with the state insofar as their own migration activities are only a derivative of or a reaction to state migration policies and actions and they cannot in legal terms institutionally and structurally exist, operate or function outside the conduits of state laws and regulations. The choice of the state as the primary responsibility-bearer towards missing migrants is not to undermine the importance of those other agents of responsibility that I have identified. In fact, the

2016) p. 1. See Nollkaemper & Plakokefalos, ‘The Practice of Shared Responsibility in International Law’, Nollkaemper & Plakokefalos (eds.) (Cambridge: Cambridge University Press, 2017).

²³⁵ D.F. Thomson, ‘Moral Responsibility of Public Officials: The Problem of Many Hands’ (1980) *The American Political Science Review* Vol. 74 No. 4 p. 905; D.F. Thomson, ‘Designing Responsibility: The Problem of Many Hands in Complex Organisations’ in *The Design Turn in Applied Ethics*, Jeroen van den Hoven *et al.* (eds.) (Oxford: Oxford University Press, 2017) pp. 32-56.

²³⁶ T.A. Aleinikoff, *International Organisation for Migration: International Dialogue on Migration No. 3 International Legal Norms and Migration. An Analysis*, (Geneva: IOM, 2002) p. 13.

²³⁷ Ian Brownlie, *Principles of International Law*, 7th edition (Oxford: Oxford University Press, 2008) p. 457.

²³⁸ Andre Nollkaemper and Dov Jacobs, ‘The Shared Responsibility in International Law: A Conceptual Framework’ (2013) *Michigan Journal of International Law* Vol. 34 Issue 2 p. 363.

²³⁹ John E. Noyes and Brian D. Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) *Yale Journal of International Law* Vol 13 Issue 2 p. 225.

²⁴⁰ Samantha Besson, ‘The Bearers of Human Rights’ Duties and Responsibilities for Human Rights: A Quiet (R)evolution’ (2015) *Social Philosophy and Policy* Vol. 32 Issue 1 pp. 244-268 p. 246.

secondary interviews with families of missing migrants that will be used in this study were derived from the investigative works of a group of international organisations working on the subject of missing migrants on both sides of the Mediterranean Sea which demonstrates the importance and responsibility-fitness of such organisations when it comes to responding to the problem of missing migrants. However, as we shall see later, the evidence provided in the interviews collected by these organisations rather challenges the inappropriate conducts, actions and policies of states when dealing with migrants, and therefore, on the point of responsibility attribution, they too defend the position that the state is responsible for violations of migrants' rights and is also responsible for accounting for dead and missing migrants and meeting the needs of their surviving families. In addition, the international responsibility of regional blocs like the EU and other multinational organisations have been a subject of scholarly attention.²⁴¹ However, whenever I seek to assign responsibility to the EU in relation to migrants, it is done on the understanding that it is a bloc made up of European states whose collective migration policies affect migrants, and as such, the collective and shared responsibility for such policies is attributable to both the EU through its institutions and to its individual member states.

The choice of the state is particularly compatible with the third approach to assigning obligations described earlier in that it allows for the integration of holistic and pluralist views to assigning responsibility. A claim is sometimes made in the literature that no state as a sovereign person in international law can have any legal responsibility.²⁴² Lassa Oppenheim, however, argues that such assertion is true only to the extent that it is made with a "reference to certain acts of a state towards its subjects. Since a state can abolish parts of its municipal law and can make new municipal law, it can always avoid legal, although not moral, responsibility by a change of municipal law."²⁴³ In this light, mainstream international legal theory consistently emphasises the state as the centrepiece of the international legal order, whereby the identities of the state and international law are considered two sides of the same coin.²⁴⁴ On the international level, states constitute and are constituted by the legal and socio-political challenges and conflicts in which their decisions, policies and actions are called to question. As such, states in their own right have

²⁴¹ Gloria Fernandez Arribas, 'International Responsibility of the European Union for the Activities of its Military Operations: The Issue of Effective Control' (2013-2014) *Spanish Yearbook of International Law* Vol. 18 pp. 33-59 and Kirsten Leube, 'Can the EU be Held Accountable for Financing Development Projects that Violate Human Rights' (2017) *Georgetown Journal of International Law* Vol. 48 pp. 1245-1272.

²⁴² Lassa Francis Oppenheim, *International Law: A Treatise, Volume 1 (of 2), 2nd ed.* (London: Longmans, Green and Co, 1912) pp. 242-243.

²⁴³ L.F Oppenheim *ibid* pp. 242-243.

²⁴⁴ Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law' (1993) *European Journal of International Law* Vol. 4 pp. 447-471.

to be considered an important unit of analysis. Ideally, there are many other legal, political and theory-related reasons for accepting the state as the best agent that can ground the kind of responsibility I seek to establish. First, in this study, my interest is in the conduct of states for their actions and policies in relation to missing migrants and the obligation they give rise to. Second, we should understand that most of the international law and policy instruments that I work with in this thesis derive from treaties and agreements of states as well as other 'transnational legal provisions' which, though they may not have been strictly adopted by the states, still regulate states' behaviour in relation to transnational migration. Therefore, if we fail to recognise states as the most responsible agent, we will ultimately encounter serious difficulties in accounting for any 'transnational law'²⁴⁵ that may not necessarily derive from international treaties and/or agreement of states against which we seek to apply them.

It is also acceptable, in view of the way we engage with the subject of responsibility in the legal and political philosophy tradition, to treat states as some form of organised agents to which it is customary under current general international law to attribute holistic responsibility and other associated obligations for their actions and policies.²⁴⁶ Virtually every aspect of our lives are of interest to states and subject to state control.²⁴⁷ States through their internal laws, regulations and administrative directives and decisions effectively control and influence our economic, social, cultural, health and even our intimate biological life. For example, when states enact migration laws and policies, it is because they want to police the mobile society²⁴⁸ by controlling our ability and freedom to make cross-border movements, but this is also seen as part of fulfilling their responsibility to avoid people going missing through unsafe, disorderly and irregular migration. When they enact birth control or population laws and policies, it is because they want to control our intimate sexual and reproductive life and relationships. The capacity of states to control and govern not only the intrinsic character of these relationships but also their practical expressions reflect the profound ways in which states include our biological life into the mechanisms and calculations of state power (biopolitics), thereby making the state central to our lives. In his book

²⁴⁵ See Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) p. 1; Carrie Menkel-Meadow, 'Why and How to Study Transnational Law' (2011) *UC Irvine Law Review* Vol. 1 No. 1 p. 103.

²⁴⁶ Anna Stilz, 'Collective Responsibility and the State' (2011) *The Journal of Political Philosophy* Vol. 19 No. 2 p. 190.

²⁴⁷ Lammer-Heindel C. Spencer, 'Does the State Have Moral Duties? State Duty-Claims and the Possibility of Institutionally held Moral Obligations' (2012) PhD Thesis, University of Iowa USA p. 3.

²⁴⁸ Jennifer Allsopp *et al*, 'Policing the Mobility Society: The Effects of EU Anti-Migrant Smuggling Policies on Humanitarianism' (2018) *International Journal of Migration and Border Studies* Vol. No. 3 pp. 236-276.

Medieval Origins of the Modern State published in 1970, Joseph Strayer vividly captured the all-important place of the state in our lives when stating,

“a man can lead a reasonably full life without a family, a fixed local residence or a religious affiliation, but if he is stateless he is nothing. He has no rights, no security and little opportunity for a useful career. There is no salvation on earth outside the framework of an organised state”.²⁴⁹

For some, Strayer’s claim that all the benefits we live to enjoy in this world derive directly from a system of organised states may appear overstated. However, assuming but without conceding that his claim is overstated, then, we should find John Rawls conception of ‘society’ (though distinct from but never autonomous from the state) as a ‘social union of social unions’²⁵⁰ even more odd, yet certainly true. I do recognise that individuals, for example, in our context, migrants and members of their families, can potentially be responsible for the decisions they make individually and collectively to embark on deadly migration journeys which may increase migrants’ likelihood of dying and going missing at sea and borders.²⁵¹ In that case, some might argue that as much as individuals can make institutional duty-claims from states, states too can make valid individual duty-claims from individuals. Whereas an institutional duty claim affirms that the state as an institution has a duty to carry out some action ‘X’, individual duty-claim asserts that a particular individual, citizen or non-citizen has a duty to do ‘Y’.²⁵² The same kind of duty relationship is also thought to exist between states and non-state/quasi-state entities. However, the activities of non-state entities in relation to the issue of missing migrants are subsumed inside the governance structure of the state insofar as they cannot find existence and life outside the framework of the organised state. Again, a closer look at the political character and international legal personality of non-state entities when it comes to matters of migration reveals that most, if not all, lack the attributes of a genuine agency that can ground the kind of responsibility that I am seeking to establish in this work. But states do possess that genuine agency required to validate responsibility attribution on the basis of the contingency relationship that exists between them and non-state agents. Importantly, it is the states that make all the migration laws, policies and regulations that give rise to one effect or the other—the *buck of responsibility stops at the table of states*—responsibility is not passed on beyond this point. The mere fact that international law

²⁴⁹ J.R Strayer, *On the Medieval Origins of the Modern State* (Princeton University Press, 2005) p. 3.

²⁵⁰ John Rawls, *A Theory of Justice, Revised Edition* (Harvard: Harvard University Press, 1971) p. xix.

²⁵¹ Paolo Cuttitta *et al*, ‘Various Actors: The Border Death Regime’ in Paolo Cuttitta and Tamara Last (eds.) *‘Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality’* (Amsterdam: University of Amsterdam Press, 2020) p. 37.

²⁵² Lammer-Heindel C. Spencer, note 247 p. 1.

vest upon states' the omnipotent powers and apparatuses to control migration and police human mobility,²⁵³ makes states the undisputed "manager of migration".²⁵⁴ It, therefore, presupposes that in the context of migration governance, no other agent, however sophisticated their migration activities and operations might be, can effectively control our lives the way the state does.

However, despite these reasons justifying states as the primary agent of responsibility in relation to missing migrants and migration more generally, it is critical to also point out that some might, for other reasons, still object to the choice of the state as the primary agent of responsibility in migration matters. For instance, there have been arguments by some scholars suggesting that the state is not the exclusive and sole sovereign agent that affects migrants'/refugees' lives; and therefore, it would be inaccurate to overlook the significance of the reach of sovereign power that moves at different levels, involving a multiplicity of non-state sovereigns when analysing refugees' lives. Those who hold this position argue that identifying the state as the sole authority that affects migrant lives misses out other kinds or complexities of power relations that also affect migrant lives in profound ways. They seem to contend that uncritical "state-centric approaches...based exclusively on law and rights prevent us from recognising lived experiences".²⁵⁵ For Martin Diana, "a state-centric and law-centric approach would underplay the macropolitics operating on the global scale as well as the micropolitics on the ground constituted by multiple and micro forms of resistance displayed by refugees in their ongoing struggles".²⁵⁶

In response, I submit that while the case for factoring in non-state sovereigns operating at multi-scalar levels into the landscape of sovereign power seems strong, it nonetheless fails to recognise that non-state and/or quasi-state sovereigns cannot govern migration with such level of authority, control and organisation as would the state. There have also been arguments in some quarters that even though the state can be treated as the primary agent of responsibility in respect of any international subject matter at all, it is, nonetheless, futile to assign obligations to states because states easily disregard their obligations without any consequence. Those who hold this view would argue that the obligations of states are based exclusively on their consent to

²⁵³ Khalid Koser, 'Introduction: International Migration and Global Governance' (2010) *Global Governance* Vol. 16 pp. 301-315 p. 301.

²⁵⁴ Reinhard Schweitzer, 'The Micro-Management of Migrant Irregularity and Its Control: A Qualitative Study of the Intersection of Public Service Provision with Immigration Enforcement in London and Barcelona' (2017) *PhD Thesis, University of Sussex* p. 13.

²⁵⁵ See Martin Diana, 'The 'Where' of Sovereign Power and Exception: Palestinian Life and Refugee Camps in Lebanon' PhD Thesis, University of Durham (2012) p. 4.

²⁵⁶ *ibid* p. 4.

be bound and that states can decide to withhold their consent without any consequence.²⁵⁷ For them, international law is created by the will of states²⁵⁸ and strictly governed by state sovereignty. In other words, the international legal order is volunteerist in nature, whereby the consent of states can be expressed explicitly through bilateral or multilateral treaties, or implicitly through customary international law.²⁵⁹ This argument follows the classic positivist idea that states are only bound by the rules they consent to, and that states need not explicitly renounce their prior obligations before acting in a manner inconsistent with it. From this point of view, it would be pointless to assign obligations for anything to the state, an agent that may never commit to these obligations. In my view, this sort of claim would be spurious and misrepresentative of states, especially taking into consideration how states function politically. Rather than treating states as agents that are not always inclined to comply with legal rules or carry out their legal obligations, it would be more theoretically and philosophically accurate to treat the states as if they were always morally and legally willing and motivated to comply with international legal rules and obligations.²⁶⁰ From that standpoint, we can then proceed to ascertain why states often default or fail to keep to their agreed international obligations and the legal rules they make for the good governance of the world community. This approach agrees with the more generally accepted ways of theorising in the law and normative political philosophy tradition, whereby we take up an argument from “some fixed position to which we are relatively confident (some accepted principles on the one hand; some clear-cut intuition on the other) and reason clearly and consistently from there”.²⁶¹

In their work *Why States Follow the Rules*, Kreps and Arend developed what they called ‘positional adherence theory’ to explain the adherence or otherwise noncompliance behaviour of states towards their international obligations and rules.²⁶² In their analogy, the most significant reason why states behave in a particular way on the international stage is the ‘position’ that each state takes in regard to issues of transnational importance.²⁶³ The nature of a treaty regime, for example, as well as the extent to which the regime infringes on state sovereignty, normativity of

²⁵⁷ A.T. Guzman, ‘The Consent Problem in International Law’ (2011) *Berkeley Program in Law and Economics Working Paper Series* pp. 2-5.

²⁵⁸ Cf. Anthony D’Amato, ‘The Groundwork for International Law’ (2014) *The American Journal of International Law* Vol. 108 No. 4 p. 660.

²⁵⁹ Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013) p. 38.

²⁶⁰ In support, see Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edition (Columbia: Columbia University Press, 1979) p. 47.

²⁶¹ Elizabeth Cripps, *Climate Change and the Moral Agent: Individual Duties in an Interdependent World* (Oxford: Oxford University Press, 2013) pp. 18-19.

²⁶² S.E. Kreps and A.C. Arend, ‘Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes’ (2006) *Duke Journal of International and Comparative Law* Vol. 16 p. 332.

²⁶³ S.E. Kreps and A.C. Arend *ibid* p. 332, 404.

the treaty regime, and enforcement arrangements of that regime, all influence the decisions of states to behave in a particular way.²⁶⁴ For Glennon “there is not and will never be a ‘field theory’ of international law and relations that succeeds in explaining individual or state conduct so completely as to permit reliable prediction of specific state actions that will occur in distant, concrete circumstances”.²⁶⁵ We can however infer even on the institutional and normative levels that states would be willing to comply with legal rules and obligations if some conditions for compliance and how states should respond to such conditions exist and are clearly, consistently and predictably set out. On this ground, I defend and hold the firm view that states would always be favourably disposed, on whatever terms, to comply with their legal obligations, provided that the rules and treaties setting out such obligations and what exactly states should do in respect of them are clearly defined.

One further argument against taking the state as the primary agent of responsibility is that even though states may be able to exercise legal obligation, they are incapable of exercising moral obligations because the state is not a moral person that can be sensitive to moral and other reasons. Those who hold this opinion would argue that moral obligations can only be assigned to rational agents, and not to artificial persons like the state. This opinion usually finds expression in the philosophy of political and international relations theorists who insist on knowing what the state is, whether it is an artificial or real entity²⁶⁶ that is capable of exercising obligations. However, I argue that the reflexive capacity of states to make both sound and abstract judgments about the world generally and more specifically about their own activities, actions and policies, such as ‘this is just’ or ‘this is unjust’, ‘this is right’ or ‘this is wrong’ is what makes states responsive to moral reasons.²⁶⁷ In other words, as an autonomous agent, and as a matter of moral fitness to be held responsible for anything, states in their everyday business of administration and governance (just like individual humans) are consistently faced with the choice or option of doing something right or wrong—what Pettit calls “value-relevant choices”.²⁶⁸ Since states are able to make value-relevant choices, they also have the requisite understanding and access to evidence required to make rational, sound and practical judgments about the relative value of such choices—what

²⁶⁴ *ibid* p. 332, 404. Cf. H.H Koh, ‘Why Do Nations Obey International Law’ (1994) *The Yale Law Journal* Vol. 106 p. 2634.

²⁶⁵ M.J Glennon, ‘How International Rules Die’ (2005) *The Georgetown Law Journal* Vol. 93 p. 988

²⁶⁶ C.S Hay, ‘Neither Real nor Fictitious but ‘As if Real’: A Political Ontology of the State’ (2014) *British Journal of Sociology* Vol. 65 No. 3 p. 1.

²⁶⁷ Neomi Rao, ‘Public Choice and International Law Compliance: The Executive Branch is a ‘They’ not an ‘It’ (2011) *Minnesota Law Review* Vol 96 p. 210.

²⁶⁸ Philip Pettit, ‘Responsibility Incorporated’ (2007) *Ethics* Vol. 117 p. 175.

Pettit calls “value-judgment”.²⁶⁹ By the same token, on the basis of judgment that states make about the relative value of choosing between any options, they have the control necessary to make those choices—what could be called “value-sensitivity”.²⁷⁰ This means that through a framework of beliefs, desires and goals,²⁷¹ states are able to engage and reflect on their desires, make further choices, and form moral intentions.²⁷² For these reasons, I conclude that the state satisfies the basic conditions of moral agency and therefore, I accept the state as a rational moral agent to whom we can attribute moral responsibility in relation to missing migrants.²⁷³

3.3 Responsible for *What*? On What Constitutes the ‘Object’ of Responsibility for Which the State is Responsible

For “*what*” in particular do we say the state is responsible when discussing the transnational problem of missing migrants? First, we have to understand that the basis or rationale for ascribing responsibility to any agent is normative and simple—if you are the one that made something or a situation worse off than it was *ex ante*, then, you are responsible for putting things right. By object of responsibility, we mean specific actions, behaviours and events whose authorship is the ground of responsibility attribution.²⁷⁴ This extends to responsibility of the EU and EU states to minimise the migrant deaths that occur as an effect of deterrence-oriented and border control policies of states.²⁷⁵ This implies that international responsibility may be attributed to multiple states jointly and severally for their actions and events such as the enforcement of migration policies that give rise to migrant deaths and migrants going missing. This will include any institutional,²⁷⁶ transient and factual link²⁷⁷ of state actions and policies to migrant deaths at sea, border and other spaces.

In her 2017 report, Agnes Callamard, Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions stated “[...] evidence...suggest multiple failures on the part of states to respect and protect refugees’ and migrants’ right to life, such as unlawful

²⁶⁹ Philip Pettit *ibid* p. 175.

²⁷⁰ *ibid* p. 175.

²⁷¹ Kay Mathiesen, ‘We’re all in this Together: Responsibility of Collective Agents and their Members’ (2006) *Midwest Studies in Philosophy*, XXX p. 243.

²⁷² Kay Mathiesen *ibid* pp. 243-244.

²⁷³ Cf. Seam Fleming, ‘Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility’ (2017) *International Theory* Vol. 9 No. 3.

²⁷⁴ Meir Dan-Cohen, ‘Responsibility and the Boundaries of the Self’ (1992) *Harvard Law Review* Vol.105 No. 5 pp. 959-1003 p. 962 & 963.

²⁷⁵ Thomas Spijkerboer, ‘Are European States Accountable for Border Deaths?’ p. 74.

²⁷⁶ ILC Articles on State Responsibility, Articles 4-7.

²⁷⁷ *ibid* Articles 8-11.

killings, including through the excessive use of force and as a result of deterrence policies and practices which increase the risk of death”.²⁷⁸ These instances of deaths and disappearances of migrants linked to state actions either by means of support, tolerance or acquiescence (and this is rampant in Latin and Central America)²⁷⁹ put the states in an obligatory position and it justifies attributing responsibility to states for their actions and policies in priority to other agents. In 2019, legal action was filed against EU states by a group of international lawyers at the international criminal court for intentionally creating the “world’s deadliest migration route in the Mediterranean, and enacting migration policies intended to sacrifice the lives of migrants in distress at sea”.²⁸⁰ Migrants die in those deadly routes not by accident but by the design of states.²⁸¹ As Arendt once powerfully argued, it was the migration policies of states premised on nationalism which, at its very peak, began the mass denaturalisations of unwanted minorities that produced in millions the people we know today as ‘refugees’.²⁸² This on the historical level puts states in an obligatory position to remedy wrongs of the past—what may be called corrective or rectificatory justice; especially because states remain the ‘primary agents of justice’²⁸³ on the international level.

3.4 Responsible to *Whom?* On ‘Migrants and their Families’ as Subjects to Whom the State is Responsible

I have selected and justified the ‘state’ as the primary agent of responsibility to whom we can validly assign holistic and pluralistic obligations for their *actions and events* (principally migration control) in relation to missing migrants. Migration controls by states affect migrant lives in profound ways, sometimes leading to migrant deaths and migrants going missing at sea, borders and other migration spaces. Therefore, it is imperative to also identify the rightful category of persons to whom the states may owe the relevant obligations. Here too, there are a number of persons to whom obligations may be owed: the migrants themselves, their families and perhaps the local communities of the migrants, as well as those that states may owe to themselves *inter se* under

²⁷⁸ Agnes Callamard, ‘Unlawful Death of Refugees and Migrants’ (2017) Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/72/335.

²⁷⁹ Gabriella Citroni note 64 pp. 735-757 p. 741.

²⁸⁰ Owen Bowcott, ‘ICC Submission Calls for Prosecution of EU over Migrant Deaths’ the Guardian 3 June 2019; Maurice Stier, ‘EU Sued at International Criminal Court Over Mediterranean Migration Policy—as More Die at Sea’ *The Conversation* 4 June 2019.

²⁸¹ Syd Bolton and Catriona Jarvis, ‘Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants’ in E. Guild and T. Basaran (eds.), *The UN’s Global Compact for Safe, Regular and Orderly Migration: Analysis of the Final Draft, Objective by Objective*, Refugee Law Initiative, 2019 p. 27.

²⁸² Hannah Arendt note 153 pp. 177-178.

²⁸³ Carlos R. Cordourier-Real, *Transnational Social Justice* (Palgrave Macmillan, 2010) p. 99.

a cooperation arrangement or agreement. Again, I contend that not all the groups are helpful categories for the purpose of establishing links between the rights and interests of missing migrants and their families and the kind of obligations I am seeking to establish and attribute to the states. Here it would appear more practically useful to consider individuals (i.e., the migrants and their families) as the primary rights bearers in respect of whom obligations may be imposed on the states.

Two reasons justify my stand here. Firstly, I am interested in specifically establishing legal obligations of states towards dead and missing migrants and their surviving relatives, not some other kinds of individual right bearers. As we shall see later in this work, in my overall exegesis of the specific obligations of states towards missing migrants, 'individuals' taken as rights bearers feature prominently and take centre stage. Also, when migrants go missing, it is their families that bear the loss. This unequivocally put 'families' of missing migrants in a concrete position to claim rights as well as remedies. Therefore, migrants and their families taken as the individuals in our context, stand at the receiving end of state actions and policies, which puts the state in an obligatory position. We often discuss claims or rights that individuals, citizens and non-citizens and families may have against the state in different areas: as victims of human rights violations²⁸⁴ or as recipients of government benefits and services.²⁸⁵ This is very common in the field of law, social science and normative political philosophy and it enhances the acceptability and capacity of individuals to claim rights and benefits from the state.

Secondly, it would be unnecessarily cumbersome as well as a potentially misleading and futile exercise to derive state obligations towards missing migrants and their families from what states may owe each other *inter se*. I do not deny that under general international law and more specifically, international law of state responsibility, states have obligations towards one another. In fact, there already exists a special body of international rules on state responsibility produced by the international law commission in 2001 to define responsibilities of states to other states and these broad rules have been adopted by states internationally.²⁸⁶ However, the far-reaching commentaries on the ILC Draft Articles still recognises that even within the framework of reparations for internationally wrongful acts, specifically when human rights violations are alleged, it is individuals, not states that are taken as the real beneficiaries.²⁸⁷ Thus, I argue that migrants

²⁸⁴ Axelle Reiter, 'Victims of Human Rights Violations and Victims of Human Rights Restrictions' (2014) *TEMIDA* pp. 29-46.

²⁸⁵ A. Hood and A.N Kieller 'A Survey of the UK Benefit System' (2016) *Institute for Fiscal Studies* p. 4.

²⁸⁶ ILC Articles on State Responsibility (2001).

²⁸⁷ ILC Draft Articles (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 33, para. 3.

and their families are the rightful persons to whom obligations of states are owed. The major area, as we shall see later, in which states have obligations *inter-se* for purpose of migration is in the context of international cooperation relating to migration governance at the international level, as is the case with the newly adopted GCM.²⁸⁸ Aside from that, there seems to be no other condition or circumstance under which one state may make duty-claims from another state in relation to missing migrants. Therefore, I accept that in the context of this study, the migrants themselves and their families are the valid categories of persons to whom states may owe obligations.

3.5 Responsible for *Actions* and *Events* in *Where*? On ‘Places and Territories’ Where Responsibility of States May be Invoked and Exercised

The question of *where* migration and border control policies of states are enforced and how they affect migrants has become crucial in current discourses about migration²⁸⁹ not least because it raises important issues about state responsibility for extraterritorialised and externalised migration controls.²⁹⁰ In principle, there are three possible ways that states can govern and/or enforce migration measures that affect migrants. The first is by exercising *effective control and jurisdiction* over migrants who enter their territories by any means whether through the sea routes, air or external borders of the state. The second is by *extraterritorial conduct* in the form of exercising external control over migrants and the territories where the migrants are and situations facing such migrants abroad.²⁹¹ And the third is by *domestic conduct*, in the form of pursuing national migration policies that produce extraterritorial effects outside the territory of the states involved.²⁹² With respect to state jurisdiction especially when migrant deaths at sea, borders and other spaces are alleged, states can be held responsible for:

- i. acts they carry out *within* their own territories (land and water) including where the effects (for e.g., migrant deaths and migrants going missing) produced by those acts occur *within* the territory of that state.
- ii. acts that occur *inside* the territorial confines of a given state, and those acts produce an effect *outside* the territory of the relevant state.

²⁸⁸ UN Global Compact for Safe, Orderly and Regular Migration, 2018, (Objective 8).

²⁸⁹ Mustapha Dikec, ‘The ‘Where’ of Asylum’ (2009) *Environmental and Planning D: Society and Space*, SAGE, Vol 27 pp. 183-189.

²⁹⁰ V. Moreno-Lax and M. Lemberg-Pedersen, ‘Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalisation’ (2019) *QIL* Vol. 56 Issue 1 pp. 5-33 p. 6.

²⁹¹ *Al-Skeini v The United Kingdom* [ECtHR] Application No. 55721/07.

²⁹² Lorand Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) *European Journal of International Law* Vol. 25 No. 4 pp. 1071-1091.

- iii. acts that take place at the international sea, or on the internal waters of states.²⁹³

In this work, the question of *where* refers to any place or territory where migrants come under the direct or indirect control and jurisdiction of states whether within or outside the territories of states. This extends to the controlling authority and jurisdiction of the EU over migrants within the EU and outside the borders of the EU.²⁹⁴ This would include EU states' exercise of control over migrants in the Mediterranean Sea, borders etc. While it is true that migrant deaths and migrants going missing often occur in transit between different state territories, thereby making the allocation of responsibilities to multiple states difficult,²⁹⁵ there is little doubt that the externalised migration and border control policies of many states contribute to the clandestine dynamics of migrant journeys. Therefore, responsibility can be attributed to states extraterritorially.

Specifically in judicial terms, with respect to the extraterritorial control and jurisdiction of European states over migrants and attribution of responsibility for such conducts, the European Court of Human Rights has held that although the ECHR treaty was intended to function primarily within the *espace juridique* of the European contracting states,²⁹⁶ protective principles like the *non-refoulement* principle apply extraterritorially, because "acts of authorities whether performed within or outside national boundaries produce effect outside their own territory".²⁹⁷ Tzevelekos and Proukaki maintain that state obligations towards migrants extends extraterritorially especially with regard to search and rescue of migrants at sea, and this obligation stems from provisions of IHRL and law of the sea read together, interpreted and applied in light of the principle and duty of due diligence.²⁹⁸ This is more so given that the internal and external migration control policies of states imply jurisdiction of states under international law.²⁹⁹ Immigration control is consistently

²⁹³ Thomas Spijkerboer, 'Are European States Responsible for Border Deaths' in S.S Juss (ed.), *Ashgate Research Companion to Migration Law, Theory and Policy* (Routledge, 2011) pp. 63-66.

²⁹⁴ Articles 3(5) and 21(3)(1) of the Treaty on the European Union (TEU).

²⁹⁵ Estela Schindel, 'Border Matters: Death Mourning and Materiality at the European Borderlands' (2020) *EuropeNow: A Journal of Research and Art* Issue 33 p. 1.

²⁹⁶ Article 1 of the ECHR; and *Banković and Others v. Belgium and Others* (Dec.) [GC], Application No. 52207/99, ECHR 2001-XII para. 80.

²⁹⁷ *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, Judgment [GC], 1995 (ECtHR) para. 62.

²⁹⁸ V.P Tzevelekos and E.K Proukaki, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) *Nordic Journal of International Law* Vol. 86 p. 429.

²⁹⁹ Ruben Wissing, 'Allocating Responsibility for Refugee Protecting to States: Actual and Potential Criteria in International (Case) Law in G.C Bruno *et al* (eds.) *Migration Issues Before International Courts and Tribunals* (Rome: CNR Edizioni, 2019) pp. 45-64.

assumed to be the 'primary prerogative of sovereign states',³⁰⁰ hence, it is not uncommon to attribute responsibility to states for such control.³⁰¹

3.6 Conclusion

In this chapter, I have attempted to resolve the fundamental question of *who* in particular among a multiplicity of agents is the primary agent of responsibility in relation to missing migrants. Following a detailed engagement with the extant literature on the international responsibility of states, I argued that states are the primary agents of responsibility to whom we can validly assign the legal and moral obligations in relation to missing migrants. I also established that the relevant obligations of states are owed to migrants themselves and their families. The chapter also reflected on the specific conducts, actions and policies of states that may constitute responsibility of the state, and *where*, in particular, this legal responsibility may be invoked and applied. Consequently, having justified the state as the primary agent of responsibility in relation to missing migrants, the scene is set and there is now a foundational basis for reviewing in the next chapter the relevant literature on missing migrants which deals significantly with state policies in relation to missing migrants. In particular, the legal and policy responses and obligations of states towards missing migrants and the psychosocial implication of migrants going missing for their families.

³⁰⁰ John Rawls, *The Law of Peoples; With the Idea of Public Reason Revisited* (Harvard, Massachusetts: Harvard University Press, 1999) pp. 9, 108; Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) pp. 31-61; Cf. Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) *Review of Politics* Vol 49 pp. 251-73; Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control your Own Borders' (2008) *Political Theory* Vol. 36 No. 1 pp. 37-65.

³⁰¹ Giuseppe Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations Against Migrants in Libya' (2019) *Questions of International Law (QIL)* Vol. 56 pp. 35-58; Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy be Held Accountable for Violations of International Law' (2018) *The Italian Law Journal* Vol. 04 No. 02 pp. 489-530.

Chapter 4

Review of the Relevant Literature on Missing Migrants

4.1 Introduction

This chapter reviews previous scholarship and current literature on missing migrants in order to identify gaps in knowledge. The review of previous scholarship is crucial because it allows one to critically analyse, synthesise and evaluate knowledge about the research topic in order to gain a deeper understanding of the context of the study as well as the rationale behind the general aims, objectives and questions addressed by the research.³⁰² Generally, while the issue of missing migrants remains a pressing problem with vast areas of conflicting interests for states, individuals, families, communities and international organisations, relatively little is known about migrants who die and go missing while crossing the sea and state borders in an attempt to reach international destinations.³⁰³ However, academic research has recently taken steps to address the problem, in particular, the Missing Migrants Project (MMP) carried out by UK academics in collaboration with the IOM.³⁰⁴ The MMP focused on the migrant crisis in the Mediterranean as well as the law, policy and practice around the identification of bodies of dead migrants in Greece and Italy.³⁰⁵ A related project led by Singleton considered the role of setting up memorials for dead and missing migrants in order to enable successful mourning and to “‘presence’ the missing people and those left behind in the minds of policy makers...”³⁰⁶ Other works also considered the obligations of states to protect migrants at sea and border spaces,³⁰⁷ as well as the impact of migration policies on migrants on

³⁰² Chris Hart *‘Doing a Literature Review: Releasing the Social Science Research Imagination’* (London, Thousand Oaks, New Delhi: Sage Publications, 1998) pp. 1-3.

³⁰³ T. Brian and F. Laczko, note 51 p. 11.

³⁰⁴ Ann Singleton *et al*, ‘Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis. Summary Report’ (2016) pp. 1-14.

³⁰⁵ F.B Attia *et al*, ‘Like a Part of a Puzzle which is Missing: The Impact on Families of a Relative Missing in Migration Across the Mediterranean’ *Report on the Situation of Families* (2016); F.B Attia *et al*, ‘Mediterranean Missing Migrants Project: Understanding the Needs of Families and Obligations of States’ Italy Country Report (Long Version) (2016); F.B. Attia *et al*, ‘Report of the Mediterranean Missing Migrants Project: Understanding the Needs of Families and Obligations of States’ Italy Country Report (Short Version) (2016); F.B. Attia *et al*, ‘Missing Migrants: Management of Dead Bodies in Lesbos’ Greece Country Report (2016) *Background Briefing* pp. 2-10; V. Kerasiotis and M. Spiliotakara, ‘Missing and Dead Migrants at Sea: The Legal Framework in Greece’, *Greece Legal Briefing* (2016) pp. 4-11; Serena Romano, ‘The Italian Legal Framework for the Management of Missing Persons and Unidentified Dead Bodies, and the Rights of the Relatives’ *Italian Legal Briefing* (2016) pp. 4-15.

³⁰⁶ Ann Singleton, ‘Memorials to People Who Have Died and to those Missing During Migration: A Global Project’ available at: <https://wun.ac.uk/wun/research/view/memorials> (accessed 7/1/2020).

³⁰⁷ V.P Tzevelekos and E.K Proukaki, note 298 pp. 427-469.

the move.³⁰⁸ While Parker *et al*, for example, focus on the impact of the migrant crisis on human lives in the Mediterranean³⁰⁹, Guild *et al* attempt to map out migration trajectories and spaces of transit across Europe to understand the effects of migration policies on migrants.³¹⁰

In similar vein, Crawley examined why and how people move and how particular patterns of migration increase the risk of people dying and going missing in migration.³¹¹ Regarding migrant deaths and the obligations of states thereto, scholars agree that international law does not plainly frame such deaths as the responsibility of any state.³¹² Therefore, the Last Rights Project sought to address this challenge by formulating a legal protocol that outlines the obligations of states to missing migrants based on existing international law³¹³; an effort which culminated in the formal drafting of the Mytilini Declaration on Missing Migrants.³¹⁴ Studies have also focused on recording and collection of data on deaths³¹⁵ as well as exploring the procedures and practices adopted by states to investigate, identify and repatriate migrant dead bodies to their families.³¹⁶ These are in addition to the IOM's research on the problem of missing migrants.³¹⁷ In line with these research efforts and building on evidence in literature which is delimited by the topic of the study, five key and closely related thematic areas guide this present chapter's review of previous scholarship on missing migrants: They include: the legal and policy responses of states to missing migrants; why migrants die and go missing in migration; the obligations of states towards missing migrants; the transnational effectiveness of state migration policies in relation to missing migrants; and finally, the psychosocial implications of migrants going missing for their families through the lens of loss, mourning, grief and bereavement. In the next sections below, I review the literature in respect of each of these themes beginning with the legal and policy responses of states to missing migrants.

³⁰⁸ Vicki Squire *et al*, 'Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experience' (2017) Final Project Report; Vicki Squire *et al*, 'Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experiences' (2017), *Second Evidence Brief*.

³⁰⁹ S.F Parker *et al*, 'Precarious Trajectories: Understanding the Human Cost of the Migration Crisis in the Central Mediterranean' (2016).

³¹⁰ Elspeth Guild *et al*, 'Documenting the Migration Crisis in the Mediterranean: Spaces of Transit, Migration Management and Migrant Agency' CEPS Paper in Liberty and Security in Europe No. 94/September 2016.

³¹¹ Heaven Crawley, 'Unravelling the Mediterranean Migration Crisis' (2016) MEDMIG.

³¹² Eleni Papapanou, 'Confronting the 'Out of Sight, Out of Mind' Attitude Surrounding Migrant Deaths' (2019) *Brown Political Review*.

³¹³ C. Jarvis, 'Last Right: Cross-Border Deaths—Towards a New Framework' (2017) pp. 131-150 p. 131.

³¹⁴ Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys signed on 11th May 2018.

³¹⁵ Tamara Last *et al*, note 29 pp. 693-712.

³¹⁶ Ottavia Ampuero Villagran, 'Identifying Migrant Bodies in the Mediterranean' (2018) Policy Report No. 2, Series 5; and S. Grant, 'Identification and Tracing' in Tara Brian and Frank Laczko (eds.) *Fatal Journeys Volume 2: Identification and Tracing of Dead and Missing Migrants* (Geneva: IOM, 2016) pp. 37-51.

³¹⁷ IOM's Global Migration Data Analysis Centre available: <https://gmdac.iom.int/> (accessed 13/1/2020).

4.2 The Legal and Policy Responses of States to Missing Migrants

The question of what should be the appropriate legal and policy response of states to the migrant crisis has been one of “obsession of sorts, not only in Europe, but also in other parts of the so-called developed world” argues Itamar Mann.³¹⁸ As such, there is no dearth of literature on EU legal and policy responses to migrant flows to Europe including addressing the role played by surveillance technologies that monitor and capture migrant mobilities,³¹⁹ push-back operations,³²⁰ interception and interdiction of migrants at sea,³²¹ border and coastal policing, the role of migrant smugglers and biopolitical perspectives on migrant deaths at sea, borders and other geographic spaces.³²² However, existing literature on state responses to the problem has focused largely on four key underlying measures: *humanitarianism*, *securitisation*, *externalisation* and *solidarity*.

4.2.1 Humanitarianism Response

Humanitarianism revolves around the need to save migrant lives at sea and borders, establish measures for ‘management, identification and repatriation of migrant bodies’³²³, respect the rights and dignity of migrants³²⁴ and promote the human wellbeing.³²⁵ It underlies the “fundamental belief in the value of human life and dignity and in the moral imperative to protect human beings and relieve human suffering in the wake of natural disasters or man-made crisis”.³²⁶ In what appears to be an allusion to the life-saving humanitarian goal of states, Stierl argues that framing migration

³¹⁸ Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge: Cambridge University Press, 2016) p. 3.

³¹⁹ M.G Jumbert, ‘Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea’ (2018) *Disasters* Vol. 42 No. 4 pp. 674-696.

³²⁰ Mariagjulia Giuffré, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya’ (2013) *International Journal of Refugee Law* Vol. 24 No. 4 pp. 692-734.

³²¹ V. Moreno-Lax *et al*, ‘Between Life, Security and Rights: Framing Interdiction of ‘Boat Migrants’ in the Central Mediterranean and Australia’ (2019) *Leiden Journal of International Law* Vol. 32 No. 4 pp. 715-740.

³²² Iosif Kovras and Simon Robins, ‘Missing Migrants: Deaths at Sea and Unidentified Bodies in Lesbos’ in: Hastings Donnan *et al*, (eds.) *Migrating Borders and Moving Times: Temporality and the Crossing of Borders in Europe* (Manchester: Manchester University Press, 2017) pp. 160-163.

³²³ O.A Villagran note 316 pp. 13-14; A. M’charek and S. Casarelli, ‘Identifying Dead Migrants: Forensic Care Work and Relational Citizenship’ (2019) *Citizenship Studies* Vol. 23 No. 7 pp. 738-757.

³²⁴ Nina Piquer and M.Z Aguirre (eds.), ‘Humanitarian Consequences of Family Separation and People Going Missing’ (2019) ICRC pp. 6-44.

³²⁵ Paolo Cuttitta, ‘The Central Mediterranean as a Humanitarianism Space’ in N.N Sorensen and Sine Plambech (eds.), *When Human Welfare Meets the Political and Security Agendas: Global Perspectives on Humanitarianism* (2019) Danish Institute for International Studies (DIIS) Reports p. 18.

³²⁶ N.N Sorensen and Sine Plambech, ‘Introduction’ in N.N Sorensen and Sine Plambech (eds.) *When Human Welfare Meets the Political and Security Agendas: Global Perspectives on Humanitarianism* (2019) Danish Institute for International Studies (DIIS) Reports p. 6.

governance in Europe as purely humanitarian requires adopting military-humanitarian measures in response to migrant deaths at sea, and is an inevitable measure if further drownings of boat migrants are to be prevented.³²⁷ According to Carling and Hernández-Carretero, the humanitarian life-saving response is operationalised in two ways: the first is preventing and dissuading migrants from embarking on life-threatening journeys in the first place, and the second is using surveillance capacity to rescue those in distress at sea.³²⁸ The Italian *Mare Nostrum* policy and the EU's *Triton* operation that both aimed at saving the lives of migrants in the Mediterranean capture the latter understanding.³²⁹ Beyond these two humanitarian operationalisation strategies, it is argued that the humanitarian life-saving goal of states extends to management of migrant bodies, although Tamara Last contends that what happens to migrant bodies at European frontiers is very much in the dark as it has never been included in any EU policy agenda on migration.³³⁰ M'charek and Black canvass the point that when migrants are found dead in migration, their bodies have to be engaged with as a matter of care, dignity and respect³³¹ so as to create some form of psychosocial relationships with the dead whilst also accounting for deaths during migration.³³²

4.2.2 Securitisation Response

Securitisation revolves around the policy of deterrence³³³ and combating illegal migration and migrant smuggling³³⁴ in order to prevent deaths.³³⁵ The securitisation theory first appeared in the

³²⁷ Maurice Stierl, 'A Fleet of Mediterranean Border Humanitarians' (2017) *ANTIPODE, A Radical Journal of Geography* Vol. 50 Issue 3 pp. 704-724 p. 704.

³²⁸ Jørgen Carling and M. Hernández-Carretero, 'Protecting Europe and Protecting Migrants?' p. 44; Adrian Little and N. Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2017) *European Journal of International Relations* Vol. 23 Issue 3 p. 533.

³²⁹ Paolo Cuttitta, 'Delocalisation, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2017) *Antipode* Vol. 00 No. 0 pp. 7-9.

³³⁰ Tamara Last, 'Who is the Boat Migrant? Challenging the Anonymity of Death by Border-Sea' in M.L. Violeta and P. Efthymios (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Leiden: Brill Nijhoff, 2017) pp. 79-80.

³³¹ A. M'charek and Julia Black 'Engaging Bodies as a Matter of Care: Counting and Accounting for Death During Migration' in P. Cuttitta & T. Last (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam: Amsterdam University Press, 2020) pp. 85-97.

³³² *ibid* pp. 85-97.

³³³ Thomas Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration' in Violeta Moreno-Lax and Elfhymios Papastavridis (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Brill Nijhoff, 2016) pp. 60-61.

³³⁴ Jean-Pierre Gauci and Patricia Mallia, 'The Migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Inter-sectionality and Multi-actor Cooperation' in M.L. Violeta and P. Efthymios (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Netherlands: Brill Nijhoff, 2017) pp. 137-199.

³³⁵ Daniel Ghezelbash *et al*, 'Securitisation of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) *International and Comparative Law Quarterly* Vol. 67 Issue 2 pp. 315-351.

literature of the Copenhagen School of Critical Security Studies in the mid-1990s. This school viewed securitisation as a form of ‘speech act’ or linguistic representation that designated some human problems, such as irregular migration as existential security threats.³³⁶ Viewed from this traditional perspective, the question to ask is how does securitisation prevent loss of lives or migrants going missing in migration? For states, the answer is simple: secure the sea and borders by deploying security apparatuses of states and the EU to police the unauthorised journeys of migrants often ending in deaths. Ghezelbash *et al*/however criticise the EU’s securitised response to migration for compromising the humanitarian goal of search and rescue in the name of maintaining border security.³³⁷ Bigo argues that “migration is increasingly interpreted as a security problem”³³⁸ in which irregular migrants are viewed as an “element of insecurity”³³⁹, thereby, turning the EU into a security actor.³⁴⁰ As such, EU states’ law enforcement agencies deploy their security tools to police human mobility to an extent that, as Foucault argued, security becomes biopoliticised.³⁴¹ Given this tendency of sovereign states to label migrant mobility as security threats, Bigo’s notion of “governmentality of unease”³⁴² and Huysmans’s notion of “politics of insecurity”³⁴³ both warn us not to leave uncritical the *process* through which migration is framed as a security threat. It is argued that the governmental problematisation of migration as a security threat is more likely to lead to migrant deaths at sea and borders than saving lives.

4.2.3 Externalisation Response

Externalisation exemplifies the EU’s decision to establish means for transnational cooperation with third states to stem the tide of migrant flows leading to deaths.³⁴⁴ It is a pre-emptive or

³³⁶ Ole Weaver, ‘Securitisation and Desecuritisation’ in *On Security* (New York: Columbia University Press, 1995) pp. 46-86.

³³⁷ Daniel Ghezelbash *et al*, ‘Securitisation of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’ (2018) *ICLQ* Vol. 67 Issue 2 p. 315.

³³⁸ Didier Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’ (2002) *Alternatives* Vol. 27 p. 63. Cf. Zygmunt Bauman, *Liquid Fear* (Cambridge: Polity Press, 2006).

³³⁹ Susana Ferreira, ‘From Narratives to Perceptions in the Securitisation of the Migration Crisis in Europe’ in Marianna Karakoulaki *et al*, (eds.) *Critical Perspectives on Migration in the Twenty-First Century* (Bristol, England: E-International Relations Publishing, 2018) p. 59.

³⁴⁰ Ole Waever, ‘The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-Sovereign Security Orders’ in M. Kelstrub and M.C Williams (eds.) *International Relations Theory and the Politics of European Integration: Power, Security and Community* (London: Routledge, 2000) pp. 250-294.

³⁴¹ M. Foucault, ‘Security, Territory and Population’ *Lectures at the Collège de France 1977-1978* p. 16.

³⁴² Didier Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’ (2002) *Alternatives* Vol. 27 pp. 63-92 p. 63.

³⁴³ Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London: Routledge, 2006) pp. 1-2.

³⁴⁴ Andrea Terlizzi, ‘Border Management and Migration Controls in Italy’ Research Report, Working Paper on ‘Global Migration: Consequences and Responses’ Paper 2019/17, June 2019.

presumptive control of migration³⁴⁵ whereby states adopt a range of measures and practices from the extension of border controls abroad to other broader measures that are targeted at tackling the drivers of migration.³⁴⁶ Although externalisation has been a policy of the EU and EU states for decades now,³⁴⁷ it turned into a matter of serious debate in the wake of the migrant crisis, marked by increased migrant drownings and deaths at sea and borders of the EU. Markard, for example, believes that the externalised practice of coastal states acting in the interest of EU destination states to prevent migrant departures by sea serves at least two key purposes: first, to restrict border crossing that stops unauthorised migrants from entering the EU; and second, to prevent smuggling through the sea in order to “protect the life and health of migrants”.³⁴⁸ As such, some scholars have argued that externalisation policies are a justifiable measure to prevent migrant deaths and migrants going missing at sea and borders, although, others contend that such actions are a direct result of the ineffectiveness of state policies.³⁴⁹ It is argued that although interpreting externalisation as a measure to protect migrant lives may have some legal basis, such measures cannot be used to justify interception of irregular migrants who are genuinely fleeing conflict and persecution as it could violate the non-refoulement obligation of states under international law.

4.2.4 Solidarity Response

Solidarity relates to the EU states’ collective decision to establish a burden-sharing responsibility regime to tackle the rising migrant flows into Europe. It can be argued that the problem of missing migrants is a crisis of solidarity.³⁵⁰ For Brändle *et al* the refugee crisis was not only a litmus test for EU solidarity but also a reflection of the solidarity gap between member state actors due to the exclusive application/interpretations of the notion of solidarity among its member states.³⁵¹ Existing literature recognises that in many EU states, the migrant crisis is widely framed as a

³⁴⁵ Martin Lemberg-Pedersen, ‘Loosing the Right to Have Rights: EU Externalisation of Border Control’ in E.A Andersen and E.M Lassen (eds.) *Europe and the Americas: Transatlantic Approaches to Human Rights* (Brill Nijhoff, 2015) p. 398.

³⁴⁶ Inka Stock *et al*, ‘Externalisation at Work: Responses to Migration Policies from the Global South’ (2019) *Comparative Migration Studies* Vol 7 No. 48 p. 1.

³⁴⁷ S.K.N Bendixsen, ‘The Refugee Crisis: Destabilising and Restabilising European Borders’ (2016) *History and Anthropology* Vol. 27 No. 5 pp. 536-554.

³⁴⁸ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) *European Journal of International Law* Vol. 27 pp. 591-616 p. 602.

³⁴⁹ Bill Frelick *et al*, ‘The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) *Journal on Migration and Human Security* Vol. 4 No. 4 pp. 193-194.

³⁵⁰ Cf. Marianne Takle, ‘Is the Migration Crisis a Solidarity Crisis?’ in Andreas Grimm (ed.), *The Crisis of the European Union* (London: Routledge, 2018) pp. 116-129.

³⁵¹ V.K Brändle *et al*, ‘Contesting the European Solidarity During the ‘Refugee Crisis’: A Comparative Investigation of Media Claims in Denmark, Germany, Greece and Italy’ (2019) *Mass Communication and Society* Vol. 22 No. 6 pp. 708-732.

European problem and not one of any particular state, and should be dealt with through solidarity of EU states.³⁵² This is without prejudice to the fact policies on irregular migration differ across EU states³⁵³ and state responses to missing migrants have been largely determined by national law and practice.³⁵⁴ Nonetheless, states generally agree that they have a “shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner”.³⁵⁵ Overall, from the assessment of the four response approaches: *humanitarianism, securitisation, externalisation and solidarity*—we can clearly see that they were not specifically designed with missing migrants in mind; instead, they were designed to respond to migration flows into the EU more generally. It can therefore be rightly said, I argue, that the EU and EU states’ legal and policy responses to the transnational problem of missing migrants exist at the level of what Alexander Betts refers to as *embeddedness*.³⁵⁶ By embeddedness, it is meant that while these response approaches may not have been specifically designed to directly deal with the issue of missing migrants as such, EU and EU states’ legal and policy responses to the problem of missing migrants are nonetheless embedded in them and as such, they also regulate, influence and facilitate how states deal with the pressing issue of missing migrants.

4.3 Why Migrants Die and Go Missing in Transnational Migration

The question of why migrants die and go missing in transnational migration is contested in current literature and has been debated by scholars around two key narratives: the *humanitarian-oriented narrative* and the *deterrence-oriented narrative*.

4.3.1 Humanitarian-Oriented Narrative

Experts employing the *humanitarian-oriented narrative* argue that there is a causal link between state migration policies and migrant deaths at sea and borders.³⁵⁷ Many scholars, whose writings

³⁵² F. Pasetti and B. Garcés-Mascreñas, ‘Who is Responsible, for What and to Whom? Patterns of Politicisation on Refugees and the European Solidarity Crisis’ (2018) *CEASEVAL* No. 16 p. 12.

³⁵³ Anna Triandafyllidou, ‘Undocumented Migration: Counting the Uncountable, Data and Trends Across Europe’ (2009) European Commission CLANDESTINO PROJECT Final Report p. 18.

³⁵⁴ Stephanie Grant, note 30 p. 4.

³⁵⁵ Preamble 11 of the New York Declaration for Refugees and Migrants A/RES/71/1 (2016).

³⁵⁶ Alexander Betts note 111 p. 3.

³⁵⁷ See for example, Jason De León, *Land of Open Graves, Living and Dying on the Migrant Trail* (California: University of California Press, 2015) pp. 23-37; Karl Eschbach *et al*, ‘Death at the Border’ (1999) *International Migration Review* Vol. 33 No 2 p. 447; Peter Shields, ‘The Human Cost of European Union’s External Border Regime’ (2015) *Peace Review: A Journal of Social Justice* Vol. 27 pp. 82-90; Thomas Spijkerboer, ‘The Human Cost of Border Control’ (2007) *European Journal of Migration and Law* Vol. 9 pp.

on biopolitics provide insights into how state bordering practices result in migrant deaths, accept this humanitarian-oriented logic.³⁵⁸ They argue that the death by policy phenomenon results from the EU policy of non-assistance³⁵⁹ in the form of wilful delay to search for and rescue of migrants in distress at sea.³⁶⁰ Even in cases where states frame border deaths as either ‘accidents’³⁶¹ or ‘natural’, these group of scholars dispute it and maintains the claim that border deaths are a result of the structural violence³⁶² and physical violence³⁶³ against migrants triggered by strict migration policies. The stringent migration and border control policies mean that migrants are constrained to “patronise the services of people smugglers”³⁶⁴ to assist them to facilitate their clandestine journeys and circumvent strict border entry requirements. For Heijer *et al*, this trend not only complicates existing death risks but also creates new ones.³⁶⁵ To avert such risks, this perspective supports the search and rescue of migrants at sea, although some critics have dismissed the EU migrant rescue policy as nothing but “organised hypocrisy” that is not matched with action by the EU.³⁶⁶ This perspective also contend that opening up more “legal channels”³⁶⁷ would drastically reduce deaths³⁶⁸ as fewer migrants would risk death if more legal channels exist.³⁶⁹

147-161; Stephanie Grant, ‘Recording and Identifying European Frontier Deaths’ (2011) *European Journal of Migration and Law* Vol. 13 No. 2 p. 135; Robyn Sampson, ‘Reframing Immigration Detention in Response to Irregular Migration: Does Migration Deter’ (2015) *International Detention Coalition* No. 1 p. 1.

³⁵⁸ J. De Leon, *The Land of Open Graves: Living and Dying on the Migrant Trail* (California: University of California Press, 2015); R.L Doty, ‘Bare-Life: Border Crossing Deaths and Spaces of Moral Alibi’ (2011) *Environment and Planning D: Society and Space* Vol. 29 Issue 4 pp. 599-612.

³⁵⁹ Charles Heller and Lorenzo Pezzani, ‘Liquid Traces: Investigating the Deaths of Migrants at the EU’s Maritime Frontier’ in Nicholas De Genova (ed.), *The Borders of Europe: Autonomy of Migration, Tactics of Bordering* (Duke: Duke University Press, 2017) pp. 657-680.

³⁶⁰ Heller Charles, and Lorenzo Pezzani, ‘Death by Rescue: The Lethal Effects of the EU’s Policies of Non-Assistance’ (2016) *Forensic Oceanography*.

³⁶¹ Maurizio Albahari, ‘Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe’ (2006) *Working Paper* 136 p. 2.

³⁶² Estela Schindel, ‘Deaths and Disappearances in Migration to Europe: Exploring the Uses of a Transnationalised Category’ (2019) *American Behavioral Scientist* 00(0) pp. 1-16.

³⁶³ Paolo Cuttitta, ‘Preface: The Increasing Focus on Border Deaths’ in Paolo Cuttitta and Tamara Last (eds.), *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam: Amsterdam University Press, 2020) p. 11.

³⁶⁴ W.A Cornelius, ‘Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy’ (2001) *Population and Development Review* Vol. 27 pp. 661-685.

³⁶⁵ M.D Heijer *et al*, ‘Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System (2016) *Common Market Law Review* Vol. 53 pp. 616-617.

³⁶⁶ Eugenio Cusumano, ‘Migrant Rescue as Organised Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarian and Border Control’ (2018) *Cooperation and Conflict* Vol. 00 No. 0 pp. 1-22 p. 1.

³⁶⁷ Camino Mortera-Martinez and Beth Oppenheim, ‘Why Europe Needs Legal Migration and How to Sell it’ (2018) *Open Society European Policy Institute* pp. 1-11.

³⁶⁸ Sarah Wolff, ‘Migration and Refugee Governance in the Mediterranean: Europe and International Organisations at a Crossroads’ (2015) *Istituto Affari Internazionali (IAI) Working Papers* 15/42 p. 11.

³⁶⁹ Frank Laczko, ‘New Directions for Migration Policy in Europe’ (2002) *Phil. Trans. R. Soc. Lond. B* p. 604; L.A de Vries *et al*, ‘Legal Pathways to Protection: Towards the Provision of Safe, Legal and Accessible Routes for Refugees and Vulnerable Migrants’ (2018) *Policy Brief* p. 4.

4.3.2 Deterrence-Oriented Narrative

Many scholars that employ the *deterrence-oriented narrative* contend that the less deterrence-oriented border control policies and the search and rescue of irregular migrants at sea are rather responsible for the increase in migrant deaths because they are acting as a motivation for migrants to make the risky journeys.³⁷⁰ They contend that state and EU migration policies such as Italy's *Operation Mare Nostrum* and EU's *Operation Triton*, both focusing on search and rescue of migrants at sea, act as a "magnet"³⁷¹ or "bridge to Europe",³⁷² thereby encouraging more migrants to make the risky journeys leading to unnecessary loss of lives. For them, adopting deterrence policies that shift away from rescue operations actually prevents migrant deaths and migrants going missing by dissuading them from embarking on life-threatening journeys.³⁷³ This group of scholars have no difficulty dismissing ideas that defend migrant rights such as Agamben's idea of *bare life* viewing migrants as victims of state violence³⁷⁴ and Bauman's notion of *wasted lives*,³⁷⁵ viewing migrants as people exempted by states from protection and deprived of the life of dignity. Overall, within these two diametrically opposed policy narratives, we confront the inherent conflict between the duty to 'protect Europe and 'protect migrants' faced by European states³⁷⁶; and this raises a vital question as to the obligation of states towards missing migrants.

4.4 The Obligation of States Towards Missing Migrants

There is no dearth of literature accepting that states have obligations towards missing migrants and their families.³⁷⁷ However, the more specific issue here is whether the ostensible causal link

³⁷⁰ Elias Steinhilper and R.J. Gruijters, 'A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean' (2018) *Sociology* Vol. 52 No. 3 pp. 515-517.

³⁷¹ Nicholas Farrell 'Italy is Killing Refugees with Kindness: The Mare Nostrum Policy Has Acted as a Magnet for Boat People; the Crisis is Only Growing' (2014) *The Spectator*.

³⁷² Marianne Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Switzerland: Palgrave Macmillan, 2018) p. 68.

³⁷³ Saskia Bonjour, 'The Power and Morals of Policy Makers: Reassessing the Control Gap Debate' (2011) *International Migration Review* Vol. 45 No. 1 pp. 89-122.

³⁷⁴ Giorgio Agamben note 145 p. 11.

³⁷⁵ Zygmunt Bauman, *Wasted Lives: Modernity and its Outcasts* (Cambridge: Polity Press, 2004) p. 73; Thomas Spijkerboer, 'Wasted Lives: Borders and the Right of People Crossing Them' (2017) *Nordic Journal of International Law* Vol. 86 p. 27.

³⁷⁶ Jørgen Carling and María Hernández-Carretero, 'Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa' (2011) *British Journal of Politics and International Relations* Vol. 13 pp. 42-43.

³⁷⁷ Stephanie Grant, note 30; Last Rights Project, '*The Dead, the Missing and the Bereaved Europe's International Borders, Proposal for a Statement of the International Legal Obligations of States*', May 2017.

between state migration policies and migrant deaths and going missing at sea and borders as the foregoing literature suggest, gives rise to any obligations of states to address the issue of missing migrants and the needs of their families. If taken from the perspective of violation of the right to life of migrants at sea, borders and other spaces in circumstances involving the complicity of states, two approaches suggest Spijkerboer can be used to analyse state obligations.³⁷⁸ The first would be to argue that state agents are not involved in perpetuating violence occasioning migrant deaths at sea and borders. Instead, state migration policies may in some cases produce unintended side-effect that push migrants to more dangerous routes.³⁷⁹ The second would be to argue that migrant deaths result from changes in state migration policies, the effect of which is to side-step the obligations of states towards migrants.³⁸⁰

In either case, proper determination of the scope of the states' obligations towards migrants is key for purpose of allocating responsibility; especially in cases where they are still in transit and have yet to reach state territories.³⁸¹ The general principle of law is that jurisdiction of states is primarily territorial and viewed from this perspective, states do not become responsible to take on migrants until they reach their territory. However, scholars have questioned the sustainability of this argument against the background of the increase in extraterritorial activities of states targeted at preventing migrants from reaching their territories.³⁸² The argument that until migrants reach state territories, no state has obligations may be attributed to two factors that are indicative of normative gaps in the international law of state responsibility relating to migrants. First, the high sea where the migrants are drowning represents a fragmented space of migration where international law imposes various obligations on states, yet the "precise division and content of these sovereign responsibilities remain contested and subject to varying interpretations".³⁸³ Second is the absence of a clear rule on how obligations should be properly distributed, shared or allocated to multiple states in practice in the context of missing migrants.

³⁷⁸ Thomas Spijkerboer, 'Moving Migrants, States and Rights: Human Rights and Border Deaths' (2013) *The Law and Ethics of Human Rights* Vol. 7 No. 2 p. 223.

³⁷⁹ Thomas Spijkerboer *ibid* p. 223.

³⁸⁰ *ibid* p. 223.

³⁸¹ María -Teresa Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) *International Journal of Refugee Law* Vol. 18 Issue 3-4 pp. 571-572.

³⁸² M.N Casas, 'The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers' (2019) *Journal of International Law and International Relations* No. 7 pp. 162-163.

³⁸³ Thomas Gammeltoft-Hansen and Tanja E. Aalberts, 'Sovereignty at Sea: The Law and Politics of Saving Lives in the Mare Liberum' (2010) *DIIS Working Paper* 18 p. 6.

4.5 Transnational Effectiveness of State Migration Policies in Relation to Missing Migrants

The central normative aspiration of transnational law is that human problems such as the issue of missing migrants that transcend borders should be tackled through a transnational legal and policy approach.³⁸⁴ The transnational nature of the issue of missing migrants, the externalisation of national migration policies, and the extraterritorialisation of jurisdiction and obligations of states towards migrants all justify an investigation into the transnational effectiveness of state migration policies in relation to missing migrants. However, despite the significance of this argument, there appears to be a considerable dearth of existing literature on the transnational effectiveness of state migration policies in relation to missing migrants, although the literature has considered the effectiveness of migration policies at the national level.³⁸⁵ Most of the literature that examined the effectiveness of migration policies approached it from the angle of how much of the goals of the policies have been achieved.³⁸⁶ One scholar that has looked at the transnational effectiveness of social policies in relation to migration, though quite marginally is de Swaan.³⁸⁷ Swaan argued that in a globalised world where rich states are faced with mass immigration by people from poor states, social policies that are transnationally effective and build on states' interdependence are necessary to find a common solution.³⁸⁸

4.6 The Psychosocial Implications of Migrants Going Missing for their Families through the Lens of Loss, Mourning, Grief and Bereavement

This section of the review follows a particular historical order from the Freudian beginnings (1917) on *Mourning and Melancholia*³⁸⁹ to the present-day research on ambiguous loss championed by its leading theorist Pauline Boss. I aim to show that even though the psychosocial consequences

³⁸⁴ The imperatives of transnationally effective policies to tackling problems like migration has been stressed in the literature. See Peggy Levitt, 'Transnational Migrants: When 'Home' Means More than One Country' (2004) *Migration Policy Institute* (MPI); Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights 1993-2013' (2013) *Harvard International Law Journal* Vol. 54 pp. 315–392.

³⁸⁵ Mathias Czaika and Hein De Haas, 'The Effectiveness of Immigration Policies' (2013) *Population and Development Review* Vol. 39 No. 3 pp. 487-508.

³⁸⁶ Stephen Castles, 'The Factors that Make and Unmake Migration Policies' (2004) *International Migration Review* Vol. 38 No. 3 pp. 852-884.

³⁸⁷ Abram de Swaan, 'The Receding Prospects for Transnational Social Policy' (1997) *Theory and Society* Vol. 26 No. 4 p. 563.

³⁸⁸ Abram de Swaan *ibid* p. 563.

³⁸⁹ Sigmund Freud, *Mourning and Melancholia*, The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XIV (1914-1916): On the History of the Psycho-Analytic Movement, Papers on Metapsychology and Other Works pp. 237-258; Michael Jacobs, *Sigmund Freud—Key Figures in Counselling and Psychotherapy Series Editor: Windy Dryden 2nd ed.* (London: SAGE, 2003) pp. 33-36.

faced by grieving families following the loss of their relatives both in ambiguous and unambiguous circumstances does hold a lot in common, there is clearly a marked difference between the kind of psychosocial implications faced by families where there is a dead body to mourn (unambiguous loss) and that faced where there is no dead body to mourn (ambiguous loss). The former, where there is a dead body to facilitate the process of grief and mourning, is explained by an extensive body of literature on mourning, grief and bereavement³⁹⁰ from Freud through to the inter-war periods and thereafter. The latter, explained by a contemporary body of literature on ambiguous loss, the fate of the missing is unclear and so, as a consequence, the process of grief, mourning and bereavement is frozen and unfacilitated; there is no definite closure.

4.6.1 Psychosocial Research on Grief and Mourning from the Early 20th Century Beginnings: Freud on Mourning and Melancholia

Sigmund Freud's essay *Mourning and Melancholia* published in 1917³⁹¹ is an exemplar of work that first sought to understand on the scientific level the psychosocial impact of unresolved grief and sadness over the loss of a relative and is usually where literature reviews on grief, bereavement and mourning begin. Inspired by Freud's writings, early grief research on death and dying in the aftermath of World War II understood successful mourning for the loss of a loved one as basically about the linear process of detaching from and letting go of one's relationship³⁹² with the deceased person (lost loved object)³⁹³ and reinvesting that relationship in a new object.³⁹⁴ As it came to be understood in later psychosocial research, when this process and the task of mourning fails or is not realised, the result is *melancholia*; in which loss was the "environmental

³⁹⁰ While *mourning* is understood to be the actions and manner of expressing grief following the loss of someone important to us; *grief* refers to the "outward sign of bereavement and mourning after death" which we express through a range of emotions and feelings as we adjust to the loss. *Bereavement* on the other hand is the experience of losing someone dear to us through death. See generally Yasemin Özel and Birgül Özkan, 'A Psychosocial Approach to Loss and Mourning' (2020) *Psikiyatride Güncel Yaklaşımlar-Current Approaches in Psychiatry* Vol. 12 Issue 3 pp. 352-367 p. 354; ALS Society of Canada, *Coping with Grief: Strategies for People Living with ALS*, Factsheet, p. 1; V.D Volkan, 'What Some Monuments Tell Us About Mourning and Forgiveness' (2003) *Paper for a Collection of Essays Based on the Apologies Conference at Claremont Graduate University in February 2002* p. 6; C.M Parkes, 'Bereavement as a Psychosocial Transition: Processes of Adaption to Change' (1988) *Journal of Social Issues* Vol. 44 Issue 3 pp. 53-63.

³⁹¹ Sigmund Freud, '*Mourning and Melancholia*' (London: The Hogarth Press, 1917) p. 243.

³⁹² Tammy Clewell, 'Mourning Beyond Melancholia: Freud's Psychoanalysis of Loss' (2004) *Journal of the American Psychoanalytic Association* Vol. 52 No 1 p. 43. Cf. J.G Allen, '*Coping with Trauma: Hope Through Understanding*' 2nd edition (Washington DC: American Psychiatric Publishing Inc, 2005) pp. 25-41.

³⁹³ J.E Baker, 'Mourning and the Transformation of Object Relationships: Evidence for the Persistence of Internal Attachment' (2001) *Psychoanalytic Psychology* Vol. 18 No. 1 pp. 55-73 p. 55.

³⁹⁴ Neil Small, 'Theories of Grief: A Critical Review' in Jeanne Katz *et al*, (eds.) *Grief, Mourning and Death Ritual* (Buckingham UK: Open University Press, 2001) pp. 19-48.

influence” even though that loss could be an entirely abstract phenomenon.³⁹⁵ Freud likens the condition of melancholia with mourning on the basis that they share the same causal influence when a loved person is lost coupled with one’s feeling of difficulty or inability to accept the reality of that loss.³⁹⁶ Since Freud, psychosocial research and psychoanalysts have increasingly turned to the work of Melanie Klein (1940) who expanded Freud’s thoughts on mourning, grief and melancholia to include the psychoanalysis and understanding of the experience of one losing their internal good object.³⁹⁷ Freud and Klein agree that objects were mental images of the lost loved one that were internalised from infancy by someone who had been the primary caregiver of the dead person or another loved one such as parents, spouses, children, siblings etc and therefore, the memories of life shared together have become part of their sense of self. For Klein, the success of the psychological response to bereavement whether described as melancholia or mourning is dependent on how much of the lost object the bereaved are able to reinstate in their life and how much such recoveries rebuilt their disintegrated world.³⁹⁸

After an extensive review of Freud, G.H Pollock³⁹⁹ and other early grief researches, Volkan in his work *Immigrants and Refugees* argue that any complications arising from failure to realise the process of mourning do not always lead to melancholia (depression) as Freud argued.⁴⁰⁰ Instead, it may lead to another outcome he called “established pathological mourning” whereby adults suffering from and preoccupied with it become *perennial mourners* (not being able to bring their mourning to a practical conclusion) for decades, perhaps, even for the rest of their lives.⁴⁰¹ In other words, for Volkan, mourning is perennial and never ends because “we never ‘kill’ the mental representation of a significant dead person or lost thing until we die”.⁴⁰² In their later work *Life After Loss*, Volkan and Zintl claim that the inevitable course through grief after loss, the revival of past losses by current loss experience and the potential regeneration and growth that fully

³⁹⁵ Caroline Pearce, ‘Recovering Normal: A Qualitative Study of Grief following Bereavement’ (2016) PhD Thesis, The Open University, p. 17.

³⁹⁶ Sigmund Freud note 391 p. 243.

³⁹⁷ Melanie Klein, ‘Mourning and its Relation to Manic-Depressive States’ in *Love, Guilt and Reparation and other Works 1921-1945: The Writings of Melanie Klein Volume 1* (London: Hogarth Press, 1940) pp. 344-369; Meira Likierman, *Melanie Klein: Her Work in Context* (London-New York: Continuum, 2001) pp. 85-112. Julia Segal, *Melanie Klein—Key Figures in Counselling and Psychotherapy Series, 2nd edition*, editor: Windy Dryden (London: SAGE Publications, 2004) pp. 41-46.

³⁹⁸ Melanie Klein *ibid* p. 353.

³⁹⁹ G.H. Polloc ‘Mourning and Adaptation’ (1961) *International Journal of Psychoanalysis* Vol. 42 p. 341.

⁴⁰⁰ V.D Volkan, *Immigrants and Refugees: Trauma, Perennial Mourning, Prejudice, and Border Psychology* (London: Karnac Books Limited, 2017) p. 17.

⁴⁰¹ V.D Volkan *ibid* p. 17; V.D Volkan, ‘The ‘Linking Objects’ of Pathological Mourners’ (1972) *Archives of General Psychiatry* Vol. 27 pp. 215-222.

⁴⁰² V.D Volkan, ‘Unending Mourning and Its Consequences’ (2011) *Psychotherapie – Wissenschaft* Vol. 2 pp. 102-110 p. 102.

mourning each loss may bring constitute three factors that are key to understanding mourning.⁴⁰³ It is argued that migration, shaped by the perilous journey of migrants across international waters and borders, is a typical life phenomenon that activates the mourning processes as families of those journeying migrants tend to perennially mourn the death and going missing of their relatives in migration.

4.6.2 *Psychosocial Research on Grief and Mourning in the Inter-War Period*

The inter-war period between World War I and II left a miserable legacy of human disappearances and mass deaths for several thousands of families around the world, and it was no surprise that this period witnessed burgeoning psychosocial research by psychologists, psychiatrists and psychoanalytic thinkers who were keen to investigate and find answers to questions of grief and loss suffered by many families during the wars.⁴⁰⁴ Most researches in this period focused largely on grief as a syndrome including the categories of adjustment (Elliot, 1932)⁴⁰⁵ and recovery from bereavement following tragic deaths (Fulcomer, 1942).⁴⁰⁶ In 1944, Eric Lindemann, often credited with the first empirical systematic research on acute grief and its psychiatric management, finds grief as a distinct universal syndrome with its own symptomatology that includes feeling of guilt, experiencing of somatic distress, and preoccupation with and constant review of the memories and images of the deceased lost person in one's mind.⁴⁰⁷ Lindemann's major contribution to the original thoughts of Freud was mainly the introduction of element of time into the grief literature whereby he emphasised that while grief remains pre-eminently seen and perceived as a process of detaching from or disentangling oneself from the deceased person,⁴⁰⁸ interpreting grief also as an event that can appear and dissipate within a set period of time is particularly significant for understanding absent or delayed response/reaction to grief. Lindemann's idea can be particularly relevant in situations of ambiguous loss in migration where affected families may consciously, as

⁴⁰³ V.D Volkan and Elizabeth Zintl, *Life After Loss: The Lessons of Grief* (New York: Charles Scribner's Sons, 1993) p. 4.

⁴⁰⁴ The growth of grief and bereavement research in the 20th century up to the present times occurred within the fields of psychology, psychiatry and psychoanalysis. See Nikolas Rose, *The Psychological Complex: Psychology, Politics and Society in England 1869-1939* (London: Routledge and Kegan Paul Plc, 1985); 1989); Caroline Pearce, *Recovering Normal: A Qualitative Study of Grief following Bereavement* p. 25.

⁴⁰⁵ T.D Elliot, 'The Bereaved Family' (1932) *Annals of the American Academy of Political and Social Science* Vol. 160 Issue 1 pp. 184-190.

⁴⁰⁶ D.M Fulcomer, 'The Adjustive Behaviour of Some Recently Bereaved Spouses: A Psycho-Sociological Study' (1942) Unpublished PhD Thesis, Northwestern University.

⁴⁰⁷ Erich Lindemann, 'Symptomatology and Management of Acute Grief' (1944) *American Journal of Psychiatry* Vol. 101 pp. 141-148.

⁴⁰⁸ Erich Lindemann *ibid* p. 147.

a coping or defence mechanism, refuse to grieve or postpone or delay activation of the process of grief, mourning and bereavement, until the fate of their missing relatives is clarified and conclusively determined, and if they are dead, their bodies returned home for proper funeral and observance of all cultural and customary burial rites.

4.6.3 Psychosocial Research on Mourning and Grief in the Post-War Period

The post-war periods witnessed the emergence and growth of grief and bereavement research that focused largely on understanding grief and mourning as a *process*, pioneered by the works of John Bowlby on *Attachment and Loss*.⁴⁰⁹ Based on his psychoanalysis of mourning, grief and loss, Bowlby developed four models and/or phases of mourning and grief in adults framed as a biological process: shock and numbness, yearning and searching, disorganisation and despair and reorganisation and recovery⁴¹⁰ to describe how one responds to grief and bereavement in adulthood following the loss of a loved one. For Bowlby, grief over the loss of someone dear is a way those affected by the loss express their universal biologically programmed emotions towards the lost object that they were attached to for the most part of their life. Following from Bowlby, British psychiatrist C.M. Parkes⁴¹¹ created a relational phase model of grief that shared much similarity with that of Bowlby, in which he conceived grief over the loss of close relative as a process that involves some kind of 'psychosocial transition' from a prevailing state of affairs occasioned by the loss, rather than merely seeing grief as a state as such. In other words, the psychosocial transition requires identity adjustment that allows the bereaved to adjust from their internal ruptured world brought about by the loss to a new kind of life without the departed one. The contribution of Bowlby, Lindemann and Parkes to the grief literature remains the development of the *stage model of grief*. Their respective works influenced the five stages of dying that was later developed and applied to the grief process by Swiss Psychiatrist Elizabeth Kübler-Ross (1970).⁴¹² Kübler-Ross argues that her stages of grief—denial, anger, bargaining, depression and acceptance—serve as a defence and/or coping mechanism against extremely difficult situations

⁴⁰⁹ John Bowlby, *Attachment and Loss: Loss Sadness and Depression*, Volume III (New York: Basic Books, 1980) pp. 92-96.

⁴¹⁰ John Bowlby, 'Process of Mourning' (1961) *International Journal of Psychoanalysis* XLII pp. 317-340; John Bowlby, 'Process of Mourning' (1961) *Psychoanalytic Quarterly* Vol. 31 p. 576.

⁴¹¹ C.M Parkes, *Bereavement: Studies of Grief in Adult Life* (New York: International Universities Press, 1972); C.M Parkes and H.G. Prigerson, *Bereavement: Studies of Grief in Adult Life*, 4th edition (London: Routledge, 2010).

⁴¹² Elizabeth Kübler-Ross, *On Death and Dying*, 40th Anniversary Edition (New York: Macmillan, 1969) pp. 31-112; Elizabeth Kübler-Ross, *Encountering Death and Dying* (USA: Chelsea House Publishers, 2005) pp. 1-4 & 40-50.

brought about by the loss of a close relative.⁴¹³ While Kübler-Ross' five stages of grief are highly seductive for the kind of therapeutic messages that they each carry, they should, I argue, be viewed as an adjustable framework and not necessarily a straitjacket linear hierarchy or some fixed recipe for overcoming grief. Neither do they require one to grieve in a particular way or suggest that one is grieving correctly or incorrectly following the loss of a loved one. As families of missing migrants grapple with uncertainties about the fate of their relatives and the attendant trauma, loss and emotion that come with such experiences of life, they want to know how long their uncertainty might last and what will happen to them should their missing loved ones never be found.

It is argued that in such a condition of life, affected individuals and families would need some therapeutic impetus to hold on to and Kübler-Ross' five-stage model of grief which allows one to tick off any stage passed appears to offer them just that. It is a kind of course of action strategy to adopt, adapt and follow when dealing with difficult situations of loss and uncertainty. As families of missing migrants are greeted with the news of the disappearance of their relatives at sea and borders; first, there is this initial *denial/disbelief*—no not me, it just can't be me! As this initial disbelief gradually degenerate into grief, then, there is the surfacing of *anger*—but why me, why me? One then attempts to manage their anger through *bargaining*—okay if I wait a little more for some searches to take place, I will find him, everything will be okay, right! When expected positive results are not forthcoming, then *sadness/depression* kicks in—I don't know when this uncertainty will end, when will they find my missing child, brother, sister, parent or spouse. And as the uncertainty persists, one begins to gradually succumb to the condition of *acceptance*—okay, it's true this is happening, what will be will be, I have to figure out how to move on with my life.

It can be claimed that from Kübler-Ross' five-stage model of grief that the real power to grapple with uncertain situations that families of missing migrants face lie with *acceptance*. In the stage of acceptance as some kind of coping mechanism, one begins to find some level of control and policing of the affect, emotion and trauma suffered by the bereaved individuals and families of the missing person. By 'emotion', it is meant relatively conscious feelings usually expressed when individuals grapple with situations they consider personally significant⁴¹⁴ while 'affect' refers to the embodied, unconscious feeling that happens in situations of profound grief described in

⁴¹³ Cf. Hamish McIlwraith, *Coping with Bereavement* (Oxford: Oneworld Publications, 1998) pp. 7-15.

⁴¹⁴ Lita Crociani-Windland and Paul Hoggett, 'Politics and Affect' (2012) *Subjectivity* Vol. 5 p. 164.

terms of melancholia by Freud.⁴¹⁵ Since affect is usually the “more bodily based indeterminate level of experience”,⁴¹⁶ there is always the tendency for denial of loss when thinking about what gets repressed and cannot be mourned because there is no object in mind to grieve over.⁴¹⁷ A recent study on the stage theory of grief by Maciejewski *et al* with some 233 bereaved individuals in Connecticut found that of Kübler-Ross’ five-stage model, acceptance was the most endorsed in terms of psychological response to grief occasioned by the loss of a loved one.⁴¹⁸

Post Kübler-Ross, the next major contributor to loss and grief literature was J.W. Worden who developed four tasks of mourning for the bereaved in response to the stage model: “accepting the loss, processing the pain of grief, adjusting the environment in which the deceased is missing and establishing a lasting connection while embarking on a new life”.⁴¹⁹ Worden’s idea is similar to Rando’s six R’s of mourning: recognising the loss, reacting to the separation, recollect and re-experience with the lost loved one, relinquish old attachment, readjusting to the new world whilst not forgetting the old world and reinvesting emotional energy.⁴²⁰ The cornerstone of Worden’s tasks model and Rando’s six R’s seems to be the understanding that allowing individual mourners to become active rather than passive participants in their own grief enables them to assume some level of responsibility for their mourning. However, despite the influence of the stage, process, phases and task models of grief, later psychosocial literature indicated a gradual paradigm shift from the detachment and letting go theories to one of *continuing bonds* with the deceased.

For example, in their work *Continuing Bonds: New Understandings of Grief*, Klass, while acknowledging that grief and bereavement theories have so far focused on the imperatives of breaking ties or detaching oneself from the dead as a pathway to effective recovery from grief, proceeded to challenge the normative premises of the detachment models of grief.⁴²¹ Silverman and Klass, in particular, argue that it is a normative response to grief for mourners to seek to keep bonds with the deceased and to maintain presence and connection with them, rather than letting

⁴¹⁵ Sigmund Freud note 391 p. 245.

⁴¹⁶ Lita Crociani-Windland and Paul Hoggett *ibid* pp. 164-165.

⁴¹⁷ Sigmund Freud note 391 p. 245.

⁴¹⁸ P.K Maciejewski *et al*, ‘An Empirical Examination of the Stage Theory of Grief’ (2007) *Journal of American Medical Association* Vol. 297 No. 7 pp. 716-722 p. 716.

⁴¹⁹ J. W Worden, *Grief Counselling and Grief Therapy: A Handbook for the Mental Health Practitioner*, 4th edition (New York: Springer Publishing Company, LLC, 2009) pp. 39-53.

⁴²⁰ T.A Rando, *Treatment of Complicated Mourning* (Champaign Ill: Research Press, 1993).

⁴²¹ Dennis Klass *et al*, (eds.) *Continuing Bonds: New Understandings of Grief* (Phil.PA, USA: Taylor and Francis, 1996) pp. xviii, 16 & 22.

go of their ties with the dead, even though this presence may not be entirely static.⁴²² For them, bereavement and grief is a psychological phenomenon that can never be fully resolved such as to culminate in any definite closure or recovery. Silverman and Klass's arguments were certainly a response to Freud, Bowlby and Parkes's earlier works which somewhat all viewed severance of ties with the dead as the only positive way to resolve grief or successfully recover from unresolved grief. For them, the views of Freud and his followers were based on the western world view of self which assumes that as people are separate from each other, their independence and individual autonomy should be esteemed as good and their dependence judged as somewhat bad.⁴²³ In other words, the underlining premise of continuing bond theory appears to be the idea that bereaved people should accommodate or incorporate their past relationship with the dead into their present lives (e.g. through displaying and keeping of the deceased's photographs) even though the theory left the question of what exactly should be continued as a matter of choice for the bereaved person.⁴²⁴

It is suggested that even though the continuing bonds literature may have had some impact on how grief and mourning were theorised in later literature post Freud, it fails to realise that even though the process and stage theories of grief emphasised detachment from the dead, they were actually based on the assumption that human attachment is not only vital but may, in fact, be a biological imperative; and that human beings were already inherently dependent on one another. Not least because, as Arnason subsequently argued, the continuing bonds theory still assumed prior separation before continuing the bond.⁴²⁵ Following Silverman and Klass, later research on loss, mourning and grief focused on the *dynamic dual process* of grief and mourning whereby the primary task of coping with loss was based on how the bereaved person negotiates the meaning of life without the dead.⁴²⁶ For Stroebe and Schutt, people who are grieving and mourning the loss of their loved ones ostensibly keep oscillating between orientation and

⁴²² Silverman and Klass, 'Introduction' in *Continuing Bonds: New Understandings of Grief* (Phil.PA, USA: Taylor and Francis, 1996) p. 17.

⁴²³ Silverman and Klass, *ibid* p. 14.

⁴²⁴ N.P Field and Charles Filanosky, 'Continuing Bonds, Risk Factors for Complicated Grief, and Adjustment to Bereavement' (2009) *Death Studies* Vol. 34 Issue 1 pp. 1-29; Margaret Stroebe and Henk Schut, 'To Continue or Relinquish Bonds: A Review of Consequences for the Bereaved' (2005) *Death Studies* Vol. 29 Issue 6 pp. 477-494.

⁴²⁵ Arnar Arnason, 'Individuals and Relationships: On the Possibilities and Impossibilities of Presence' in D. Davies and C.W Parkes (eds.) *Emotion, Identity and Death: Mortality Across Disciplines* (Surrey: Ashgate, 2012) pp. 59-70.

⁴²⁶ Margaret Stroebe and Henk Schutt, 'The Dual Model of Coping with Bereavement, Rational and Descriptive' (1999) *Death Studies* Vol. 23 No. 3 pp. 197-224.

restoration when focusing on the loss itself becomes somewhat too burdensome to bear and both orientations could be a real source of distress and anxiety.⁴²⁷

By and large, the literature on grief, mourning and bereavement considered so far whether medically, culturally or psychosocially constructed all assume that someone is dead and there is no ambiguity regarding the availability of the body of the deceased to be mourned. Since there is no ambiguity as to the fate of the deceased person, their focus, in order to find some closure for affected individuals and families, was primarily on how to successfully recover from the grief that follows. It is argued that ambiguous loss situations where there is no news about the fate of the missing person, whether alive or dead, present a more psychosocially challenging condition for which unrevised and uncritical reliance on the stage, phase and process models of grief for their management (though psychologically helpful for grieving families/individuals in many respects as the foregoing analysis demonstrate) is nonetheless inadequate to deal with the peculiar condition of ambiguous loss. As this thesis will demonstrate later when analysing the secondary interviews with families of missing migrants, the simplistic readings of Freud's and others' mourning and grief theories as a linear psychological process, whereby one walks through various tasks and stages to realise successful mourning, fails to recognise the power of ambiguous loss to sometimes overwhelm that process, stage and task-oriented models of grief in situations where there is no migrant dead body to mourn. While ambiguous loss does not necessarily turn Freud's detachment thesis, Bowlby's grief process, Rando's six R's of mourning, Worden's four tasks of mourning or Kübler-Ross' five stages of grief into, to recall Wortman and Silver's word a 'myth'⁴²⁸ as such, they nonetheless challenge their central assumptions as long as there is no confirmation of death and no dead body to facilitate the process of mourning and grief.

4.6.4 A New Dawn of Contemporary Ambiguous Loss Research on People Missing in Transnational Migration: Pauline Boss and Beyond

Ambiguous loss, literally speaking, expresses both the physical and psychological experiences of families that are not always and clearly identifiable, determinable or concrete as other traditional losses such as confirmed and verified deaths,⁴²⁹ as the foregoing literature on grief, mourning and bereavement already demonstrate. Often perceived as a lasting reminder that life is not always

⁴²⁷ Margaret Stroebe and Henk Schutt *ibid* pp. 197-224.

⁴²⁸ C.B Wortman and R.C Silver, 'The Myths of Coping with Loss' (1989) *Journal of Consulting and Clinical Psychology* Vol. 57 Issue 3 pp. 349-357.

⁴²⁹ Gabriella Betz and Jill M. Thorngren, 'Ambiguous Loss and the Family Grieving Process' (2006) *The Family Journal: Counselling and Therapy for Couples and Families* Vol. 14 No. 4 p. 359.

fair or kind, ambiguous loss, Pauline Boss argues, entails a situation where someone dies or goes missing in ambiguous circumstances and their fate—in terms of whether they are alive or dead is unclear/unresolved.⁴³⁰ The theory has been widely applied in the US to explore the psychosocial implications of human disappearances for families of US soldiers who were missing after the Vietnam War in the 1990s⁴³¹ and those missing in Post conflict Nepal⁴³² and in many other context of enforced disappearances.⁴³³ More recently, the theory has been applied to study the psychosocial impact of ambiguous loss on families of those who were missing in the aftermath of the 9/11 terrorist attacks on New York City,⁴³⁴ those missing in the context of migration,⁴³⁵ and similar studies on missing persons worldwide.⁴³⁶ Its basic premise is that given the boundary ambiguity that it creates, ambiguous loss is the “most stressful kind of loss because it defies resolution and creates confused perceptions about who is in or out of a particular family”.⁴³⁷ In boundary ambiguity, families of missing persons are unsure in their judgment of who actually is in and out of their family, and who in the prevailing ambiguous circumstances could be said to be performing what roles within the family system.⁴³⁸ Understood in this way, Boss identifies the following assumptions (not exhaustive) as underlining the ambiguous loss theory:⁴³⁹

- In ambiguous loss, the truth about the fate of the missing is assumed to be not attainable, but instead relative, since the underlying question remains how people live with and cope with the truth *absence*.
- Ambiguous loss is a phenomenon that assumes attachment to the missing person.
- The pathology of ambiguous loss lies not in the type of grief suffered but in the type of loss experienced.⁴⁴⁰

⁴³⁰ Pauline Boss, *Ambiguous Loss: Learning to Live with Unresolved Grief* (Harvard University, 1999).

⁴³¹ E.J Hunter, ‘Captivity: The Family in Waiting’ in C.R Figley and H.I McCubbin (eds.) *Stress and the Family, Vol. II: Coping with Catastrophe* (New York: Brunner/Mazel, 1983) pp. 171-177.

⁴³² Simon Robins, ‘Ambiguous Loss in a Non-Western Context: Families of the Disappeared in Postconflict Nepal’ (2010) *Family Relations, Interdisciplinary Journal of Applied Family Studies* Vol. 59 No. 3 p. 253.

⁴³³ Simon Robins, ‘Discursive Approaches to Ambiguous Loss: Theorising Community-Based Therapy After Enforced Disappearance’ (2016) *Journal of Family Theory and Review* Vol. 8 No. 3 pp. 308-322.

⁴³⁴ Pauline Boss note 46 p. 553.

⁴³⁵ F.B. Attia *et al* note 305 p. 27.

⁴³⁶ Theo Hollander, ‘Ambiguous Loss and Complicated Grief: Understanding the Grief of Parents of the Disappeared in Northern Uganda’ (2016) *Journal of Family Theory and Review* Vol. 8 No. 3 p. 294.

⁴³⁷ Pauline Boss, ‘Ambiguous Loss Theory: Challenges for Scholars and Practitioners’ (2007) *Family Relations* Vol. 56 No. 2 p. 106.

⁴³⁸ Pauline Boss *et al*, ‘Normative Loss in Mid-Life Families: Rural, Urban and Gender Differences’ (1987) *Family Relations* Vol. 36 No. 4 p. 437.

⁴³⁹ Pauline Boss, ‘The Context and Process of Theory Development: The Story of Ambiguous Loss’ (2016) *Journal of Family Theory and Review* Vol. 8 pp. 269-286.

⁴⁴⁰ Pauline Boss, ‘The Trauma and Complicated Grief of Ambiguous Loss’ (2010) *Pastoral Psychology* Vol. 59 Issue 2 pp. 137-145; Pauline Boss, ‘Coping with the Suffering of Ambiguous Loss’ in R.E Anderson (ed.)

- In ambiguous loss situations, closure is assumed to be a 'myth' since without any definite news about the missing person, loss and grief may linger indefinitely.⁴⁴¹
- In ambiguous loss, the resilience which can be natural in families carries a specific meaning that has to do with increasing one's tolerance for ambiguity, and this can be influenced by the cultural values and beliefs of affected families.⁴⁴²

For Boss, two kinds of ambiguous loss exist: the first is "where a family member is psychologically present but physically absent" (e.g. missing body, missing in migration, missing in war etc.)⁴⁴³ This condition she describes as "leaving without goodbye".⁴⁴⁴ The second is "where a family member is psychologically absent but physically present" (e.g., depression, unresolved grief, dementia etc);⁴⁴⁵ this she describes as "goodbye without leaving".⁴⁴⁶ Although the first type of ambiguous loss where the missing person is psychologically present but physically absent is primarily what this study is concerned with, nonetheless, as Boss argued and I will demonstrate when analysing the secondary interviews with families of missing migrants, the ambiguous loss experience of families of people missing in transnational migration context presents special characteristics different from other contexts in that in migration contexts there is a "crossover"⁴⁴⁷ of the two types of ambiguous loss because "it has elements of both types of ambiguous loss".⁴⁴⁸ In this crossover situation, we see that while the going missing of migrants means physical absence and psychological presence of the missing person in the minds of their families; the extreme emotional anguish expressed by the families over their loss also shows that they themselves are in many cases physically present but psychologically and emotionally unavailable to others. Boss identifies 6 coping mechanisms for living with such ambiguous loss.⁴⁴⁹

The first is *finding meaning* which entails getting families to understand that the situation they are facing has a name called 'ambiguous loss' in order to ease their feeling of helplessness,

'*World Suffering and the Quality of Life*' (New York: Springer, 2015a) pp. 125-134; Pauline Boss and Donna Carnes, 'The Myth of Closure' (2012) *Family Process* Vol. 51 Issue 4 pp. 456-469.

⁴⁴¹ P. Boss and Donna Carnes, 'The Myth of Closure' (2012) *Family Process* Vol. 51 No. 4 pp. 456-468.

⁴⁴² A.S. Masten, 'Resilience in Developing Systems: Progress and Promise as the Fourth Wave Rises' (2007) *Development and Psychopathology* Vol. 19 Issue 3 pp. 921-930.

⁴⁴³ Pauline Boss note 430.

⁴⁴⁴ Pauline Boss & Janet Yeats, 'Ambiguous Loss: A Complicated Type of Grief when Loved Ones Disappear' (2014) *Bereavement Care*, Vol 33 Issue 2 pp. 63-69 p. 64.

⁴⁴⁵ Pauline Boss & Janet Yeats *ibid* pp. 63-69.

⁴⁴⁶ *ibid* p. 64.

⁴⁴⁷ *ibid*.

⁴⁴⁸ C.J Falicov, 'Ambiguous Loss: Risk and Resilience in Latino Immigrant Families' in M. Suarez-Orozco and M. Paez (eds.) *Latinos: Remaking America* (CA: University of California Press, 2002) pp. 274-288.

⁴⁴⁹ Pauline Boss, 'Families of the Missing: Psychosocial Effects and Therapeutic Approaches' (2017) *International Review of the Red Cross* Vol. 99 No. 2. p. 533.

powerlessness, blame and guilt⁴⁵⁰ whilst they wait for any news on their missing relatives. For Prilleltensky, meaning-making “positions human beings as agents of personal and collective change”⁴⁵¹ whereby, as Walter and McCoyd argue, mourners through the help of grief work “construct and reconstruct stories of meaning that enable them to move into their new lives and their assumptive worlds in the physical absence of the entity who/which was lost”.⁴⁵² The second coping mechanism is *adjusting mastery* which implies that developing a mastery orientation, the sense that one can actually solve problems, can help families facing ambiguous loss situations to moderate the impact of trauma and stress that come with ambiguous loss of their relatives.⁴⁵³ The third is *reconstructing identity* which involves people reconstructing their identity in a way that allows them to fill the void and role left by the missing person in the family; a new kind of identity that reflects who one truly is now that the missing person is gone, perhaps forever.⁴⁵⁴ The fourth coping mechanism is *normalising ambivalence* which describes having mixed or conflicting emotions about someone, for example, love/hate, anger/sadness, admission/blame etc that emanates from external social rupture, and therefore normalising ambivalence is a strategy that is focused at managing the negative side of the ambivalence in order to enhance the chances of bringing some kind of closure to the pain of a loved one going missing.⁴⁵⁵

The fifth is *revising attachment* which relates to the emotional, social and cognitive attachment that relatives of the missing person have with the missing. Revising attachment is targeted at helping bereaved people to maintain two parallel beliefs that the missing though deemed gone, is still here with them; what Boss called the “both-and” paradox.⁴⁵⁶ And finally there is the coping mechanism of *discovering new hope* which involves people facing ambiguous loss situations developing some new kind of hopes and dreams and aspirations that takes focus away from the missing person.⁴⁵⁷ It is argued that families of missing migrants successfully employing these coping mechanisms to manage ambiguous loss requires a policy informed psychosocial support for the affected families. However, a recent study by Attia *et al*/based on qualitative semi-structured interviews with 84 bereaved families of missing migrants from five states, found that

⁴⁵⁰ *ibid* p. 530.

⁴⁵¹ Isaac Prilleltensky, ‘Meaning-Making, Mattering, and Thriving in Community Psychology: From Co-optation to Amelioration and Transformation’ (2014) *Psychosocial Intervention* Vol. 23 No. 2 pp. 151-154 p. 151.

⁴⁵² C.A Walter and Judith L.M. McCoyd, *Grief and Loss Across the Lifespan: A Biopsychosocial Perspective* (New York: Springer, 2009) p 15.

⁴⁵³ Pauline Boss note 449 p. 531.

⁴⁵⁴ Pauline Boss *ibid* p. 532.

⁴⁵⁵ *ibid* p. 532.

⁴⁵⁶ *ibid* p. 533.

⁴⁵⁷ *ibid* p. 533; Pauline Boss, *Loss, Trauma, and Resilience* (NY: Norton, 2006).

there were no dedicated support mechanisms for families of missing migrants in Europe,⁴⁵⁸ and where professional help was available, it was found it to be “both clinically and culturally inappropriate”.⁴⁵⁹

4.7 Summary of the Review and Spotting the Knowledge Gaps

This chapter has provided a review of the extant literature on missing migrants focusing on five key thematic areas. In so doing, evidence to explain the current state of the art in the literature in regard to the key elements of the study (legal, policy and psychosocial) were adduced. The aim was to identify gaps in the literature that warrants further investigation by this study. The following knowledge gaps are immediately apparent:

1. On the Legal and Policy Responses of States to Missing Migrants: A critical look at the reviewed literature shows that one thread that connects together all the four response approaches is that they are all informed by doctrines of legal positivism, viewing law solely as a reductionist body of legal rules for which the independent moral value of obedience is assumed. A policy-oriented response approach where law becomes a theory for making social choices aimed at promoting the human dignity of migrants is highly neglected.
2. On Why Migrants Die and Go Missing in Transnational Migration: While the existing studies reviewed largely attribute the high migrant mortality rate at sea and borders to the deterrence-oriented migration policies of states based on empirical evidence and figures, there is little or no inclusion of theory grounded evidence to understand the phenomenon of migrant mortalities.
3. On the Obligations of States Towards Missing Migrants: While some attempts have been made by scholars to develop a legal protocol that seeks to outline the core obligations of states towards missing migrants, e.g., the Last Rights Project, there are fewer studies on how those core obligations may be assigned, shared and allocated to states in practice.
4. On the Transnational Effectiveness of State Migration Policies in Relation to Missing Migrants: While literature may have examined the effectiveness of state migration policies in relation to migration more generally, no study has specifically looked at the transnational

⁴⁵⁸ F.B. Attia *et al* note 305 pp. 32-39; F.B Attia *et al*, note 22 pp. 2-13.

⁴⁵⁹ *ibid* p.37.

effectiveness of national migration policies in relation to missing migrants. In the UK, there remains a country-specific knowledge gap as to the transnational effectiveness of UK migration policy in relation to missing migrants.

5. *On the Psychosocial Implications of Migrants Going Missing for their Families:* The psychosocial implications of migrants going missing in migration for their families is still highly marginalised in the current legal research despite the abundance of literature on grief, mourning and bereavement in other contexts of loss outside migration. For example, current literature fails to consider the specific question as to whether states' migration policies in relation to missing migrants are psychosocially compliant, informed or aware.

Research to fill these gaps in knowledge is not only important but also critical and timely. The five research questions outlined earlier emerged from this literature review and were therefore framed to reflect each of these five gaps. In the next chapter, I take up the first substantive question; that is, what, from a policy-oriented international law perspective, should be the appropriate legal and policy response of states to the problem of missing migrants.

Chapter 5

The Legal and Policy Frameworks and Responses of States to Missing Migrants: A New Haven School Policy-Oriented Perspective

5.1 Introduction

As the previous chapters demonstrate, there is no such thing as a simple solution to a real-world problem; not least, when a legal subject is missing in migration. At present, as indicated in the literature review in Chapter 4, states' legal and policy responses to the problem, often informed by a mix of doctrines of humanitarianism, externalisation, securitisation and solidarity, have been embedded in a multileveled legal and policy architecture that, whilst at times complementary at EU level, also competes and conflicts with the interests of other stakeholders outside of Europe. National responses at the state level coupled with demands of international cooperation, coordination and collaboration in migration governance, e.g., through EU agencies like *Frontex*⁴⁶⁰ and regional policies like *Operation Sophia*⁴⁶¹ create a paradigm of legal and policy responses that are difficult to determine precisely at any particular level.

Although the missing migrants' problem is a complex one, the difficulty in solving it rests squarely in the "minds of men".⁴⁶² Therefore, given the intricacy of the problem and the multiplicity of state responses to the problem, selecting the right jurisprudence for analysing them and the applicable legal and policy framework and the actors and institutions involved becomes critical. Through the lens of the New Haven School of International Law which provides a contemporary theoretical and methodological approach to analysing international law and international decision-making processes through a policy-oriented jurisprudence,⁴⁶³ this chapter examines the legal and policy frameworks and specific responses of states to the problem of missing migrants initiated at the international (UN) and regional (EU) levels. Later in Chapter 8 I will look at the national (UK) level. Starting from the premise that law should serve human beings in terms of what values and

⁴⁶⁰ Frontex was established by Regulation (EU) 2016/1624 of 14 Sep 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1); Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 Sep 2016 amending Regulation (EU) 2016/399 and repealing Regulation (EC) No 863/2007.

⁴⁶¹ EUNAVFOR-MED *Operation Sophia*.

⁴⁶² P.C Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) p. 109 cited in Denise Wallace, *Human Rights and Businesses: A Policy-Oriented Perspective* (Leiden: Brill Nijhoff, 2014) p. 4.

⁴⁶³ Fozia Lone, 'The New Haven School of International Law' (2019) *Oxford Bibliographies*; Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) *Yale Journal of International Law* Vol. 1 No. 1 pp. 1-3.

goals international law should vindicate, the New Haven School inspired by the legal realism and sociological jurisprudence views law as a theory about making social choices; a social process and tool of responding to societal problems through the “process of *authoritative* and *controlling* decision-making designed to promote human dignity and public order”.⁴⁶⁴

For the New Haven School, law is not simply a body of rules that enforces itself but instead relies on the “conveyor belt of human actions”⁴⁶⁵ for its implementation. Three “processes of communication”,⁴⁶⁶ namely: the *content of the policy* of the message communicated; the *authority* of the person communicating the message; and the *control intent* of the message being communicated⁴⁶⁷ are characterised as law.⁴⁶⁸ By a focus on law as being more than rules but also how legal and policy decisions made from law affect human beings,⁴⁶⁹ the New Haven School integrates into its methodological and theoretical framework eight shared, mutually coexistent values of human dignity: *power, enlightenment, well-being, wealth, skills, affection, rectitude and respect*⁴⁷⁰ that the international community of states strives to achieve.⁴⁷¹ For New Haven School, promoting and maximising human access to these shared values of dignity for the protection and benefit of human beings is the primary goal of international law. The effect on families, society and the state when migrants die and go missing in transnational migration clearly triggers these shared values of human dignity. In the context of the Europe migrant crisis, the decisions of

⁴⁶⁴ W.M. Reisman *et al*, note 151 pp. 575, 576. The resulting authoritative and controlling decision is said to consist of seven closely interrelated functions: *intelligence, promotion, prescription, invocation, application, termination* and *appraisal* that they each perform in the decision-making process. See Siegfried Wiesner, ‘Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman’ (2009) *Yale Journal of International Law* Vol. 34 Issue 2 p. 528; Myres McDougal *et al*, ‘Human Rights and World Public Order: A Framework for Policy Oriented Inquiry’ (1969) *The American Journal of International Law* Vol. 63 p. 240; W.M. Reisman, ‘A Jurisprudence from the Perspective of the Political Superior’ (1996) *Northern Kentucky Law Review* Vol. 23 No. 3 pp. 605-612.

⁴⁶⁵ Siegfried Wiessner, ‘International Law in the 21st Century: Decision Making in Institutionalised and Non-Institutionalised Settings’ (1997) *THESAURUS ACROASIMUM* Vol. 26 p. 129 cited in S. Wiessner and A.R. Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity’ (1999) *The American Journal of International Law* Vol. 93, No. 2 p. 319.

⁴⁶⁶ W.M. Reisman, ‘International Law-Making: A Process of Communication’ (1981) *Proceedings of the American Society of International Law* Vol. 75 pp. 101 at 108-111.

⁴⁶⁷ W.M. Reisman *ibid* pp. 108-111; M.S. McDougal & W.M. Reisman, ‘The Prescribing Function in World Constitutive Process: How International Law Is Made’ (1980) *Yale Studies in World Public Order* Vol. 6 p. 250.

⁴⁶⁸ Siegfried Wiessner and A.R. Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity’ (1999) *The American Journal of International Law* Vol. 93 No. 2. p. 319.

⁴⁶⁹ Myres McDougal, ‘Jurisprudence for a Free Society,’ (1961) *Georgia Law Review* Vol. 1 p. 2.

⁴⁷⁰ M.S. McDougal *et al*, note 151 pp. 227-307.

⁴⁷¹ M.S. McDougal ‘International Law, Power and Policy: A Contemporary Conception’ (1953) *RECUEIL DES COURS* Vol. 82 p 168; M.S. McDougal *et al*, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven and London: Yale University Press, 1980) pp. 3-37.

migrants to jump on the boat to seek a better life in Europe, and the actions of European states to regulate such risky journeys often end up infringing on some or all of these values.

In analysing the international, regional and national legal and policy responses to any societal problem such as the issue at hand in light of these human dignity values, the New Haven School utilises five intellectual tasks based on “contextualism and problem-solving orientation”⁴⁷² that allow us to find, in rational, interdisciplinary legal analysis:⁴⁷³ (1) the delineation of the bounds of the societal problems that the law seeks to address in order to reach specific goals; (2) to then assess the conflicting claims, the relevant claimants, their perspectives and bases of power; (3) to evaluate the previous legal responses to the problem in light of the conditioning factors that produced them;⁴⁷⁴ (4) to forecast future trends in decisions in relation to the problem at hand;⁴⁷⁵ and (5) to appraise past trends in decisions, develop new alternatives⁴⁷⁶ and find solutions that “fit in line with a good public order, a favourite order that is compatible with human dignity”.⁴⁷⁷ Framed by this understanding, this chapter using the New Haven concept of *shared values of human dignity* as a unifying conceptual frame analyses the societal problem of missing migrants that international law and states seek to solve. The central argument pursued in this chapter is that states developing more value-based, value-dependent national migration policies that empower migrants to maximise and have greater access to these shared values of human dignity at all stages of their journeys across seas and borders is key to preventing migrant deaths and migrants going missing in migration, whilst also responding to cases of those already dead and missing and addressing the psychosocial needs of their families.

The chapter proceeds as follows: In Section 5.2, I comprehensively outline the different layers of the problem of missing migrants that international law seeks to address. In the section that follows, I highlight the conflicting claims relating to the problem of missing migrants; those who are the relevant claimants, their perspectives and bases of power. Then, in Section 5.4, I lay

⁴⁷² Hengameh Saberi, ‘Between the Scylla of Legal Formalism and the Charybdis of Policy Conceptualism: Yale’s Policy Science and International Law’ (2014) *Osgoode Legal Studies Research Paper Series* No. 33 Vol. 10 Issue 08 p. 1.

⁴⁷³ R.A Falk, ‘Casting the Spell: The New Haven School of International Law, 1991, 1997’ (1995) *Yale Law Journal* p. 104.

⁴⁷⁴ Myres McDougal, *et al*, ‘Theories About International Law: Prologue to a Configurative Jurisprudence’ (1967-1968) *Virginia Journal of International Law* Vol. 8 No. 2 p. 197

⁴⁷⁵ F.S Tipson, ‘Lasswell–McDougal Enterprise: Towards a World Public Order of Human Dignity’ (1973-74) *Virginia Journal of International Law* Vol. 14 p. 535

⁴⁷⁶ Rosalyn Higgins, ‘Policy Considerations and the International Judicial Process’ (1968) *International and Comparative Law Quarterly* Vol. 17 No. 1 pp. 58-84

⁴⁷⁷ Siegfried Wiessner, ‘The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law’ (2010) *Asia Pacific Law Review* Vol. 18 No. 1 p. 48.

out the past trends in decisions relating to missing migrants at the international and regional levels by examining the different international and regional legal and policy frameworks that have been initiated to address the problem. This is then followed by a projection of future trends in decisions, that is, a forecast of what future decisions are highly likely to be taken or made by states as a response to the issue of missing migrants. In Section 5.6, I appraise past trends in terms of what shortages characterised past trends in decisions; to then recommend approaches to find solutions to the problems analysed (the recommendations are reserved for the final Chapter 10). Finally, in Section 5.7, I provide a summary of the legal analysis.

5.2 Delimitation of the Transnational Problem of Missing Migrants that the Law Seeks to Address

As stated above, the first of the five intellectual tasks that the New Haven School proposes is a clear delimitation of the societal problem that the law seeks to address. For New Haven, the way we characterise the problems, the intellectual tools we use to research them, and the information we think relevant for addressing them will all be determined by our conception of the law.⁴⁷⁸ One's conception of the law might vary markedly depending on whether one is a member of the system being observed, one is an outsider, or one sits at the margin.⁴⁷⁹ In our case, the EU and member states' national decision-makers have faced enormous challenges in terms of characterising what the real problems are, their bounds and how to tackle them. Given the fluid and complex nature of the question of missing migrants, it will be more appropriate to delimit the transnational problem to three different but equally constituting thematic bounds: practical, legal and policy problems.

5.2.1 The *Practical Problem*

Firstly, for every migrant that goes missing, there is a family desperately waiting for information on what has become of their loved ones.⁴⁸⁰ Despite such expectations, many families are unsure of the whereabouts of their missing relatives.⁴⁸¹ In many cases "nobody is found, no record is

⁴⁷⁸ W.M. Reisman, 'The View from the New Haven School of International Law' (1992) *ASIL Proceedings* p. 119.

⁴⁷⁹ Siegfried Wiessner and A.R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) *AJIL* Vol. 93 No. 2. p. 322.

⁴⁸⁰ Iosif Kovras and Simon Robins, 'Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU's Mediterranean Frontier' (2016) *Political Geography* Vol. 55 p. 41.

⁴⁸¹ Ernesto Schwartz-Marin and Arely Cruz-Santiago, 'Pure Corpses, Dangerous Citizens: Transgressing the Boundaries Between Mourners and Experts in the Search for the Disappeared in Mexico' (2016) *Social Research: An International Quarterly* Vol. 83 No. 2 pp. 483-510.

made, no story is told, and migrants disappear without any acknowledgment of their humanity”.⁴⁸² While some tragic cases of migrant deaths, such as that of the three-year-old Syrian toddler, Alan Kurdi who drowned in the Aegean sea and his body washed up on the coast of Turkey in 2015 managed to make media headlines,⁴⁸³ the majority of deaths go unnoticed.⁴⁸⁴ Their deaths often occur in remote and traceless parts of the sea, deserts and borders, almost as “clandestinely as the journey itself”.⁴⁸⁵ Experts believe that for every dead body recovered from the seashores of the advanced world “there are at least two others that are never found”,⁴⁸⁶ and “where bodies have been found, they are often buried in unmarked graves”.⁴⁸⁷ The struggle of migrant families “for truth, justice and commemoration often remains invisible”.⁴⁸⁸ Not knowing what happened to a missing relative creates ‘boundary ambiguity’ in that it leaves confused perceptions about who is in and out of a family.⁴⁸⁹

In many cases, narratives around missing migrants focus not on the individuals who are reported missing but instead on bodies that are found. For Simon Robins, this approach risks characterising the problem as merely a technical one of tagging those unidentified bodies, without taking into account the importance of addressing the specific needs of families who are missing the individuals that the dead bodies represent.⁴⁹⁰ The ambiguous loss experiences of families are compounded by the fact that states are not always able to involve families in their efforts to identify the dead and missing migrants. Recent studies suggest that there remains a considerable “lack of outreach to families of the missing, who can provide first-hand information and antemortem data to enable identification, and who should anyway be at the centre of all efforts to address the issue of the missing and identify the dead”.⁴⁹¹ While international agreements have been reached by states to ‘establish transnational coordination channels including through consular cooperation

⁴⁸² Julia Black and Marta Sánchez Dionis, ‘Statistics versus Stories: The Invisibility of Missing Migrants’, IOM-UN Migration Statistics, June 2018, available at: <https://medium.com/@UNmigration/statistics-versus-stories-the-invisibility-of-missing-migrants-e8e41ef478e9> (accessed 20/11/2019).

⁴⁸³ Penelope Papailias, ‘(Un)seeing Dead Refugee Bodies: Mourning Memes, Spectropolitics, and the Haunting of Europe’ (2019) *Media, Culture and Society* Vol. 41 Issue 8 pp. 1048-1068.

⁴⁸⁴ Eleni Papapanou, ‘Confronting the ‘Out of Sight, Out of Mind’ Attitude Surrounding Migrant Deaths’ (2019) *Brown Political Review*.

⁴⁸⁵ Estela Schindel, ‘Border Matters: Death Mourning and Materiality at the European Borderlands’ (2020) *EuropeNow: A Journal of Research and Art* Issue 33 p. 1.

⁴⁸⁶ Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Hampshire: Palgrave Macmillan, 2011) pp. 34-68, 69-89.

⁴⁸⁷ Vladimir Hernandez and Nossos Stylianou, ‘Buried without a Name, the Untold Story of Europe’s Drowned Migrants’ *BBC News* 10 May 2016.

⁴⁸⁸ Julia Black and Marta Sánchez Dionis note 482.

⁴⁸⁹ Pauline Boss note 46 p. 553.

⁴⁹⁰ Simon Robins note 24 p. 14.

⁴⁹¹ F.B Attia *et al* note 22 p. 2.

and designated contact points to assist families looking for their relatives missing in migration',⁴⁹² national support systems designed to integrate families into the search process are highly bureaucratic and access to what they can offer grieving families remains limited.⁴⁹³

Secondly, in addition to the psychosocial burden that missing migrants' families face on learning of the ambiguous disappearance of their relatives, there is still no common practical "framework for identifying those who die or recording their numbers".⁴⁹⁴ There is at present no common practice or a common set of principles for correlating information on migrant deaths both nationally and internationally.⁴⁹⁵ While the technical proficiencies needed for identification may exist, there is not yet an international framework prescribing what information to collect, when to collect them, where to collect them, how they should be collected and in what ways and with whom they may be shared.⁴⁹⁶ In the absence of such framework, state authorities often fall back to three traditional ways of collecting information on migrants: (a) when they arrive at destination points and the authorities records and processes their individual information; (b) when their deaths or going missing at sea and borders are reported to appropriate state authorities;⁴⁹⁷ and (c) when migrant fatalities are reported in the media.⁴⁹⁸

However, these ways of gathering information on migrant journeys have often proven inadequate because of a number of factors. Firstly, most of the migrant deaths occur on illegal or irregular routes which means that important data about migrant journeys can easily escape the vigilance of surveillance authorities since the ultimate objective of irregular journeys by migrants is to avoid detection by state authorities.⁴⁹⁹ Secondly, when migrant deaths occur in the high sea, most of the victims' bodies are never recovered, and without any compiled list of passengers and identity documents coupled with conflicting media reports on the number of deaths, the accurate number of the missing remains unknown.⁵⁰⁰ Thirdly, migrants upon arrival at destination points may face intimidations and fear of arrest by the coast and border guards, thereby making it highly

⁴⁹² GCM, Objective 8 (d) pp. 15-16.

⁴⁹³ Gabriella Citroni note 64 p. 756.

⁴⁹⁴ Stephanie Grant, 'Identity Unknown: Migrant Deaths at Sea' (2011) *Forced Migration Review* Issue 38 p. 1.

⁴⁹⁵ Stephanie Grant Ibid p. 1.

⁴⁹⁶ Ibid p. 1.

⁴⁹⁷ Katherine Hoffmann *et al*, 'Using Big Data to Study Rescue Patterns in the Mediterranean' in Frank Laczko *et al*, (eds.) *Fatal Journeys Volume 3 Part 1* (Geneva: IOM, 2017) p. 25.

⁴⁹⁸ Tara Brian and Frank Laczko, 'Counting Migrant Deaths: An International Overview' in Frank Laczko *et al*, (eds.) *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva: IOM, 2014) p. 32-33.

⁴⁹⁹ Tara Brian and Frank Laczko *ibid* p. 29.

⁵⁰⁰ *ibid*.

unlikely for surviving migrants to willingly come forward to report deaths or give eye-witness accounts.⁵⁰¹

5.2.2 The Legal Problem

Firstly, the legal regime whether at the national, regional or international level, which applies to those who die and/or go missing in the course of migration journeys, are not clearly defined.⁵⁰² The subject of dead and missing migrants is “inadequately studied and understood in legal terms as well as the impact of a heavy loss of lives on several thousands of migrant families and in terms of efficient and effective release of resources to address these problems in ways that guarantee respect for human dignity”.⁵⁰³ As a result, states sometimes “deny or refuse to acknowledge that they have any obligation towards the dead and missing migrants and their surviving families”.⁵⁰⁴ In some cases, states admit at least in principle that they have an obligation; in practice, the reality may be different. Not only may states lack the political will⁵⁰⁵ or capacity to effectively respond to the problem, investigations into the missing dead may also be hampered by individual state’s lack of institutional preparedness, non-implementation of investigative efforts, lack of cooperation from other states or assistance by the international community and delay of recovery efforts. Although the GCM recognises that states have a duty to cooperate in dealing with missing migrants, in particular, in the area of “recovering, identifying and repatriating the remains of dead migrants to their states of origin and respecting wishes of families...”,⁵⁰⁶ it does not specify what level or kind of cooperation is required of states, neither does it prescribe how to distribute or allocate the duty to cooperate. An “undistributed duty...to which everybody is subject is likely to be exercised by nobody unless it can be allocated in some way”.⁵⁰⁷

Secondly, to date, there is still no known unified body of law on missing migrants to refer to as an authoritative binding legal document at the international level.⁵⁰⁸ According to Chetail,

⁵⁰¹ *ibid.*

⁵⁰² Catriona Jarvis, ‘Last Right: Cross-Border Deaths—Towards a New Framework’ (2017) *Journal of Immigration, Asylum and Nationality Law*, Vol. 31 pp. 131-150.

⁵⁰³ Catriona Jarvis *ibid* p. 131.

⁵⁰⁴ Simon Robins note 39 p. 24.

⁵⁰⁵ 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) *International Journal of Human Rights* Vol. 22 No 2 pp. 220 & 222; Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ (2020) *German Law Journal* Vol. 21 Special Issue 3 p. 599.

⁵⁰⁶ Objective 8 (f) of the Global Compact for Safe, Orderly and Regular Migration’ pp. 15-16.

⁵⁰⁷ David Miller note 142 p. 98.

⁵⁰⁸ A.S Coralli and Irene Manganini, ‘International Legal Obligations of States Concerning the Search for Missing Migrants: A Possible Way Forward’ (2019) *International Law Blog*.

migration laws are scattered widely across public international law⁵⁰⁹ which transcends the gamut of IHRL and international humanitarian law (IHL). At the EU level, the mechanisms for migration governance are scattered across many policy and legal instruments.⁵¹⁰ Yet obligations of states towards missing migrants are prescribed in those dispersed laws. Such fragmentation of international law and obligations⁵¹¹ presents the biggest challenge for any research on dead and missing migrants because it undermines the application, interpretation and understanding of existing norms.⁵¹² The ICRC, in an attempt to solve this problem way back in 2009 developed a soft law framework it called the 'Guiding Principles/Model Law on the missing'⁵¹³ to guide states on how to deal with missing persons' cases within their domestic legal orders. However, the Model Law only addresses cases of people who go missing in the context of armed conflicts, in particular, missing soldiers and the role of parties to an armed conflict. It says nothing about those who die and go missing outside the context of armed conflicts or those who disappeared while fleeing conflicts such as migrants.⁵¹⁴ Furthermore, the unresolved debates about how the EU states should approach the issue of missing migrants continues to create uncertainty in international decision-making relating to migration. As a result, several years into the migrant crisis, there is still no sign of a coordinated long-term response.⁵¹⁵

5.2.3 The Policy Problem

Although international law creates and imposes on states the obligation to search for missing migrants and respect the rights of their families, a recent study on migrant deaths in Greece and Italy has found that within Europe, concerned states do not always acknowledge or act upon their obligations.⁵¹⁶ This situation has been attributed to a 'policy void' around the issue of missing

⁵⁰⁹ Vincent Chetail, 'The Transnational Movement of Persons under General International Law—Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Celine Bouloz (eds.) *Research Handbook on International Law and Migration* (Edgar: 2014) pp. 1-2.

⁵¹⁰ Joanna Apap *et al*, 'The Migration Issue', (2019) Briefing EU Policies—Delivering for Citizens, European Parliament; European Parliamentary Research Service p. 2.

⁵¹¹ Martti Koskeniemi 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) Report of the Study Group of the International Law Commission, submitted to the Fifty-Eighth Session Geneva, 1st May—9th June and 3rd July-11.

⁵¹² Jaya Ramji-Nogales & P.J Spiro, 'Introduction to Symposium on Framing Global Migration Law' (2017) *American Journal of International Law (Unbound)* Vol. 111 p. 1.

⁵¹³ ICRC Model Law on the Missing 2009.

⁵¹⁴ Catriona Jarvis, 'Last Rights: Cross-Border Deaths-Towards a New Framework' (2017) *Journal of Immigration, Asylum and Nationality Law* Vol. 31 Issue 2 p. 136.

⁵¹⁵ Heaven Crawley *et al*, Destination Europe: Understanding the Dynamics and Drivers of Mediterranean Migration in 2015 (MEDMIG) Final Report, November (2016).

⁵¹⁶ F.B Attia *et al* note 22 p. 5.

migrants at the national and European Union levels.⁵¹⁷ Part of the policy gap is the fact that data collected on missing migrants are highly fragmented (despite the IOM database that consolidates over 800 sources of data on irregular migration into Europe)⁵¹⁸ and policy-makers fear that turning such messy data into policy statements might be misleading because doubts remain about their evidential value. Experts including Weber and Pickering,⁵¹⁹ Last and Spijkerboer⁵²⁰ and Heller⁵²¹ have all recognised that fragmentation of current data on migrant deaths makes existing statistics hugely unreliable and poor for policymaking. Finally, owing to legislative gaps at the national and EU levels, in terms of managing migrant bodies and addressing the issue of those that remain missing, migration policies at all levels have not been specifically designed with missing migrants and the needs of their families in mind.⁵²² According to Tamara Last, “what happens to bodies of dead migrants in the Mediterranean is very much in the dark; it has...never been on any national or EU institution’s agenda”.⁵²³

Therefore, based on the above definition and characterisation of the problem of missing migrants from the practical, legal and policy standpoint, the consequence when judged through the lens of the New Haven School is clearly ‘*ruptured*’ values of *human dignity* and *public order* that states should have realised as part of a concerted and coordinated human rights-based response to migrant deaths and migrants going missing at sea and borders. For example, when families of migrants have no information about the whereabouts of their missing relatives, their value of *respect* (i.e., respect for their right to know) and *well-being* (including their mental well-being), as well as those of the journeying migrants, themselves stands ruptured since it brings untold mental and psychosocial suffering on the many families affected. So, what next? The New Haven School jurisprudence requires us to analyse and evaluate what has been the legal and policy responses of states to the problem in the past; to then forecast what would be the likely future responses to the same problem. This requires clarification of the specific *goals*⁵²⁴ that states

⁵¹⁷ Giorgia Mirto, ‘Between Exclusion and Familiarity: An Ethnography of the Mediterranean Missing Project’ (2018) *Practicing Anthropology*, Vol. 40 No. 2 pp. 28-31.

⁵¹⁸ On the IOM’s database, see here: <https://gmdac.iom.int/research-database/> (accessed 13/1/2020).

⁵¹⁹ Leanne Weber and Sharon Pickering, *Globalisation and Borders: Death at the Global Frontier* (London: Palgrave Macmillan, 2011) Chapters 2 & 3.

⁵²⁰ Tamara Last and Thomas Spijkerboer, ‘Tracking Deaths in the Mediterranean’ in *Fatal Journeys* Tara Brian and Frank Laczko, (eds.) (Geneva: International Organisation for Migration, 2014) pp. 85-106.

⁵²¹ Charles Heller ‘Liquid Trajectories: Documenting Illegalised Migration and the Violence of Borders’ (2015) PhD Thesis, Goldsmiths University of London (esp. Chapter 4).

⁵²² Simon Robins note 140 pp. 64-65.

⁵²³ Tamara Last ‘Who is the Boat Migrant? Challenging the Anonymity of Death by Border-Sea’ in in Moreno Lox Violeta and Papastavridis Efthymios, (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Leiden, Netherlands: Brill Nijhoff, 2017) pp. 79-80.

⁵²⁴ H. Lasswell, ‘The Emerging Conception of Policy Sciences’ (1971) *Policy Sciences* Vol. 1 No.1 p. 11.

aim to achieve as a way of solving the identified problems; and to promote as an effect of it, the shared values of human dignity and public order.

5.3 Clarification and Specification of Goals

The clarification and specification of goals of the relevant community is specific to particular contexts. We have to ask ourselves what those specific goals are that states aim to achieve when responding to the problem of missing migrants. In practical terms and based on the provisions of the GCM (Objective 8)⁵²⁵ and UN 2030 Agenda for Sustainable Development (Goal 10.7),⁵²⁶ it is submitted that the primary and most fundamental goal of states when addressing the problem of missing migrants and migration more generally is promotion and realisation of a migration world based on the principles of human dignity and public order. To be more precise, we can divide the specific goals sought to be achieved into two equally constituting and synergic societal goals: the first is to secure a *safe, orderly and regular* migration world⁵²⁷ where migrants are empowered to have greater access to the shared values of human dignity and where they are not allowed to die or go missing in their journeys. For those already reported missing, to search for and find them; for those found dead, to give them dignified burial or repatriate their bodies to their families in their origin states whilst also meeting other psychosocial needs of the affected families (let us call this first goal 'human dignity goal').

The second goal is to *prevent* imminent violation or rupture of public order by migrants through *unsafe, disorderly, irregular and irresponsible* migration journeys. It is an anticipatory action hence, the use of the term *orderly* in the GCM. This also involves *suspending* further public order violations by irregular migrants assuming rupture has occurred and *detering* potential public order violations by migrants. Also, *restoring* public order after it has been violated by irregular migrants and other actors; *correcting* any decried behaviour of migrants and other actors that may generate public order violations; and *rehabilitating* victims who have suffered the consequences of public order violations. And finally, *reconstructing* the larger social process to identify and remove social

⁵²⁵ Objective 8 of the GCM.

⁵²⁶ UN 2030 Agenda for Sustainable Development (Goal 10.7).

⁵²⁷ Elspeth Guild, 'The UN's Search for a Global Compact on Safe, Orderly and Regular Migration' (2017) *Germany Law Journal* Vol. 18 No. 07 pp. 1780-1796; Elspeth Guild 'Unsafe, Disorderly and Irregular Migration? Examining the Assumptions Underlying the United Nations' New York Declaration' (2018) *The Canadian Journal of Peace and Conflict Studies* Vol. 50 Issue 1 pp. 53-75.

situations and conditions that provide fertile ground for public order violations to occur⁵²⁸ (let us call this second goal ‘public order goal’).⁵²⁹ These specific goals (both human dignity-based and public order-based) are applicable and always invoked in synergy at all stages of the migration process and also throughout the process of making vital legal and policy decisions by states that affect migrant lives when journeying across seas and borders.

Throughout the next stages of the analysis below, I will reflect on these goals as a shared agenda of states and their underpinning legal and policy frameworks in relation to responses of states to the problem of missing migrants. It is argued contrary to the divisive narratives in existing literature (often pitting human dignity adherents against public order defenders) that shared values of human dignity and public order are (1) mutually coexistent and inclusive goals of international law; (2) designed to function in compatibility and complementarity as opposed to divergence and fragmentation as none can be realised in isolation of the other; and (3) therefore when responding to the problem of missing migrants and the migrant crisis in a wider sense, international law should become a tool and theory for making social choices targeted at engaging states and other actors in a constructive dialogue over conflicting claims (in the sense of assertion of a right to these shared values) in order to promote the realisation of human dignity and public order goals in a cooperative way.

Viewed in this way, for our context, respect for those shared values of human dignity becomes not only an end itself but also a means of actualising public order goals that promote a *safe, orderly* and *regular* migration world that prevents or reduces migrant deaths and migrants going missing. So, now that we have a clear idea of these specific goals and what they mean for our context, how should the states proceed to achieve them? First of all, as hinted above, the New Haven School recognises that although realising these goals may be viewed as a way of solving the legal, policy and practical problems of missing migrants that we have identified, conflicting claims to those shared human values by different actors involved in the community can actually undermine the prospects of realising them. So, our next intellectual task under the New Haven structure is to first identify what, at present, the key and principal actors within the community say

⁵²⁸ These specific goals outlined are adapted from W.M Reisman’s work. See W.M Reisman, ‘Legal Responses to Genocide and Other Massive Violations of Human Rights’ (1996) *Law and Contemporary Problems* Vol. 59 No. 4 pp. 76-80.

⁵²⁹ In this thesis, the notion of ‘public order’ goal is conceived as ‘orderliness’ in society as opposed to ‘chaos’. For detailed engagement with the debate on different ways of conceiving ‘public order’ in different context, see C.J Borgen, ‘Whose Public, Whose Order? Imperium, Region and Normative Friction’ (2007) *The Yale Journal of International Law* Vol. 32 pp. 332-362

they want, who claims what; what bases of power—legal, political and institutional—support their claims and what in normative terms should constitute the basis for such claims?

5.4 Conflicting Claims, Claimants and Their Bases of Power

Conflicting claims amongst key actors in a community are important and context-specific social indices of any problems that the law has to address,⁵³⁰ otherwise, the decision-making processes may be stifled and deadlocked. The primary function of law in human society is to resolve conflicts and contestations by attempting to understand the arena in which conflicting claims are being pursued, the forum or mechanisms used to pursue them, and the players involved; to then promote cooperation among actors.⁵³¹ In our case, as pointed out in the literature review in Chapter 4, the main battle lines are drawn between those who argue that migrant deaths and going missing at sea and borders are a result of Europe's exclusionary policies and strict border control; and those arguing for even tighter border controls and stricter migration policies as a way of preventing migrant deaths and going missing.⁵³² Such actors as states, migrants, families, UN refugee agency, humanitarian and other organisations may all qualify as valid claimants to those eight shared values of human dignity that human beings seek after.

In the continuous process of authoritative and controlling decision-making that affects migrant lives in profound ways, these actors may make and place huge “demands on the authoritative decision-makers to weigh their claims and counter-claims and make prescriptions”.⁵³³ For this work, only three categories of claimants are selected for analysis: (i) the states, in light of the value claims they may maintain against migrants and their families for embarking on irregular journeys leading to migrant deaths and migrants going missing; (ii) migrants and their families, in light of the value claims they may make against states when their relatives go missing in migration; and (iii) inter-state claimants, in terms of value claims that some states may pursue against others when dealing with the problem of missing and dead migrants under an international cooperation arrangement.

⁵³⁰ Siegfried Wiessner and A.R Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) *The American Journal of International Law* Vol. 93 No. 2. p. 326.

⁵³¹ Monika Hakimi, 'The Work of International Law' (2017) *Harvard International Law Journal* Vol. 58 No. 1 p. 1-6.

⁵³² Elias Steinhilper and R.J Gruijters, 'A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean' (2018) *Sociology* Vol. 52 No. 3 p. 515.

⁵³³ Hengameh Saberi note 472 p. 1.

5.4.1 States and their Value Claims Against Migrants and Their Families

Migrants, through crossing national borders in their attempt to reach an international destination, challenge an international system built on the premise of state sovereignty. For the states, the most important value at stake that migrants and their families violate when they embark on unsafe, disorderly and irregular journeys, is *power*. Power as a value can be viewed, interpreted and understood in different ways depending on who is laying claim to it. For migrants, it could mean empowerment that enables them to claim rights and protection from the state during their journeys. For the state, it is generally understood to be the ability of or primary mechanism through which sovereign states direct and control the affairs of men,⁵³⁴ influence human behaviours and make rational social choices that shape human society and the functionality of the law. For state authorities, when migrants make unsafe, disorderly and irregular journeys, they violate the power and right of states to decide who should enter and leave through their territorial borders. They consistently contend that irregular migrants, by attempting to negotiate the border with states during their journeys, subvert the regulatory power of state laws and this throws *public order* and national jurisdiction into crisis.⁵³⁵

States, therefore, see it as a public order duty to stop people who use illegal or irregular routes and means to attempt to enter their territories.⁵³⁶ For them, *respect* for their national sovereignty and laws is a key value for the state that must not be violated. States, therefore, use their bases of power e.g. diplomatic powers, through persuading and striking deals with safe third states and states of first arrival to strengthen their border controls, readmit irregular migrants in return for trade and financial incentives;⁵³⁷ military powers, e.g. through Frontex operations to police international seas and stop irregular migration; and economic powers e.g. through the EU Emergency Trust Fund for migrant producing states and regions especially African states to stem the tide of migrant flows into Europe.⁵³⁸ As already canvassed in Chapter 4, many scholars that

⁵³⁴ Max Webber, *Economy and Society* Vol. 1 (1914); M.S McDougal, 'Law and Power (1952) *The American Journal of International Law* Vol. 46 pp. 107-108.

⁵³⁵ Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Migration' (2019) *Political Theory* Vol. 47 No. 4 p. 455.

⁵³⁶ For example, in the wake of the migrant crisis in the English Channel, British Prime Minister, Boris Johnson tells migrants making the journeys "...we will send you back". See *Sky News* 'Boris Johnson tells migrants not to cross English Channel as we will send you back', 23 August 2019.

⁵³⁷ Tineke Strik, 'The Global Approach to Migration and Mobility' (2017) *Groningen Journal of International Law* Vol. 5 No. 2 pp. 310-328 p. 310.

⁵³⁸ Elise Kervyn and Raphael Shilhav, 'An Emergency for Whom: The EU Emergency Trust Fund for Africa—Migratory Routes and Development Aid in Africa', *Oxfam Briefing Note*, Nov 2017.

defend the deterrence-oriented narrative argue in favour of states' position. They contend that undocumented migrants, having lost all the value claims against the state and confronted with expulsion, often resort to violent conduct and resistance against state powers at borders and other migration spaces, which increases the risk of death.⁵³⁹ So then, in view of these value claims by states and those that support them, what do migrants and families of missing migrants have to say and what could be their own value counterclaims against the states?

5.4.2 Migrants and their Families and their Value Claims Against the State

It may be argued that the paradigm of contemporary migration of people through dangerous sea routes is the increase in human suffering in the contemporary world. The drive and aspiration of migrants to gain access to the shared values of human dignity especially the value of *well-being* is the very real reason why migrants move.⁵⁴⁰ No migrant however suffering from a high defect of reason would voluntarily embark on life-threatening journeys across dangerous seas if they could have accessed these human values from their own places of origin. They are pushed and driven out of their original abodes by conflicts, persecution, human rights abuses etc; and they move in search of these values elsewhere. These shared values of human dignity are washed away by the war raging in the migrants' origin states. No matter their status, age, the circumstances of their journeys or where they come from, all migrants have a primary claim to the shared value of *wellbeing*, their human right to wellness and good life, security, liberty and freedom from inhuman and degrading treatment. In a migratory situation characterised by sea perils and strict border controls, migrants are virtually deprived of these values.

They therefore persistently demand and mount pressure on states to grant them greater access to these shared values; access not only to the value of *well-being* but also to *power*. For the migrants, as much as the states have a right to maximise their access to power and to exercise it in the best national interests, they too are entitled to have access to and have a grip on *power* as a human value. For them, this would mean states empowering them to have enhanced access to those shared values that every human being seeks after. In other words, for the migrants, empowerment to claim the right to have rights and secure access to security and protection at all stages of their journeys is the most effective way to prevent deaths at sea and borders. Being on

⁵³⁹ Antje Ellermann, *Undocumented Migrants and Resistance in the State of Exception* (2009), Paper Presented at the European Union Studies Association Meeting in Los Angeles, CA, April 2009 p. 1.

⁵⁴⁰ S.T Hettige *et al*, 'Understanding Psychosocial Issues Faced by Migrant Workers and their Families' (2012) *Background Paper* (MFEPW) p. 8.

the receiving end of deterrence-oriented policies and restrictive border controls, migrants live in a particular situation of vulnerability; they have virtually no *power* to easily acquire recognition before the states and the law because of their irregular legal status.

Similarly, *respect* is another value at stake that migrants look for, respect for their right to life and dignity. Axel Honneth's theory of recognition holds that people must be loved, socially esteemed and *respected* as having rights and entitlements that are institutionalised on the juridical and state level, and as autonomous beings in their everyday social interactions.⁵⁴¹ The first article of the 1948 Universal Declaration of Human Rights affirms that all human beings are born equal in dignity and rights and no human being can be deprived of their inalienable rights without reasonable justification.⁵⁴² In situations of perilous and deadly sea migration that lead to migrant deaths and disappearances, migrants enjoy neither liberty nor freedom nor are they treated with dignity. Also, in a migration world where states are increasingly tightening up immigration policies and hostile environment towards migrants by radical-right anti-immigrant populist governments appear to be mounting,⁵⁴³ migrants also feel deprived of the shared value of *affection*, their aspiration for love and recognition, acceptance and protection in receiving states after fleeing human suffering occasioned by war, slavery and persecution in the origin states.

Furthermore, like all human beings, migrants also desire *wealth* as a value of human dignity; their quest for a better standard of living contribute to their desire and motivation to move in search of survival. Migrants fleeing poverty and human suffering caused by conflicts and wars in their place of origin identify *wealth* as central to enhancing their individual *well-being* and the well-being of their families. Their desire to pursue wealth and make their lives worth living again in the aftermath of wars and violence means that migrants easily fall prey to false promises of people smugglers who assure them of opportunities to acquire jobs and values of *skills*, *enlightenment* and *rectitude* offered by the laws and social care systems of the receiving states. In a smuggling scenario, migrants are not guaranteed safety and protection, they are subjected to human rights abuses and exploitation en route⁵⁴⁴ and are usually packed into unseaworthy

⁵⁴¹ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Joel Anderson (Trans) (Cambridge: MIT Press, 1995) p. 21.

⁵⁴² Article 1 of the Universal Declaration of Human Rights 1948.

⁵⁴³ M.A Schain, *Shifting Tides: Radical-Right Populism and Immigration Policy in Europe and the United States* (Washington, DC: Migration Policy Institute, 2018) pp. 1-26.

⁵⁴⁴ I. Atak and F. Crepeau, 'Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges' (2014) *Journal européen des droits de l'homme* Vol. 5 pp. 591-622 p. 592.

boats with little chance of reaching their destination; a key factor that explains the many boat mishaps and drowning of migrants in the Mediterranean.

When migrants die and go missing as a result of such risky journeys, their families left behind are the ones that bear the brunt. Migrant lives loved and lost means that families have their own value claims against states. Families of missing migrants consider a lack of information and clarifications from state authorities about the whereabouts of their missing relatives a violation of their right to the shared value of *respect*; that is, respect for their right to know of the status of their missing relatives, the right to mourn their dead⁵⁴⁵ and respect for their psychosocial *well-being*. The values of *respect* and *well-being* are two core values that form part of the psychosocial needs of families and for them, there can be no real right to protection of their human dignity without addressing the devastating impact of the ambiguous loss of their relatives on their physical, psychological and mental *well-being*. Therefore, families consider the repatriation of the bodies of their deceased members a crucial way of ending their mental torture and suffering by allowing them to mourn their dead whilst also offering them the closure they desperately need.

Many experts, mainly humanitarian organisations and human rights activists have argued in support of the position of the migrants and their families. For them, migrants should not have to die as an unintended or undesired side effect of EU states' migration policies and strict border controls. They argue from a victimology perspective that closely aligns with Giorgio Agamben's claims about the state's wagering and forcible reduction of migrants' life to *bare life*, life deprived of human dignity, embodied in the figure of *homo sacer* who continues to face sovereign violence in a typical *state of exception*. According to Kati Turtiainen, the neoliberal policies of many states "do not regard undocumented migrants as deserving of good life".⁵⁴⁶ They also argue from the viewpoint of Hannah Arendt's theory of right to have rights whereby they advocate that migrants be empowered by the states to claim rights in order to be able to live a life that is compatible with principles of human dignity.

Those who represent the humanitarian narrative argue that the problem of missing migrants should be addressed from a transnational human rights perspective with the utmost concern being protection and *respect* for migrants' right to life and human dignity as encapsulated

⁵⁴⁵ O.A Villagran note 316 p. 15.

⁵⁴⁶ Kati Turtiainen, 'Recognising Forced Migrants in Transnational Social Work' (2018) *International Journal of Migration, Health and Social Care* Vol. 14 No. 2 pp. 186, 192, 194.

in IHRL.⁵⁴⁷ The defenders of this view also support the idea of the rescue of migrants at sea. They argue that the high human cost of migration is a direct result of border control policies of many states.⁵⁴⁸ For them, migrant deaths at sea and borders have significantly increased following migrants clandestine movements along the more treacherous routes as a reaction to tighter border control measures and policies of states.⁵⁴⁹ The border controls and pushback operations, tend to create market opportunities for people smugglers, and migrants are forced to patronise their services⁵⁵⁰ since they believe smugglers will help them facilitate their clandestine journeys and circumvent strict border entry requirements; a trend which not only complicates existing death risks but also create new ones. Thus, migrants and their families aspire to gain access to those values that human rights law has recognised as rights of human beings such as the right to human dignity and life and for families, the right to know the truth of what has become of their missing relatives, right to have the body of their relatives repatriated if dead, right to take part in the investigations into the death of their missing relatives etc. It is these rights that migrants and their families claim have been violated or denied by the state. They aspire to use whatever *bases of power* at their disposal (migrant activism/protest marches, appeal to sympathy/empathy of national governments, civil society and international organisations, UN Refugee Agency, the media and so on)⁵⁵¹ to secure a favourable legal and policy response from the states; a response they hope will restore their ruptured right to the values of human dignity.

5.4.3 States' Value Claims *Inter-se*

Based on the above characterisation and analysis of the claims and counterclaims between states and migrants and their families, how should states address the conflicting claims? Should the problem at hand that gave rise to the conflicting claims be viewed as one of any particular state or as the business of all states regardless of whether or not migrants have come under their control and jurisdiction? International law and international legal practise appear to favour the fact that the problem of missing migrants is a transnational one involving many states and therefore multiple states have a cooperation obligation and burden-sharing responsibility to address the

⁵⁴⁷ Article 14 of the Universal Declaration of Human Rights 1948; Articles 2 and 3 ECHR 1950.

⁵⁴⁸ Maria Jimenez, 'Humanitarian Crisis: Migrant Deaths at the U.S-Mexico Border' (2009) *American Civil Liberties Union of San Diego* pp. 21-23.

⁵⁴⁹ Thomas Spijkerboer note 357 pp. 147-161; Robyn Sampson, note 357 p. 1.

⁵⁵⁰ W.A Cornelius note 364 pp. 661-685.

⁵⁵¹ A good example of such migrant activism is that staged by mothers of missing migrants in Latin America. See Marta Sánchez Dionis, 'Resisting Invisibility: Mothers of Missing Migrants' (2018) *In Border Criminologies Blog*.

problem. However, the cooperation regime too is not free of conflicting claims; states often raise a number of value claims against themselves when they “compete for resources and other forms of *power*”⁵⁵² which could undermine all national and international efforts to find a solution to the problem. They may attempt to deny that the requisite conditions for inter-state cooperation apply to them or are satisfied in some specific cases even when such cooperation arrangement is legally formalised. As what international law mean by ‘state cooperation’ in the context of missing migrants has yet to be clarified and agreed upon by states, there is bound to be a clash of interests and shifting or denial of responsibility by some states to the dissatisfaction of others.

So, what are the conflicting value claims that states may maintain against themselves *inter se* when seeking to address the problem of missing migrants from a transnational cooperation perspective? It is submitted that different conflicting claims, most of which relate to the problem of ‘overdetermination’ and others related to the issue of ‘unfairness’ may arise or be made by states. The notion of overdetermination holds that regardless of whether or not any relevant conditions for assigning obligations to states exist, the problems in question would have still resulted since there are multiple causes and multiple wrongdoers involved⁵⁵³ and therefore no one should be blamed. The unfairness notion, on the other hand, is often about how burdens can be allocated fairly amongst states so that no state incurs greater or less responsibility than it should or even escape responsibility completely. While overdetermination claims may threaten states’ exercise of the shared value of *power* to respond to the issue of missing migrants, unfairness related claims may impact directly on the value of *wealth* in terms of who should fund the mission to search for missing migrants, conduct investigations into migrant deaths, repatriate bodies and reach out to their families. In the illustrations below, I consider some of the possible conflicting claims (not by any means exhaustive given the dynamics of migration, its potentials and limitations) that states might make when seeking to address the problem of missing migrants.

Claim I: State ‘A’ tells the rest of the states B, C, D...etc: the dead migrants did not die in my territory, they died in the high sea where I have no exclusive jurisdiction except the right of innocent passage; I am far removed from the sea where they are drowning. I do not have any search, rescue or even disembarkation duties at all. I think the specific littoral sea states are better suited to take responsibility. Again,

⁵⁵² Monica Hakimi, ‘State Bystander Responsibility’ (2010) *European Journal of International Law* Vol. 21 Issue 2 p. 347 p. 1.

⁵⁵³ Ilias Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’ (2015) *European Journal of International Law* Vol. 26 No. 2 p. 472; Antony Honoré and John Garner, ‘Causation in the Law’ (2010) *Stanford Encyclopaedia of Philosophy*.

those that died at the borders did not die in my territory, they did not reach my territory at all; I can only act when they reach my territory.

This is an overdetermination related claim that may leave the migrants, their families and all the states involved in an awkward situation, not least because it appears to blur lines of attribution of international legal obligations to states at sea and are likely to influence states' "interpretation and application of binding commitments".⁵⁵⁴ First, it is a kind of claim that the problem in question emanated from different sources involving a multiplicity of agents (the problem of many hands) that leads to diffusion of responsibility. State 'A' believes that it is not responsible and that the littoral sea states may be better positioned to assume responsibility—a good example of shifting of responsibility comparable to the recurrent Italy/Malta dispute over disembarkation of rescued migrants onto their territories.⁵⁵⁵ Second, it is the kind of duty-evasive-claim that is open to any state; every state would be exempt from responsibility once they could prove that migrants did not reach their territory. Third, such claims deny the 'transnational' nature of migration as well as the imperatives of greater international cooperation and responsibility-sharing amongst states to deal with the problem of missing migrants. Fourth, they appear to promote a nationalistic approach to enforcing migration policies and governance. And finally, they show a lack of political will to implement existing state obligations⁵⁵⁶ which human rights law and the new GCM promote.

Claim II: State 'C' tells other states F, G, H, I...etc: the resource demands of rescue, investigation, identification, tracing and repatriation of bodies of migrants as well as involving their families in these processes are simply huge and disproportionate to what I can offer; the law should accord the respective states some differential treatment based on their level of development and economic capabilities.

This is an unfairness related claim that directly impacts *wealth* as one of the shared human values. Some states may argue that the resource demands of investigation, identification, tracing and repatriation of bodies of migrants are disproportionate to what they can offer and therefore international law should accord states some differential kind of treatment that *respects* and recognises their different levels of development and national capacities. For example, in the

⁵⁵⁴ Violeta Moreno-Lax, 'Between Life, Security and Rights: Framing the Interdiction of 'Boat Migrants' in the Central Mediterranean and Australia (2019) *Leiden Journal of International Law* pp. 1-26 p. 2.

⁵⁵⁵ Alexandra Larkin, 'Italy and the Aquarius: A Migrant Crisis' (2019) *Pace International Law Review* Vol. 32 Issue 1 pp. 139-167. See also the *Guardian*, 'Italy Declares Victory as Spain Accepts Rescue Boat', 11th June 2018; and *BBC News*, 'Spain to Accept Disputed Migrant Ship Aquarius', 12 June 2018, available at: <https://www.bbc.co.uk/news/world-europe-44441386> (accessed 5/7/2018).

⁵⁵⁶ Jeremy Sarkin note 505 pp. 220 & 222.

current EU migrant crisis, Italy has consistently claimed, and in many respects, quite validly, that migrant/refugee flows are a European-wide problem and that it cannot be abandoned to bear the burden of rescue and disembarkation of migrants alone regardless of the fact that its Island of Lampedusa is a hotspot for migrant arrivals to the EU. Before Italy called off its Mare Nostrum rescue operation in 2014, the Italian authorities had claimed that the rescue mission was costing the European state over €9 million a month which is impacting heavily on her national economy (*wealth*). As such, huge cost and lack of political will on the part of states are cited as reasons for the non-repatriation of migrant bodies to their families in the origin states.⁵⁵⁷ The same goes for the humanitarian duty of rescuing migrants at sea—who bears the cost of the operation assuming the resources at the disposal of the relevant states are limited?⁵⁵⁸ It is argued that although the resource demands of investigation, rescue and repatriation of migrant bodies to origin states may be disproportionate in some ways, it does not necessarily absolve states of their legal obligations towards migrants under human rights law insofar as states could not escape liability under domestic law. The GCM already declares that its implementation is to be based purely on national realities, capacities, levels of development and respecting national priorities.⁵⁵⁹ In line with the provisions of the GCM and as many experts have argued, states are expected to make good use of the resources (*wealth*) and other means available to them to prevent loss of migrant lives.⁵⁶⁰

5.5 Past Trends in Decisions and their Conditioning Factors

So far, I have delineated and analysed the problem of missing migrants that the law and states seek to address; clarified the specific goals that the states aim to achieve as a way of solving the problems and set out the conflicting claims of actors to the shared values that often arise when states attempt to address the issue. The next question to resolve is: how have states' decision-makers responded with *authoritative* and *controlling* intent to the problem taking into account these conflicting claims? The New Haven School requires us to assess past trends in decisions, that is, for our context, how well the sanctioning process of the states has performed in reaching its specific goal of preventing migrant deaths and migrants going missing whilst also accounting for those already dead or missing and addressing the needs of their grieving families. This task

⁵⁵⁷ Ruairi Connolly *et al*, 'Repatriation of Human Remains Following Deaths in International Travellers (2017) *Journal of Travel Medicine* Vol. 24 No. 2 p. 4.

⁵⁵⁸ David Miller, 'Our Responsibilities to Refugees', In Proceedings of the 2018 ZiF Workshop 'Studying Migration Policies at the Interface between Empirical Research and Normative Analysis', Matthias Hoesch and Lena Laube (ed.) ULB Münster (miami.uni-muenster.de) p. 40.

⁵⁵⁹ GCM (paragraph 41).

⁵⁶⁰ V.P Tzevelekos and E.K Proukaki, note 20 p. 457.

requires us to address the questions of why trends have been what they are. For the New Haven School, those making the key decisions are viewed as *participants*; the subjective dimensions that animate them from an observational standpoint (demands, expectations and identifications) as their *perspectives*; the context in which claims are lodged⁵⁶¹ as *situations*; the resources at the disposal of the participants upon which they derive their power as *bases of power*, and the ways they deploy those resources (diplomatic, economic, military etc) as *strategies*.⁵⁶²

So, what are those trends in decisions in the context of missing migrants? Who are those making the key legal and policy decisions; and is there enough showing of authority and controlling intent? I address these puzzles by examining the relevant laws and treaties adopted to respond to the issue at hand and the decisions derived from the process of making, applying and enforcing them at different community levels—UN and EU levels—all of which are component communities of the world community. Overall, what I have done is not to analyse the entire contents of all the relevant laws and policies; rather, I extrapolate only those contents that deal directly or indirectly with the problem of missing migrants and missing persons more generally. Where relevant and necessary I also provide cases to highlight situations where the treaties had been interpreted and applied by the courts and the policy implications of the resulting judicial decisions in response to the problem of missing migrants.

5.5.1 International Legal Responses and Decisions at UN Level

At the UN level, different international decisions arising from complex negotiations between states and which were subsequently translated into technical legal documents as treaties, declarations, action plans and the like were reached in past decades to address the issue of missing persons. One of the earliest of such decisions was the adoption of the League of Nations Arrangement Concerning the Conveyance of Corpses 1937 and the 1950 UN Convention on the Declaration of Death of Missing Persons after World War II. Subsequently, other treaties spanning international humanitarian law, international human rights law, international refugee law, the law of the sea, international criminal law, data protection laws and a host of soft laws were also adopted under the auspices of the UN. These legal frameworks are considered in the sections below.

⁵⁶¹ A.J Silverstein, 'Emigration: A Policy Oriented Inquiry' (1974) *Syracuse Journal of International Law and Commerce* Vol. 2 No. 2 p. 156.

⁵⁶² W.M Reisman *et al*, note 151 p. 578.

i. The 1937 Arrangement Concerning the Conveyance of Corpses

Death is the “most concrete of losses”;⁵⁶³ an “inevitable end of life”⁵⁶⁴ and a traumatic experience for the families affected.⁵⁶⁵ It happens everywhere: the ground, at sea and in the air.⁵⁶⁶ As such, the “dead body matters, everywhere and across time, as well as in particular times and in particular places”.⁵⁶⁷ But what happens to mortal remains of dead migrants and the powerful psychosocial symbolism and cultural cosmologies that transnational and diasporic migrant dying carries, remains a big legal question to reflect on. Legal aspects of death, repatriation and burial of mortal bodies transcend borders and are therefore subject to restrictions and control under international law. Prior to the adoption of the International Arrangement Concerning the Conveyance of Corpses in Berlin (hereinafter ‘the Berlin Arrangement’), if a person died in another state other than his own and their body is found, there were “no global rules or guidelines”⁵⁶⁸ for transporting their human remains back to their state of origin in such a way that respects human dignity, rights and needs of affected families. In an attempt to address this challenge, states took an international legislative decision to adopt the Berlin Arrangement in 1937 under the auspices of the League of Nations, the predecessor of the UN, and continues to be in force.⁵⁶⁹ It is a multilateral agreement designed to overcome the “difficulties arising from differences in the regulations concerning the conveyance of corpses”⁵⁷⁰ and to facilitate safe, convenient and timely international transfer and acceptance of corpses across state borders.⁵⁷¹

The Berlin Arrangement significantly influenced the adoption of an identical framework at the European level—the Council of Europe Agreement Concerning the Conveyance of Corpses 1973 which was adapted from the Berlin Arrangement to meet the wider European needs when seeking

⁵⁶³ V.D Volkan note 400 p. 13.

⁵⁶⁴ Anna Jackson, ‘The Inevitable—Death: Oregon’s End-of-Life Choices’ (2008) *Willamette Law Review* Vol. 45 p. 137.

⁵⁶⁵ Filip Křepelka, ‘Death Abroad—Legal Framework and Practices in Gołaczyński J. *et al*, (eds.) ‘*Non omnis moriar Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*’ (Wrocław: Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2015) pp. 488-489.

⁵⁶⁶ Patrick Deroose, ‘Repatriation of Mortal Remains: A Practical Guide for Managers of a Global Mobile Workforce’ (2019) *International Corporate Health Leadership Council* p. 10

⁵⁶⁷ T.W Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton, New Jersey: Princeton University Press, 2015) p. 1.

⁵⁶⁸ Ruwantissa Abeyratne, ‘Acceptance of Human Remains for Carriage by Air—Some Concerns in Security and Safety’ (2012) *Journal of Transportation Security* Vol. 5 pp. 305-306.

⁵⁶⁹ Arrangement Concerning the Conveyance of Corpses 1937, League of Nations Treaty Series 189 No. 4391 (1938), 315-325.

⁵⁷⁰ Preamble to the Berlin Arrangement 1937.

⁵⁷¹ Cf. Council of Europe Agreement on the Transfer of Corpses 1973, Council of Europe, European Treaty Series No. 80, Strasbourg , 26.X. 1973.

to transport and repatriate corpses across European borders. It specifically addresses three essential issues relating to the transport of corpses across international borders—the health and sanitation concerns of carriage of human remains; respect for rights of the relatives of the dead to have the human remains of loved ones repatriated back home with dignity in line with provisions of IHRL; and the risks posed by the carriage of corpses to cross-border and aviation security.⁵⁷² Although the Berlin Arrangement does not specifically mention dead migrants or repatriation of their bodies thereto, it is, however, a multilateral treaty of general application covering every possible case of transporting human remains to families across state borders. Therefore, the interpretation/application of its elaborate provisions will highly likely come in handy when states are attempting to repatriate the bodies of dead migrants back to their families in the origin states.

ii. **The 1950 United Nations Convention on the Declaration of Death of Missing Persons After the World War II (1939-1945)**

Post-World War II, international decision-making shifted focus to negotiating a legal framework to assist in finding answers to the question of people reported missing as a result of war. The adoption of the 1950 United Nations Convention on the Declaration of Death of Missing Persons after World War II (1939-1945)⁵⁷³ was one of the outcomes of such negotiations and decisions. The Convention provided for the declaration of the death of “missing persons whose last residence was in Europe, Asia or Africa who disappeared in the years 1939-1945 under circumstances allowing reasonable ground to infer that they died in consequence of events of war or of racial, religious, political or national persecution”.⁵⁷⁴ However, it did not allow for a declaration of the death of missing persons with general application.⁵⁷⁵ In other words, the scope of application of the convention was limited only to well-defined cases as to time, place, background and circumstances of disappearance.⁵⁷⁶

In addition, the lifespan of the Convention was not to exceed 24 January 1972. Although the convention is limited in *scope*, *effect*, *time* and *place* of operation, its legal, practical and moral significance for all contemporary efforts towards addressing the issue of missing migrants is a far-reaching one. It is a blueprint Convention that represents the first attempt and internationally

⁵⁷² Ruwantissa Abeyratne note 568 p. 306.

⁵⁷³ UN Convention on the Declaration of Death of Missing Persons after the World War II (1939-1945) Ch—XV—I, Vol—2, Lake Success New York 6th April 1950, entry into force 1952, UNTS, Vol. 119, p. 99.

⁵⁷⁴ *ibid* Article 1(1).

⁵⁷⁵ Andrew Friedmann, ‘Declarations of Deaths—A New International Convention’ (2013) *St. John’s Law Review* Vol. 25 Issue 1, 1950 p. 41.

⁵⁷⁶ Andrew Friedmann *ibid* p. 33.

coordinated effort and decision by the international community to define the responsibilities of states towards missing persons and to acknowledge the sufferings of families and relatives of those missing. It represents a moral tribute paid by the United Nations and its member states to the victims of war, slave labour, mass killing and exterminations at a particular period in the history of human existence.⁵⁷⁷ Viewed from this angle, the convention is reminiscent of tragedies of human disappearances occasioned by armed conflicts including those of missing migrants and the need to recognise the human dignity of the victims and respect the rights of their families. This body of law has to be taken into account when responding to migrants missing in migration.⁵⁷⁸

iii. International Humanitarian Law

Given the limited lifespan of the 1950 Convention on the Declaration of the Deaths of Missing Persons after World War II, international decision-making subsequently turned attention to how international law could be used as a more permanent instrument to regulate the conduct of actors in situations of war in order to prevent human disappearances in the first place; and in the event of the death and going missing of people, to effectively manage the bodies of those found dead whilst also searching for and finding those who may still be alive. Such international decisions gave rise to the adoption of a series of international humanitarian laws which were enshrined in the four Geneva Conventions of 1949⁵⁷⁹ and their Additional Protocols I and II 1977⁵⁸⁰ as well as customary IHL. Premised on Henry Dunant's famous commentary on the 1859 Battle of Solferino,⁵⁸¹ IHL is perhaps the oldest source of law dealing with the issue of missing persons and members of their families in the context of armed conflicts. The Geneva Convention outlines procedures and steps that must be taken by parties to a conflict to ensure that people do not go missing. It creates two general obligations concerning the recording of information about people who are stripped of their liberty and dignity, obligations relating to the dead, and obligations related to the rights of families to know the truth of what has become of their missing relatives. These

⁵⁷⁷ *ibid* p. 41.

⁵⁷⁸ Stephanie Grant note 30 p. 5.

⁵⁷⁹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 31; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Second Geneva Convention), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, (Third Geneva Convention), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS; and Convention Relative to the Protection of Civilian Persons in Time of War, (Fourth Geneva Convention), adopted 12 August 1949, entered into force 21 October 1950, 75 UNTS 287.

⁵⁸⁰ Additional Protocol I to the Geneva Conventions, 8 June 1977.

⁵⁸¹ Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1939).

laws essentially obligate states and parties to an armed conflict to clarify the fate and whereabouts of missing persons, prevent people from going missing,⁵⁸² and search for and identify the dead.⁵⁸³

The first of the four conventions specifically recognise the rights of families to know the fate of their missing members. It requires states to adopt internal measures to protect a person's data, address the needs of families and identify, and preserve and manage the mortal remains of the dead. These rules set basic standards for humane treatment of dead persons and their surviving families, including preservation of the memory and dignity of the dead.⁵⁸⁴ In addition, under the rules of the ICRC customary IHL, parties to a conflict are under a duty to adopt all necessary measures to account for persons reported missing.⁵⁸⁵ Although the Geneva Conventions do not specifically mention migrants or address issues around missing migrants, they are, however, an important source of international law whose fundamental provisions are general in application covering every case of people that go missing in ambiguous circumstances. Therefore, the standards and norms created by it also guide international actions and efforts and legal responses of states to missing migrants, more so given that thousands of the dead and missing migrants in the Mediterranean are people who disappeared fleeing conflicts in different parts of the world.⁵⁸⁶

iv. International Human Rights Law

International human rights law and IHL operate side by side when invoked by states to respond to incidences of missing persons. It is often claimed that human rights ground the most basic considerations about international morality.⁵⁸⁷ When the talk of human rights rings like a bell, two things for whatever reasons readily come to mind: the highest moral precepts inherent in human dignity that it professes, and the political ideals that it seeks to uphold.⁵⁸⁸ For the New Haven School, 'law' constitutes a mechanism through which members of the international community

⁵⁸² First Geneva Convention (GC I), Arts 16-17; Second Geneva Convention (GC II), Arts 19-20; Third Geneva Convention (GC III), Arts 122-124; Fourth Geneva Convention (GC IV), Arts 136-141 and the First Additional Protocol to the Geneva Convention (AP I), Arts 32-33.

⁵⁸³ GC I, Arts 15-17; GC II, Arts 18-20; GC III, Arts 120-121; GC IV, Art. 16; AP I, Arts 33-34; Second Additional Protocol to the Geneva Convention (hereinafter AP II), Art. 8.

⁵⁸⁴ Daniela Gavshon, *The Dead, the 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) pp. 227-296, cited in Stephanie Grant note 30 p. 5.

⁵⁸⁵ Rules 112, 116 and 117 of the ICRC Customary International Humanitarian Law Study (CIHL).

⁵⁸⁶ Eleni Papapanou, 'Confronting the 'Out of Sight, Out of Sight' Attitude Surrounding Migrant Deaths' (2019) *Brown Political Review*.

⁵⁸⁷ R.R. Haule, 'Some Reflections on the Foundation of Human Rights—Are Human Rights an Alternative to Moral Values' (2006) *Max Planck UNYB* Vol 10 pp. 367-395 p. 388-392.

⁵⁸⁸ Samuel Moyn, *The Last Utopia, Human Rights in History* (Belknap Harvard: Harvard University Press, 2010) p. 1.

seek to define and protect their common interest.⁵⁸⁹ Through the action of this process, human rights are established, preserved, changed and improved upon from time to time; and it reflects the particular ways the law is authoritatively used to protect and empower human beings in their everyday quests to access and share each of the eight human values.⁵⁹⁰ In relation to migrants, the key elements in IHRL that encompass human protection, specifically the protection of the shared values of human dignity, include: the UN Charter 1945,⁵⁹¹ Universal Declaration of Human Rights 1948,⁵⁹² UN Convention on Civil and Political Rights 1966⁵⁹³ and UN Convention on Economic, Social and Cultural Rights 1966.⁵⁹⁴ Others include the Torture Convention,⁵⁹⁵ International Convention for the Protection of all Persons against Enforced Disappearance 2010⁵⁹⁶ and UN Convention on the Rights of the Child 1989.⁵⁹⁷ These global human rights treaties protect the shared values of human dignity in the sense that they not only “aspire to name, define, call into being or redeem the human”⁵⁹⁸ but also aspire to make ‘human’ who would otherwise be ‘non-human’ such as migrants. It is however critical to note that the question of how the concept of human dignity grounds human rights remains a controversial issue within international legal discourses on human rights.⁵⁹⁹ It is often said that human dignity is the foundational concept of the global human rights regime.⁶⁰⁰ When the universal human rights system is surveyed, the assertion that all human rights derive from human dignity and that it naturally inheres in the human is constantly repeated.⁶⁰¹ According to Moyn, in his book *The Last Utopia: Human Rights in History*, the basis of human rights is that it is conceived as an “agenda for improving the world

⁵⁸⁹ Siegfried Wiessner and A.R. Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity’ (1999) *The American Journal of International Law* Vol. 93 No. 2. p. 319.

⁵⁹⁰ Siegfried Wiessner and A.R. Willard Ibid p. 319.

⁵⁹¹ Charter of the United Nations 1945.

⁵⁹² United Nations Universal Declaration of Human Rights (UDHR) 1948 (G.A. Resolution 217 A).

⁵⁹³ International Covenant on Civil and Political Rights esp. pmb. 2, Mar. 23, 1976, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵⁹⁴ International Covenant on Economic, Social and Cultural Rights esp. pmb. 2, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3 (hereinafter ICESCR).

⁵⁹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment esp. pmb. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

⁵⁹⁶ International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (2006).

⁵⁹⁷ United Nations Convention on the Rights of the Child, entry into force 2 September 1990.

⁵⁹⁸ Samera Esmeir, *On Making Dehumanization Possible* (2006) *The Humanities in Human Rights: Critique, Language, Politics* (PMLA) Vol 121 No 5 p. 1544; Samera Esmeir, ‘*Juridical Humanity. A Colonial History*’ (California, Stanford University Press, 2012).

⁵⁹⁹ Christopher McCrudden, *Understanding Human Dignity* (ed.) (Oxford: Oxford University Press, 2014).

⁶⁰⁰ J.J. Waldron, ‘Is Dignity the Foundation of Human Rights’ (2013) *New York University Public Law and Legal Theory Working Papers* 374 p. 1-29.

⁶⁰¹ Arts 1, 22 & 23(3) UDHR 1948; Art 13 ICESCR 1966 and Art 10 ICCPR 1966; D. Beylveled and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001) pp. 1-28.

and bringing about a new one in which the human dignity of each individual will enjoy secure international protection”.⁶⁰²

For Roger Brownsword, human dignity remains a nebulous concept in the lexicon of the law,⁶⁰³ but its overarching basis seems to be that man has acquired some worth which demands some particular kind of *respect* on the basis of their humanness and based on no other special undertaking beyond a place in the world and membership in the political community. Viewed in this way, IHRL ascribes basic rights to individuals which states are obligated to respect, protect and fulfil. While the obligation to *respect* is a standard positive obligation not to violate rights, the obligation to *protect* is a negative obligation that requires states to stop third parties from violating rights. On the other hand, the obligation to *fulfil* requires states to foster or promote the enjoyment of positive rights⁶⁰⁴ and the shared values of human dignity. Of all the obligations of states towards missing migrants, most are derived from the right to life under human rights law.⁶⁰⁵ Generally, the human rights obligations of states towards migrants may arise in many respects. First, where a migrant is found dead in a state’s internal waters and their body washed ashore or where migrant bodies are found within state borders. The legal obligations of states in such situations derive from the territorial jurisdiction of states under international law to exercise effective control over everyone within their territory.⁶⁰⁶ Second, where a migrant is reported missing within a state’s territorial borders. Third, where a state successfully retrieves a migrant’s body from the high seas or international waters. Fourth, where a relative of a missing migrant is understood to be within the jurisdiction of the state where a migrant is believed to have gone missing.⁶⁰⁷ And, fifth, where migrants are trapped at sea. Most of these duties fit more into the context of the law of the sea.

v. International Law of the Sea

The period dating back to 1975 saw the increased recognition by the UNHCR of the problems often associated with the interaction between the law of the sea and other legal regimes especially

⁶⁰² Samuel Moyn, *The Last Utopia, Human Rights in History*, prologue p. 1.

⁶⁰³ Roger Brownsword, ‘Human Dignity from a Legal Perspective’ in Marcus Duwell *et al*, (eds.) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, (Cambridge: Cambridge University Press, 2014) pp. 1-22; Roger Brownsword, ‘Human Dignity, Human Rights and Simply Trying to Do the Right Thing’ in Christopher McCrudden (ed.) *Understanding Human Dignity* (Oxford: Oxford University Press, 2014) pp. 470-490.

⁶⁰⁴ Monica Hakimi, ‘State Bystander Responsibility’ (2010) *European Journal of International Law* Vol. 21 Issue 2 p. 347.

⁶⁰⁵ Article 2 ECHR.

⁶⁰⁶ ECHR, Article 1.

⁶⁰⁷ Stephanie Grant note 30 p. 9.

when migrants arrive at a state's territorial sea and seek to disembark and come ashore.⁶⁰⁸ The relevant sea treaties in this regard include: the United Nations Convention on the Law of the Sea (UNCLOS) 1982,⁶⁰⁹ the International Convention for the Safety of Life at Sea (SOLAS) 1974,⁶¹⁰ International Convention on Maritime Search and Rescue (ICMSR) 1979,⁶¹¹ the Convention on the High Seas (CHS) 1958,⁶¹² the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (Salvage at Sea Convention) 1910,⁶¹³ and the Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels 1910.⁶¹⁴ The main aim of these sea treaties is to protect and assist people in distress at sea. For instance, Article 98(1) UNCLOS requires that "every state shall require the master of a ship flying its flag...(a) to render assistance to *any person* found at sea in danger of being lost, (b) to proceed with all possible speed to the rescue of *persons* in distress..."⁶¹⁵ including migrants.

Article 98(1) is supplemented by Chapter V of the International Convention for the Safety of Life at Sea (SOLAS) which makes special regulations relating to distress messages, creating obligations and procedures.⁶¹⁶ SOLAS specifically creates and imposes two important duties on states, namely: a duty to render assistance at sea, and an obligation on the coastal states relating to search and rescue facilities.⁶¹⁷ This means that the law of the sea disallows any actions that could endanger the life of seaborne migrants. One key action of states that have been identified as often amounting to a violation of human rights law and the law of the sea is the pushback policies against migrants attempting to reach their borders through sea routes. The pushback policies of states against migrants are not a new phenomenon as historical precedents are well documented which describe the practice.⁶¹⁸ Across time and space, Britain in the 1940s, Malaysia

⁶⁰⁸ Mark Pallis, 'Obligations of States toward Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) *International Journal of Refugee Law*, Vol. 14 (2-3) p. 330.

⁶⁰⁹ United Nations Convention on the Law of the Sea, Montego Bay (1982), opened for signature at Montego Bay, Jamaica, on 10 December 1982, entry into force on 14 November 1994, UNTS, 1833.

⁶¹⁰ International Convention for the Safety of Life at Sea, 1974 UNTS 18961.

⁶¹¹ International Convention on Maritime Search and Rescue (ICMSR), 1979 UNTS 23489.

⁶¹² Convention on the High Seas, Geneva, 29 April 1958, entry into force, 30 September 1962, in accordance with Article 34, UNTS No. 6465.

⁶¹³ Convention Relating to the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910, entry into force 1 March 1913, 37 Stat. 1658; Treaty Series 576 (Article 11).

⁶¹⁴ Hereinafter "the Collision of Vessel at Sea Convention) 1910); Article 8.

⁶¹⁵ Article 98(1) UNCLOS, 1982.

⁶¹⁶ Chapter V of SOLAS.

⁶¹⁷ Mark Pallis, 'Obligations of States toward Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) *International Journal of Refugee Law*, Vol. 14 (2-3) p. 331; Chapters II, IV and V of the ICMSR 1979.

⁶¹⁸ A.C Velasco, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration' (2015) *The Irish Yearbook of International Law* Vol. 10 p. 63.

in the late 1970s, the United States in the 1990s, and Australia in the 2000s have pushed migrants back to places outside their territories.⁶¹⁹

A frequently cited example is the Indo-China Refugee Crisis of the 1970s and 1980s which witnessed a deliberate application of force by some states against migrants, including towing of unseaworthy vessels back to the perilous high seas where migrants stood the risk of death and loss.⁶²⁰ A more recent example is the 2001 *MV Tampa* incident, when a Norwegian freighter ship, *MV Tampa*, rescued from the Indian Ocean an Indonesian dilapidated fishing vessel in danger of sinking with dozens of migrants on board some 140 kilometres north of Christmas Island, while they journeyed from Indonesia to Australia. Australia refused the *MV Tampa*⁶²¹ entry permission to disembark on its Christmas Island territory. The ship was later redirected for disembarkation elsewhere following Australia's agreement with Nauru and New Zealand.⁶²² Following the *MV Tampa* incident, Australia adopted what it called the 'pacific solution'⁶²³ to check the entry of migrants into her territory by boat. The push back of migrants to danger zones may be said to be a violation of values of human dignity and the right to life of migrants. According to Goodwin-Gill, the duty to rescue those trapped at sea is established firmly in both treaty and general international law.⁶²⁴ Rights to be rescued at sea "co-exist with human rights rules and the duty to protect human life"⁶²⁵ because the right to be rescued and the corresponding duty on states to rescue are both part of international human rights provisions.⁶²⁶ Viewed in this way, the "law of the sea offers means that make it possible to achieve the ends of human rights law".⁶²⁷ Therefore, states are to enforce IHL, international law of the sea and IHRL in harmony with international refugee law.

⁶¹⁹ Irial Glynn, 'Comparing Europe's Recent Reaction to Boat Refugees Across Time and Space', (2017) Council for European Studies (CES).

⁶²⁰ G.S Goodwin-Gill, 'Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific' (2003) *Pacific Rim Law and Policy Journal* Vol. 12 No. 1 p. 32.

⁶²¹ Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) *American Journal of International Law*, Vol. 96, No. 3 pp. 661-676.

⁶²² Bernard Ryan and Valamis Mitsilegas (eds.) *Extraterritorial Immigration Control* (The Netherlands: Koninklijke Brill, 2010) pp. 347-374.

⁶²³ Janet Phillips, 'The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island' *Background Note, Social Policy Section—Department of Parliamentary Services of the Parliament of Australia* 4th September 2012 p. 2.

⁶²⁴ G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition (Oxford: Clarendon Press, 1996) p. 157; Seline Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' (2014) *Questions of International Law* Vol. 4 pp. 3, 5-8. Cf. Jean-François Durieux, 'The Duty to Rescue Refugees' (2016) *International Journal of Refugee Law*, Vol. 28, Issue 4 p. 637; E.D Papastavridis, 'Is There a Right to be Rescued at Sea? A Skeptical View' (2014) *Questions of International Law* Vol. 4 pp. 21, 23.

⁶²⁵ V.P Tzevelekos and E.K Proukaki note 20 p. 437.

⁶²⁶ *ibid* p. 437.

⁶²⁷ *ibid*.

vi. International Refugee Law

The foundation of the UN Convention Relating to Status of Refugees adopted in 1951⁶²⁸ are grounded in Article 14 of the UN Universal Declaration of Human Rights 1948.⁶²⁹ Article 14 of the UNDHR affirms the right of persons to seek protection from persecution in states other than their own. The birth of the Refugee Convention dates back to the work of the Ad Hoc Committee on Statelessness and Related Problems⁶³⁰ appointed by the UN Economic and Social Council (ECOSOC)⁶³¹ with the mandate of considering the desirability of a revised and consolidated convention relating to the status of refugees and if necessary draft the text of such a convention.⁶³² The subsequent work of the Ad Hoc Committee on the basis of this proposal culminated in a draft Refugee Convention⁶³³ which was later amended by the 1967 Refugee Protocol⁶³⁴ to remove the geographic and temporal limits of the 1951 convention.⁶³⁵ The convention is a consolidation of all previous legal instruments relating to refugees and provides the most exhaustive codification of refugees' rights at the international level. The Convention is both a status-based and a rights-based treaty⁶³⁶ which is underpinned by three legal principles namely the principles of 'non-discrimination',⁶³⁷ 'non-penalisation'⁶³⁸ and 'non-refoulement'.⁶³⁹ With regard to the principle of non-discrimination, the convention provisions are to be applied without discrimination as to race, religion, nationality etc. As for the principle of non-penalisation, the Convention provides, subject to exceptions, that refugees should not be penalised for illegal entry or stay in any state so long as they take steps to regularise their position with the state concerned.⁶⁴⁰ While the principles of

⁶²⁸ UN General Assembly, *Draft Convention Relating to the Status of Refugees*, 1950, A/RES/429.

⁶²⁹ Preamble 1 to the 1951 Convention.

⁶³⁰ Hereinafter 'the ad hoc committee'.

⁶³¹ UN Resolution 248 (IX) of August 1949.

⁶³² Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller *et al*, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) pp. 98-177 p. 98, 99.

⁶³² Elihu Lauterpacht and Daniel Bethlehem *ibid* pp. 98-99.

⁶³³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Texts of the Draft Convention and the Draft Protocol to Be Considered by the Conference: Note by the Secretary-General*, 12 March 1951, A/CONF.2/1.

⁶³⁴ Elihu Lauterpacht and Daniel Bethlehem note 632 pp. 101-103.

⁶³⁵ Article 1(2) & (3) of the Protocol.

⁶³⁶ *Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR)* annexed to the Text of the 1951 Convention Relating to the Status of Refugees and Text of the 1967 Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) pp. 2-5.

⁶³⁷ Article 3 of the Refugee Convention 1951.

⁶³⁸ Article 31(1) of the Refugee Convention 1951.

⁶³⁹ Article 33(1) of the Refugee Convention 1951.

⁶⁴⁰ Convention Relating to Status of Refugees and Text of the 1967 Protocol Relating to Status of Refugees, with an Introductory Note by the UNHCR p. 3; UN General Assembly Human Rights Council, Seventh Session, 'Report of the Working Group on Arbitrary Detention' A/HRC/7/4, (Geneva, 2008), para. 53;

non-discrimination and non-penalisation are key to the protection of migrants, the cornerstone of international protection for migrants contained in the Convention is, however, the principle of non-refoulement.⁶⁴¹ Article 33 of the Convention provides that no contracting state shall expel or refoul refugees where their life or freedom can be threatened.⁶⁴² The rationale for prohibiting the refoulement of refugees to danger zones may be interpreted quite expansively to include the fact that the process of refoulement could lead to not only human rights violations and endangering of human security but also migrants dying and going missing at sea and borders and in the most ambiguous circumstances. It has been argued that the principle of non-refoulement has attained the status of *jus cogens* in international law for which no derogation is permitted from states.⁶⁴³

5.5.2 Specific International Legal Responses and Decisions through Soft Laws

International decision-making has also focused on the adoption of a number of soft multilateral legal frameworks to respond to the problem of missing migrants. Over the last two decades, at least, three such soft laws have been adopted by states and another proposed by the ICRC to guide states when dealing with missing persons. The soft laws include, *inter alia*: the UN Global Compact for Safe, Orderly and Regular Migration 2016, the Guiding Principles for the Search for Disappeared Persons 2019, the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organised Crime 2000, and the ICRC Guiding Principles/Model Law on the Missing.

i. The UN Global Compact for Safe, Orderly and Regular Migration

In 2008, Alexander Betts was among those that called for the adoption of a soft law framework for the protection of vulnerable migrants on the international level.⁶⁴⁴ In response to such call, in 2016, the UN adopted the New York Declaration on Refugees and Migrants, comprising of two compacts: Global Compact for Refugees (GCR) and Global Compact for Safe, Orderly and

International Organisation for Migration (IOM), Council 106th Session, 'Migration Governance Framework', C/106/40, (Geneva: IOM, 2015), para. 11.

⁶⁴¹ Yannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter, A Handbook for Legal Practitioners* (Council of Europe: Council of Europe Publishing, 2013) pp. 79-80.

⁶⁴² Article 33(1) of the Refugee Convention 1951.

⁶⁴³ Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) *International Journal of Refugee Law* Vol. 13 No. 4 pp. 533-557 p. 538.

⁶⁴⁴ Alexander Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Migrants' (2008) New Issues in Refugee Research, UN Refugee Agency, Research Paper No. 162.

Regular Migration (GCM). Both instruments are an intergovernmental non-treaty, non-binding agreement that sets out principles, objectives and partnerships for refugees and migration governance at the international level. Particularly relevant to this study is Objective 8(a-f) of the GCM which seeks to address the humanitarian challenges arising from the perilous journeys of migrants who died and went missing in an attempt to reach safe international destinations.

Although Objective 8 deals directly with missing migrants, the provision is not exhaustive and cannot be read or enforced in isolation of other relevant provisions of the GCM.⁶⁴⁵ Not least because the provisions are designed to be mutually inclusive in their application and should be read and interpreted in that light.⁶⁴⁶ The main purpose of Objective 8 is to save lives⁶⁴⁷ and establish coordinated transnational efforts to find missing migrants.⁶⁴⁸ It calls on states to adopt measures to prevent migrant deaths, support joint search and rescue of migrants,⁶⁴⁹ and collect and exchange information in a standardised way⁶⁵⁰ as well as commit to identification of the dead⁶⁵¹ and family outreach.⁶⁵² Particularly relevant is the requirement that states should review their migration policies and laws to ensure that their impacts do not raise or create the risk of migrants going missing.⁶⁵³ The goals advanced by Objective 8 are central to effectively dealing with the crisis of missing migrants at the international level, but what is not so clear is how states, given the non-treaty legal status of the compact, might implement its contents nationally, and what would be the consequences of states' failure to implement.

The GCM is not legally binding *stricto sensu*,⁶⁵⁴ but it is politically binding.⁶⁵⁵ This is evident in the consistent use of the phrase 'we commit...'⁶⁵⁶ throughout the Compact. By all indications, whether states intend it or not, the GCM can be treated as soft law that can have direct, qualifying, interpretative and political effects.⁶⁵⁷ Generally, when the obligations created by international soft

⁶⁴⁵ Objectives 1, 3, 4, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 21 of the GCM.

⁶⁴⁶ Syd Bolton and Catriona Jarvis note 281 p. 25.

⁶⁴⁷ Objective 8(a).

⁶⁴⁸ Objective 8 paragraph 24.

⁶⁴⁹ Objective 8(a).

⁶⁵⁰ Objective 8(e).

⁶⁵¹ Objective 8(f).

⁶⁵² Objective 8(c) & (d).

⁶⁵³ Objective 8(b).

⁶⁵⁴ Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) *German Law Journal* Vol. 21 p. 321.

⁶⁵⁵ Kathryn Allinson *et al*, 'GCM: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International Law and UK Law' *Refugee Law Initiative Blog on Refugee Law and Forced Migration*, School of Advanced Study, University of London.

⁶⁵⁶ Paragraphs 8 and 17-39 of the Compact.

⁶⁵⁷ G-W Tadeusz, 'A Framework for Understanding Soft Law' (1984) *McGill Law Journal* Vol. 30 p. 52.

law are implemented nationally, soft law like the GCM can actually play hardball and can be used to counter, confirm, affirm or reaffirm the existence and/or validity of existing hard laws⁶⁵⁸ as well as existing soft laws.⁶⁵⁹ The states' resolve under the GCM to save lives at sea is complemented by the 2019 Guiding Principles for the Search for Disappeared Persons which calls on states to facilitate effective and timely search and recovery of disappeared persons, including migrants.⁶⁶⁰ The Guiding Principles acknowledge that under international law, refusing to give information to families of the missing constitutes inhuman and degrading treatment of family members.⁶⁶¹

ii. The Migrant Smuggling Protocol

Migrant smuggling by sea and land across the Mediterranean coast is one aspect of unauthorised migration to Europe that presents a particular kind of legal, policy and political challenge for EU states.⁶⁶² Despite the EU's adoption of a common legal framework to combat migrant smuggling, the so-called 'Facilitators Package'⁶⁶³ comprised of Council Directive 2002/90/EC⁶⁶⁴ and Council Framework Decision 2002/946/JHA,⁶⁶⁵ in many cases, state sovereignty and common security interests of EU states clash with foundational principles of human rights and refugee law imposing obligations on member states to respect the human rights and dignity of migrants. Multiple states have to grapple with conflicting roles of protecting their national borders and suppressing migrant smuggling,⁶⁶⁶ whilst also rescuing migrants and protecting human rights. Following the *Dover* case of 2000 which left 58 Chinese migrants dead in Port Lorry as they were being smuggled into the UK⁶⁶⁷ and most recently, the 2019 death of 39 Vietnamese migrants smuggled in a lorry into

⁶⁵⁸ G.C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) *Minnesota Law Review* Vol. 94 p. 788.

⁶⁵⁹ *Ibid* p. 788.

⁶⁶⁰ Guiding Principles for the Search for Disappeared Persons adopted pursuant to the International Convention for the Protection of all Persons from Enforced Disappearance, CED/C/7, 8 May 2019.

⁶⁶¹ *Ibid* Principle 2.

⁶⁶² Those challenges prompted EU's adoption of the *Action Plan on Migrant Smuggling (2015-2020)* in a strategic attempt to tackle migrant smuggling. See 'EU Action Plan on Migrant Smuggling (2015-2020)' COM(2015) 285 Final.

⁶⁶³ Sergio Carrera *et al*, 'Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update' (2018) European Parliament pp. 21-112.

⁶⁶⁴ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, (2002) *Official Journal of the European Communities*, 328, 5.12.2002, p. 17-18.

⁶⁶⁵ Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, (2002) *Official Journal of the European Communities*, 328, 5.12.2002, p. 1-3.

⁶⁶⁶ Daphe Bouteillet-Paquet 'Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications' (New York: United Nations, 2011).

⁶⁶⁷ BBC News of 19 June 2000 captioned '58 Dead in Port Lorry', available at: <http://news.bbc.co.uk/1/hi/uk/796791.stm> (accessed 9/12/2019).

the UK,⁶⁶⁸ states have taken some legal measures to prevent migrant deaths and disappearances in the hands of people smugglers. One of the key decisions reached by states at the UN level was the adoption of the Migrant Smuggling Protocol 2000.⁶⁶⁹ The Smuggling Protocol criminalises migrant smuggling, but it does not criminalise migrants who are smuggled⁶⁷⁰ neither does it criminalise migration itself. Instead, the Protocol enjoins states to adopt “legislative and other measures”⁶⁷¹ to protect migrants, in particular, in circumstances where the smuggling “endangers or is likely to endanger the life or safety of that migrant”.⁶⁷² The rationale for the adoption of the Protocol is the belief that illicit smuggling of migrants by land, sea and air amounts to trading in humans. There can be no doubt that trading in humans is a clear violation of human dignity.⁶⁷³

In that case, it may be argued that if migrant smugglers rely on some of the shared values, say *power* and *wealth* to facilitate their illicit trade to the suffering of humanity, then legal, policy and institutional responses of states may be tailored, in part, towards changing how perpetrators access and use these values. Overall, it can be argued that the Migrant smuggling protocol aims at achieving three goals. The first is combating the scourge of migrant smuggling⁶⁷⁴ that lead to deaths and disappearances of migrants at the hands of smugglers. The second is to promote international cooperation between states in tackling trading in humans;⁶⁷⁵ and the third is to protect the rights of smuggled migrants,⁶⁷⁶ particularly their right to life and human dignity. The Protocol when viewed through the lens of human dignity may be seen as good since it seeks to prevent trading in humans. Its provisions can be strengthened “to prevent as well as search for, recover, identify and return to their families, migrants that go missing”.⁶⁷⁷ These state-initiated soft laws on the missing persons are supplemented by one important non-state legal framework—the 2009 ICRC Model Law and Guiding Principles on the Missing.

⁶⁶⁸ Lucy Williamson, ‘Essex Lorry Deaths: The Vietnamese Risking it All to Get to the UK’ BBC News of 26 October 2019.

⁶⁶⁹ UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime (2000), UNTS, Vol. 2241, p. 507; Doc. A/55/383.

⁶⁷⁰ Article 5 of the Smuggling Protocol.

⁶⁷¹ Article 16 of the Smuggling Protocol.

⁶⁷² Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) *International Journal of Refugee Law* Vol. 14 p. 591.

⁶⁷³ Roza Pati, ‘Human Trafficking: An Issue of Human and National Security’ (2013) *University of Miami National Security and Armed Conflict Law Review* Vol. IV pp. 29-42.

⁶⁷⁴ Claire Brolan, ‘An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective’ (2002) *International Journal of Refugee Law* Vol. 14 p. 591.

⁶⁷⁵ *ibid* p. 591; Objectives 9 & 10 of the GCM.

⁶⁷⁶ Claire Brolan *supra* p. 591.

⁶⁷⁷ Jeremy Sarkin note 505 p. 214.

iii. ICRC Model Law on the Missing 2009

The norms of IHL in the Geneva Conventions which govern the subject of the missing including rules around the recovery, identification, burial of bodies and notification of families in the context of armed conflict have received expression in the ICRC Model Law on the Missing (hereinafter 'ICRC Model Law').⁶⁷⁸ The Model Law in its Part I⁶⁷⁹ defined who missing persons are, persons considered their relatives, authorities for tracing missing persons, minimum data on a missing person and identification of human remains. In Part II,⁶⁸⁰ the Model Law outlines the rights and interests of missing persons and those of their relatives. It also contains provisions on tracing, identification, recording of data and family outreach. Part III⁶⁸¹ defined the legal status of missing persons. Further, Part IV⁶⁸² of the law prescribed procedures and modalities for tracing missing persons; Part V⁶⁸³ outlined obligations relating to search, recovery and treatment of the dead; and Part VI⁶⁸⁴ defined criminal acts or consequences that could result from failure of the state authorities and parties to an armed conflict to carry out their obligations towards the missing and their grieving families. The Model Law contains elements and provisions, in particular, tracing, identification, information or outreach to missing persons' relatives, and recording of data at the supranational level which must feature in any international or national legislation or framework designed to address missing persons' situations. The major limitation of the Model Law is that it only addresses cases of missing persons in the context of armed conflict and does not deal with persons that go missing in other contexts outside conflict or those fleeing conflicts such as migrants. Nonetheless, their provisions can be drawn upon to develop a more uniform model law that covers various contexts through which people may go missing including through migration.

5.5.3 Regional Legal and Policy Responses and Decisions at EU Level

The EU, it is clear, is the worst hit of the global migrant crisis. As noted earlier in chapter 4, the response of the EU to the crisis has been centred on some strategic areas: "action with partners

⁶⁷⁸ ICRC 'Guiding Model Law on the Missing' available at: <https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law> (accessed 15/8/2018).

⁶⁷⁹ Part I made up of (Articles 1 and 2).

⁶⁸⁰ Part II made up of (Article 3-7).

⁶⁸¹ Part III made up of (Articles 8-10).

⁶⁸² Part IV made up of (Articles 11-18).

⁶⁸³ Part V made up of (Articles 19-23).

⁶⁸⁴ Part VI made up of (Articles 24-25).

outside the EU; action at the EU external borders; and action inside the EU”.⁶⁸⁵ This section looks at how these responses have been operationalised through EU legal and policy frameworks particularly human rights treaties and other instruments and judicial decisions of the ECtHR.

i. Responses through Policy and Institutional Frameworks

The policy frameworks adopted to respond to migrant movements across international borders have grown increasingly more complex, connecting even, “European capitals to policy centres in Africa”.⁶⁸⁶ They continue to dominate high-level discussions among policymakers at the regional levels on how they can be deployed to effectively respond to the Europe migrant crisis. At the EU level, legal decision-making and policy responses to migrant flows have often been determined within the Justice and Home Affairs framework.⁶⁸⁷ This decision-making strategy follows a familiar tradition employed in the Maastricht Treaty,⁶⁸⁸ Dublin III Regulation,⁶⁸⁹ Schengen Agreement,⁶⁹⁰ EU Sea Borders Regulation,⁶⁹¹ European Agenda on Migration,⁶⁹² EU-Turkey Joint Action Plan⁶⁹³ and more recently the European Council Strategic Agenda 2019-2024.⁶⁹⁴ There have also been other policy frameworks adopted by the EU to operationalise obligations of states towards migrants prior to, and subsequently in the wake of, the growing crisis of human tragedies in the Mediterranean. Those include the Global Approach to Migration and Mobility (GAMM),⁶⁹⁵ the Bilateral and Regional Frameworks for Dialogue and Cooperation,⁶⁹⁶ the EU Readmission Agreements (EURAs),⁶⁹⁷ the EU Regional Protection Programmes (RPPs),⁶⁹⁸ the Exchange of

⁶⁸⁵ European Union Commission ‘Managing Migration in all its Aspects: Progress under the European Agenda on Migration’ COM(2018) 798 Final.

⁶⁸⁶ Itamar Mann note 384 p. 336.

⁶⁸⁷ F.B. Attia *et al*, ‘Missing Migrants: Management of Dead Bodies in Sicily, Italy Summary Report, Mediterranean Missing Project’ (2016) Background Briefing p. 4.

⁶⁸⁸ Consolidated Texts of the EU Treaties, Amended by the Treaty of Lisbon (2008) (the ‘Maastricht Treaty’).

⁶⁸⁹ Dublin III Regulation, Regulation (EU) No 604/2013.

⁶⁹⁰ European Union ‘Schengen Agreement’ 14 June 1985, *Official Journal*, L 239, 22/09/2000.

⁶⁹¹ Regulation No 656/2014 European Parliament and the Council, 2014 (‘EU Sea Borders Regulation’).

⁶⁹² European Agenda on Migration pp. 1-22 at p. 2.

⁶⁹³ EU-Turkey Statement 2016, Council of the EU Press Release 144/16 (accessed 18/03/2016).

⁶⁹⁴ European Council and Council of the European Union ‘A New Strategic Agenda (2019-2024)’ June 2019.

⁶⁹⁵ European Commission ‘The Global Approach to Migration and Mobility’, COM/2011.0743 final; Council Conclusions on the Global Approach to Migration and Mobility, Council Document No 9417/12, 3 May 2012.

⁶⁹⁶ European Commission ‘A dialogue for migration, mobility and security with the southern Mediterranean countries’, COM (2011) 292 final, 24.5.2011 p. 3. See Samuel Cogolati *supra* pp. 47-55.

⁶⁹⁷ For more on the *EU Readmission Agreements*, see M. Lilienkamp & S. Saliba, ‘EU Readmission Agreements: Facilitating the Return of Irregular Migrants’, Briefing, European Parliamentary Research Service, April 2015; Samuel Cogolati *ibid* pp. 47-55.

⁶⁹⁸ *On the Regional Protection Programmes (RPPs)*, see European Commission ‘On Regional Protection Programmes’, COM (2005) 388 final, 1.9.2005, Samuel Cogolati *ibid* pp. 47-55.

Information with Third Countries,⁶⁹⁹ the EU-Africa Joint Valletta Action Plan⁷⁰⁰ (to be monitored by the Khartoum and Rabat Process respectively)⁷⁰¹ and sometimes insertion of *Migration Clauses* in Global Agreements⁷⁰² between the EU, its member states and third countries. This wide nest of measures shows that policymaking to address migration issues in Europe has gradually moved from the erstwhile inter-governmental decision-making outside the framework of the EU to EU competence.⁷⁰³

Putting these policy measures together, it may be said that EU states' responses to the movement of third-country nationals to Europe have been conducted at the broadest level from either of and sometimes a combination of, two policy bases: the Common Foreign and Security Policy (CFSP) inclusive of the Common Security and Defence Policy (CSDP) and the migration policies (non-CSFP) approach as well as other EU external relations legal framework.⁷⁰⁴ The CFSP matches the idea of a foreign policy pursued at the intergovernmental level through the Council of the EU and the European Council while the non-CSFP parallels migration and other goals pursued at the regional level through EU institutions⁷⁰⁵ including through the Justice and Home Affairs Council, the European Commission, European Parliament and the European Council.⁷⁰⁶ However, these broad policy measures were not specifically designed to address the problem of missing migrants. The closest the policies came towards addressing the problem of missing migrants was the declaration made by EU states in the European Agenda on Migration adopted as a specific response to the Mediterranean migration crisis.⁷⁰⁷ The European Agenda pledged the commitment of the EU and EU states to rescue and save lives at sea,⁷⁰⁸ a step that

⁶⁹⁹ *The Exchange of Information with Third Countries*—Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004, OJ L 141/13, 27.5.2011; Samuel Cogolati *ibid* pp. 47-55.

⁷⁰⁰ African Union (AU), the '*EU-Africa Joint Valletta Action Plan—Conclusions 2018*'.

⁷⁰¹ IOM, *EU-Horn of Africa Migration Route Initiative (Khartoum Process)*, 2014; On the Rabat process, see available at: <https://www.rabat-process.org/en/about/rabat-process> (accessed 28/10/2019).

⁷⁰² Paula García Andrade *et al*, 'EU Cooperation with Third Countries in the Field of Migration' (2015) Study for the LIBE Committee, European Parliament pp. 35-37.

⁷⁰³ F. Ben Attia, *et al*, 'Missing Migrants: Management of Dead Bodies in Sicily, Italy Summary Report, Mediterranean Missing Project' p. 4.

⁷⁰⁴ Graham Butler, 'Legal Responses to the European Union's Migration Crisis' (2018) *San Diego International Law Journal* Vol. 19 Issue 2 p. 279.

⁷⁰⁵ Graham Butler *ibid* p. 279.

⁷⁰⁶ A. Dimitriadi and H. Malamidis, 'Talking of Values: Understanding the Normative Discourse of EU Migration Policy—On (Value-Based) EU Policies on Migration' (2019) *NOVAMIGRA D2.1 Paper on the (Value-Based) EU Policies on Migration* pp. 11-18.

⁷⁰⁷ European Commission 'Progress Report on the Implementation of the European Agenda and Migration' COM(2019) 481 Final, Brussels, 16.10.2019.

⁷⁰⁸ European Commission 'A European Agenda on Migration' (2015) COM (2015) 240 Final, at p. 2.

may be perceived as crucial to enforcing migrants' human dignity, in particular their rights to life and security. The next most effective EU policy after the European Agenda was the EU Triton⁷⁰⁹ rescue mission initiated as part of the non-CFSP policy implementation. The Triton policy enforced through Frontex was more of a preventive effort to reduce migrant deaths at sea, police the Mediterranean coast and clamp down on the activities of people smugglers.

ii. Responses through Human Rights Treaty Frameworks at EU Level

Legal decision-making and responses at the EU level in the area of human rights draw upon the Council of Europe Convention on Human Rights and Fundamental Freedoms 1950⁷¹⁰ and Charter of Fundamental Rights of the European Union⁷¹¹ as well as the Consolidated Text of the Treaty on the European Union and Treaty on the Functioning of the European Union (Lisbon Treaty).⁷¹² These instruments protect the human dignity of people in Europe. Other regional human rights treaties comparable to Europe include the Inter-American Convention on Human Rights 1969,⁷¹³ the Inter-American Convention on Forced Disappearance of Persons 1994,⁷¹⁴ the African Charter on Human and Peoples Rights 1981,⁷¹⁵ the OAU Convention Governing the Specific Aspects of Refugees Problems in Africa⁷¹⁶ and the 1984 Cartagena Declaration on Refugees in Latin America.⁷¹⁷ These regional treaties are important for analysing state obligations towards migrants, but the focus here is on the European instruments (ECHR and CFREU) which are arguably the most advanced in terms of application and enforcement. Although the EU has yet to accede to the ECHR, its human rights norms and practice under the CFREU are significantly shaped by the ECHR.⁷¹⁸ The European frameworks protect the right to life of boat migrants⁷¹⁹ and in the context

⁷⁰⁹ See 'Amnesty International's Blue-Print for Action to end Refugee and Migrant Deaths in the Med' (2015).

⁷¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms esp. p.mbl. 4 Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 (hereinafter ECHR).

⁷¹¹ Charter of Fundamental Rights of the European Union, 2000 (hereinafter CFREU), (2000/C 364/01).

⁷¹² Consolidated Texts of the EU Treaties Amended by the Treaty of Lisbon (2008).

⁷¹³ Organisation of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 Nov. 1969.

⁷¹⁴ Inter-American Convention on the Forced Disappearance of Persons adopted at Belem do para, Brazil ON 06/09/94 Conf/Assem/meeting: twenty-fourth regular session of the general assembly to the Organisation of American States, entry into force 03/28/96.

⁷¹⁵ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁷¹⁶ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, adopted by the Assembly of Heads of States and Governments at its Sixth Ordinary Session in Addis Ababa, 10 Sept 1969.

⁷¹⁷ *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

⁷¹⁸ Samuel Cogolati note 696 p. 23.

⁷¹⁹ Article 2 ECHR and Article 2(1) CFREU.

of the Mediterranean Sea, the right to life translates into duty of EU states to render assistance to migrants in distress.⁷²⁰ The right to life of irregular migrants is also tied to that of their human dignity under the ECHR⁷²¹ and CFREU⁷²² which means that unreasonable force cannot be used to prevent entry of migrants, not least since migrants fleeing wars have a right to seek asylum under the CFREU.⁷²³ Also, the CFREU enshrines the principle of *non-refoulement* which prohibits EU states from returning migrants to places where their protection, safety and security might come under threat.⁷²⁴ This includes prohibition against collective expulsion of migrants.⁷²⁵ Legal responses to migration matters through decisions of the European Court of Human Rights are considered below to further highlight the application and interpretation of these provisions.

iii. **Responses Through Decisions of the European Court of Human Rights (ECtHR) Relevant to Migrants**

In the jurisprudence of the European Court of Human Rights, we have yet to register any decided cases that deal directly with missing migrants that can be treated as a judicial response to the problem, neither have we recorded any clear-cut decisions detailing the rights of the families of missing migrants. What we do have however are cases that deal with comparable situations such as the extraterritorial obligation of states to protect migrants, repatriation of dead bodies to families and issues around the dignity of dead bodies. These comparable cases highlight some useful principles, from a legal response point of view to shipwrecks and migrant disappearances in the Mediterranean Sea. One such case is the *Hirsi Jamaa v Italy* where the ECtHR held that returning migrants to unsafe places in Libya through the Mediterranean high sea amounted to inhuman and degrading treatment under Article 3 of the European Convention and that the non-refoulement obligation of states applied extraterritorially.⁷²⁶

With regard to the obligation of European states to investigate deaths including suspected cases of migrant deaths, some guidelines on the minimum criteria that an investigation must meet in order to satisfy international human rights standards have been developed by the ECtHR.

⁷²⁰ Samuel Cogolati note 696 p. 23.

⁷²¹ Article 3 ECHR.

⁷²² Article 4 CFREU.

⁷²³ Article 18 CFREU.

⁷²⁴ Article 19(2) CFREU.

⁷²⁵ Article 19(1) CFREU and Article 4 Protocol 4 to the ECHR.

⁷²⁶ *Hirsi Jamaa v. Italy* Application No 27765/09; *Medvedyev and Others v France* [Grand Chamber] App No 3394/03 ECtHR, 29 March 2010 *para* 81. Cf. *Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Incorporated* 509 US 155 (1993).

Among them are the fact that: (1) state authorities shall, as soon as death is reported, put initiatives in place to investigate circumstances of such deaths;⁷²⁷ (2) those conducting the investigation must be independent or institutionally different from those accused of complicity in the deaths; (3) the investigation must be effective and capable of establishing that certain actions taken by states was either justifiable or not in any circumstance; and also, the investigation must be capable of assembling evidence to establish the level of complicity of those connected with the death; (4) the investigation must be timely and prompt; (5) the investigation must be fair, transparent and open to public scrutiny such as to guarantee the integrity of the investigation process and at the end of the investigation, have an investigation report published. And (6) the next-of-kin or other relatives of the deceased, if they are accessible, should be part of the investigation to the extent that their legitimate interest can be safeguarded in line with Articles 2 and 13 of the ECHR.⁷²⁸

In *Al-Skeini v United Kingdom*,⁷²⁹ it was held by the ECtHR that IHRL obligation to investigate deaths continues to apply even in difficult security conditions, including in situations of armed hostilities.⁷³⁰ In the area of repatriation of dead bodies to families, the ECtHR interpreting the right to family life under Article 8 of ECHR in *Pannullo and Forte v France* found that the delay of the French state to repatriate the body of the deceased to her family after an autopsy constituted a violation of the family's right to both private and family life under Article 8 of the ECHR.⁷³¹ Thus, where a body has been found, failure on the part of state authorities to facilitate a timely return of the deceased's remains to their family, or to disclose where a missing person's dead body has been buried, can constitute a violation of European human rights law. The only exception as held in *Sabanchiyeva and Others v Russia* is where non-repatriation of mortal remains accords well with the law and in pursuit of a legitimate aim, necessary in a democratic society (in accordance with Article 8(2) of the ECHR), in the interest of national security, public safety or economic well-being of a state, protection of health or morals, proportionate, non-discriminatory or in furtherance of investigation or prevention of crime.⁷³²

⁷²⁷ Held in *Ilhan v Turkey* [2000] Application No 22277/93 ECtHR [GC] para. 93 and *Ahmet Ozkan and Ors v Turkey* [2004] case no 21869/93 ECtHR para. 310.

⁷²⁸ Held in *Paul and Audrey Edwards v UK* [2002] Application No 46477/99. See also the United Kingdom Parliament Joint Committee on Human Rights—Third Report, Session 2004-05, 8 December 2004.

⁷²⁹ *Al-Skeini v. United Kingdom*, [2011] App. No. 55721/07, para. 164.

⁷³⁰ Monica Hakimi, 'The Theory and Practice at the Intersection Between Human Rights and Humanitarian Law' (2017) *American Journal of International Law Vol. 111 Issue 4* p. 1065.

⁷³¹ *Pannullo and Forte v France* [2001] Application No. 37794/97 paras 31-40 ECtHR.

⁷³² *Sabanchiyeva and Others v Russia* [2013] Application No. 38450/05 para. 122 ECtHR.

In *Akpınar and Altun v Turkey* the ECtHR interpreting Article 3 of the ECHR first observed that the provision had never been applied in the context of disrespect for a dead body and therefore found that “human quality is extinguished on death, and, therefore prohibition of ill-treatment is no longer applicable to corpses...despite the cruelty of the acts concerned”.⁷³³ In the case, the applicants had alleged before the ECtHR that the ears of the two dead bodies of their relatives had been mutilated or cut off, in whole or in part by Turkish security forces at the time of post-mortem examination and by the time the corpses were returned to them.⁷³⁴ It is not clear if the effect of this decision is to conclude in judicial terms that cruel treatment of a dead body does not violate Article 3 of the ECHR.⁷³⁵ It may be said that, for the ECtHR, except for the special field of ‘organ and tissue transplant’⁷³⁶ where a human body may not be despoiled even after death,⁷³⁷ the right to freedom from undignified treatment ceases upon death.⁷³⁸ However, in *Genner v Austria* which concerned question of defamation of character or reputation of the dead, the ECtHR found that “dealing appropriately with the dead out of respect for the feelings of the deceased’s relatives falls within the scope of Article 8 of the ECHR”.⁷³⁹ It is argued that these ECtHR decisions contribute to construction of the European identity based on the shared values of human dignity⁷⁴⁰ in relation to missing migrants. It is important to observe that for purpose of carrying out an effective investigation into suspected migrant deaths as well as identification and repatriation of bodies, the personal and genetic data of migrants and those of their families are very likely to come under the control of European states,⁷⁴¹ and therefore, human rights law and European data protection law will apply concurrently in such situations.

iv. European Data Protection Law and Regulations

As hinted above, European human rights law and data protection law are inextricably interlinked when it comes to EU and EU states legal and policy responses to the problem of missing migrants.

⁷³³ *Akpınar and Altun v Turkey* (56760/00) 2007 para. 82 [ECtHR].

⁷³⁴ *ibid* paras 10, 76-79.

⁷³⁵ *ibid* para. 83.

⁷³⁶ Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, ETS No 164, 1997 (Arts. 19-20).

⁷³⁷ *Elberte v Latvia*, [2015] ECtHR, Application No: 61243/08.

⁷³⁸ Cf. Welmoet Wels, ‘Dead Body Management in Armed Conflict: Paradoxes in Trying to Do Justice to the Dead’ (2016) Graduate Thesis, Leiden University pp. 33-37.

⁷³⁹ *Genner v Austria* (55495/08), 2016 para. 35 [ECtHR].

⁷⁴⁰ Carola Lingaas, ‘Judicial Responses to the Migration Crisis: The Role of Courts in the Construction of a European Identity’ in G.C Bruno *et al*, (eds.) *Migration Issues Before International Courts and Tribunals* (Rome: CNR Edizioni, 2019) pp. 1-24.

⁷⁴¹ See INTERPOL’s ‘Disaster Victim Identification (DVI)’, available at: <https://www.interpol.int/en/How-we-work/Forensics/Disaster-Victim-Identification-DVI> (accessed 1/5/2020).

Data protection law seeks to protect the human rights and dignity of people by controlling how the personal data that affect people's lives are collected, stored, processed and distributed across many public and commercial databases. At the EU level, the General Data Protection Regulation (GDPR)⁷⁴² was adopted to regulate how private and personal data of individuals are used within the EU. The main objective of the GDPR is to strike a balance between 'privacy of individuals'⁷⁴³ as defined by Article 8 of the ECHR⁷⁴⁴ and the need for authorities to use personal data only for purposes that are legitimate. The GDPR is reinforced by provisions of the 1981 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.⁷⁴⁵

The protection of natural persons in relation to the processing of their personal data as well as their 'genetic data'⁷⁴⁶ is a fundamental right. Article 8(1) of the Charter of the Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) both provide that everyone has the right to protection of their personal data. Thus, where clarification of the fate and the whereabouts of missing and dead migrants is at issue, processing of personal data has to be done on the basis of the utmost interest of the migrant concerned or their relatives, as well as on the basis of overriding public interest or policy. In our context, states are under an obligation to ensure that data collected for the purpose of search, investigation and identification of dead migrants are compatible with both humanitarian and human rights purposes. Data relating to migrants are an essential part of their human dignity values and must be respected, whilst also facilitating data collection and sharing to assist states to clarify the fate of the missing.

Put together, these international and regional legal and policy frameworks and the responses of states to missing migrants examined above, all represent both past and current trends in decisions in response to the problem. The New Haven School requires us to go further than that to examine and/or forecast what might be the likely future trends in decisions in relation to the problem at hand in light of the changed and changing conditioning factors that characterised those past and current trends in decisions.

⁷⁴² Hereinafter 'GDPR (EU) 2016/679'.

⁷⁴³ Christopher Kuner, *European Data Protection Law, Corporate Regulation and Compliance*, 2nd edition, (Oxford: Oxford University Press, 2007) p. 1.

⁷⁴⁴ Article 8 ECHR.

⁷⁴⁵ Convention 108, CETS NO. 108, 1981.

⁷⁴⁶ Regulations 34 of the GDPR.

5.6 Forecasting Future Trends in Decisions in Light of Changed and Changing Conditioning Factors

Forecasting future trends in decisions is the fourth intellectual task of the New Haven School, and it requires evaluation of the realistic expectations of what will happen or is highly likely to happen in the future and not just a mere expression of what one believes should happen. It is a realistic approach to confronting real societal problems affecting real people. It requires us to understand the conditioning factors that characterised past trends in decisions, and “how they might express themselves in the future”.⁷⁴⁷ Taking into account the totality of the foregoing analysis in terms of international legal responses to missing migrants, what is clearly foreseeable may be evaluated from three contrasting perspectives. The first in a positive sense is a predicted change in course or direction in terms of EU states adopting and implementing new legal and policy responses to missing migrants that take into account the changed and subsisting conditioning factors brought about by the human rights decisions of the European Court of Human Rights such as that reached in the 2012 locus classicus case of *Hirsi Jamaa v Italy*. This case, it could be argued, influenced and changed Italy’s policy response to the Mediterranean migrant crisis marked by increased deaths at sea. As I observed in the foregoing analysis, Italy, in a positive response to this decision, had introduced the *Mare Nostrum* rescue operation in 2013 which was widely regarded as a huge success⁷⁴⁸ having saved more than 100,000 lives in the Mediterranean⁷⁴⁹ whilst also assisting to disrupt the activities of migrant smugglers risking migrant lives in the area.

At the EU level, the European Agenda on Migration was launched by the EU in 2015 in response to the deaths of nearly 3,771 migrants in the Mediterranean within the first five months of the 2015 migrant crisis.⁷⁵⁰ The second, perhaps, in a negative sense is an upward trajectory of anti-immigrant actions by states against those seeking to enter Europe and the UK through unauthorised, disorderly and irregular channels. Never before in the history of Europe has there been so much political attention given to journeys of transnational migrants,⁷⁵¹ than when migrants fleeing conflicts and repressions in Africa, the Middle East and other parts of the world started

⁷⁴⁷ Siegfried Wiessner and A.R. Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity’ (1999) *The American Journal of International Law* Vol. 93 No. 2. p. 332.

⁷⁴⁸ Carlo Motta, ‘Italy’s Rescue Operation Mare Nostrum Shuts Down with no Real Replacement: EU’s Triton instead Might put Lives at Risk’ *The European Sting Political Newspaper*, 4 Nov 2014.

⁷⁴⁹ Jim Yardley, ‘Migration Crisis Puts Europe’s Policy Missteps into Focus, Experts Say’ *The New York Times*, April 24, 2015.

⁷⁵⁰ UNHCR ‘Mediterranean Death Toll Soars, 2016 is the Deadliest Year Yet’ (2016).

⁷⁵¹ Thomas Huddleston and Hind Sharif *Who is Reshaping Public Opinion on the EU’s Migration Crisis?* (2019) Research Social Platform on Migration and Asylum (ReSOMA) Discussion Policy Brief p. 3.

jumping on the boats, drowning and going missing in the Mediterranean and at EU borders, with their families raising questions requiring answers from states. And third, is the increasing trend of politicisation of responsibility in terms of conflicting claims by states about who is responsible for what when it comes to dealing with missing migrants.

5.7 Appraisal, New Alternatives and Recommendation of Solutions

Appraisal, developing new alternatives, and recommendations of solutions in the common interest of the world community is the last intellectual task that the New Haven School proposes for the purpose of addressing real-world problems. Let us briefly consider each of these in relation to the problem of missing migrants at hand.

5.7.1 Appraisal

At the appraisal stage, we evaluate the inadequacies that have characterised past trends in decisions, to then develop new alternatives and recommend solutions that fit in line with human dignity and public order. This involves analysis of whether the primary goal of ensuring a *safe*, *orderly* and *regular* migration world based on human dignity and public order has been achieved. In order to do this, we have to assess the effectiveness or otherwise of the foregoing trends in decisions which aimed at achieving this goal. Have the decisions demonstrated enough showing of authority and controlling intent? With respect to *authority*, there is no doubt that the adoption of international treaties emanates from spirited negotiation and agreement of states which confers huge authority and legitimacy on the treaties in terms of their acceptability for policy-making and global migration governance. This puts states at the epicentre of *authoritative* decision making and international legal enforcement.

In terms of their *controlling* intent, this is where the problem lies, especially when viewed from the perspective of international legal enforcement. For example, at the EU level, while there may be acceptable legal and political rationales for the EU adopting the various policy measures, the practical approaches to the enforcement of the policies appear to take focus away from the intended public goals described earlier. In relation to the decisions of the ECtHR considered, there is no doubt that the regional court wields enormous *authority* and commands great power and respect when it comes to deciding issues of human rights that affect the interests of European states and the collective policies they pursue together at EU level. The ECtHR through its decision

delivers a message with *policy content* (e.g. 'do this' or 'don't do that'), emanating from a person or persons with *authority* (i.e. persons who the community expects to make legally binding decisions, such as ECtHR's judges) and showing a *controlling intent* (i.e. decisions that are backed up by realistic threats of deprivations in the event of non-compliance with issued decisions).⁷⁵² To this extent, it can be argued that the decisions of the court have both authoritative and controlling character such as to promote the values of human dignity.

Thus, from the analysis of the legal frameworks and the trends in decisions taken by states and judicial institutions like the ECtHR which emerged from the process of making and applying them, it may be argued that international and regional legal and policy responses to missing migrants have been a mixed bag of successes and failures. On the one hand, we have seen some progress made towards finding answers to the issue of missing migrants at the international level through the humanitarian and research works of IOM, ICRC and ICMP, all of which premises their activities on the fundamental principles of IHL and IHRL. At the EU level, some European states, including the UK and also EU institutions, have made efforts including providing funds for research⁷⁵³ into missing migrants but also for ameliorating the plights of migrants whilst also addressing the needs of their families. What is however not always forthcoming is the desired cooperation from other states, who often argue that the issue of missing migrants is not happening in their territories and therefore they are not responsible to account for missing and dead migrants.

5.7.2 New Alternatives and Recommendation of Solutions

Developing new alternatives and recommendations of solutions in the common interest is the last intellectual task that completes the five-step theoretical and methodological structure of the New Haven School. It concerns the evaluation of alternatives and recommending solutions to the foregoing problem of missing migrants that we have analysed. In view of those problems, a variety of legal and policy measures can be undertaken by states as a response. These may involve authoritative and controlling decisions on the part of national, regional and international decision-makers. However, the recommendations will be given in the concluding Chapter 10. In that way, I make the recommendations in light of the totality of the findings made in the study.

⁷⁵² Cf. Rosa Pati, 'Trading in Humans: A New Haven Perspective' (2012) *Asia Pacific Law Review* Vol. 20 No. 2 pp. 147-148.

⁷⁵³ For example, the Mediterranean Missing Migrants Research Project was funded by the ESRC UK.

5.8 Conclusion

The New Haven School does not promise or claim to guarantee one single, correct approach that answers every question of international law so completely that it succeeds in permitting reliable prediction of responses to global problems that will occur in distant, concrete circumstances. What it does offer, however, is a comprehensive and intellectual tasks-based approach to addressing complex societal problems such as the issue of missing migrants. One of its distinctive features is that it allows for maximisation of intelligence when analysing real-world problems, and to make more policy informed decisions that are premised on social choices rather than a mere stipulation of legal rules for which the moral value of obedience is assumed. The resolve of states to find answers to the issue of missing migrants can only benefit from this policy-attentive jurisprudence. The initial four phases of its methodological structure, from the allocation of the problem to the extrapolation of future decisions, is essentially analytical, and the fifth one is evaluative, normative and prescriptive.⁷⁵⁴ In this chapter, I have with the aid of this policy jurisprudence offered a legal analysis of the problem of missing migrants that international law seeks to solve; reflected on past responses of states to the problem; pointed out the inadequacies that characterised past trends; and then made a forecast of what future responses of states might be. Later in Chapter 10, I will offer recommendations that I hope should fit in line with the societal goal of promoting a safe, orderly and regular migration world based on the principles of shared values of human dignity.

With the foregoing analysis, I have attempted to unveil or bring to the fore what life vested with shared values of human dignity is like. I stressed the importance of states' upholding those values for migrants and their families in their quest for safety and survival. That analysis allowed us to see as much as possible one important side of the coin—the question of the meaning of life empowered by shared human values in relation to migrants. The opposite side of the coin and/or question that we have yet to address is, what life that is divested of the shared values of human dignity is like for migrants and their families in their daily struggle for recognition, survival and protection. In the next chapter below, I explore this opposite side of the coin or question using Agamben's concept of *bare life* to provide, on the one hand, some more theory grounded evidence beyond statistical figures, to understand the causes of migrant deaths at sea, borders and other liminal migration spaces; and on the other hand, understand the effects of biopoliticised policies of states on the obligations and responses of states towards missing migrants.

⁷⁵⁴ Siegfried Wiessner, 'The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law' *Asia Pacific Law Review*, Vol. 18 No. 1 pp. 45-61.

Chapter 6

Why Migrants Die and Go Missing in Transnational Migration: Agamben, State Responsibility and the *Bare Life* of Migrants

6.1 Introduction

The argument canvassed in this chapter is that the EU and EU states' inadequate legal protection of migrants and enactment of biopoliticised migration policies that ignore migrants' shared values of human dignity and right to have rights not only render void and ineffective the legal and policy responses and obligations of states towards migrants but also renders the migrant *bare life* and *rightless*. They prefigure the biophysical violence (understood as some 'form of violence whereby physical forces acts directly on migrating bodies')⁷⁵⁵ that migrants face in the spaces of exception often (but not always) leading to migrant deaths and migrants going missing at sea, state borders and other biopoliticised migration spaces. While existing literature largely attributes the deaths and disappearances of migrants in the Mediterranean Sea, state borders and other migration spaces to the restrictive, deterrent and militarised policies of EU states and other states, the reason and/or rationale behind why policies of states are framed in such restrictive, deterrent and militarised tone both in language and enforcement is grossly under-theorised in current literature.

Thus, my aim in this chapter is to provide through the lens of Agamben's biopolitics theory, more specifically his concept of *bare life*, a more theory grounded analysis and evidence to explain why, on the one hand, EU and EU states' laws and policies relating to migration are framed in the biopoliticised, deterrent and militarised way they are and the resultant effect of their enforcement in the way and manner so framed on the lives/safety of migrants. And on the other hand, to explain why such framing and enforcement turns states' legal and policy responses to the problem of missing migrants into what critics often call "organised hypocrisy"⁷⁵⁶ suggesting that the professed legal and policy commitments of EU and EU states to protection of migrants and honouring their obligations thereto are mere paper commitments that are not matched with consistent action by the EU. The whole idea is about unveiling the inside story of the devastating effect of the EU and

⁷⁵⁵ Vicki Squire, 'Human Dignity and Biophysical Violence: Migrant Deaths Across the Mediterranean Sea', part of the research project entitled 'Crossing the Mediterranean Sea by Boat' (2018).

⁷⁵⁶ Eugenio Cusumano 'Migrant Rescue as Organised Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarian and Border Control' (2018) *Cooperation and Conflict* Vol. 00 No. 0 pp. 1-22 p. 1. Cf. Adrian Hyde-Price 'A Tragic Actor'? A Realist Perspective on 'Ethical Power Europe' (2008) *International Affairs* Vol. 84 No. 1 pp. 29-44 p. 32.

EU states biopoliticised migration laws and policies on migrant lives and safety. Earlier in Chapter 2 of this thesis setting out the underpinning theoretical framework, I explained how the New Haven School of international law unveils to us the meaning of life vested with shared values of human dignity in relation to migrants' lives and lived experiences. In Chapter 5, I broadened that analogy within the framework of the international laws, decisions and policies that have been adopted by states at the UN and EU levels to respond to the problem of missing migrants. In the same vein, I pointed out that Agamben's concept of *bare life* unveils to us the reverse concept to life that is vested with shared values of human dignity; that is, a life that is dehumanised⁷⁵⁷ and divested of values of human dignity and its implications for migrants in their struggles for safety and survival. In this chapter, I will expand on that argument. I aim to demonstrate that biopoliticised policies of EU states designed to curtail migrant flows to Europe have structural links to migrant deaths and migrants going missing at sea and borders and evidence the limitations that the European states' migration policies have placed on the obligations of states towards missing migrants and also on the migrants' shared values of human dignity.

The chapter proceeds as follows: In Section 6.2, I engage with Agamben's 'biopolitics theory' and apply it to the plights and everyday struggles of migrants using the example of the *left-to-die boat* migrants case as an explication tool. In Section 6.3, I will consider the biopolitical governance of the migrant dead to gain a deeper understanding as to whether states' biopolitical control of live migrants as 'objects of interest' is also reflected in their governance or management of dead migrants. Then, in Section 6.4, I consider Arendt's theory of *right to have rights* from the perspective that it is a critical response to the biopolitical human condition and everyday struggles of migrants and argues that the right to have rights thesis is key to enforcing state obligations and enabling migrants to overcome *bare life*. In Section 6.5, I will present the summary of the analysis.

6.2 The Biopolitics of Irregular Migration and Everyday Struggles of Migrants at Sea and Borders: What Does Agamben Tell Us?

When human life is wagered and "included in the mechanisms and calculations of state power", and politics pivots around life as an object of power, we arrive at biopolitics, opines Agamben⁷⁵⁸

⁷⁵⁷ Cf. Steve Kirkwood, 'The Humanisation of Refugees: A Discourse Analysis of UK Parliamentary Debates on the European Refugee Crisis' (2017) *Journal of Community and Applied Social Psychology* Vol. 27 pp. 115-125.

⁷⁵⁸ Giorgio Agamben note 145 p. 3; Giorgio Agamben 'Introduction to Homo Sacer: Sovereign Power and Bare Life' in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham and London: Duke University Press, 2013) p. 134 & Giorgio Agamben *State of Exception* (Chicago: University of Chicago

and before him, Michel Foucault.⁷⁵⁹ That is to say, in the biopolitical ordering of modern society, the subjugation and subjectification of bodies and population are taken as the dominant system of social control.⁷⁶⁰ The consequence is the reduction of human life to mere biology when one is stripped of political rights by the state that has the ultimate power to determine who is in/excluded from legal protection as worthy sovereign human beings.⁷⁶¹ In order to have a good understanding of what 'concepts' and 'figures' make up Agamben's theory; what the structure of his thoughts is; and what it means to apply his biopolitical concept of *bare life* to missing migrants, it will be more appropriate to start this chapter's analysis using a real-life case or incident as an explication tool.

The case borders on the tragic story of 72 migrants who fled fighting in Libya in March 2011, taking an inflatable boat across the Mediterranean Sea and hoping to reach the small Italian Island of Lampedusa. After leaving the port of Tripoli and travelling about halfway to Lampedusa during their first day at sea, the boat ran out of fuel and started to fall adrift in the strait of Sicily for the following 14 days of their journey without food or water. The tragedy which has come to be known as the *left-to-die* boat case left 63 migrants dead and only about 9 survivors. In an interview following the incident, the survivors recounted their dreadful experience and series of interactions they had with many multinational military and maritime authorities⁷⁶² stationed in the area as they appealed for help from the authorities. This included a French military aircraft that flew over them, dropped biscuits and signalled it would return, two further encounters with fishing vessels, a military helicopter and a military ship as well as distress calls they put across to these authorities.⁷⁶³ In particular, the Italian and Maltese Maritime Rescue Centres and NATO forces present in the area were all alerted about the distress of the boat and its exact location, and had the logistical and technical ability to render assistance to the boat and its occupants.⁷⁶⁴ Despite the Mediterranean being one of the most heavily-monitored seas on earth at that material time, the boat in distress was never rescued, and the migrants on board were left-to-die.⁷⁶⁵ The incident

Press, London, 2005). Cf. Willem Schinkel, 'Illegal Aliens and the State, or: Bare Bodies vs the Zombie' (2009) *International Sociology* Vol 24 No 6 p. 780.

⁷⁵⁹ Michel Foucault note 146; Michel Foucault note 146 p. 403.

⁷⁶⁰ Jen Pylypa note 148 p. 21.

⁷⁶¹ Alisson Ross, 'The Agamben Effect: Introduction' (2008) *South Atlantic Quarterly* Vol. 107 No. 1 p. 8.

⁷⁶² Lorenzo Pezzani, 'Liquid Traces: Spatial Practices, Aesthetics and Humanitarian Dilemmas at the Maritime Borders of the EU' (2015) PhD Thesis, Goldsmith University of London pp. 122-123.

⁷⁶³ For a detailed account of the stories of the survivors of the 'left-to-die' boat incident, see the BBC Documentary on the incident, available at: <https://www.bbc.co.uk/sounds/play/p0101r27> (seen 7/12/2019).

⁷⁶⁴ Lorenzo Pezzani note 762 p. 123.

⁷⁶⁵ K.S Follis, 'Responsibility, Emergency, Blame: Reporting on Migrant Deaths on the Mediterranean on the Council of Europe' (2015) *Journal of Human Rights* Vol. 14 Issue 1 p. 41; Jack Shenker, 'Aircraft Carrier Left us to Die, say Migrants' (2011) *The Guardian* of Sunday 8 May 2011.

sparked international outrage prompting a subsequent investigation into the incident by the Parliament of the Council of Europe after adopting its *Resolution 1872*⁷⁶⁶ to that effect in a move to establish responsibility for the tragedy.⁷⁶⁷ The outcome of the investigation corroborated by the findings of the *Forensic Oceanography Project*⁷⁶⁸ was framed as a question of state responsibility and responses to the problem of irregular migration. It revealed a catalogue of legal, institutional and moral failures indicative of playing double standards in valuing human life on the part of states and several maritime authorities stationed in the Mediterranean at the material time.⁷⁶⁹

Although there have been several lethal boat mishaps in the Mediterranean Sea in recent past including the 2013 Lampedusa shipwreck in which about 366 migrants drowned⁷⁷⁰ and the April 2015 migrant shipwreck that left more than 800 migrants dead and many others missing,⁷⁷¹ what sets the *left-to-die boat case* apart from similar incidents is how the widely publicised global attention that the testimonies of the nine survivors attracted brought to public knowledge for the first time how perilous sea migration journeys unfolded in the Mediterranean.⁷⁷² The *left-to-die boat case* is arguably a perfect reflection of what Foucault, in *Society Must Be Defended*, claimed constitutes the literal meaning of sovereignty—the power of the state to *make live* and *let die*⁷⁷³ notwithstanding his later argument about the shift from sovereign power to bio-power, understood as shift from the power to ‘take life and let live’ in favour of power “to foster life or disallow it to the point of death”.⁷⁷⁴ Foucault’s expressed view of sovereign power is no doubt a striking resonance of Agamben’s conception of politics as “an ongoing tension between inclusion and exclusion, between forms of life the sovereign will protect and represent and those it will not”.⁷⁷⁵ In this regard, the biopolitical governance of migrant lives through fostering of their lives and at the same

⁷⁶⁶ Parliamentary Assembly of the Council of Europe Resolution 1872 (2012) entitled ‘Lives Lost in the Mediterranean: Who is Responsible’, available: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18234&lang=en>. (accessed 27/8/2021).

⁷⁶⁷ Tineke Strik, note 141.

⁷⁶⁸ Charles Heller *et al*, ‘Report on the Left-to-Die Boat’ *Forensic Oceanography*.

⁷⁶⁹ Jack Shenker, ‘Migrants Left to Die After Catalogue of Failures, Says Report into Boat Tragedy’, *The Guardian* 28 March 2012.

⁷⁷⁰ European Commission ‘Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions’ (2017) *EPSC Strategic Notes*, Issue 22 p. 3.

⁷⁷¹ UNCHR ‘The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees’ (2015) p. 2.

⁷⁷² K.S. Folis, ‘Responsibility, Emergency, Blame: Reporting on Migrant Deaths on the Mediterranean in the Council of Europe’ (2015) *Journal of Human Rights* Vol. 14 Issue 1 p. 42.

⁷⁷³ Michel Foucault, *Society Must Be Defended*, in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham & London: Duke University Press, 2013) pp. 61-81; Michel Foucault, ‘Right of Death and Power Over Life’ in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham and London: Duke University Press, 2013) pp. 41-60.

⁷⁷⁴ Michel Foucault, *The History of Sexuality: The Will to Knowledge V. 1: The Will to Knowledge*, Robert Hurley (trans) (London: Penguin Books, 1998d) pp. 136, 138.

⁷⁷⁵ Giorgio Agamben note 145.

time disallowing them to the point of death, (that is, allowing migrants to die or go missing at sea and border spaces) can be viewed as a “demonstration of sovereign power”.⁷⁷⁶ I will now examine more closely and critically Agamben’s *bare life* concept in relation to migrants and to demonstrate its invalidating effect on the legal and policy responses and obligations of states towards migrants using the *left-to-die* boat case as a tool of analysis.

6.2.1 The *Bare Life* of Migrants

When human beings are deprived of their human dignity values and rights, and have their political life destroyed, the result is what Agamben calls *bare life*.⁷⁷⁷ *Bare life* is a term Agamben borrowed from the works of German critic and essayist, Walter Benjamin.⁷⁷⁸ Benjamin wrote about *bloßes Leben* which when translated from German to English means ‘bare life’ or ‘mere life’.⁷⁷⁹ Agamben used two Greek words *bios* and *zoē* to illustrate the two kinds of life in human society; one that the sovereign recognises as belonging to the community of politically qualified human beings (*political life*) and the other classified only in terms of biological fact, the politically stripped human beings with no rights and protection (*bare life*).⁷⁸⁰ That *bare life* emerges in the ambiguous and emblematic zone of indistinction⁷⁸¹ between the *bios* and *zoē*; between exception and norm; that is, the limbo zone of ‘inclusive-exclusion’ where one is neither wholly included nor excluded from the political community or social group.⁷⁸² By implication, this means that political life is life vested

⁷⁷⁶ Simon Robins note 158 p. 3.

⁷⁷⁷ Giorgio Agamben, ‘We Refugees, Symposium’ (1995) *A Quarterly Journal in Modern Literatures* Vol 49 No 2 pp. 114-119; Giorgio Agamben, ‘Beyond Human Rights’ contained in the sub-part: ‘Means Without End, Notes on Politics’ in Sandra Buckley *et al.* (eds.) Vincenzo Binetti and Cesare Casarino (trans) *Theory Out of Bounds* Volume 20 (Minneapolis/London: University of Minnesota Press, 2000) p. 15; Giorgio Agamben, ‘Beyond Human Rights’ (2008) *Open, Social Engineering* No 15 pp. 90-95. Cf. Hannah Arendt ‘We Refugees’ (1943) *Menorah Journal* 31, No. 1 pp. 69-77. Cf. Hannah Arendt ‘We Refugees’ in Marc Robinson (ed.) *Altogether Elsewhere, Writers on Exile* (Boston: Faber and Faber, 1943) pp. 110-119.

⁷⁷⁸ Walter Benjamin, *Selected Writings Volume 1 (1913-1926)* Marcus Bullock and M.W. Jennings (eds.) (Cambridge, Massachusetts: Harvard University Press, 1996) pp. 297-98.

⁷⁷⁹ Walter Benjamin *ibid* pp. 297-98.

⁷⁸⁰ Agamben’s distinction of *bare life* from political life was hugely influenced by the writings of two Greek philosophers. The first is Plato’s mention of the three kinds of life in the *Philebus*. See Donald Davidson *Plato’s Philebus* Vol 10 (London and New York: Routledge, 1990) pp. 15-22. The second, is Aristotle’s distinction of the philosopher’s contemplative life (*bios theoretikos*) from the life of pleasure (*bios apolaustikos*) and the political life (*bios politikos*) in the *Nichomachean Ethics*. See Aristotle, *Nichomachean Ethics*, W.D Ross (trans) Kitchener (Batoche Books, 1999) p. 5. Aristotle, *Nichomachean Ethics*, David Ross (trans), Revised with an Introduction and Notes by Lesley Brown (Oxford: Oxford University Press, 2009) p. 6. Cf. Aristotle’s distinction between natural life and political life in his book *Politics*. See Aristotle *Politics* (trans) by Ernest Barker, R.F Stalley (ed.) Book 1 (Oxford: OUP, 1998) Ch. 2, p. 10.

⁷⁸¹ Giorgio Agamben note 758.

⁷⁸² Anthony Downey, ‘Zones of Indistinction: Giorgio Agamben’s Bare Life and the Politics of Aesthetics’ (2009) *Third Text* Vol. 23 Issue 2 pp. 112-113.

with values of human dignity while *bare life* is life deprived of such values.⁷⁸³ *Bare life* is produced in two major ways: first is when there is abandonment of life through the sovereign exception; and second, is when life is inevitably threatened by sovereign power.⁷⁸⁴

When the above meaning of *bare life* is applied to the example of the *left-to-die boat case*, it can be argued that the lack of intervention by the states by way of rescue from sea peril amounts to an abandonment of their international obligations to migrants which rendered the 72 migrants *bare life*. They were abandoned by multiple states' authorities whose naval ships and helicopters operated in the Mediterranean; the migrants were left to their fate and struggled helplessly as their lives crumbled and ended at sea. The various testimonies of the nine survivors of the boat were particularly striking because they demonstrate the tendency of states to easily neglect their obligations and turn away from boats carrying migrants even when in distress. As Basaran points out, states often want to turn away from such boats to avoid the likelihood of triggering state legal obligations, costly investigation, detention or prosecution that will follow.⁷⁸⁵ Many on board could have been saved, were it not for the authorities ignoring their cries.⁷⁸⁶ While under international law, states have obligations to render assistance to people in peril at sea; however, when it comes to the rescue of migrants at sea, there has been an increasing number of states' national migration policies that have sought to discourage the search and rescue of boat migrants; cracking down even on migrant solidarity⁷⁸⁷, criminalising the civil society and NGO rescue and humanitarian assistance to boat migrants⁷⁸⁸ and putting those involved in giving assistance on a criminal trial.⁷⁸⁹

It may be argued that the tendency of states to turn their back on irregular migrants in peril at sea is reflective of the binary distinction between migrants rendered *bare life* and those vested with values of human dignity and how such distinction sits tight at the foundation of anti-immigrant rhetoric that has dominated the European and wider global, political, and policy debates about irregular migrants and their perilous journeys. The effect is that the emblematic figure of the *bare*

⁷⁸³ Nicholas de Genova, 'Sovereign Power and the 'Bare Life' of Elvira Arellano' (2009) *Feminist Media Studies* Vol. 9 No. 2 pp. 245-50.

⁷⁸⁴ Decha Tangseefa, 'Imperceptible Naked-Lives and Atrocities: Forcibly Displaced Peoples and the Thai-Burmese in-Between Spaces' (2003) PhD Thesis, University of Hawai'i USA p. 20 pp. 31-32.

⁷⁸⁵ Tugba Basaran, 'Saving Lives at Sea: Security, Law and Adverse Effects' (2014) *European Journal of Migration and Law* Vol. 16 pp. 365-387 p. 367.

⁷⁸⁶ Tugba Basaran *ibid* p. 367.

⁷⁸⁷ Deanna Dadusc and Pierpaolo Mudu, 'Care Without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity' (2020) *Geopolitics* (online) pp. 1-21.

⁷⁸⁸ Human Rights at Sea 'Legal and Policy Matters Arising from the Increased Criminalisation of Civil Society Search and Rescue Activities in the Mediterranean' (2019) *HRAS Briefing Note*.

⁷⁸⁹ Paolo Cuttitta, 'Repolicitisation Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean' (2018) *Geopolitics* Vol. 23 No. 3 p. 637.

life migrant stands dehumanised both in language and law. This I contend is significant for three reasons: first, it enables states to justify their non-compliance with their legal obligations to protect migrants whilst also legitimising the loss of migrant lives at liminal spaces of exception such as seas and borders. Second, it underscores the argument that the failure of states and international human rights to protect migrants at sea is not just something that we can write off as “marginal or exceptional, instead, it is structural, consistent and endemic”.⁷⁹⁰ And third, such neglect of human life by states when irregular migration is at issue places some limitation on values of human dignity and prevents migrants facing imminent perils at sea from being recognised and humanised. While they (irregular migrants) are allowed to exist, they will have no identity or rights; they will remain what they are for Agamben—*bare life*. Agamben finds the paradigm of *bare life* produced as an effect of sovereign ‘ban’⁷⁹¹ in the figure of the *homo sacer* of Ancient Roman law⁷⁹², someone who in punishment was cast out of the community and denied his legal right to protection.⁷⁹³ He is in a precarious relationship with the law⁷⁹⁴; he is abandoned by the law⁷⁹⁵ in such a way that enables the states to “foster life or disallow it to the point of death”.⁷⁹⁶ In Agamben’s terms, once the *homo sacer* (the migrant in this context) is reduced to *bare life*, his legal protection is extinguished.⁷⁹⁷

In the context of the *left-to-die boat case* whose occupants (framed as the bearers of *bare life*) were abandoned by multiple state authorities and left to their own fate at sea, the idea of fostering life and at the same time disallowing it to the point of death is exemplified in the tension between the humanitarian goal of saving migrant lives and the externalisation goal of preventing migrants from reaching EU borders in the first place. This can be illustrated better by attempting to draw up and analyse the geography of the perilous journey of the *left-to-die boat* migrants from their departure zone in Libya through the risky Mediterranean and their failed attempt to reach

⁷⁹⁰ For detailed analysis of the failings of the international legal project of which human rights law is part of, see Jason Beckett, ‘Critical International Legal Theory’ (2012) *Oxford Bibliographies* p. 1.

⁷⁹¹ The word ‘ban’ is a term Agamben ostensibly borrowed from Jean-Luc Nancy’s notion of ‘ban’ whereby Agamben seeks to assert that the relation of exception is a relation of ban. See Jean-Luc Nancy, ‘Abandoned Being’ in *The Birth to Presence*, Brian Holmes (trans) (Stanford CA: Stanford University Press, 1993) pp. 36-47; Jean-Luc Nancy, ‘The Kategorein of Excess’ in *A Finite Thinking*, J.G Walsh and Simon Sparks (trans), Simon Sparks (ed.) (Stanford CA: Stanford University Press, 2003) pp. 133-51.

⁷⁹² Giorgio Agamben note 145 p. 71.

⁷⁹³ *ibid* p. 48.

⁷⁹⁴ Anthony Downey, ‘Zones of Indistinction: Giorgio Agamben’s Bare Life and the Politics of Aesthetics’ (2009) *Third Text* Vol. 23 Issue 2 p. 109.

⁷⁹⁵ Daria Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration Crisis’ (2019) *European Journal of International Law* Vol. 29 No. 4 p. 1182.

⁷⁹⁶ Michel Foucault, *Society Must be Defended*, Lectures at the *Collège de France* (1975-1976), Mauro Bertani and Alessandro Fontana (eds.), David Macey (trans) (New York: Picador, 2003) pp. 254-256; Michel Foucault note 773 pp. 61-81; Michel Foucault, ‘Right of Death and Power Over Life’ note 773 pp. 41-60.

⁷⁹⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Roazen (Trans) p. 114.

European arrival territories. In this analogy, and building on the works of Paolo Cuttitta,⁷⁹⁸ we can define the larger picture of the journey of the migrants as involving their crossing three major biopoliticised spaces of migration governance. The first is the North Africa space with Libya as the departure point for most migrants seeking to reach Europe from the region. The second is the space of the sea (Mediterranean Sea). And the third is the European space made up of different EU destination states that the migrants might wish to reach in search of safety and protection.

In this order, we can conceive the departure Libyan territory as a space of exclusion and chaos of some sort where the values of human dignity have been obliterated by war while we can conceive the European destination zones as a more uniform space of migration where the values of human dignity exist or more realisable for people living in them. The Mediterranean Sea on the other hand is conceived as a 'space-in between' which the migrants must cross in order to achieve their goal of reaching Europe. For Paolo Cuttitta, the prevailing logic of inclusion and exclusion in operation in the Mediterranean Sea will determine whether the migrants will reach their goal.⁷⁹⁹ The logic of inclusion is said to prevail when migrants are allowed to reach Europe through legal pathways and perhaps also granted protection, or when drowning migrants are rescued at sea and taken to safe zones to be attended to.⁸⁰⁰ In the same vein, the logic of exclusion is said to prevail when migrants are prevented by EU states from reaching Europe through legal pathways, forcing migrants to risk crossing the in-between Mediterranean sea space and other possible sea routes to Europe; or when they face distress at sea and are not rescued; instead, as de Genova argues, the exclusions 'render migrant illegality visible'.⁸⁰¹

These seeming opposing logics operate concurrently at European border zones despite their constitution as a more uniform space of migration governance. This is usually the case when multiple European states allow migrants who arrive their territories to secure protection (inclusion) and when they seek to stop migrants (usually through externalisation and securitisation practices) from reaching their territory or returning those who have reached their shores back to their origin states or taking them to detention facilities (exclusion). For example, in a recent case comparable

⁷⁹⁸ Paolo Cuttitta, 'Inclusion and Exclusion in the Fragmented Space of the Sea Actors, Territories and Legal Regimes Between Libya and Italy' in Elaine Burroughs and Kira Williams (eds.) *Contemporary Boat Migration: Data, Geopolitics and Discourses* (London and New York: Rowman and Littlefield International, 2018) p. 75.

⁷⁹⁹ Paolo Cuttitta *ibid* p. 75.

⁸⁰⁰ Paolo Cuttitta, 'Delocalisation, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2018) *Antipode* Vol. 50 Issue 3 pp. 783-803.

⁸⁰¹ Nicholas de Genova, 'Spectacles of Migrant 'Illegality': The Scene of Exclusion, the Obscene of Inclusion' (2013) *Ethnic and Racial Studies* p. 1180.

to the *left-to-die boat case*, in August 2020, some 45 migrants were reported to have drowned in the Mediterranean Sea; they were not rescued by any state vessel operating in the Mediterranean while the few survivors rescued by local fishermen were detained upon disembarkation in Libya; a place where they may be subjected to inhuman and degrading treatment⁸⁰² given the disturbing record of abuses of migrant human rights in Libya.⁸⁰³ Similarly, in the aftermath of the Lampedusa shipwreck of 2013 which marked a turning point in the EU migrant crisis, the Italian government granted hundreds of migrants who drowned in the Mediterranean posthumous Italian citizenship and turned back to charge the survivors of the same shipwreck with 'illegal migration'.⁸⁰⁴

In this analogy we can see that the Mediterranean Sea is stationed as a highly fragmented and uneven space of migration governance because of the imprecise and unpredictable decision-making by multiple state actors that leads to twists of fate one way or the other, thereby resulting in a high level of uncertainty in terms of the outcome and effect of decisions or actions taken by states in the maritime territory.⁸⁰⁵ For example, the decision whether or not to rescue migrants in distress could be the difference between life and death; decision either to foster life or disallow it to point of death. In the *left-to-die boat case*, we see that it was the logic of exclusion that disallows the life of migrants to the point of death that clearly prevailed, thus, alluding to the argument of some scholars that the exclusion of the migrants from protection "is not a careless expulsion, but a careful placing outside of the declared boundaries of the norm".⁸⁰⁶ The rendering of migrants as *bare life* is also a resonating reminder of the notion of the *Other* in Edward Said's seminal work *Orientalism*⁸⁰⁷ which reflects the contemporary politics of inclusion and exclusion in the nation-states legal and political system that is increasingly being fashioned, according to Arendt, after the order of 'nationalism'.⁸⁰⁸ The tragic experience of the *left-to-die boat* incident clearly unveiled the enormous human cost that comes with states choosing to allow the logic of exclusion to prevail at sea against migrants. That is to say, when humans are placed outside of the sphere of social

⁸⁰² United Nations Office of the High commissioner for Human Rights, 'Detained and Dehumanised' (2016) Report on Human Rights Abuses Against Migrants in Libya, 13 Dec 2016.

⁸⁰³ UNSMIL and OHCHR 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (2018) Joint Report of the United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, pp. 4-61; See also BBC News 'Dozens of Migrants Die in Shipwreck off Libya—UN' (2020) BBC News of 19 August 2020.

⁸⁰⁴ Hein de Haas, 'Lampedusa: Only the Dead Can Stay' (2013) Blog Article.

⁸⁰⁵ Paolo Cuttitta note 798 p. 78.

⁸⁰⁶ Prem Kumar Rajaram and Carl Grundy-Warr, 'Introduction' in P.K Rajaram and Carl Grundy-Warr (eds.) *Borderscape: Hidden Geographies and Politics at Territories Edge* (Minneapolis and London: University of Minnesota Press, 2007) p. XXI.

⁸⁰⁷ Edward W. Said, *Orientalism* (New York: Vintage Books, 1978) pp. 1, 21 & 24.

⁸⁰⁸ Hannah Arendt note 153.

life⁸⁰⁹ and the policy and practice of exclusion prevails against migrants, the law is turned into a mere management tool of exclusion despite it seemingly operating in the background.⁸¹⁰

As Davitti argues, in this ubiquitous situation whereby the EU and EU states, through their migration policies, sometimes but not always foster life through rescue of migrants at sea and at the same time disallow it to point of death through pushback operations against boat migrants,⁸¹¹ the continued role of international law in addressing the migrant crisis “needs to be problematised and made visible, as it contributes to the violent transformation of the EU borderscapes”.⁸¹² Using the case law analysis of right to life under Article 2 of the ECHR to problematise international law in the sense of its endemic failure to protect life, M.A. Nasir argues that the “juridical interpretation and application of the right to life produces a differentiated governmental management of life that orients governmental techniques to lives in order to ensure that both deprivation and protection of lives is lawful”.⁸¹³ Such failure to protect human life enables the enactment/institutionalisation of the state of exception and spaces of exception that make migrants increasingly more vulnerable to border violence and the attendant death and migrants going missing at border and sea spaces.

6.2.2 Migrants in the *State of Exception and Spaces of Exception*

Following Carl Schmitt’s notion of the state of exception and his idea of the sovereign as he who decides on the exception to rules that it safeguards,⁸¹⁴ Agamben claims that in order to inaugurate the biopolitical order that produces *bare life*, sovereign power enacts a state of exception⁸¹⁵ where the normal juridical order, human rights and the responsibilities of states to human beings are suspended. Agamben then locates the Nazi camps as spaces where this ban was fully deployed, the “hidden matrix of our time, the biopolitical paradigm of modern governments”.⁸¹⁶ He had

⁸⁰⁹ H.Y. Civelek, ‘Biopolitical Problematic: Syrian Refugees in Turkey’ in Deniz Eroğlu UTKU *et al*, (eds.) *Turkey’s Syrians: Today and Tomorrow* (London: Transnational Press London, 2017) p. 32.

⁸¹⁰ Daria Davitti, note 935 p. 1185.

⁸¹¹ Daria Davitti, *ibid* p. 1183.

⁸¹² *ibid* pp. 1178; Cf. Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) *Modern Law Review* Vol. 65 p. 377 (discussing how crisis mould and are moulded by international law).

⁸¹³ Muhammed Ali Nasir, ‘Biopolitics, Thanatopolitics and the Right to Life’ (2017) *Theory, Culture and Society* Vol. 34 Issue 1 p. 75.

⁸¹⁴ Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty*, George Schwab (Trans), (Cambridge, Massachusetts, and London, England: The MIT Press, 1985) pp. 5 & 15.

⁸¹⁵ Patricia Owens, ‘Reclaiming Bare Life: Against Agamben on Refugees’ (2009) *International Relations* Vol. 23 Issue 4 p. 567.

⁸¹⁶ Giorgio Agamben note 758 p. 178; Willem Schinkel, ‘Illegal Aliens and the State, or: Bare Bodies vs the Zombie’ (2009) *International Sociology* Vol. 24 No 6 p. 780.

argued that Foucault's analysis of biopolitics as an intervention on life omitted to locate the "concentration camp and the structures of the great totalitarian states of the 20th century"—the exemplary places of modern biopolitics—as the biopolitical paradigm of the West.⁸¹⁷ The camp for Agamben is not a mere historical anomaly, but the very "hidden matrix of our times, the *nomos* of the political space in which we all live".⁸¹⁸ Agamben's location of the camp as a space where the state of exception is prevalent must be understood in the proliferation of spaces of exception across societies.⁸¹⁹ For example, some scholars have framed the EU borderspaces as "necropolitical zones of exception"⁸²⁰ where the EU through the "technologies of surveillance"⁸²¹ 'produce *bare life*'⁸²² and force migrants to 'lose their right to have rights'.⁸²³

In the *left-to-die boat case*, the Mediterranean Sea, defined by logic of inclusive-exclusion and abandonment of life turned into a camp-like space of exception, a site of abjection where the boat migrants marked as 'irregular' were rejected and consigned to a state of exception by state authorities; and the outcome was deaths of 63 of the migrants on board the boat. This case points to the fact the European Agenda on Migration, designed to respond to cases exactly the same as the *left-to-die boat case*, does have the state of exception inherently embedded in its making and implementation. Not least since on the one hand, the EU Agenda is framed in humanitarian terms with the aim of saving migrant lives at sea and at the same time also framed in emergency terms to secure the borders, thereby allowing human lives that it was designed to save to also be treated as abandonable lives that can be left to die when EU interpretation of them is that they constitute a security threat to Europe. As Whyte argued in her comprehensive study of Agamben, "the convergence of humanitarianism and killing should serve as a provocation to rethink the contemporary relation between politics and life and death, and to interrogate the intersection of a power to kill with a commitment to maintaining life".⁸²⁴ After a close analysis of many incidents of

⁸¹⁷ Giorgio Agamben note 145 p. 136.

⁸¹⁸ Giorgio Agamben note 758 p. 178; Willem Schinkel note 816 p. 780.

⁸¹⁹ Noel Vaughan-William, 'Border Politics: The Limits of Sovereign Power' (Edinburgh: Edinburgh University Press, 2009).

⁸²⁰ K.N Mose and Vera Wriedt, 'Mapping the Construction of EU Borderspaces as Necropolitical Zones of Exception' (2015) *Birkbeck Law Review* Vol. 3 Issue 2 pp. 278-304.

⁸²¹ Sara Marino, *Mediating the Refugee Crisis: Digital Solidarity, Humanitarian Technologies and Border Regimes* (Palgrave Macmillan, 2021) pp. 41-68.

⁸²² Sonja Buckel and Jens Wissel, 'State Project Europe: The Transformation of the European Border Regime and the Production of Bare Life' (2010) *International Political Sociology* Vol. 4 pp. 33-49 p. 33.

⁸²³ Martin Lemberg-Pederson, 'Loosing the Right to Have Rights: EU Externalisation of Border Control' in E.A. Anderson and E.M Lassen (eds.) *Europe and the Americas: Transatlantic Approaches to Human Rights* (Brill Nijhoff, 2015) pp. 393-417.

⁸²⁴ Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (New York: State University of New York Press, 2013) pp. 19-20.

shipwrecks in the Mediterranean, Basilien-Gainche concludes that the abandonment of migrants to die at sea cannot be regarded as accidental events.⁸²⁵ Instead, they constitute a foreseeable consequence of EU and EU states' migration policies⁸²⁶ that use the language of humanitarianism professing to save lives to mask the violence of the border that render migrants vulnerable.⁸²⁷

Based on the above analysis, it is argued that the imperceptibility of the sufferings and struggles of migrants stems from their being rendered *bare life* and the view of the world from biopolitical paradigms by juridical power; a view that allows states to create 'deprivations' in the form of loss of rights and put migrants at the receiving end of these deprivations. In other words, migrants when left unempowered by states to acquire rights in their everyday struggles for safety become *bare life*⁸²⁸ "regulated and governed at the level of a population in a permanent state of exception".⁸²⁹ In their everyday struggles, they are located outside the pale of the law and denied essential values of human dignity such as *well-being, respect, empowerment* etc. This is where, some argue, the state "defines what it is to be human and thereby identifies an exception, the migrant as something other than human".⁸³⁰ Thus, the *left-to-die boat* migrants, like thousands of other migrants fleeing wars and human rights abuses, are a reflection of *bare life*.⁸³¹ In a bid to survive that *bare life* condition, migrants are forced to make the clandestine journeys that see them die and go missing at sea and border spaces. While it would be more appropriate to argue that the EU and EU states do not *always* allow migrants to die in the sense of treating migrant deaths as a *direct* result of bordering practices or failure to rescue at sea as some have argued,⁸³² there have nevertheless been policy developments in Europe that have led to increased practice

⁸²⁵ Marie-Laure Basilien-Gainche, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Brill Nijhoff, 2017) pp. 327-328.

⁸²⁶ Marie-Laure Basilien-Gainche *ibid* pp. 327-328.

⁸²⁷ Polly Pallister-Wilkins, 'Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders' (2017) *Global Policy* Vol. 8 p. 19.

⁸²⁸ Mattias Gardell, 'Torture, Terror and Truth: On the Meaning of Guantánamo and the Future of Global Order' (2008) *Temenos* Vol. 44 No. 1 p. 156. Cf. Giorgio Agamben, 'Beyond Human Rights' contained in the sub-part: 'Means Without End, Notes on Politics' in Sandra Buckley *et al*, (eds.) Vincenzo Binetti and Cesare Casarino, (Trans) *Theory Out of Bounds* Volume 20 (Minneapolis/London: University of Minnesota Press, 2000) p. 15; Giorgio Agamben, 'Beyond Human Rights' (2008) *Open, Social Engineering* No 15 pp. 90-95.

⁸²⁹ Patricia Owens, 'Reclaiming Bare Life: Against Agamben on Refugees' (2009) *International Relations* Vol. 23 Issue 4 p. 567.

⁸³⁰ Iosif Kovras and Simon Robins, note 322 p. 159.

⁸³¹ P.K Rajaram and Carl Grundy-Warr, 'The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia and Thailand' (2004) *International Migration* Vol. 42 Issue 1 pp. 31-41.

⁸³² R.L Doty 'Bare-Life: Border Crossing Deaths and Spaces of Moral Alibi' pp. 599-612; N.V Williams, 'We are not Animals: Humanitarian Border Security and Zoopolitical Spaces in Europe' (2015a) *Political Geography* Vol. 45 pp. 1-10.

of abandonment or desertion against migrants at sea and other migration spaces.⁸³³ It is argued that such biopolitical policies and practices of abandonment by states targeted at regulating migrating bodies render void the obligations of states to migrants and have *indirect* or *structural* links to migrant fatalities and going missing in migration. Not least since they are symptomatic of an operation of sovereign power that involves a particular kind or mode of migration governance that has the capacity or propensity to disregard the lives of those that are 'not deemed worth living'.⁸³⁴ In this sense, many scholars building on the work of Agamben conceptualise border-related deaths as an integral exercise or operation of sovereign power that governs through death contrary to the framing of border-related deaths by states as 'tragic accidents'.⁸³⁵

6.2.3 States, Migrants and *Forms of Resistance* in the State of Exception

Agamben's theory argues that the prerogative of the decision over the juridical and political value of lives is placed solely in the hands of state sovereigns, enabling them to wager migrant lives in their spaces of reference and produce as an effect *bare life*. Although, some scholars criticise Agamben's unbudging stance on state violence and abandonment of migrants for rather depicting migrants as 'passive' figures, overlooking migrants' multiple and micro-forms of resistance against state sovereignty; it is however contended that Agamben does not expressly rule out the probability of resistance against the exercise of sovereign power. Instead, he argued that the constitution and structure of state sovereign power leave little room for people rendered *bare life* to put up strong acts of resistance in a state of exception. It is submitted that migrants could actually stage some resistances in ways that demonstrate they are sometimes active and not always passive figures in a typical state of exception, especially given the enabling support they receive from international organisations that are activists for migrant rights.

In this instance, Ellermann considered migrants' resistance against state sovereignty in the state of exception as a possible "reversal of the state of exception."⁸³⁶ But what exactly is the nature of migrants' non-compliance or resistance against the successful exercise of sovereign power in the spaces of exception? From the earlier analysis of states' value claims against

⁸³³ Paolo Cuttitta, 'From the Cap Anamur to Mare Nostrum: Humanitarianism and Migration Controls at the EU's Maritime Borders' in C. Matera and A. Taylor (eds.) *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (CLEER, 2016) pp. 21-38.

⁸³⁴ Vicki Squire, 'Acts of Desertion: The Ambiguities of Abandonment and Renouncement Across the Sonoran Borderzone' (2015b) *Antipode* Vol. 47 Issue 2 pp. 500-516.

⁸³⁵ Nick Vaughan-Williams, *Europe's Border Crisis: Biopolitical Security and Beyond* (Oxford: Oxford University Press, 2015a) p. 47.

⁸³⁶ Antje Ellermann note 539 pp. 1-2.

migrants in Chapter 5, it may be submitted that the most significant resistance that migrants can put up against states' sovereign power is their neglect or rejection of state warnings regarding the dangers of unsafe, disorderly and irregular migration across international waters and borders and their resolve to continue with such journey regardless of the outcome. A good example of such migrant action is the case of two Sudanese migrants who attempted to cross the English Channel in a toy dinghy trying to reach the UK in 2020, one of which drowned.⁸³⁷ The one migrant who survived was reported as saying that he is "determined to try and reach the UK and is undeterred by the death of his pal".⁸³⁸ He said, "if I found a boat again or had a chance to get to the UK, I would."⁸³⁹ Migrant resistance actions of this nature appear to underscore the argument of some scholars that migrants who are desperately fleeing war cannot be deterred by any restrictive, stringent and deterrent state migration policies, instead, such policies will push migrants to more clandestine routes with increased risk of them dying and going missing in the process.

Another possible form of resistance of migrants against the state is that migrants who are missing but possibly still alive might choose to intentionally remain missing as a way of avoiding state detection in cases where, for example, they may have managed to enter into state territories illegally. These are some possible ways through which irregular migrants may attempt to resist the exercise of state sovereign power in biopolitical spaces of exception. However, these forms of resistance are not powerful enough to force a limit on states' exercise of governmental power to 'make live' and 'let die' especially where the scene of the resistance is the more deadly spaces of exception like the Mediterranean Sea. It is argued that in the space of the sea, their resistance would be more consistent with what James Scott called "weapon of the weak"⁸⁴⁰ whereby he contended that strategies of resistance by vulnerable figures in the society do not necessarily in themselves amount to acts of empowerment as such but are instead mere acts of desperation.⁸⁴¹ For example, the investigation into the *left-to-die boat case* revealed how migrants on board could only protest by waving their hands and "holding up dead babies"⁸⁴² to signal to the authorities that

⁸³⁷ Jon Lockett 'We Lost Him Quickly, Migrant, 28, Who Drowned Trying to Reach the UK in Toy Dinghy Tried to Clutch on but Couldn't Make it, Friend Reveal' (2020) *The Sun* of 21 August 2020.

⁸³⁸ Jon Lockett *ibid.*

⁸³⁹ *ibid.*

⁸⁴⁰ J.C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven and London: Yale University Press, 1985) pp. 31 & 52.

⁸⁴¹ J.C Scott *ibid.* pp. 31 & 52.

⁸⁴² Leonhard den Hertog, 'Two Boats in the Mediterranean and their Unfortunate Encounters with Europe's Policies Towards People on the Move' (2012) *Centre for European Policy Studies (CEPS) Paper in Liberty and Security in Europe No. 48/July 2012* p. 2.

they were drowning and facing imminent death⁸⁴³ but could do no more than that. Also, in the last moments before the Lampedusa shipwreck happened, the migrants on board had set fire to a blanket to attract the attention of maritime rescue authorities in the area that they are drowning⁸⁴⁴; indeed, a form of a desperate call to the states to enforce their legal obligation to assist and rescue the migrants in sea peril but received no positive response from the state authorities.

6.3 Biopolitical Control and Governance of the Migrant Dead

Based on the analysis so far, we can see that the rendering of migrants as *bare life* makes them vulnerable to violence and death at sea and borders. One further aspect of the question to address is whether the biopolitical control of the living as objects of interest by states is also reflected in the management of the dead? For Kovras and Robins, when migrants die, sovereign states often assign their dead bodies a status that is incompatible with their legal personhood, thus reflecting the contemporary biopolitical paradigm of how sovereign power is expressed at borders.⁸⁴⁵ Like live migrants who are reduced to *bare life*, so too are the bodies of dead migrants treated as bare or naked dead bodies condemned to the status 'to be discarded'; not worthy of dignified burial.⁸⁴⁶ Existing literature about state management of migrant bodies in the Greek Island of Lesbos and Italian Island of Lampedusa reveals that the authorities largely ignore the death of migrants as marginal to the concerns of the biopolitical.⁸⁴⁷ As such, it can be argued that migrant bodies have no political status assigned to them by the biopolitical; even though some experts have argued that the silence that circumscribes dead bodies and unidentified graves of dead migrants are politically significant because of the "absence of political capital invested in them".⁸⁴⁸ For Verdery, the 'political lives' of dead bodies captures the symbolic usefulness of human remains and political leaders deploy their graves to meet political objectives.⁸⁴⁹ However, in relation to migrants, states' interest in human life as object of political governance appears not reflected in the management of the dead⁸⁵⁰ since migrant dead bodies appear to be beyond the reach of sovereign power.

⁸⁴³ Michael Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) *Journal of Refugee Studies* Vol. 17 No. 1 pp. 50-66 p. 50.

⁸⁴⁴ Nick Dines *et al*, 'Thinking Lampedusa: Border Construction, the Spectacle of Bare Life and the Productivity of Migrants' (2015) *Ethnic and Racial Studies* Vol. 38 No. 3 pp. 430-445 p. 430.

⁸⁴⁵ Iosif Kovras and Simon Robins, note 322 p. 160.

⁸⁴⁶ Simon Robins, note 158 p. 4.

⁸⁴⁷ Iosif Kovras and Simon Robins, note 322 pp. 160-161.

⁸⁴⁸ Iosif Kovras and Simon Robins, note 322 p. 163.

⁸⁴⁹ Katherine Verdery, *The Political Lives of Dead Bodies: Reburial and Post Socialist Change* (New York: Columbia University Press, 2000) p. 33.

⁸⁵⁰ Iosif Kovras and Simon Robins, note 322 p. 159; Simon Robins, note 172 p. 4.

If death is beyond the reach of power and power has a grip on it only in statistical terms,⁸⁵¹ then migrants dead in migration, whether Alan Kurdi⁸⁵² or Valeria Martínez and father,⁸⁵³ indicates the stark failure of states to recognise their legal obligations to treat migrant dead bodies with dignity. For Judith Butler, the irregular migrant is implicit “an ungrievable life, one that cannot be mourned because...it has never counted as a life at all.”⁸⁵⁴ This indicates how lives that count and those that do not count in the registry of states also determine the hierarchy of bodies that count as mournable and those ‘unmournable’ upon death.⁸⁵⁵ It may be argued that the dead bodies of people who were perhaps administered and governed as *bare life* in life by sovereign power translate into bare bodies upon death and such enigma explains, at least in part, the drawing of lines between mournable and unmournable migrant bodies within the power relations structure of sovereign states. It is argued following Verdery⁸⁵⁶ and Mountz⁸⁵⁷ that biopolitical power, failing to recognise the life of migrants as liveable in their lifetime, prevents the recognition of their bodies as mournable bodies upon death and this complicates the grief of their families. Such a reality points to the fact that our human empathy towards dead bodies has limits, and it indicates the existence of a hierarchy of values that we place on humans both in life and in death as ‘worthy or unworthy lives’⁸⁵⁸ based on factors such as colour, race and the likes. In this regard, Jinah Kim’s work *‘Post-Colonial Grief’*,⁸⁵⁹ which draws on Fanon’s writings on melancholia violence⁸⁶⁰, and Hisaye Yamamoto’s short story *‘A Fire in Fontana’*,⁸⁶¹ recount moments of the afterlives of the pacific wars in the Americas when a new kind of transformative politics, understood as racial

⁸⁵¹ Michel Foucault, ‘Society Must Be Defended’ *Lectures at the Collège de France 1975-1976*, Mauro Bertani and Alessandro Fontana (eds.) David Macey (trans) (New York: Picado, 2003) p. 248.

⁸⁵² Yasmin Ibrahim, ‘The Unsacred and the Spectacularized: Alan Kurdi and the Migrant Body’ (2018) *Social Media + Society* pp. 1-8; S. Goodman *et al*, ‘How a Photograph of a Drowned Refugee Child Turned a Migrant Crisis into a Refugee Crisis: A Comparative Discourse Analysis’ (2018) *for(e)dialogue* Vol. 2 Issue 1: Special Issue (Forced) Migration and Media pp. 12-28.

⁸⁵³ Azam Ahmed and Kirk Semple, ‘Photo of Drowned Migrants Captures Pathos of Those Who Risk It All’ (2019) *The New York Times*.

⁸⁵⁴ Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (New York: Verso, 2004) pp. 20, 36 & 148.

⁸⁵⁵ Teju Cole, ‘Unmournable Bodies’ (2015) *Cultural Comment, The New Yorker*.

⁸⁵⁶ Katherine Verdery, *The Political Lives of Dead Bodies: Reburial and Post Socialist Change* (New York: Columbia University Press, 2000) p. 33.

⁸⁵⁷ Alison Mountz, ‘in/Visibility and the Securitisation of Migration: Shaping Publics through Border Enforcement on Islands’ (2015) *Cultural Politics* Vol. 11 Issue 2 p. 188.

⁸⁵⁸ Vicki Squire, ‘Governing Migration through Death in Europe and the US: Identification, Burial and the Crisis of Modern Humanism’ (2017) *European Journal of International Relations* Vol. 23 No. 3 p. 513.

⁸⁵⁹ Jinah Kim, *‘Postcolonial Grief: The Afterlives of the Pacific Wars in the Americas’* (Duke: Duke University Press, 2019) pp. 1-22 & 23-40.

⁸⁶⁰ See generally Frantz Fanon, *The Wretched of the Earth*, Richard Philcox (Trans from French) with Commentary Jean-Paul Sartre and Homi K. Bhabha (New York: Grove Press, 1963).

⁸⁶¹ Hisaye Yamamoto, ‘A Fire in Fontana [1985]’ in *Seventeen Syllables and Other Stories, Revised Edition* (New Brunswick: Rutgers University Press, 2001) pp. 150-157.

colonialism and neoliberal biopolitics, were enacted to distinguish between the deaths and bodies of those deemed unmournable, ungrievable and unworthy of remembering; and the lives that counted. When the unmournability of dead migrants is mentioned in that sort of historical context, it has been argued that in a biopolitical system that appropriates migrant bodies as exploitable bodies, merely crossing state borders already makes the journeying migrant a 'missing person' and their actual physical disappearances during their journeys are a result of biophysical violence they experience as the outcasts of the society.⁸⁶² So, in light of the prevailing condition of rejection and abandonment that characterises the migrant story, what possible remedies may be adopted to alleviate migrant sufferings, deaths and disappearances in their spaces of reference?

6.4 The Theory of *Right to Have Rights*: Hannah Arendt's Critical Response to the Biopolitical Human Condition and Everyday Struggles of Migrants

The remedy that Arendt proposes as a response to the failure of state responsibility to migrants, as well as the human insecurity and biopolitical human condition of migrants, is her theory of *right to have rights*.⁸⁶³ This is a concept she coined in her critical reflections on the mass displacement of refugees after World War I, but is now a term guiding modern studies on irregular migration.⁸⁶⁴ When she wrote in her influential essay '*We Refugees*' that refugees lost the "familiarity of daily life",⁸⁶⁵ experienced a "rupture of [their] private lives"⁸⁶⁶ and were "dispossessed of a political community that could render their actions, speech and opinion relevant and meaningful",⁸⁶⁷ she was referring to the 'rightlessness'⁸⁶⁸ of migrants. She described refugees as people who were excluded from the nation-state system; a system which from the moment it turned biopolitical and perverted to an instrument of nationalism started to render millions of migrants stateless and rightless in the world. Arendt recognises this as a 'tragedy' because it transformed states from

⁸⁶² Robin Reineke, 'Los desaparecidos de la frontera (The Disappeared on the Border)' in Raquel Rubio-Goldsmith *et al*, (eds.) *Migrant Deaths in the Arizona Desert* (Arizona University Press, 2016) pp. 132-133.

⁸⁶³ Hannah Arendt note 167 p. 296; Natalie Oman, 'Hannah Arendt's 'Right to Have Rights': A Philosophical Context for Human Security' (2010) *Journal of Human Rights* Vol. 9 No. 3 p. 282.

⁸⁶⁴ Monika Krause, 'Undocumented Migrants: An Arendtian Perspective' (2008) *European Journal of Political Theory* Vol. 7 No. 3 pp. 331-348; Cristina Beltrán, 'Going Public: Hannah Arendt, and the Spaces of Appearance' (2009) *Political Theory* Vol. 37 No. 5 pp. 595-622; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: CUP, 2004) pp. 49-70; Alison Kesby *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford: Oxford University Press, 2012).

⁸⁶⁵ Arendt note 153 p. 294.

⁸⁶⁶ Hannah Arendt, *The Jewish Writings*, J. Kohn and R.H. Feldman (eds.) (New York: Schocken Books, 2007a) pp. 264.

⁸⁶⁷ Hannah Arendt note 153 p. 376.

⁸⁶⁸ Hannah Arendt *ibid* pp. 293, 294-296.

being the guarantors of human rights to protectors of “only nationals”.⁸⁶⁹ Arendt argued that “the conception of human rights based upon the assumed existence of a human being as such” was ripped apart precisely the moment the nation-state system was confronted by refugees “who had lost all other qualities and specific relationships except that they were still human”.⁸⁷⁰

Arendt’s conception of the state of rightlessness of migrants clearly aligns with Agamben’s framing of irregular migrants as *homo sacer* and the ultimate embodiment of *bare life*—the victims of state repression. Before Agamben, Arendt had argued that the moment we realise that we are just ordinary humans with no political life and values of human dignity, the moment we are stripped of our ‘right to have rights’; our political right to action and speech taken away, then, we become aware of our ‘rightlessness’⁸⁷¹ and “expulsion from humanity”.⁸⁷² The absence of political life vested with values of human dignity exposes the “abstract nakedness of being human”⁸⁷³ and worthlessness of life “outside the pale of the law”.⁸⁷⁴ While calling for “a new guarantee for human dignity”⁸⁷⁵ of migrants in the world, Arendt claims that in order to truly become a bearer of human dignity, a person must have a *place* to be in the world, right to *belonging* in a state, recognition as having *legal personhood* and *political agency* to claim rights such as to render their actions and opinions significant. Her attempt to redefine human rights in relation to migrants suggest that she does not totally write off human rights as an abstraction despite her criticism of the 1948 Universal Declaration of Human Rights, instead, she claims that it would be meaningless and useless if it fails to empower human beings by according everyone a meaningful ‘place’ in the world. Arendt’s claim resonates with Burke’s who despite dismissing the ‘abstract’ rights of man as a “dangerous and revolutionary nonsense”, still managed to declare that what confers dignity on humans is not the fact of one’s humanness per se but rather the fact of one’s ‘place’ in society.⁸⁷⁶

I submit in light of the foregoing analysis that if we use Arendt’s theory of ‘right to have rights’ to evaluate the present system of human rights in the world, then migrants, especially those that daily share the same fate as those onboard the *left-to-die* boat perceived *not as* but *as if* they were stateless people in the world of today have become the paradigmatic example of human

⁸⁶⁹ *ibid* pp. 230-231.

⁸⁷⁰ *ibid* p. 299.

⁸⁷¹ *ibid* p. 296.

⁸⁷² *ibid* p. 297.

⁸⁷³ *ibid* p. 380.

⁸⁷⁴ *ibid* pp. 277, 283, 286; Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (London and New York: Routledge, 2016) pp. 7-8.

⁸⁷⁵ *ibid* (Preface section) p. ix.

⁸⁷⁶ Edmund Burke, *Reflections on the French Revolution* (1790) pp. 32-35.

beings who have lost their *place* and *right to have rights* in the world—there is little or no guarantee of legal protection for migrants caught up in irregular migration. The states' neglect of their obligations to migrants and lack of legal pathways to protection offered irregular migrants is a key determinant factor that explains the high rate of migrant deaths and migrants going missing at sea and borders as migrants fleeing conflict continue to cross to Europe through those more clandestine routes in search of values of human dignity and means of survival. However, despite the rightlessness of migrants and perplexities about the rights of man in a world, Arendt does not totally rule out the fact that migrant struggles for recognition make them “subject per excellence of emancipatory politics that challenges the current distribution of rights and contests the distinction between the insiders and outsiders”.⁸⁷⁷ It is argued that in order to challenge sovereign power and make human rights and the obligations of states to protect migrants more meaningful and relevant to migrants, Arendt's theory of right to have rights must be conceived as a productive, emancipatory and redemptive pathway to overcoming the *bare life* condition, thereby, enabling migrants to reclaim the values of human dignity. Not least because Arendt's theory continues to inspire modern efforts by human rights institutions such as the ECtHR,⁸⁷⁸ to influence states to recognise their obligations under international law by addressing the plights of migrants fleeing conflicts and violence in many parts of the world.

6.5 Conclusion

In this chapter, I have engaged with the works of Giorgio Agamben and the broader literature on biopolitics to analyse the main causes of migrant deaths in order to defend my claim that extreme exercise of state and governmental powers and enactment of deterrence-oriented migration and border policies against journeying migrants not only render void the legal obligations of states to migrants but also have a structural connection with migrant deaths and migrants going missing in transnational migration. The argument challenges states' frequent claims that deterrent migration policies are aimed at saving migrant lives at sea and borders and also preventing migrant deaths by deterring migrants from embarking on risky journeys. The analysis also demonstrates that the biopolitical control of live migrants as objects of interest by states appears not reflected in the management of dead migrants, despite some arguments suggesting that migrants “count more in death than in life”.⁸⁷⁹ Finally, I pointed out that in the fragmented space of the sea and borders

⁸⁷⁷ Nanda Oudejans note 535 p. 452.

⁸⁷⁸ The ECtHR's decision in *Hirsi Jamaa & Ors vs Italy* remains a key reference point in this regard.

⁸⁷⁹ Vicki Squire note 858.

where enforcing the state of exception as a rule against irregular migrants can easily materialise, there is not much space still left to imagine or determine how this state of exception could be reversed. Nonetheless, the direction offered by Hannah Arendt's right to have rights theory could be key to enforcing state obligations to migrants whilst also guaranteeing migrants a *place* in the world. Migrants becoming empowered and vested with shared values of human dignity in ways that are compatible with the principle of right to have rights in order to overcome *bare life* would ultimately be dependent on states recognising and acting on their obligations towards migrants and families of those already dead or missing. In the next chapter, I examine those key obligations of states towards migrants with particular focus on how the relevant obligations can be distributed, assigned or allocated to multiple states in practice under a framework of international cooperation.

Chapter 7

The Specific Obligations of States Towards Missing Migrants and Their Families

7.1 Introduction

In previous chapters setting out the theoretical and legal analysis, I established that biopolitical state migration policies that ignore migrants' shared values of human dignity and right to have rights forcibly reduce migrants to *bare life* and have structural links to migrant deaths and migrants going missing in migration. In such a situation as the *left-to-die boat case* demonstrates, questions about the responsibility of states towards migrants who died or went missing as an effect of such state practices and policies must necessarily arise.⁸⁸⁰ Therefore, this chapter seeks to address the question: what specific obligations do states have towards missing migrants and their families; to what extent have states lived up to them; and how, in practice, should we assign them to states under international law? I seek to determine what the attributable obligations are, their nature and contents (Section 7.2); how and in what ways the attributable obligations are to be shared or distributed to multiple states (Section 7.3); what should be each state's share of responsibility and the conditions for determining each state's level or share of responsibility (Section 7.4). And finally, (Section 7.5) concludes the analysis. These interrelated puzzles are what I tackle in this chapter using the law, normative political philosophy and political theory notions of framing responsibility as a tool to develop a responsibility-based argument that focuses on how the relevant obligations could be shared and allocated to states in practice.

7.2 Identifying and Examining the Specific Obligations of States

Under general and treaty international law, there are several obligations of states towards missing migrants, and they can be either substantive or procedural in nature. In terms of how we can interpret the obligations—whether they are obligations of *means* or of *result*, it is contended that there are no fixed criteria for determining their nature. I submit that the criteria for interpreting them should be subjective. This is so in that in some cases, interpreting the obligations as one of *result* is almost certainly going to prove vital especially when the right to life of migrants is at stake.

⁸⁸⁰ Francesco Messineo, 'The Left-to-Die Boat: Whose Responsibility for the Death of 63 Migrants in the Mediterranean' (2012) *EJIL Talk, Blog of the European Journal of International Law*.

In other cases, for example, in the management of migrant bodies, the resource demands to implement the obligation suggest that it could also be one of *means*, not of *result*. Following from the examination of all relevant international laws and the works of the 'Last Rights Project',⁸⁸¹ the Mediterranean Missing Migrants Project and the decisions of the European Court of Human Rights (ECtHR)⁸⁸² and the Inter-American Court of Human Rights (IACtHR)⁸⁸³ in the previous chapters, I conclude that the following international legal obligations listed below are the most fundamental obligations of states towards missing migrants and their families:

- a. Obligation to *prevent* and *investigate* migrant deaths and disappearances
- b. Obligation to respect the rights of families of missing migrants to 'know' the fate of their missing relatives
- c. Obligation to repatriate the remains of dead migrants to their families
- d. Obligation not to discriminate between deaths of citizens and non-citizens
- e. Obligation to offer special protection to child migrants
- f. Obligation to guarantee and respect the dignity of dead migrants
- g. Obligation to issue death certificates to families of deceased migrants
- h. Obligation to protect data obtained for purpose of investigation and identification of the dead migrants.
- i. Obligation to mark the gravesites of dead migrants
- j. Obligation to preserve the personal effects of dead migrants

While these obligations are mutually inclusive and interlinked and must be read, understood and interpreted in that light, the substantive obligation to prevent and investigate migrant deaths and disappearances, the obligation to search for missing migrants and respect the right of their waiting families to 'know' the fate of their missing relatives, as well as the obligation to repatriate migrant bodies to their surviving families in the event of confirmed deaths, are about the most compelling ones. Therefore, these three obligations are used to provide a largely descriptive analysis of the obligations of states towards missing migrants and their families whilst also making adequate references to all the other obligations in terms of their inextricability.

⁸⁸¹ Catriona Jarvis note 514 pp. 131-150; and Grant *et al* note 139 p. 3.

⁸⁸² The ECtHR has been at the forefront of all judicial efforts to protect the rights of migrants as exemplified in the *Hirsi Jamma & Ors v Italy* (GC) case.

⁸⁸³ The IACtHR has played similar role to the ECtHR in terms of protecting the rights of migrants. See A.C Beduschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges' (2015) *Refugee Survey Quarterly* p. 8.

a. Obligation to *prevent* and *investigate* migrant deaths and disappearances

From the analysis of the legal and policy frameworks in Chapter 5, it is clear that states have a substantive duty to prevent migrant deaths and migrants going missing including through ‘rescue operations’⁸⁸⁴ and this derives from migrants’ right to life⁸⁸⁵ and human dignity. The obligation of states to prevent deaths may be direct or indirect prevention. Direct prevention can be seen as a mitigation strategy that aims to prevent migrant deaths and migrants from going missing by reducing the risk factors and eliminating all possible, foreseeable root causes. It is a long-term, forward-looking strategy that aims to create an environment where migrant deaths and migrants going missing are less likely to occur. It presupposes states taking actions that are real, genuine and timely to tackle foreseeable threats to the lives of migrants.

Indirect prevention, on the other hand, can be seen as a deterrence strategy that states may employ when migrant deaths are reported, and the focus is to prevent a recurrence of such incidents. In implementing the obligation to prevent deaths, IHRL requires states to take adequate steps to offer special protection to child migrants. Given the vulnerabilities of children in migration,⁸⁸⁶ states have an obligation to take additional measures beyond that which would ordinarily be required of them to protect child migrants,⁸⁸⁷ in particular, unaccompanied ones. This obligation derives from the *parens patriae* doctrine,⁸⁸⁸ the *best interests’ principle*⁸⁸⁹ and *family reunification*⁸⁹⁰ principle under international law. Closely related to the substantive obligation of states to prevent deaths is the procedural obligation to investigate the deaths and disappearances of migrants where they have already occurred.

The obligation to investigate migrant deaths is expansive, not limited to only where state involvement is alleged, such as deaths resulting from border control activities and coast guard operations, but also extends to where deaths result from activities of other actors, example, deaths arising from activities of migrant smugglers and human traffickers. The duty to investigate

⁸⁸⁴ ECHR (Art. 2 & 13), UNCLOS (Art. 98) and SAR Convention (Regulations 1.3.1 & 1.3.2)

⁸⁸⁵ ECHR (Art. 2); UDHR (Art. 3); ICCPR (Art. 6) and CRC (Art. 6).

⁸⁸⁶ Marit Buddenbaum and Stephanie Rap, ‘Lost in Migration: Working Together to Protect Children from Disappearances, from European Priorities to Local Realities’ (2018) p. 6.

⁸⁸⁷ Article 22 of the United Nations Convention on the Rights of the Child (UNCRC).

⁸⁸⁸ The term *parens patriae* is a Latin legal maxim which means ‘parent of the country’. See Jacqueline Bhabha, ‘Legal Obligations of States with Regard to Child Migrant Death and Disappearances’ p. 73.

⁸⁸⁹ Article 3(1) of the United Nations Convention on the Rights of the Child (hereinafter the ‘UNCRC’); Art. 6 UNCRC.

⁸⁹⁰ Arts 9, 22(2) & 39 UNCRC; Art 25 of the African Charter on the Rights and Welfare of the Child 1990.

deaths further extends to identification and preservation of the remains of dead migrants.⁸⁹¹ Investigation into migrant deaths is required to commence as soon death is reported,⁸⁹² and aims to protect the interests of all parties affected, especially the deceased's next-of-kin.⁸⁹³ Through investigation, the cause, manner, place and the time of death and the complicity of persons in the deaths are revealed and accountability can be established.

For state investigations into migrant deaths and disappearances to be deemed compliant with IHRL and minimum legal standards, there must be no discrimination between the deaths of nationals and of non-citizens and adequate steps must be taken by states to avert and investigate all suspicious migrant deaths.⁸⁹⁴ In *A & others v Secretary of State for Home Department*,⁸⁹⁵ it was held that it is discriminatory and incompatible with UK's international human rights obligations to limit the liberty of non-nationals on grounds of state security if the limitation did not also apply to nationals. It follows that states cannot apply their laws or deploy investigative resources in ways that distinguish between citizens and non-citizens when investigating deaths. In addition, during an investigation, the personal and genetic data of migrants or their family members are likely to come into possession of state authorities and should be protected.⁸⁹⁶ Overall, the obligation to investigate human disappearances has been interpreted as part of the wider 'right to remedy or reparation' both within the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights.⁸⁹⁷

b. Obligation to *Respect* the Rights of Families of Missing Migrants to 'Know' the Fate of their Missing Relatives

The obligation to investigate migrant deaths is linked to the duty to respect the right of families to 'know' of what has become of their missing relatives.⁸⁹⁸ The right of families to know about the whereabouts of their missing relatives is part of the wider right to family life.⁸⁹⁹ Families can only know what happened when the cause and circumstances of deaths are established, and this information follows from search and investigation. This extends to the right to be informed of the

⁸⁹¹ Stephanie Grant, note 30 pp. 8, 13.

⁸⁹² Stephanie Grant *ibid* p. 17.

⁸⁹³ ICRC *Guidelines for Investigating Deaths in Custody* (Geneva Switzerland, 2013) p. 9.

⁸⁹⁴ Stephanie Grant, note 30 p. 9.

⁸⁹⁵ *A & others v Secretary of State for the Home Department* [2004] UKHL 56.

⁸⁹⁶ CFREU (Art 8); ICMP Hague Conference on Missing Persons, Netherlands (2013) p. 18.

⁸⁹⁷ Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations under International Law' (1990) *California Law Review* Vol. 78 Issue 2 p. 478.

⁸⁹⁸ ICCPR (Art. 19) and UNDHR (Art. 19).

⁸⁹⁹ *Pannullo and Forte v France* [2001] Application No. 37794/97 paras 31-40 ECtHR.

existence or commencement of investigation into the disappearances of their relatives and up-to-date reports of the progress of such investigation and any obstacles encountered.⁹⁰⁰ Thus the right to know requires states to *collect, preserve and respect* the bodies of the dead migrants.⁹⁰¹ Experts argue that enforcing this right would require states to establish “protocols for exhumation, antemortem data collection, autopsies and identification, based on scientifically valid and reliable methods and technologies”.⁹⁰² The ICRC suggests that standardised policies and procedures to account for the dead and those missing should be developed by relevant state authorities (courts, investigators, forensic institutes etc.)⁹⁰³

c. Obligation to Repatriate Remains of Dead Migrants to Families

Where migrant death is established, and their bodies recovered following an investigation, states are required under IHL to repatriate the bodies to their families.⁹⁰⁴ Repatriation of bodies provides families the closure they need but also serves as a respect for the dignity of the dead.⁹⁰⁵ However, it is still a matter of debate whether states also have a substantive obligation to respect the dignity of the dead.⁹⁰⁶ For the conservative legal minds who defend the legal rule that rights die with the dead and that only the living bear rights,⁹⁰⁷ states do not have any legal obligation whatsoever to recover, identify or honour dead bodies. It is argued on the contrary that respect for the dignity of the dead has always formed part of cultures, traditions and literature of societies dating back to the primordial times.⁹⁰⁸ Think of Ugo Foscolo’s *Of the Sepulchres*,⁹⁰⁹ a poem written as a protest against Napoleon’s decree against tomb inscriptions. Also, Sophocles *Antigone* where Antigone vowed to bury her brother’s dead body in defiance of Creon’s edict.⁹¹⁰ In contemporary times, the Italian Criminal Code punishes crimes against the dead’s piety.⁹¹¹ The Additional Protocol II of the Geneva Convention requires parties to an armed conflict to take steps after an engagement

⁹⁰⁰ *Moiwana Village v Suriname* (Inter-Am Ct. H.R., (Ser. C) No. 145 (2005) para 86(15).

⁹⁰¹ ICRC Report: ‘The Missing and their Families, Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts’, 19-21 February 2003.

⁹⁰² *ibid.*

⁹⁰³ ICRC *Forensic Identification of Human Remains*, Dec 2013 <https://www.icrc.org/eng/resources/documents/publication/p4154.htm> (accessed 16/9/2019).

⁹⁰⁴ Geneva Convention, Additional Protocol I [Article 34(2)].

⁹⁰⁵ Frances Webber, ‘Respecting the Dead’ (2017) *Institute of Race Relations*.

⁹⁰⁶ *Akpınar & Altun v Turkey*; *Genner v Austria* ECHR (Arts 3 & 8) and *Italian Penal Code* (Arts. 407-413); Steven Luper, ‘The Moral Standing of the Dead’ (2018) *Phil. Trans. R. Soc. B* Vol. 373 Issue 1754.

⁹⁰⁷ Kirsten Rabe Smolensky, ‘Rights of the Dead’ (2009) *HOFSTRA Law Review* Vol 37 p. 763.

⁹⁰⁸ Katsumi Shimane, ‘Social Bonds with the Dead: How Funerals Transformed in the Twentieth and Twenty-first Centuries’ (2018) *Phil. Trans. R. Soc. B* Vol. 373 Issue 1754.

⁹⁰⁹ Ugo Foscolo, *The Sepulchres: Addressed to Ippolito Pindemonte from the Italian of Ugo Foscolo* (1820).

⁹¹⁰ Sophocles, *Antigone*, Greek Tragedy (442 BCE), R.C. Jebb (Trans into English).

⁹¹¹ Italian Penal Code, Articles 407–413.

to search for the missing dead and prevent their bodies from being despoiled and to decently dispose of them.⁹¹²

Inextricably interlinked with the substantive obligation to repatriate dead bodies to their surviving families is the procedural obligation to issue a death certificate to the deceased's family despite the argument that in contexts of migration "death management systems are not designed with migrants in mind..."⁹¹³ The fourth Geneva Convention specifically requires that "deaths of internees shall be certified in any case by a doctor, and a death certificate shall be made out, showing the causes of death and the condition under which it occurred".⁹¹⁴ Where for legitimate reasons states are unable to repatriate bodies, they are under an obligation to bury the bodies decently and protect and mark the gravesites for easy and accurate identification.⁹¹⁵ The names of those dead, their age and place of origin may be inscribed on the tomb as part of the mark of identification. The surviving family members and relatives of those buried in those gravesites must be allowed safe and unhindered access by states to the gravesite to pay respect to their dead and to erect memorials. The UN Inter-Agency Guidelines recognises that families be "informed about the location of gravesites and have full access to them..."⁹¹⁶

7.3 Implementing and Operationalising the Obligations in Practice: How Should We Share, Allocate and Distribute Responsibilities to States?

The legal obligations considered above, ranging from the obligations to prevent and investigate deaths to obligations to respect the rights of families to know the fate of their missing relatives, are no doubt strong obligations under IHRL. However, it has been recognised that considering the transnational nature of human migration, it would be impossible for any individual state to fully realise these obligations or effectively deal with cases of migrants missing without cooperation from other states. The imperatives of such a cooperative approach to solving contemporary human problems were stressed in the *Anglo-Norwegian Fisheries* case, with Judge Alvarez stating "the traditional individualistic regime on which social life was founded was being substituted by a new regime, namely the regime of social interdependence".⁹¹⁷ The GCM already

⁹¹² Article 8 of the Second Additional Protocol (AP II) to the Geneva Convention 1949.

⁹¹³ Stefanie Grant *et al*, 'Last Rights Project, note 139 p. 3.

⁹¹⁴ Article 129 of the Fourth Geneva Convention 1949.

⁹¹⁵ Geneva Conventions 1949 (IV—Art. 130) and Additional Protocol I to the 1949 Geneva Convention, (Art. 34(2)(b)).

⁹¹⁶ IASC Guidelines D.3.9.

⁹¹⁷ *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* ICJ Reports 116 (1951), 149.

recognises that the issue of missing migrants is a transnational social problem that requires greater cooperation between states, as well as, policies with transnational effects.⁹¹⁸ Against this backdrop, questions about how responsibility may be shared or allocated to multiple states within that international cooperation system are repeatedly raised.⁹¹⁹ There are many arguments and theories that can be developed on this responsibility attribution question, but in this work, I put forward the following responsibility-based arguments as the most relevant. It is to the effect that the implementation of the obligations within an international cooperation system cannot be effective in practice unless:

1. There is established a clear formula for attributing, allocating or sharing responsibilities amongst the collective and individual responsible states, as well as defining the governing factors for determining each state's share or level of responsibility.
2. The conditions for allocating, sharing and attributing obligations exist, are clearly spelt out and consistently certain and predictable.

In the next sections below, I take up these points and develop my idea about how to assign, share, allocate and distribute obligations of states towards missing migrants and their families in the face of theoretical challenges. I build on my earlier analysis of the *left-to-die boat case* to examine the obligations of states towards irregular migrants generally and missing migrants and their families specifically through the lens of responsibility. This is important because the investigations into the *left-to-die boat* incident framed the multiple failures of several states and maritime authorities stationed in the Mediterranean at the material time as a matter of responsibility.⁹²⁰ But what sort of responsibility are we talking about here? The investigative report⁹²¹ arrived at a politically acceptable account that the abandonment of the *left-to-die boat* migrants was a direct result of 'collective failures' on the part of multiple states and supranational maritime authorities which makes a closer and critical examination of 'collective responsibility' and 'shared responsibility' of states imperative to allocating responsibility to multiple states in relation to migrants. I begin with the first point: the notion of shared responsibility of states, the challenges that attend it and how we can overcome them.

⁹¹⁸ GCM, Objectives 8(d) & (f) p. 3.

⁹¹⁹ Rebecca Dowd and Jane MacAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How' (2017) *International and Comparative Law Quarterly* Vol. 66 pp. 863-892.

⁹²⁰ K.S Follis, 'Responsibility, Emergency and Blame: Reporting Migrant Deaths on the Mediterranean in the Council of Europe' (2015) p. 43.

⁹²¹ Tineke Strik note 141.

7.4 The Shared Responsibilities of States

'United we stand' may perhaps be the best phrase to describe what shared responsibility in light of state cooperation means for our context. But it is more than that, we have a problem here. What should shared responsibility mean for states, when dealing with the transnational problem of missing migrants in a migrating world where actions bringing about the bad outcomes often trigger dispersion of responsibility between states? While there are fewer difficulties attributing responsibility to individual states for individually created outcomes, many theoretical drawbacks attend situations where multiple states are involved in causing the same bad outcomes. For Marion Smiley, if we use criteria such as justice, equity, effectiveness and power to determine how we can allocate responsibilities, it may be argued that those states best placed or with the capacity to effectively remedy the prevailing bad state of affairs in the world should incur a greater share of responsibility than others,⁹²² regardless of the different levels of contribution of individual states to the collective bad outcomes. A counterargument might be that we cannot simply substitute *causal responsibility* with the *capacity to right a wrong*.⁹²³

To effectively engage with these responsibility challenges, we have to understand that shared responsibility deals with the responsibility of group members/multiple actors where they contributed to or acted together to bring about the same bad outcome.⁹²⁴ We hold that multiple actors (states) contribute to the same bad outcome in different ways by their actions, interactions and activities, especially in the contentious areas of migration and climate change. In the context of climate change, for example, David Miller finds that states as collective moral agents have an ethical obligation, a duty of justice to do no harm to the world or avoid harm to the world.⁹²⁵ The same could be said about a collective group of states whose group migration policies cause or increase the risk of migrant deaths and migrants going missing at sea, borders etc. Miller is concerned about developing a principle for distributing responsibilities to a collective group of states as group members for bringing about these harms, in such a manner that each state within that group knows what they have to do to remedy a breach and bring about a desirable outcome. Thus, shared responsibility so conceived seeks to distribute or allocate the legal, moral and

⁹²² Marion Smiley, 'Collective Responsibility' (2005) *Stanford Encyclopaedia of Philosophy*.

⁹²³ Marion Smiley *ibid*.

⁹²⁴ A Nollkaemper, 'The Duality of Shared Responsibility' (2018) *Contemporary Politics* Vol 24 No 5 p. 528.

⁹²⁵ David Miller, *Global Justice and Climate Change: How Should Responsibilities be Distributed*, The Tanner Lectures Delivered at Tsinghua University, Beijing, 24-25 March 2008 pp. 119-156.

remedial responsibility for bad outcomes to states. The assignment of shared responsibilities to responsible agents (states) for bringing about the problems being considered is viewed as a way of correcting injustices at the global level.

It is also important to clarify shared responsibility as well as the conditions of agency that distinguish it from other notions of responsibility. First, shared responsibility refers to the responsibility of multiple agents e.g. states, international organisations, individuals etc. for harm in the world.⁹²⁶ Second, the responsibility of the multiple agents is for their contributions to a 'same' as opposed to 'distinct' bad outcomes.⁹²⁷ Third, causation is not to be used as the only basis for attributing responsibility to any agent,⁹²⁸ although causation, as we shall see later, is a good way of identifying a good candidate for outcome responsibility. And fourth, the responsibility of the multiple agents is distributed to them separately not collectively,⁹²⁹ even though this aspect of shared responsibility builds on the notion of collective responsibility. For the last example, collective responsibility is about the responsibility of collective entities understood as 'collectives' for harm in the world, while shared responsibility refers to the responsibility of individual members of that entity in cases where they acted together to bring about harm. Thus, overall, we can understand responsibility on three overlapping levels: (a) shared responsibility of multiple states as members of a collective group; (b) collective responsibility of states as 'collectives'; and (c) individual responsibility of states acting alone, not being members of any collective group.

It is also important to note that 'shared responsibility' is sometimes used interchangeably with 'joint responsibility' although the latter is narrower in scope. The idea is that by using 'joint responsibility' to also refer to 'shared responsibility', we will better account through the state, the contributions of other agents to bad outcomes. Understood in this way, it would be more suitable to divide instances of shared responsibility into two main groups for our context. The first is a *cooperative* shared responsibility which treats responsibility as arising out of joint or concerted actions.⁹³⁰ The second is *cumulative* shared responsibility whereby responsibility for bad outcomes may not necessarily arise out of consent to the collective action, and therefore, the resulting consequence may not necessarily ground responsibility.⁹³¹ For the remaining parts of

⁹²⁶ Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) *Michigan Journal of International Law* Vol 34 Issue 2 p. 366.

⁹²⁷ Andre Nollkaemper and Dov Jacobs *ibid* p. 367.

⁹²⁸ *Ibid* p. 367.

⁹²⁹ *Ibid* p. 367.

⁹³⁰ *ibid* p. 368.

⁹³¹ *ibid* p. 369.

this responsibility analysis, the former, that is, cooperative shared responsibility, will be the ideal vehicle for responsibility attribution. This is important because state responsibility in the area of transnational migration builds primarily on the framework of international cooperation between multiple states, without which responsibility attribution may not be operationalised. To put shared responsibility in light of state cooperation, and the apparent challenges associated with it, in perspective let us now consider the various responsibility attribution approaches through which responsibility towards missing migrants may be assigned to multiple states and what should be their share of responsibility within an international cooperation system.

7.4.1 Forward-Looking Responsibility Attribution Approach

The forward-looking responsibility concerns the responsibility of agents for a particular state of affairs in the world.⁹³² In forward-looking responsibility, our focus is not to tell the causal story of agents, how they have caused an undesirable state of affairs in the sense of blameworthiness and how they should be responsible for causing bad outcomes; rather, our attention is on what the agents should *now be doing* in the world to put things right, having caused the bad outcome. It asks, 'who should do this thing?'⁹³³ Hence, it is also often called *remedial* responsibility.⁹³⁴ Miller defines remedial responsibility as an obligation incumbent upon an agent "either individually or along with others, to remedy the position of the deprived or suffering people, one that is not equally shared with all agents; and to be liable to sanction...if the responsibility is not discharged".⁹³⁵ It is a kind of a prospective, future-oriented task, an example of duty-based responsibility.⁹³⁶ It is a responsibility that concerns duties and obligations for future events; the duty to prevent bad outcomes and produce good outcomes.⁹³⁷

Sometimes we wrongly assume that we should point out what tasks the agent should be doing and describe them as the agent's responsibility. That is not strictly what forward-looking responsibility is about. We do not say an agent has the responsibility 'X', rather we say the agent is responsible for making sure that a desirable state of affairs 'X' comes into existence. Thus,

⁹³² Marion Smiley, note 922'.

⁹³³ Miranda del Corral, *The Role of Forward-Looking Responsibility in Collective Responsibility for Omission* (UNED) p. 3.

⁹³⁴ Marion Smiley, note 922.

⁹³⁵ David Miller note 142 pp 98-99.

⁹³⁶ Robert Goodin, 'Social Welfare and Individual Responsibility' (Cambridge: Cambridge University Press, 1998) cited in Marion Smiley, 'Collective Responsibility'.

⁹³⁷ Peter Cane, *Responsibility in Law and Morality* (United Kingdom: Hart Publishing, 2002) Chapter 2.

when we apply forward-looking responsibility to missing migrants, our concern will not necessarily be to tell the casual story of how states caused migrant deaths or migrants going missing (bad outcomes) and how states should be responsible thereto, instead, our concern will be on what states should now be doing to remedy the existing undesirable situation having caused the bad outcomes. Thus, in forward-looking responsibility, instead of attributing blameworthiness to states for causing bad outcomes, we need to ascertain which agent is in the best position to do something about a problem. When we do, according to Robert Goodin, we would realise that in practice and in many cases, the agent that caused the bad outcome may not actually be the one who is now able to remedy it.⁹³⁸

It may be argued that Goodin's view is one essential position that states should accept if the problem of missing migrants is to be addressed substantially. This is not suggesting total abandonment of causal responsibility when ascribing forward-looking responsibility since judgment arising from such is founded on the principles of justice and fairness, instead, it is to stress the impropriety of grounding forward-looking responsibility exclusively on causal responsibility. So then, how should we ascribe forward-looking responsibility in practice? I hold the view that we should allow room for different kinds of practical judgments in relation to non-casual matters in respect of which we seek to assign responsibility. This would be inclusive of judgments that draw attention to who is best suited to remedy existing bad outcomes as Goodin argued,⁹³⁹ at what cost and relative value, as well as questions of justice and fairness. In that way, based on existing laws and political commitments that states have undertaken or incurred for various reasons, forward-looking responsibility can be attributed.⁹⁴⁰ The notion of backward-looking responsibility is considered below to further buttress this point.

7.4.2 Backward-Looking Responsibility Attribution Approach

Just as we can apply responsibility for the existing state of affairs in the world, so too we can apply responsibility to our past actions. As reflexive agents, we are able to remember and reflect on those things we did in the past, why we did them and the consequences of our actions. Being retrospective in nature, backward-looking responsibility seeks to know who has authored a particular state of affairs in the world—it asks, 'who has done this thing?'⁹⁴¹ For example, as we

⁹³⁸ Robert Goodin, note 936 p. 50.

⁹³⁹ Marion Smiley, note 922.

⁹⁴⁰ Objective 8 of the GCM.

⁹⁴¹ Miranda del Corral note 933 p. 3.

know, the missing migrant crisis is a serious social, legal and political problem for the world today; so now, the question that is repeatedly raised by all concerned is, who is he that has done what resulted in migrant deaths or migrants going missing or who is he that has authored the specific events that lead to migrant deaths or migrants going missing? If it relates to responsibility for omission to carry out an obligation, it asks, who should have done this thing?⁹⁴² Thus, backward-looking responsibility is a historically oriented account that seeks to understand the relationships of agents to past events that led to or gave rise to the present bad outcomes.

Based on this account, we are able to form judgments about those responsible agents, their moral character and their causal contributions to events of today. It looks at a chain of historical incidents in order to identify the agent that should bear responsibility for bringing about a harmful outcome. For instance, some scholars have looked into the relationship between the past activities of former colonial states in the territories of their erstwhile colonies and how those past activities contributed to or triggered the current global refugee crisis.⁹⁴³ For migration to the UK, the Oxford Migration Observatory argues that: “colonial links and networks remain important determinants of the origins and composition of migration to the UK”.⁹⁴⁴ Thus, in engaging with the transnational problem of missing migrants, we have to develop our understandings of the past⁹⁴⁵ and appreciate that “history is the fruit of power”.⁹⁴⁶ The idea is that by inquiring into the past conducts or behaviours of agents, and how they brought about today’s bad outcomes, we are able to make a fair judgment and assign responsibility to whomever it belongs.

Like Lucy Mayblin⁹⁴⁷ I do not argue that paying attention to history is the only trajectory through which we can identify the most responsible states for bad migration outcomes, neither is it intended to provide a singular proposition that invalidates all others. Rather, it is to stress something that has hitherto been paid little attention to in current studies about migration. We

⁹⁴² *ibid.*

⁹⁴³ E. Gutiérrez Rodríguez, ‘The Coloniality of Migration and the Refugee Crisis: On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism’ (2018) *Refuge* Vol 34 No 1 pp. 16-25.

⁹⁴⁴ Mathias Czaika and Hein De Haas, ‘Determinants of Migration to the UK’ (2017) *The Migration Observatory Policy Briefing (2nd Revision)*, University of Oxford, p. 4.

⁹⁴⁵ Philip Marfleet, ‘Refugees and History: Why We Must Address the Past’ (2007) *Refugee Survey Quarterly* Vol 26 Issue 3 pp. 136-146 p. 136.

⁹⁴⁶ Michel-Ralph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press Books, 1995) p. xix.

⁹⁴⁷ Lucy Mayblin, ‘Colonialism, Decolonisation and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees’ (2014) *Journal of Historical Sociology* Vol. 27 No. 3 p. 424.

often hear about modern states paying reparations for the historical injustices of the past.⁹⁴⁸ As such, historical activities of agents do matter when assigning responsibility to them for bad migration outcomes. This is key to operationalising backward-looking responsibility in migration context given that it is of different kinds: causal, moral, legal and outcome responsibility.

Although each of these responsibility types may be distinct both in nature, character and content, the justifications for attributing any of them to agents tend to overlap in practice; and in almost all cases, it would appear desirable to collapse them into one so that we can attribute responsibility more holistically. Nonetheless, it is still important that we keep the line of difference between them and not blur it, so that whilst we seek to understand responsibility more holistically, we also benefit from the dialectical interactions between them when assigning responsibility. The first, *causal responsibility*, uses responsibility to describe the *cause-and-effect* relations of responsible agents to the outcome they produce.⁹⁴⁹ For example, we can say that border violence by states leads to migrant deaths at borders (cause) and thereby brings about grief to families (effect). In casual responsibility, we want to know why something happened;⁹⁵⁰ why did 'X' occur and who caused it? We want to know which of the many conditions that can make X occur did in fact make X occur and who brought it about? So, it is about establishing a connection (relationship) of the responsible agents (states) to the bad outcomes they generate.

The second, *moral responsibility* concerns the blameworthiness or praiseworthiness that we attribute to agents for their actions or conducts.⁹⁵¹ However, we should understand that for practical reasons, moral responsibility may be persuasive only when it speaks to specific events or conditions that can be forthrightly attributed to agents on the basis that it was the blameworthy behaviour of the relevant agent that resulted in or gave rise to the event or condition complained of.⁹⁵² For example, state 'A' should not have pushed migrant boats back to the high sea; it will result in loss of lives and migrants going missing; it amounts to moral failure—she should not have done that. Here, the specific event in question is the pushing of migrants boat back to the sea and the blameworthy behaviour of state 'A' is her unwise 'decision' to push the boat back to a death zone knowing fully well that such action could result in loss of lives and violate

⁹⁴⁸ For e.g., Germany's payment of reparation to the Jews for the Nazi Holocaust. See Melissa Eddy, 'For 60th Year, Germany Honours Duty to Pay Holocaust Victims' *The New York Times*.

⁹⁴⁹ Alexa Zellentin note 222 p. 6.

⁹⁵⁰ David Miller note 142 p. 86.

⁹⁵¹ Alexa Zellentin note 222 p. 6.

⁹⁵² M. Goodhart, 'Interpreting Responsibility Politically' (2017) *Journal of Political Philosophy* Vol. 25 No 2 p. 174.

international human rights norms. Thus, for moral responsibility, our focus is on the moral character of the agent; and it involves the opinions and judgments in the form of “appraisal or censure that we may hold in regard to behaviour of others in matters of morality”.⁹⁵³

The third, *legal responsibility* seeks to attribute responsibility to agents based on existing laws, mainly, international law of state responsibility and IHRL; which constitute the two main sources of law with the greatest relevance when it comes to the question of state obligation to redress issues around transnational migration.⁹⁵⁴ The foundational value upon which legal responsibility is based is that the law having created a system of reasonable expectations in society, there is need for the legal ordering of the society based on those expectations. The fourth and last notion of backward-looking responsibility is *outcome responsibility* which focuses on the doings of agents (the doings of states) that brought about an undesirable state of affairs (bad outcomes) in the world and which now requires states to make good the harms they have brought about. We want the responsible agents to provide a remedy adequate enough to fix the resultant harms. Because of the centrality of outcome responsibility approach to the kind of obligations I seek to establish and assign to states, it is considered in more detail below.

7.4.3 Outcome Responsibility Attribution Approach

Outcome responsibility, as the name implies is a special kind of backward-looking responsibility which we attribute to agents for bringing about a bad outcome.⁹⁵⁵ In outcome responsibility, our focus is not on the *doer* but on the *doing*,⁹⁵⁶ specifically, the *wrong* in the *doing*. The wrong in the doing may for example consist in an agent’s action or behaviour that infringes on rights. Even in cases where the action in question may be praiseworthy or justified, the mere fact that it infringed on rights defeats its justification or praiseworthiness and can trigger actions under corrective justice. Thus, in outcome responsibility, it is immaterial that the relevant agent did not intend the bad outcome that resulted from their actions; responsibility demands that agents address the fallouts of their wrongdoing.⁹⁵⁷ We do not need to formally attach blame to the agent’s actions

⁹⁵³ N.Z. Kovner, ‘Migration in a Warming World: On the Responsibility and Obligations of States Towards Climate Change Immigrants’ (2017) PhD Thesis LSE London p. 53.

⁹⁵⁴ Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge: Cambridge University Press, 2013) p. 36.

⁹⁵⁵ Alexa Zellentin note 222 p. 6.

⁹⁵⁶ N.Z. Kovner note 953 p. 53.

⁹⁵⁷ David Miller note 142 p. 116.

before we can attribute outcome responsibility;⁹⁵⁸ we are interested in holding agents responsible for the consequences of their actions which a reasonable person could have foreseen.⁹⁵⁹ So, foreseeability, as we shall see later, is an important condition for becoming outcome responsible. By implication then, what we are looking for in outcome responsibility is the failure of an agent's action with respect to some set normative standards to which they should have conformed, not necessarily the character of the agent.⁹⁶⁰ Attributing backward-looking responsibility in the form of duty-generating outcome responsibility is important in our case where we face the problem of migrant deaths and migrants going missing in the face of a multiplicity of contributing factors and agents involved and we just wonder who is responsible. The *left-to-die boat case* lends credence to this fact.

To confront this sort of challenge, Miller frames outcome responsibility as a matter of distributive and remedial justice, focusing on cases of human suffering in the world and human rights violations that states and indeed everyone should be concerned about. He wants to know what duties states have towards global justice. For this to happen, we have to know who are the responsible agents (states in our case) that should bear outcome responsibility for correcting the injustices at the international level. So, if we say that state 'A' is outcome responsible for the sufferings and deprivations of 'B', then A should be remedially responsible to help 'B'; in which case judgments of outcome responsibility may ground judgments of remedial responsibility regardless of the fact that remedial responsibility can still be assigned on other grounds.⁹⁶¹ Thus, in our context, we hold that states have a responsibility to fix the morally undesirable state of affairs in the world that they have brought about, and responsibility is just a normative way of deciding how best we should assign remedial obligations. In meeting any remedial obligations, Miller defends the view that outcome responsibility of agents need not necessarily satisfy the requisite conditions of blameworthiness for bringing about a problem.⁹⁶² In other words, Miller's account holds that the conduct in question that brought the bad outcome need not necessarily be 'blameworthy' for agents to become outcome responsible, although blameworthiness is necessary before moral responsibility can be attributed.⁹⁶³

⁹⁵⁸ Robert Judd, 'Contribution to Collective Harms and Responsibility' (2012) *Ethical Perspectives* 19(4) pp. 738-739.

⁹⁵⁹ David Miller note 142 p. 116.

⁹⁶⁰ L.J Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) pp. 217-219.

⁹⁶¹ David Miller note 142 p. 112.

⁹⁶² Alexa Zellentin, note 222 p. 1.

⁹⁶³ David Miller note 142 p. 89.

Two forms of outcome responsibility attribution thus prove essential for our context: those attributable to individual states for their contributions to the bad migration outcomes, and those attributable to the states as a collective group or union of themselves. For the latter type of responsibility, that is, outcome responsibility in a collective sense; we can further partition it into two: those attributable to individual states as members of a collective group for their contributions to the bad migration outcomes; and those holistically attributable to the collective group of states as 'collectives'. As to the notion of individual responsibility for bad outcomes, in our context, individual responsibility is taken to mean the responsibility of individual states as opposed to private individuals. For individual state responsibility for bad outcomes, we hold for example that state 'A' has brought about a bad outcome X and therefore A has the responsibility to fix the harmful outcome that it has brought about and to also compensate those harmed by X. So then, outcome responsibility is about finding the eligible candidate to bear ownership of the costs and benefits associated with the outcome that the relevant agent has produced.⁹⁶⁴ In distributive terms, the aim is to shift burdens from those who suffered harm caused by the agent to the very agent in question that caused the harm.⁹⁶⁵

As for collective responsibility of agents as collectives, it involves causal responsibility of a group of agents such as states for the harms caused in the world and the blameworthiness we attribute to them for bringing about such harmful outcomes.⁹⁶⁶ Responsibility of groups get collectivised because it seems to be the most realistic and effective way of discharging or carrying out responsibility.⁹⁶⁷ Collective responsibility does not associate blameworthiness or causal responsibility with individuals, neither does the free will of individual moral agents constitute the source of moral responsibility. Instead, it locates the origin/source of moral responsibility in the group's collective actions and in that case, causal responsibility and blameworthiness should be associated with the relevant groups understood as 'collectives'. This means that responsibility for migrant deaths, migrants going missing and the ambiguity of loss that results thereof (taken as the bad outcomes) that could emanate from the enforcement of EU migration policies can be attributed to the EU as a union of European states (collectives).

Following Miller's analogy, it may be argued that in an EU setting, we can hold EU states and their leaders as being empowered and authorised to act for the regional body in matters of

⁹⁶⁴ David Miller note 142 pp. 83-84.

⁹⁶⁵ Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) p. 229.

⁹⁶⁶ Marion Smiley note 922.

⁹⁶⁷ Robert Goodin note 936 p. 50.

migration and to enact migration policies that express the common interest, culture, values and beliefs of the EU and its institutions. In this kind of situation, the conditions for assigning collective responsibility to the EU as a group of states can be satisfied if, for example, it enacts some policies that create risks for migrants to die and go missing. Even in cases where some EU members express different beliefs and intentions, they remain collectively responsible for their membership of the union. The collective responsibility of the EU can also be reduced to their individual members such as to attach individual responsibility to each one of them based on their level of contribution to the bad outcomes. It is justifiable to impute responsibility to individual member states of the union because some may have contributed to the collective bad outcome in greater ways than others, perhaps, either because of their special leadership status or role in the union.

In that case, what I argue for is a responsibility attribution approach and/or sharing formula that unfolds in three ways: (1) differentiated responsibility attribution based on each state's level of contribution to the collective migration outcomes in cases where they as members of a collective group acted together to bring about the bad outcome (this is consistent with the notion of shared responsibility); (2) responsibility attribution of the collective group of states as 'collectives' (this is consistent with the notion of joint responsibility or joint liability model of responsibility); and (3) responsibility attribution to individual states acting alone, not being members of any collective group of states (I leave open the question of how and in what ways individual states may proceed within their domestic legal orders to enforce or actualise their assigned share of obligation). I suggest that it would be better to allow states to use their own sense of judgement derived from enforcement of national legal and policy frameworks to decide how they want to proceed to bring about the desired state of affairs once legal obligations have been assigned to them. However, before these responsibility attribution approaches can be operationalised, we have to satisfy some basic conditions that will serve as a metric for determining the level or share of responsibility of any state in any given case.

7.4.4 The Conditions for Attributing Outcome Responsibility

From our analysis above, we can deduce that at least four conditions must be satisfied before we can validly assign outcome responsibility to any state or group of states for migrant deaths or migrants going missing at sea, borders and other migration spaces. Those are: (a) the existence of genuine agency (b) the causality for bad outcomes, (c) the ability to foresee bad outcomes; and (d) the ability to act otherwise (avoid bad outcomes).

a. Existence of a Genuine Agency

For an agent to be assigned responsibility for bad outcomes, there must be genuine agency, argues Miller.⁹⁶⁸ Agency requires that there must be a relationship between actions of any agent and the outcome that results from their actions. The idea of genuine agency assumes that human agents are fallible beings, not immune to misdeeds in an uncertain world, and therefore can be responsible for bad outcomes whether intended or not.⁹⁶⁹ The rationale is that given the multiplicity of contributing factors that often attend state activities in areas of life like migration, attributing responsibility to agents beyond what may be fully under their control is acceptable. Thus, supposing state 'A' sets out to rescue sea endangered migrants, taking all necessary precautions to avoid harm to both the rescue crew and the migrants involved, but the execution of the rescue plan goes wrong; the rescue ship rams migrant boat and all the migrants on board drown in the process. Here, under the condition of genuine agency, 'A' is responsible for the deaths of the migrants and should compensate the families of the migrants involved for the harm caused them by the loss of their relatives despite 'A' having taken initial steps to avoid the resultant bad outcome. In any case, the agency of the responsible person must have played some significant role in the causal chain of events that brought about an undesirable outcome for which rectification is now required.

b. Causality for Bad Outcomes

Causality concerns whether it was really the relevant agent's actions that brought about the bad outcomes.⁹⁷⁰ For I.M. Young, who combined the fault liability and strict liability model of assigning responsibility to construct what he called 'liability model of responsibility', it must be shown that the causal relation of the candidate for responsibility to the circumstances that gave rise to harm is not borne out of coercion; otherwise, the responsibility of the agent may have to be mitigated if not totally dissolved.⁹⁷¹ Understood in the literal sense, causality is simple: it is either 'A' caused the injury suffered by 'B' or she did not.⁹⁷² But causality in outcome responsibility terms is more than that; there must be some sort of relationship between the agent and the problem (bad

⁹⁶⁸ David Miller note 142 pp. 87-88.

⁹⁶⁹ Alexa Zellentin, note 222 p. 4.

⁹⁷⁰ Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) pp. 113-141 p. 114.

⁹⁷¹ Iris Marion Young, 'Responsibility and Global Labour Justice' (2004) *The Journal of Political Philosophy* Vol 12 No 4 p. 368.

⁹⁷² Hana Chockler and Joseph Y. Halpern, 'Responsibility and Blame: A Structural-Model Approach' (2004) *Journal of Artificial Intelligence Research* Vol. 22 p. 93.

outcome) beyond causal efficacy.⁹⁷³ This is tied to the wider notion of agency discussed above and therefore, for agents, it is about deciding on what course of action to choose or take and having some considerable level of control over the resultant final outcome. In other words, causality is a good way of identifying a good candidate for outcome responsibility but becoming outcome responsible cannot be grounded exclusively on causality. Therefore, in order to hold an agent responsible for bringing about bad outcomes, two additional conditions must be satisfied beyond causation: the ability to foresee the outcome and the capacity to avoid the outcome.

c. Ability to Foresee Bad Outcomes

The ability of the agent to foresee the likelihood of bad migration outcomes resulting from their actions is key to attributing outcome responsibility. Of course, the notion of agency as a criterion for ascribing responsibility discussed herein requires that for an agent to be outcome responsible, there must be a foreseeable connection between the relevant agent's actions and the resulting outcome. For example, when states enact national migration policies that are deterrence-oriented, they are expected to foresee that if enforced in the manner in which they were initiated, this would lead to increased violence against migrants at sea and borders and could result in bad outcomes: migrant deaths, migrants going missing and loss and grief for families affected. For our context, three kinds of foreseeability prove essential. The first is subjective foreseeability which concerns how likely it is that a bad outcome would result from an agent's actions from the point of view of the agent in question.⁹⁷⁴ The second is objective foreseeability which concerns what likely outcome will result from the actions of the agent irrespective of what the agent in question actually expected.⁹⁷⁵ The third is reasonable foreseeability which concerns what outcomes the agent should have reasonably expected from her actions having regard to the amount of information available to her.⁹⁷⁶ For the last type of foreseeability, we hold that if agents could not have reasonably foreseen the final outcome of a course of action that they have undertaken, then we should not expect them to bear the cost of their actions, against an otherwise different case where there is considerable certainty about what would result from taking a particular course of action. Here what is required is not that the agent should have *actual* knowledge of the outcome of their course of action. Instead, taking the context of their actions into account, she should have taken

⁹⁷³ Andre Nollkaemper and Ilias Plakokefalos (eds.) *Principles of Shared Responsibility in International Law: An Appraisal of State of the Art* (Cambridge: Cambridge University Press, 2014) p. 9.

⁹⁷⁴ D.A Lagnado and Shelley Channon, 'Judgments of Cause and Blame: The Effects of Intentionality and Foreseeability' (2008) *Cognition* Vol. 108 p. 758.

⁹⁷⁵ D.A Lagnado and Shelley Channon *ibid* p. 758.

⁹⁷⁶ *ibid*.

the different kinds of possible outcomes that could result from her actions into consideration before acting in the way and manner she did. In that case, the agent's ability to reasonably foresee the outcome of a course of action may impose constraints on the degree of responsibility that she may have for an outcome. Not least because it will call into question the issue of intent, i.e., whether the agent intended the outcome that emanated from her actions (the foreseeability *versus* intent interplay). The idea here is that the less likely the foreseeability of an outcome is, the less likely it is for the agent's action to be intentional.

d. Capacity to Avoid Bad Outcomes

The final condition for becoming outcome responsible is the capacity for the relevant agent to avoid the occurrence or emergence of a bad outcome. The relevance of the idea of capacity to avoid bad outcomes for the purpose of assigning responsibility is that asking an agent to bear the full cost of her actions when she lacks the capacity to act otherwise is unjust and falls short of the normative standards of justice and fairness. The capacity to avoid a bad outcome derives from the wider notion of agency and therefore, in order to validly ascribe outcome responsibility to any agent in the context of missing migrants, we have to show that the state could have acted differently, that is, that it had the capacity to desist from contributing to the events that brought about migrant deaths or disappearances at sea and borders. Thus, the four conditions discussed here complete the outcome responsibility account I endorse and which, I argue, should guide our decisions to assign obligations to states in the context of missing migrants. They are summed up when for example:

- (i) State 'X' becomes a genuine agent who has brought about a bad outcome Y because of the connection of her causal actions to the resultant bad outcome (condition 1)
- (ii) X's action (could be an enactment of bad migration policies) causally contributed to the bad outcome Y (condition 2)
- (iii) X could have reasonably foreseen (maybe by learning lessons from past experiences) that her actions will causally contribute to the bad outcome Y (condition 3)
- (iv) X had the capacity to avoid the action (e.g., by illegalising push-back or deterrence policies) that brought about the bad outcome Y (condition 4).

If the above conditions are satisfied in any case, then we can hold, following Miller, Kovner and Alexa Zellentin respectively, that X is outcome responsible for bringing about Y if there is a morally significant relationship between X and the outcome of her actions, that is if her agency can be

linked to the bad outcome Y in a morally significant way. Since we take Y to be an undesirable outcome, then, we can maintain a claim that X has (i) both legal and moral duty to stop any actions giving rise to Y; (ii) prevent Y from coming about in the first place; (iii) to compensate or provide redress to those harmed by Y; (iv) if and when she fails to stop the bad effects of Y. Based on these analogies, we are able to establish a relation between causal responsibility and outcome responsibility, in order to provide a satisfactory account of state obligations resulting from bad effects of state migration policies *vis-à-vis* responsibility.

7.5 Conclusion

States have obligations towards missing migrants and their families, no doubt. Sometimes states admit that they have them; other times, they deny that they have them. In this chapter, I have with the help of international documents, laws, and theories across disciplines attempted to identify and examine what I believe would be effective ways of clearly defining the obligations of states towards missing migrants. In what may be described as a responsibility-based argument, I have canvassed the point that the most effective way to properly distribute responsibility to states is to adopt a responsibility attribution approach that is operationalised in three ways: (a) differentiated responsibility attribution based on each individual state's level of contribution to the collective bad migration outcomes when they become members of a collective group; (b) holistic responsibility attribution to a collective group of states as 'collectives'; and (c) responsibility of individual states acting alone, not being members of a collective group. However, as I argued earlier, in order for state obligations towards missing migrants and their families to be realised under an international cooperation framework, it is imperative that states develop national migration policies that are transnationally effective. In the next chapter, I explore this notion of the transnational effectiveness of national migration policies in relation to missing migrants from a UK policy perspective.

Chapter 8

Transnational Effectiveness of the UK Policies in Relation to Missing Migrants: A Transnational Law Perspective

8.1 Introduction

The fifth intellectual commitment of the New Haven School is the commitment to *transnational law* as a tool for analysing and finding solutions to pressing human problems.⁹⁷⁷ In the previous chapters of this thesis, I stated that international law, derived from human rights treaties, mandates states to search for missing migrants and respect the rights of their surviving families.⁹⁷⁸ States however sometimes fail to admit that they have obligations to deal with migrants missing in migration until the migrants reach their territories.⁹⁷⁹ Such denial/reluctance of states to accept and act on their obligations towards migrants and their families raises serious questions about migration policies and governance and how the problem of missing migrants should be dealt with on the international level. The newly adopted GCM answers a part of the question by recognising that the issue of missing migrants is a transnational social problem that requires greater cooperation amongst states as well as policies with transnational effects.⁹⁸⁰ Such declaration in the GCM echoes the sentiments of transnational law which advocates that transnational social problems that transcend national frontiers, such as migration, must be tackled through a transnational legal and policy process and efforts.⁹⁸¹ The UK was one of the earliest European states to endorse the new GCM, hinting that it respects the right of states to determine their own national migration policies and protect national interests.⁹⁸²

Given the significance of the UK's commitment to the GCM, this chapter asks whether the UK migration policy in relation to missing migrants is transnationally effective, such as to facilitate implementation of the GCM and other relevant international legal instruments nationally. Adopting a transnational law approach, the chapter unfolds as follows: In Section 8.2, I highlight, albeit

⁹⁷⁷ H.H Koh, 'Is There a 'New' New Haven School of International Law' (2007) *The Yale Journal of International Law* Vol. 32 p. 564.

⁹⁷⁸ Stephanie Grant, note 30 pp. 8, 13.

⁹⁷⁹ Simon Robins, note 39 p. 24.

⁹⁸⁰ GCM, Objective 8(a-f).

⁹⁸¹ H.H Koh, note 977 p. 564.

⁹⁸² Stefano Fella, 'United Nations Global Compact for Migration' (2019) *House of Commons Briefing Papers CBP-8459*, available at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8459> (accessed 10/1/2020).

briefly, theoretical insights of transnational law in light of the transnational nature of the problem of missing migrants. The main argument pursued is that the problem of missing migrants is a transnational legal and policy issue that requires a transnational response from states. Such a response would require a transnationally effective national migration policy. But what constitutes a transnationally effective national migration policy of states in relation to missing migrants is largely undefined in the current literature. Therefore, the chapter proceeds in Section 8.3 to theorise and define what is meant by a transnationally effective national migration policy.

It then considers, in general, the UK national policy responses to missing migrants and the question of its transnational effectiveness in Section 8.4. It then proceeds in Section 8.5 to provide the wider justification for the argument for the adoption of a transnationally effective national migration policy in response to the problem of missing migrants. Building on evidence in the current literature which shows limited knowledge about the transnational effectiveness of the UK policies, the chapter in the concluding section, Section 8.6, highlights the imperatives of strengthening, in order to avoid a future policy vacuum, the transnational effectiveness of UK policies in addressing the increasing cases of migrants who die and go missing while attempting to reach international destinations.

8.2 Transnational Law and the Transnational Problem of Missing Migrants

As I pointed out earlier, transnational legal problems such as the issue of missing migrants rarely lend themselves to some simple basic solutions. By the term “transnational” whether in reference to law or events, it is meant any phenomenon that transcends the territorial borders of states. This extends to actions and events whether generated by states, migrants or other actors in whatever form or shape that may take place *within or inside* the territorial confines of a particular state but produce external effects abroad. So, for example, in relation to migrant journeys across high seas and borders, we frame and understand such journeys as ‘transnational’ in nature because they cut across national borders beginning from the actual take-off point where *origin states* exercise jurisdiction to the transit point controlled by *transit states* and all the way down to the destination point where the *destination/arrival states* exercise jurisdiction.⁹⁸³ In relation to the law, we use the term ‘transnational’ to refer to border-crossing law that regulates events or actions that commence

⁹⁸³ See for e.g., M.V Meeteren, ‘Transnational Activities and Aspiration of Irregular Migrants in Belgium and the Netherlands’ (2012) *Global Networks* Vol. 12 No. 3 pp. 314-332; Kevin M. Dunn, ‘A Paradigm of Transnationalism for Migration Studies’ (2005) *New Zealand Population Review* Vol. 31 No. 2 pp. 15-31. See also Alexander Betts, note 111 p. 6.

in the territory of one state and end in the territory of other states, thereby, creating a jurisdictional chain that connects together all the affected and relevant multiple states to that particular event or action in question. However, in many cases, legal rules that regulate major transnational events that transcend state borders do not always fit into the traditional 'public and private international law' standard classification and/or categories. Given this fact, the term 'transnational law' is often adopted by international law scholars as a more all-encompassing terminology to capture those "other rules which do not wholly fit into such standard categories."⁹⁸⁴ In that way, transnational law does not part ways with international law but instead transforms international law into a "larger storehouse of rules"⁹⁸⁵ capable of housing together under one roof all international and national legal rules and policies that may apply to transnational events such as migration.

It is for this reason that the New Haven School of International Law at the Yale Law School adopted the term 'transnational law' as one of its five intellectual commitments and seek to use it to address transnational human problems that cut across state borders. Thus, when Philip Jessup in his 1955 influential Storrs Lectures at the Yale Law School articulated and proposed the term 'transnational law' to "include all law which regulates actions or events that transcend national frontiers",⁹⁸⁶ cross-border migration leading to migrant deaths and migrants going missing at sea, borders and other liminal spaces must have been one of those transnational events that were high on his thoughts and agenda.⁹⁸⁷ When responding to transnational problems, transnational law emphasises the interdependence and blending of international and domestic law, as opposed to a rigid separation of international law from domestic law.⁹⁸⁸ Thus, Jessup's transnational law theory recognises that externalised domestic laws and policies of states enforced abroad, beyond national frontiers can, at times, impact a state's population in more profound ways than when those laws and policies are enforced strictly within the national legal orders. One typical example of where state national policies can produce transnational effects is irregular migration where states are increasingly adopting externalised migration policies in response to migrant flows into their territories. The adoption and implementation of extraterritorialised migration policies and

⁹⁸⁴ Philip Jessup note 245 p. 2.

⁹⁸⁵ Natasha Affolder 'Transnational Law as Unseen Law' in Peer Zumbansen (ed.) *"The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal"* (Cambridge: Cambridge University Press) pp. 364-385.

⁹⁸⁶ Philip Jessup note 245 p. 1; Carrie Menkel-Meadow, 'Why and How to Study 'Transnational' Law' (2011) *UC Irvine Law Review* Vol. 1 No. 1 p. 103.

⁹⁸⁷ E.T Achiume, 'The Fatal Flaw in International Law for Migration: Model International Mobility Convention Commentary' (2018) *Columbia Journal of Transnational Law* Vol. 56 p. 257.

⁹⁸⁸ H.H Koh, 'Why Transnational Law Matters' (2006) *Penn State International Law Review* Vol. 24 Issue 4 p. 749.

procedures by states in response to migrant movements clearly indicate that migrant and refugee flows across seas and external borders of states are a transnational legal and policy issue that goes right to the heart and soul of any normative discussion of transnationalism or transnational legal theory⁹⁸⁹ as well as ‘transnational legal process’.⁹⁹⁰ The aspiration of migrants on the move is itself a ‘transnational activity’⁹⁹¹ and international migration that involves migrants crossing the borders of one or two states is itself a transnational process.⁹⁹² The broader analysis of the legal, policy and practical problem of missing migrants examined earlier in this work lends credence to its transnational dimension. Thus, in circumstances of migrant deaths and migrants going missing in transnational migration, the central normative aspiration of transnational law is that such human problems that transcend borders should be tackled through a transnational legal and policy approach. One of the central arguments pursued in this thesis is that meeting such normative aspiration of transnational law when responding to the transnational problem of missing migrants would require a transnationally effective national policy. But what is meant by a transnationally effective national migration policy is not defined in the current literature. So, how should we define a transnationally effective national migration policy in relation to missing migrants?

8.3 What Do We Mean by a Transnationally Effective National Migration Policy? Towards a Theory of Transnational Effectiveness

Following on from the earlier characterisation of the problem of missing migrants as one that transcends national borders and therefore triggers the principle of transnational law, how should we define a transnationally effective national migration policy that is consistent with the normative requirements of transnational law when global states are responding to the problem of missing migrants? If we start from the premise that migrants, by crossing national borders in their attempt to reach an international destination, challenge an international system built on the premise of sovereignty and national jurisdiction, then it can be validly argued that such transnational migrant journeys clearly demonstrate that “people and institutions are no longer constrained by national boundaries”.⁹⁹³ So, put simply, in our context, a transnationally effective national policy would

⁹⁸⁹ Itamar Mann, note 384 pp. 316, 322 & 327.

⁹⁹⁰ Gregory Shaffer, ‘Transnational Legal Process and State Change’ (2012) *Law and Policy Inquiry* Vol. 37 Issue 2 p. 230.

⁹⁹¹ M.V. Meeteren, ‘Transnational Activities and Aspiration of Irregular Migrants in Belgium and the Netherlands’ (2012) *Global Networks* Vol. 12 No. 3 pp. 314-332; Kevin M. Dunn, ‘A Paradigm of Transnationalism for Migration Studies’ (2005) *New Zealand Population Review* Vol. 31 No. 2 pp. 15-31.

⁹⁹² Alexander Betts, note 111 p. 6.

⁹⁹³ Georg Vobruba, ‘The Limits of Borders’ in de Swaan (ed.) *Social Policy Beyond Borders* (Amsterdam: Amsterdam University Press, 1994) cited in Margaret Sherraden, *Developing Transnational Social Policy:*

mean policies initiated within the domestic legal order but whose impacts, as positive as they are intended to be, are keenly felt by migrant populations outside the shores and territory of the relevant state. If a policy is made at home and its actual impact, effects and/or practical outcomes save a life abroad or fosters a cooperative relationship between actors abroad, then such a policy may be said to be a good one and transnationally effective not least because it is promoting shared values of human dignity and public order beyond borders.⁹⁹⁴ In other words, the policy is made at home, but its implementation by national authorities produces effective and desired results over relevant *subjects, territories, situations* and *persons* abroad. Such a transnational policy approach to dealing with pressing human problems should see state sovereignty and national jurisdiction become a tool for enabling the executive, judicial and legislative policy-making competencies of national governments in relation to migration to unify them within and outside their borders⁹⁹⁵ for a common purpose—the safety and protection of migrants. This approach should move us closer to realising the moral and political precepts and problem-solving aspiration of international human rights, which promises to “penetrate the impregnable state borders and gradually replace it with the authority of international law”.⁹⁹⁶ However, questions may be asked about what this so defined transnationally effective national migration policy should mean for states in terms of the wider ‘global migration governance’.⁹⁹⁷ This is imperative given that the institutional structures that regulate and shape how states deal with transnational migration build upon transnational legal norms.

Taking the United Kingdom as an example, it will be more appropriate to ask: through what channels should the United Kingdom engage with and promote the global migration governance agenda in relation to missing migrants? Also, how can we measure the transnational effectiveness of a national migration policy that may be initiated by states as part of that global migration governance agenda? And where, in particular, in terms of specific places/territories may such a transnationally effective national migration policy be applied and enforced? Addressing these issues matters for the United Kingdom because they will not only determine how the country is going to engage with the transnational migration governance but will also “shape what on the

A North American Community Service Program (2001) Centre for Social Development Global Service Institute Working Paper 01-10 p. 1.

⁹⁹⁴ Abram de Swaan, ‘The Receding Prospects for Transnational Social Policy’ (1997) *Theory and Society* Vol. 26 No. 4 p. 563.

⁹⁹⁵ Cf. Itamar Mann, note 384 pp. 315-316.

⁹⁹⁶ Samuel Moyn, *The Last Utopia, Human Rights in History* (Belknap Harvard: University Press, 2010), prologue p. 1.

⁹⁹⁷ Alexander Betts and Lena Kainz, ‘The History of Global Migration Governance’ (2017) *Working Paper Series No. 122, Refugee Studies Centre, University of Oxford* p. 1.

institutional, political and normative level global migration governance should mean for the United Kingdom”,⁹⁹⁸ especially now that it is no longer part of the EU. In terms of which aspect of the global migration governance agenda the United Kingdom can promote in order to address the transnational problem of missing migrants, it is argued that it can start by giving full legal effects (beyond political declaration) to those aspects that prioritize the humanitarian imperatives of saving migrant lives at sea. This extends to facilitating transnational investigations into migrant deaths, repatriation of migrant bodies and addressing the psychosocial needs of their families. The United Kingdom can promote this transnational migration policy approach through bilateral and multilateral channels⁹⁹⁹ and informal, transnational networks¹⁰⁰⁰ since the country already has a proven record of global migration governance through these channels.

In terms of how we can measure the effectiveness of this proposed transnational migration policy in relation to missing migrants, it is argued that taking into account the normative aspirations of transnational law, the effectiveness of such a transnational migration policy can be measured in three ways: the first is to measure it against the extent to which it has been able to realise the desired public intended goal and/or policy outcomes. I have already suggested in Chapter 5 of this thesis that in practical terms and judging from the provisions of Objective 8 of the GCM, two fundamental and synergic goals are aimed at by states when responding to the problem of missing migrants. The first is to promote and realise a *safe, orderly and regular* migration world¹⁰⁰¹ based on the principles of human dignity, where migrants are not deliberately ignored increasing the risk of dying and going missing. And where states are committed to searching for and finding those already dead or missing and repatriating their dead bodies to their families,¹⁰⁰² whilst also finding answers to questions about those who subsequently remain missing. The second goal is to secure a migration world based on ‘public order’, a world where *unsafe, disorderly, irregular and irresponsible* migration is avoided. And where public order is already violated or under threat of imminent violation, to suspend the violation and restore order. Also, to correct any decried behaviour of migrants that may generate public order violations, whilst also reconstructing the wider social process in society that provide fertile ground for public order violations to occur.¹⁰⁰³

⁹⁹⁸ Alexander Betts, note 111 p. 2.

⁹⁹⁹ *ibid* p. 6.

¹⁰⁰⁰ *Ibid* p. 6.

¹⁰⁰¹ Elspeth Guild, ‘The UN’s Search for a Global Compact on Safe, Orderly and Regular Migration’ (2017) *Germany Law Journal* Vol. 18 No. 07 pp. 1780-1796; Elspeth Guild, ‘Unsafe, Disorderly and Irregular Migration? Examining the Assumptions Underlying the United Nations’ New York Declaration’ (2018) *The Canadian Journal of Peace and Conflict Studies* Vol. 50 Issue 1 pp. 53-75.

¹⁰⁰² S. Robins and I. Kovras, note 480 pp. 40-49; R. Connolly *et al*, note 557 p. 4.

¹⁰⁰³ Adapted from W.M Reisman, note 528 pp. 76-80.

The second way we can judge the transnational effectiveness of a state policy is by looking at the extent to which it has been received, accepted and/or rejected in terms of its consistency and compliance with international legal norms or treaties to which the relevant state has endorsed. It should be understood that a legal or policy instrument is not considered transnationally effective merely because it has been accepted internationally, perhaps, because it complies with existing international norms. This is important because state migration policies may, in fact, be legally compliant with transnational legal norms yet produce dreadful results for migrants. So, beyond compliance with international norms, normative aspiration of transnational law demands that such policy has to produce a desired positive result/outcome capable of robustly addressing a problem in remote lands. This is not least since states now live in a regime of mutual interdependence,¹⁰⁰⁴ and therefore, the presence of migrants, whether in origin or transit states can generate external effects that affect the receiving states and vice versa. Thus, as migrants fleeing wars from poor countries increasingly continue to confront the rich ones with protection requests, the rich countries are invited to respond by adopting national policies with cross-border positive effects.

Such transnationally effective policies would need to be designed to address issues around the protection of lives of migrants, investigation of migrant deaths and, by the same token, also control the persistent and intrusive external effects that the migration crisis might have or might have brought upon states, including those arising from migrant deaths and migrants going missing. The third way to look at the transnational effectiveness of a state migration policy is to examine the extent to which such policy recognises the fact that an effective and goal-oriented policy response to the transnational problem of missing migrants would require a close dialogue and synergy in the transnational arena between the legal and moral dimensions of obligations of states towards migrants. By that it is meant that policy responses to missing migrants cannot, in transnational terms, be determined only by what states can do legally but also what they can do morally, not least because IHRL, from where most of the state obligations towards missing migrants are derived, ground the most basic considerations about international morality.¹⁰⁰⁵ Such policy approach conceived, even if ambitiously, will allow for 'extricating human life generally from the false necessities of market dealings'¹⁰⁰⁶ that seem to characterise transnational migration

¹⁰⁰⁴ Abram de Swaan, 'The Receding Prospects for Transnational Social Policy' (1997) *Theory and Society* Vol 26 No 4 p. 563.

¹⁰⁰⁵ R.R Haule, 'Some Reflections on the Foundation of Human Rights—Are Human Rights an Alternative to Moral Values' (2006) *Max Planck UNYB* Vol 10 pp. 367-395 p. 388-392.

¹⁰⁰⁶ Alexander Somek, 'The Social Question in a Transnational Context' (2011) LSE 'Europe in Question' Discussion Paper Series, Paper No. 39/2011, June 2011 (abstract section).

policymaking and enforcement. That is to say, for a national policy to produce the desired transnational effects, there has to be a close interface between the exercise of moral and legal obligations of states towards trans-border migrants in a mutually reinforcing and inclusive way, especially when human rights of migrants to life are at issue.

For example, while the duty to rescue migrants at sea is an obligation created by the law of the sea and human rights law to uphold the right to life, repatriation of migrant bodies is more likely to fall within the moral aspect of state obligations. This is without prejudice to the fact that the duty to repatriate corpses across international borders has been recognised under the International Arrangement Concerning the Conveyance of Corpses 1937,¹⁰⁰⁷ which remains in force; and under the Council of Europe Agreement Concerning the Conveyance of Corpses 1973,¹⁰⁰⁸ and these laws give state obligations to repatriate. Thus, the interface between legal and moral obligations of states is important because if we leave it at what states can do legally, leaving out the moral aspects of the obligations, we will fall into the familiar trap of accepting the flawed argument that until migrants reach state territories, no state could be legally or morally responsible towards migrants¹⁰⁰⁹ who disappeared while attempting to reach an international destination. In terms of '*where*', that is, the question of the specific places and territories where a transnational policy may be applied, enforced and made effective, it is suggested that it is tied to the question of extraterritorial migration controls by states. This has been addressed earlier in Chapter 3. So, given this theory of transnational effectiveness of a national policy, to what extent has the UK policy in relation to missing migrants been transnationally effective?

8.4 The UK National Migration Policy in Relation to Missing Migrants and the Question of its Transnational Effectiveness: What We Know So Far

The starting point for any discussion on the transnational effectiveness of the UK policy responses to the problem of missing migrants is to diagnose the view or position maintained by the UK in comparison with the issue which may find expression at regional and international levels. This is important because as positional adherence theory¹⁰¹⁰ holds, the most significant determinant of why states behave the way they do in the international system is the 'position' that any state takes in regard to issues of transnational importance.¹⁰¹¹ First of all, migration policymaking in the UK

¹⁰⁰⁷ Arrangement Concerning the Conveyance of Corpses 1937.

¹⁰⁰⁸ Council of Europe Agreement on the Transfer of Corpses 1973.

¹⁰⁰⁹ M.N Casas, note 382 p. 162.

¹⁰¹⁰ S.E Krept and A.C Arend, note 262 pp. 332, 404.

¹⁰¹¹ *ibid.*

covers a broad range of areas: border controls, integration, legal entry and exit and asylum processing procedures. Of these policy areas, the transnational effects of UK policy have been seen more in the area of extraterritorial asylum processing than in any other. For example, in 2004, the UK proposed the third country 'transit processing centres' (TPCs) and 'regional processing zones' (RPZs).¹⁰¹² The former is a policy that sought to transfer asylum seekers arriving in the UK and the EU to transit processing centres in countries outside the EU where they are kept until their claims are processed and assessed. The proposal (later dropped following international criticisms)¹⁰¹³ was widely believed to be an attempt by the UK and other participating EU states to de-territorialise refugee protection and stem the tide of spontaneous migrant arrivals in Europe. The TPC initiative was greatly inspired by the Australian 'Pacific Solution'.¹⁰¹⁴

The UNHCR subsequently came up with a different proposal it called 'Convention Plus'¹⁰¹⁵ to counter the UK position. Convention Plus sought to separate groups believed to be coming from countries that hardly produce any refugees and send them to reception facilities inside the EU, where their asylum claims will be assessed by a joint team of the EU.¹⁰¹⁶ The UK approach implies its extraterritorial human rights obligations to migrants in remote lands. Although there were credible arguments in several quarters that the motivations behind the UK proposals would give rise to negative outcomes (illegality and non-viability)¹⁰¹⁷ and create a potential conflict with international law,¹⁰¹⁸ they nonetheless demonstrate how migration policies initiated nationally can produce external effects abroad. However, there is little or no equivalent evidence to explain the transnational effects of the UK's policies in relation to missing migrants. This is understandably the case because the issue of missing migrants is connected with the wider question of global migration governance, over which the UK migration policies are 'relatively fragmented'¹⁰¹⁹ and were not made with missing migrants in mind. While laws such as the Coroners and Justice Act

¹⁰¹² Alexander Betts 'The International Relations of the New Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR' *Refugee* Vol. 22 No. 1 pp. 58-67.

¹⁰¹³ Alexander Betts *ibid* p. 60.

¹⁰¹⁴ Janet Phillips note 623 p. 2.

¹⁰¹⁵ *ibid* p. 58.

¹⁰¹⁶ Ruud Lubbers, 'Put an End to their Wandering', *The Guardian* 20 June 2003.

¹⁰¹⁷ Amnesty International, *Unlawful and Unworkable—Amnesty International's Views on Proposals for Extraterritorial Processing of Asylum Claims* pp. 1-37 p. 6-9.

¹⁰¹⁸ Alexander Betts, 'The International Relations of the New Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR' *Refugee* Vol. 22 No. 1 pp. 59, 60, 61-62.

¹⁰¹⁹ Alexander Betts, note 111 p. 6.

2009¹⁰²⁰ and UK Guardianship (Missing Persons) Act 2017¹⁰²¹ have been enacted to respond to the problem of missing persons generally, none of them specifically mention missing migrants. Thus, it is apparently unclear whether these laws can be invoked by the UK to respond to cases of missing migrants transnationally, given that they appear to be dealing more specifically with people missing within the UK. The reason for this policy gap may be linked to the earlier arguments about how best states can deal with the crisis of missing migrants transnationally.

The UK appears to accept the idea that until migrants reach state territories, no state has any obligations, and that they can only be in breach of their obligation if migrants go missing within their territorial jurisdiction. Again, the UK appears to accept the idea that state policies focusing on search and rescue operations at sea tend to “encourage more migrants to make the dangerous sea crossings leading to unnecessary loss of lives.”¹⁰²² As stated earlier, in 2014, the UK government announced that it would not participate in future search and rescue operations of migrants trapped in the Mediterranean Sea owing to what it called the ‘pull factor’ motivating more migrants to attempt the dangerous sea crossings.¹⁰²³ Although this decision was subsequently reversed by the UK following ‘international criticisms’,¹⁰²⁴ the government did so on the condition that the rescued migrants would be taken to the nearest seaport and will not be allowed to claim asylum in the UK.¹⁰²⁵ The UK position is that stopping rescue operations at sea would dissuade migrants from attempting the risky sea crossings. In other words, avoiding rescue assistance would actually be resulting in good policy outcomes (saving lives) that promote human dignity values rather than bad policy outcomes (losing lives) that undermine human dignity values.

However, more recently, the UK through the combined work of its national agencies has dealt with the problem of migrant deaths *within* the UK in ways that demonstrate successes that can be achieved when national migration policies become more transnationally effective. Such

¹⁰²⁰ UK Coroners and Justice Act of 2009, Chapters 1 and 2.

¹⁰²¹ United Kingdom Guardianship (Missing Persons) Act, 2017 (Chapter 27).

¹⁰²² James Brokenshire (A Home Office Minister) says ‘Migrant Rescue Operations Must be Stopped at Earliest Opportunity’, *the Guardian*, Thursday 30th October 2014.

¹⁰²³ House of Commons Home Affairs Committee, *Migration Crisis, 7th Report of Session 2016-17*, July 2016 p. 13; Baroness Anelay, ‘UK will not Support Rescue of Mediterranean Migrants’, Comments, available at: <http://www.telegraph.co.uk/news/uknews/immigration/11192027/UK-will-not-support-rescue-of-Mediterranean-migrants.html> (accessed 10/20/17).

¹⁰²⁴ Refugee Council, *UK Government Refuses to Help Rescue People at Sea*, available at: https://www.refugeecouncil.org.uk/latest/news/4183_uk_government_refuses_to_help_rescue_people_at_sea/ (accessed 3/6/2019).

¹⁰²⁵ House of Commons, *7th Report of Session 2016-17* p. 13.

agencies include the National Crime Agency UK Missing Persons Unit (MPU),¹⁰²⁶ the UK Missing Persons Taskforce,¹⁰²⁷ the UK Border Agency, the UK Missing Persons Bureau and the British Police. A good example of a case involving the works of these agencies is the tragic case of the 23 irregular Chinese migrants that were swept aside and drowned picking cockles in Morecambe Bay.¹⁰²⁸ According to Robins, the UK authorities deployed not just an enormous amount of resources to identify the 21 bodies that were recovered of the drowned migrants but also sought crucial information that involved making a trip to China whilst also collecting relevant information within the UK.¹⁰²⁹ The UK authorities also funded the repatriation of the migrant bodies to China.¹⁰³⁰ A more recent example is the identification of the bodies of the 39 Vietnamese migrants who died in a refrigerated trailer attached to an Essex lorry as they were being smuggled into the UK. Not long after the tragic incident, the UK authorities announced;

“We are in direct contact with a number of families in Vietnam and the UK, and we believe we have identified families for some of the victims whose journey ended in tragedy on our shores...the evidence is being gathered across a number of jurisdictions worldwide...”¹⁰³¹

These cases indicate successes that can be achieved in relation to the investigation of deaths and identification and return of migrant bodies when states have the political will to adopt national migration policies that are transnationally effective and honour obligations towards dead and missing migrants and their families. Although it may be argued that these cases were addressed in such an effective manner because the migrants involved died on British soil and national image was at stake, they nonetheless show that it is not impossible for states to facilitate, through their national migration policies the transnational investigation, identification and repatriation of migrant bodies to their families abroad whilst also addressing other needs of affected families beyond the shores of any particular state. Although some successes have been achieved when dealing with cases of dead and missing migrants *within* the UK, the UK still faces a real and challenging problem of management of migrant bodies. This may not be on a scale comparable to those of

¹⁰²⁶ For more on the MPU, see Catherine Fairbairn, ‘Missing Persons, guardianship and the presumption of death’, Briefing Paper No. 04890, 5 July 2017, House of Commons Library p. 4.

¹⁰²⁷ *ibid* p. 5.

¹⁰²⁸ Simon Robins *et al*, *Addressing Migrant Bodies in Europe’s Southern Frontier: An Agenda for Research and Practice* (2014) p. 14; Simon Robins, note 140 p. 72.

¹⁰²⁹ Simon Robins *et al*, *ibid* note 1028 p. 14.

¹⁰³⁰ *ibid*.

¹⁰³¹ The Telegraph: *All 39 Migrants Found Dead in Essex Lorry Confirmed as Vietnamese Nationals*, 2 November 2019.

the EU's Mediterranean states but are nonetheless analogous to those confronted in Lesbos.¹⁰³² It is suggested that dealing with this problem in a more transnationally effective way requires greater transnational cooperation between the UK and EU. Although the UK has left the EU, the government has said it still wants to continue to collaborate with its European partners after Brexit to tackle irregular migration¹⁰³³ in order to find a European solution to the migrant crisis. This is more so given that the obligations of the United Kingdom towards migrants under the European Convention on Human Rights and Fundamental Freedoms remain in force. To this end, the 2018 House of Commons Home Affairs Committee Report on UK immigration policies declares "there should be no diminution in the UK's approach towards its international humanitarian obligations as it leaves the European Union".¹⁰³⁴ Such resolve by the government demonstrates the beliefs of the UK that the migrant crisis, marked by increased deaths at sea and borders, requires a European solution. It is submitted that such political declaration is also an implicit admission by the UK that its national migration policies have to become more transnationally effective when responding to the problem of irregular migration involving migrants trapped outside its territories.

8.5 So, Why National Migration Policies with Transnational Effects?

In line with the definition of transnational effectiveness of a national policy offered at the start of the chapter, this section examines the rationale that underlies arguments for such a transnational approach in dealing with the problem of missing migrants. Generally, there are numerous reasons or justifications why finding a widely acceptable solution to the missing migrants' crisis requires national policies with transnational effects. However, I will only deal with three of them in this work: (i) the transnational nature of migration (ii) the extraterritorial reach of human rights obligations of states; and (iii) the externalisation of migration policies and border controls.

8.5.1 The Transnational Nature of Migration

The New Haven School recognises that transnational problems like the issue of missing migrants require transnational responsibility-sharing and greater cooperation between states. The very

¹⁰³² Simon Robins *et al*, note 1028 p. 14.

¹⁰³³ Foreign and Commonwealth Office (ERM0006) paras. 29 and 64; House of Commons, *Responding to Irregular Migration: A Diplomatic Route*, First Report of Session 2019, Report Together with Formal Minutes Relating to the Report p. 7.

¹⁰³⁴ House of Commons, *Immigration Policy: Basis for Building Consensus* (2018) House of Commons Home Affairs Committee, Second Report of Session 2017-19, HC 500, Report Together with Formal Minutes Relating to the Report, Ordered by the House of Commons, 10th January 2018 p. 26.

nature of the phenomenon of missing migrants implies the involvement of both origin, transit and destination states who are all caught up in the transnational nature of migration. Generally, when migrants are driven out of their homes, they go in search of a new home. In searching for a new home, they cross borders of states, with multiple states exercising territorial jurisdiction over them.¹⁰³⁵ In addition, migrants move through the high sea routes, a territory that is open to all states and where no state can claim exclusive jurisdiction.¹⁰³⁶ That being the case, states are under a plural obligation to protect and prevent migrants from going missing. The idea of creating a plural obligation for plural states to protect stems from the fact that until migrants complete their dangerous journeys and reach their destination; origin, transit and arrival states would still be expected to exercise jurisdiction in a row. In that way, two possible jurisdictional networks of states are created with each network of states seeking to exert control over the movement of migrants. The first would be a weak queue of states with marginal obligation to protect migrants and the second would be a solid chain of states with a more effective obligation to protect migrants.¹⁰³⁷

It is suggested that the chain of states analogy for the purpose of establishing state jurisdiction over the subject of transnational migration works better for the understanding of the migration issues, and any concerns arising from it can easily be resolved through the instrumentality of international cooperation and consensus-building between states. It is a fact of common knowledge that migrants move through the high sea routes, a territory that is open to all states and where no particular state claims exclusive jurisdiction or sovereignty.¹⁰³⁸ That being the case, plural states involved—origin, transit and arrival states all share a plural responsibility to protect migrants to the ‘extent that each of them can’¹⁰³⁹ and to adopt ‘collective’ measures to prevent migrant disappearances. This is an ‘interlinked responsibility (in the sense of a duty) to protect, and concurrent state responsibility (in the sense of liability) for failure to protect’.¹⁰⁴⁰ Thus, plural states have shared responsibility to protect migrants, including ‘rescue at sea’,¹⁰⁴¹ and may be required to exercise parallel concurrent jurisdiction in this regard. This is so because, in an era of increasing externalisation of migration policies and border controls, it is hard to think of any other effective way to deal with migrant deaths at sea and borders than to press and prevail on states to exercise concurrent jurisdiction to protect migrants beyond state borders.

¹⁰³⁵ V.P Tzevelekos and E.K Proukaki, note 20 p. 442.

¹⁰³⁶ *ibid* p. 441.

¹⁰³⁷ *ibid* p. 442.

¹⁰³⁸ *ibid* p. 441.

¹⁰³⁹ *ibid*.

¹⁰⁴⁰ *ibid*.

¹⁰⁴¹ G. Goodwin-Gill, note 624 p. 157.

8.5.2 Extraterritorial Effects of Positive Human Rights Obligation of States

Generally, as a matter of positive law, human rights obligations apply only internally within the territory of a state.¹⁰⁴² Modern trends, however, favour expanding state's human rights obligations to extend extraterritorially.¹⁰⁴³ Given that enforcement of state migration policies in transnational contexts can produce an effect beyond state territories,¹⁰⁴⁴ and with the significant number of migrants dying and missing at sea and borders and their families in most cases residing abroad, it is clear that an extraterritorial legal and policy approach to tackling the migrant crisis is required. The IOM argues that migration policies need to be informed by the realities of transnationalism especially as to how national migration policymaking initiated within the states' domestic legal order can be adapted to account for and manage transnational migration activities.¹⁰⁴⁵

However, while the new trend of extraterritorial expansion has been controversial, keenly contested¹⁰⁴⁶ and 'under-theorised',¹⁰⁴⁷ human rights courts that apply human rights law extraterritorially justify their decisions by reference to state control; that is—effective control by any particular state, of *territories*, often referred to as the *spatial model* of extraterritorial human rights obligation and also effective authority or control over *persons* abroad,¹⁰⁴⁸ often referred to as the *personal model* of extraterritorial human rights obligation. The idea is that “the more control a state exercises in an extraterritorial setting, the greater the likelihood the state will be held to its human rights duties”.¹⁰⁴⁹ However, there are still major disagreements about: (1) why control matters;¹⁰⁵⁰ (2) the kinds of extraterritorial control that can trigger a state's human rights duties; (3) whether other factors other than control can trigger these duties; and (4) whether the duties can be triggered simultaneously or in stages having regard to the circumstances of each case.¹⁰⁵¹

¹⁰⁴² Monica Hakimi, 'Toward a Legal Theory on the Responsibility to Protect' (2014) *The Yale Journal of International Law*, Vol. 39 Issue 247 p. 261.

¹⁰⁴³ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011) p. 1.

¹⁰⁴⁴ IOM 'Migration and Transnationalism: Opportunities and Challenges' (2010) *International Dialogue on Migration Intersessional Workshop Background Paper*, 9-10 March 2010 p. 1.

¹⁰⁴⁵ *ibid* p. 5.

¹⁰⁴⁶ Monica Hakimi, 'Toward a Legal Theory on the Responsibility to Protect' (2014) *Yale Journal of International Law*, Vol. 39 Issue 247 p. 261.

¹⁰⁴⁷ Monica Hakimi *ibid* p. 261; Marko Milanovic note 104 p. 264.

¹⁰⁴⁸ *Al-Skeini v the United Kingdom*, Application No. 55721/07 [GC, ECtHR] paras 134-138.

¹⁰⁴⁹ Monica Hakimi, note 1042 p. 262.

¹⁰⁵⁰ *ibid*.

¹⁰⁵¹ *ibid* p. 262

For the ECHR the general rule is territorial because Article 1 of ECHR refers to jurisdiction defined by reference to the recognised territory of a state; and, further, limited to the *espace juridique* of the Convention. Therefore, the extra-territorial application of the Convention is seen as an exception to the general rule and based on 'special factors' including an appropriate sense of control. From the decision in *Al-Skeini v United Kingdom*, the range of those special factors is indeterminate and depends on the facts of cases.¹⁰⁵² Regardless of which model of extraterritorial human rights jurisdiction and obligation is invoked by states in relation to migrants outside their territories, it has been argued that in cases involving migrants in distress at sea and at border zones, plural states have a legal obligation under human rights law and the law of the sea to render assistance to migrants facing distress at sea and other death zones, regardless of whether the traditional routes or links for establishing jurisdiction under international law such as territory and nationality exist or not.¹⁰⁵³

Put differently, there is a plurality of human rights duties placed on states to protect migrants from going missing and such duties extend extraterritorially, regardless of whether migrants have reached state territories or not. The ECtHR reiterated this position in *Hirsi Jamaa v Italy* when it found against the practice of *preventive refoulement* of migrants by some states and further stressed that *non-refoulement* human rights obligations of states apply extraterritorially.¹⁰⁵⁴ This extends even to the high sea, especially when a state's coastguard intercepts or interdicts migrants and seeks to return them to unsafe places. With thousands of migrants already dead or missing in an attempt to cross the Mediterranean Sea into Europe, the failure of frontline global states to take action to save human lives would be incompatible with established norms of positive human rights law and also amounts to a moral failure. While the ECtHR's respective decisions in *Al-Skeini* and *Hirsi Jamaa* expressly reflect the current position of human rights law and practice in the EU, it also implicitly reflects the understanding that migration is a transnational phenomenon where externalised migration policies and border controls have increasingly become a major response approach by states.

8.5.3 Externalisation of Migration Policies and Border Controls

Most European states have generally been providing protection to those who manage to reach their territories and present a legitimate claim to international protection. The UK for example, has

¹⁰⁵² *Al-Skeini v United Kingdom* pp. 130-142.

¹⁰⁵³ V.P Tzevelekos and E.K Proukaki note 20 p. 427.

¹⁰⁵⁴ *Hirsi Jamaa v Italy*.

played and continues to play a leading role in providing humanitarian protection to refugees in need of international protection from conflict and human rights abuses.¹⁰⁵⁵ Not only did the UK play a significant role in the process leading to the actual drafting of the 1951 Refugee Convention through which several millions of refugees across the world have received protection, it has also committed more funding than many other frontline states through its stabilisation policy to tackle the root causes and immediate threat of violence¹⁰⁵⁶ triggering irregular migration and refugee crisis in different parts of the world, particularly in Africa and the Middle East.¹⁰⁵⁷ While granting international protection to people fleeing persecution and armed conflict is most commendable, a disturbing development is that, over the years, some European and other states have increasingly aspired to adopt a series of unilateral, bilateral and multilateral externalisation of migration policies and controls whereby they seek to strike a deal with third countries (deemed safe third countries) mostly origin, transit and countries of first arrival to act as border guards in order to control flow of migrants seeking refuge in their territories.

Through such externalisation practices, states attempt to prevent, intercept or interdict migrants from arriving at destination states. Italy's ill-fated deal with Libya to intercept and pull back migrants is often cited as the most obvious example.¹⁰⁵⁸ Such extraterritorial actions to stem the tide of increasing migrant flows have been linked to ineffectiveness and politicisation of national migration policies.¹⁰⁵⁹ But many European states, including the UK, consistently claim that externalisation policies are actually devised with good intentions—to protect lives and achieve safe, orderly and regular migration.¹⁰⁶⁰ For example, the EU/AU Action Plan declares that it aims to prevent and fight migrant smuggling and trafficking in human beings in order to effectively tackle the humanitarian crisis occasioned by irregular migration from Africa to Europe. But the result of these policies in practice seems not to always reflect the supposed protection and life-saving humanitarian goals.¹⁰⁶¹ For example, the hitherto obscure negative impact of externalisation policies came to the global limelight for the first time when border communities like Calais,

¹⁰⁵⁵ House of Commons, note 1034 p. 25.

¹⁰⁵⁶ Independent Commission for Aid Impact (ICAI), 'The UK's Aid Response to Irregular Migration in the Mediterranean Sea: A Rapid Review', March 2017 pp. 1-28.

¹⁰⁵⁷ House of Commons, note 1034 p. 25; Stephano Fella note 982 p. 28.

¹⁰⁵⁸ *Hirsi Jamaa v Italy* supra.

¹⁰⁵⁹ Bill Frelick *et al*, 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) *Journal on Migration and Human Security* Vol. 4 No. 4 pp. 193-194.

¹⁰⁶⁰ Foreign Affairs Committee Report, 'Responding to Irregular Migration: A Diplomatic Route, UK and Africa' (2019).

¹⁰⁶¹ Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent Irregular Migration: European Union and United Kingdom Support to Libya' (2020) *German Law Journal* Vol. 21 pp. 459-486.

Lampedusa and Lesbos emerged as the twilight zones of indeterminate migration regulation, with migrants seeking to arrive those zones ending up dying or going missing in the process.

Even though externalisation policies may not always be devised with the best of motives by states, they nonetheless demonstrate the capacity of states to deal with problems abroad. Whatever the case, the argument here is that some policy and border externalisation practices have human rights implications for migrants. For instance, some of them tend to militarise the borders and make migration routes become more dangerous,¹⁰⁶² thereby increasing the risk of migrants going missing. Others appear to be fuelling human rights abuses outside Europe.¹⁰⁶³ The central argument put forward in this chapter is that UK migration policies in relation to missing migrants have to become more transnationally effective to facilitate the implementation of Objective 8 of the GCM and other relevant international norms nationally. This is key to states fulfilling their legal and moral obligations towards missing migrants despite the fact that states sometimes argue that until migrants reach their territories, they do not have any legal obligation towards them.

8.6 Conclusion

In this chapter, I have stressed that national and international migration policies require a degree of global governance and cooperation between states. I conclude that this should be the way forward for the UK and EU states as it can only take transnationally effective national migration policies to reach the international community's goal of preventing migrant deaths and migrants going at sea and EU external borders. The UK policy initiatives should for example specifically address issues around investigation, search and rescue of migrants, identification, management and repatriation of migrant bodies and family outreach. The UK's current policies are insufficient to address the issue of missing migrants, but by adopting a transnationally effective national migration policy that is international law and GCM compliant, the UK could shape international legal discourses on migration, standards and policy. It can adopt a transnational policy stance that is directed towards optimising compatibility, setting important agendas for the future whilst catering for those that already have reached its shores. With measurable national targets to achieve the GCM's Objectives, it has been suggested that the GCM could become an important

¹⁰⁶² M. Akkerman, 'Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme' in N. Buxton and W. de Vries (Transnational Institute, 2018) p. 34.

¹⁰⁶³ M. Akkerman *ibid* p. 35.

legal instrument in the future.¹⁰⁶⁴ The key purpose of the GCM is the realisation of *safe, orderly, and regular* migration in the world and, as such, transnationally effective national migration policies must be designed with these broader objectives in mind. Therefore, revised policies that are transnationally effective will ensure that the number of migrants trapped in death zones abroad are reduced and investigate, if not prevent, tragic deaths. Not least since migrants are a key contributor to the UK economy¹⁰⁶⁵ thus their well-being is in the state's interest. In bringing this chapter to a close, I should restate part of the central argument pursued in this thesis to the effect that if the legal and policy responses and specific obligations of states to missing migrants and their families are to become more effective, it would be dependent on the extent to which states' national migration policies are transnationally effective and psychosocially responsible. While the argument for the transnational effectiveness of the UK migration policies is what I have canvassed in this present chapter, in the next chapter, I take up the corresponding argument for psychosocial responsibility of the UK migration policies in relation to missing migrants.

¹⁰⁶⁴ Kevin Appleby, 'Global Compact on Migration: Issues at Play' in K. Appleby *et al*, (eds.) 'International Migration Policy Report: Perspectives on the Content and Implementation of the Global Compact for Safe, Orderly, and Regular Migration' A Report of the Scalabrini Migration Study Centres (2018) p. 114.

¹⁰⁶⁵ Gareth Mulvey, 'When Policy Creates Politics: The Problematising of Immigration and the Consequences for Refugee Integration in the UK' (2010) *Journal of Refugee Studies* Vol. 23 No. 4 p. 447.

Chapter 9

‘Those that Never Arrived’—How Psychosocially Responsible are the UK Migration Policies in Relation to Missing Migrants and their Families?

9.1 Introduction

‘Have you ever stopped to consider what happens to the bodies of undocumented migrants when they die trying to reach the shores of Europe? Who they are, who mourns their loss, where and how they are buried?’¹⁰⁶⁶

The above excerpt captures both the questions and the emotion of those working to find answers to the whereabouts of the several thousands of migrants who left their homes in search of refuge in Europe but died and went missing and never arrived at their target destination. Earlier in this work, I suggested that we have to investigate the problem of missing migrants from a legal, policy and psychosocial perspective, taking into account the imperatives of the shared values of human dignity, especially the *well-being* of families of missing migrants when responding to the problem. Thus, one of the main objectives of this thesis which is the focus of this chapter is to examine how psychosocially responsible the UK national migration policies in relation to missing migrants and the needs of their families are by drawing on themes established earlier in the literature review in Chapter 4 regarding the management of loss and grief.

In order to address the question regarding the psychosocial needs of families, secondary interviews with 12 families of missing migrants were collected for analysis from the official website of the ‘Missing at the Borders’ Project.¹⁰⁶⁷ Although the number of the interviews is relatively small as I noted earlier in Chapter 2, this does not affect the credibility of the analysis and findings as results are carefully calibrated/extrapolated and therefore deemed a fair reflection/representation of the psychosocial experiences of many other families of missing migrants whose relatives are missing in migration. The interviews are those contained in *Appendix I* while the method of analysis, source, nationalities of the respondents, and the number of themes that emerged from the interviews are those contained in *Appendix III*. After writing down the transcribed interviews, I extracted six key narrative themes that emerged, as stated in *Appendix IV*, and these themes

¹⁰⁶⁶ O.A Villagran, ‘Nameless and Un-Mourned: Identifying Migrant Bodies in the Mediterranean’ (2018) *Open Democracy*, available: <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/nameless-and-un-mourned-identifying-migrant-bodies-in-medite/> (accessed 1/5/2020).

¹⁰⁶⁷ ‘Missing at the Borders Project’, available: <https://missingattheborders.org/en/testimonials> (20/1/2021).

were used to analyse the psychosocial implications of migrants going missing for their families through the diagnostic lens of loss, grief, bereavement and mourning. Governed by the term ‘psychosocial’, understood as the underlining “perspectives, issues, impacts and considerations that relate to emotional, psychological, mental, social-relational and political processes and states at individual, family and community levels”,¹⁰⁶⁸ the chapter proceeds in the order set out below.

In Section 9.2 immediately below, I provide an outline of the key themes that emerged from the narrative interviews. Following on, the next six sections (Sections 9.3 to 9.8) analyse each one of those six narrative themes. In order to gain a deeper insight into the psychosocial analysis of the interviews, in Section 9.9 I situate the interviews within the broader theoretical framework that underpins the thesis (New Haven School/Agamben/Arendt). Taking into account the totality of the interview analysis and in light of the New Haven School shared value of *well-being*,¹⁰⁶⁹ I proceed in Section 9.10 to conceptually define what a psychosocially responsible UK policy in relation to missing migrants should look like. Guided by that definition, in Section 9.11, I examine the potentials of a psychosocially responsible UK policy to assist the families of missing migrants in remote lands which might resolve their loss. Finally, Section 9.12 concludes the analysis in this chapter.

9.2 Thematic Analysis of the Secondary Narrative Interviews

The data analysis strategy was to examine the interviews to locate common and recurrent themes that occurred across all the twelve participants’ accounts and to piece together a narrative from the various accounts in order to discern their recounted experiences.¹⁰⁷⁰ In analysing the interview data, I reflect on what the ambiguous loss experiences mean to the individual.¹⁰⁷¹ This in principle implies that the thematic analysis of the psychosocial needs of families may essentially be a ‘therapeutic project’.¹⁰⁷² The names of the interview participants are anonymised (*Appendix II*) in

¹⁰⁶⁸ Maleeka Salih and Gameela Samarasinghe, ‘Families of the Missing in Sri Lanka: Psychosocial Considerations in Transitional Justice Mechanisms’ (2017) *International Review of the Red Cross* Vol. 99 Issue 2 p. 502.

¹⁰⁶⁹ On the conception of the basic policies of human dignity in ‘value’ terms, see generally D.J Mattson and S.G Clarke, ‘Human Dignity in Concept and Practice’ (2011) *Policy Sciences* Vol. 44 No. 4 pp. 310-317.

¹⁰⁷⁰ Cf. Paul Cwaword *et al*, ‘Education as an Exit Strategy or Community Mental Health Nurses: A Thematic Analysis of Narratives’ (2008) *Mental Health Review Journal* Vol. 13 Issue 3 p. 10.

¹⁰⁷¹ Jane Elliott, note 199 pp. 20-21.

¹⁰⁷² Barry Richards *et al*, ‘Conclusion: Psychosocial Studies—A Therapeutic Project’ in S. Day-Sclater *et al*, *Emotion: New Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan) pp. 242-254. Important to point out that implying the psychosocial analysis of missing migrants and the needs of families as essentially a ‘therapeutic project’ may be controversial because some psychosocial theorists are highly critical of the

order to comply with ethical requirements regardless of the fact that the data are already in the public domain. The six themes are represented in table 3 below.¹⁰⁷³

Table 3: Key Themes that Emerged from the Secondary Narrative Interviews

S/N	Key Themes
1	Clouds of Ambiguity Over the Status of the Missing: Alive or Dead
2	Freezing of the Process of Mourning, Grief and Closure
3	Hope and Despair Pull in Opposite Directions
4	Systemic Effects of Ambiguous Loss on Affected Families
5	Legal-Psychosocial Needs of Families
6	Coping and Resilience Mechanisms of Families

9.3 Theme I: Clouds of Ambiguity Over the Status of the Missing: Alive or Dead?

Excerpt I

'We don't know what to do. One person says, they are alive, others say they are fighting with Daesh. Everyone says something different. The last time they told us: 'They are in Syria. You have no idea what happened to your child. One day they say he's alive, the next day they say he drowned. That means we're stuck... Since the accident, we live like a person with a full body, who has had a leg or arm cut off as if a part of the body is missing. Imagine, he was part of the family. He was part of us'. (P4, Father of Man, Missing since 6/09/2012)

Excerpt II

'His absence is the greatest pain. Because you don't know where your husband is. If he's alive or dead'. (P1, wife of man, Missing since 29/03/2011).

When families of missing persons have no information on whether their relatives are alive or dead, such loss as the above interview excerpts indicate is 'ambiguous loss' argues Boss.¹⁰⁷⁴ This is in contrast to what psychologists call 'uncomplicated bereavement', a situation where there is a body available to mourn.¹⁰⁷⁵ In ambiguous loss condition, the bereavement is said to be complicated; there is no clarity as to the fate of the missing person. As there are no dead bodies to enable families to construct personal and social meanings about the position of their missing relatives in the family and society, and no funerals organised to mark a major point of transition, the process

idea of the 'therapeutic project'. See Day Sclater *et al*, 'Introduction' in Day Sclater *et al*, (eds) *Emotion: Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan, 2009) pp. 1-19; D. Jones *et al* (2009) 'Conclusion' Day Sclater *et al*, (eds) *Emotion: Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan, 2009) pp. 242-255.

¹⁰⁷³ This table is the same as 'Appendix III' annexed in the list of appendices at the end of this thesis.

¹⁰⁷⁴ Pauline Boss note 449 p. 519; Pauline Boss & Janet Yeats, note 444 pp. 63-69 p. 64.

¹⁰⁷⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5) Fifth Edition* (Washington: American Psychiatric Association, 2013) p. 716. Cf. M.C. Shear *et al*, 'Complicated Grief and Related Bereavement Issues for DSM-5' (2011) *Depression and Anxiety* Vol. 28 No. 2.

of mourning and bereavement are left unfacilitated.¹⁰⁷⁶ In recent times, the use of virtual and digital dead body management procedures,¹⁰⁷⁷ medianisation of mourning¹⁰⁷⁸ and digital materialities¹⁰⁷⁹ as new forms of commemoration and memorialisations¹⁰⁸⁰ have emerged as modern tools to help families and communities walk around the impact of the ambiguous loss of loved ones, but many issues still persist regarding family participation in such digital and diasporic migrant mourning rituals. And as long as the fate of missing migrants is not known, families continue to face the trauma of ambiguous loss; they cannot move on with their lives and cannot reinvest their relationships with the missing. The clouds of ambiguity over the fate of the missing can produce traumatising effects on affected families, such that they are unable to develop the resilience and adaptation needed to cope with the long-term impact of the ambiguous loss of their relatives. Ambiguous loss freezes the mourning, grief and closure process that families desperately need.

9.4 *Theme II: Freezing of the Process of Mourning, Grief and Closure*

As hinted above, given the unresolved ambiguity surrounding the fate of the missing migrants, there is a freezing of the process of grieving for and mourning the dead migrants. In such situations, identification of bodies and mourning becomes difficult if not totally impossible.¹⁰⁸¹ This implies no closure for the families and the unfinished business between the living and the dead lingers on. As stated earlier, since Sigmund Freud's writing on *Mourning and Melancholia*,¹⁰⁸² the phenomenon of mourning and grief after the loss of a relative has often been compared to the

¹⁰⁷⁶ Giorgia Mirto *et al*, 'Mourning Missing Migrants: Ambiguous Loss and the Grief of Strangers' in Paolo Cuttitta and Tamara Last (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam: Amsterdam University Press, 2020) p. 104.

¹⁰⁷⁷ Kristin Bergtora Sandvik, 'Digital Dead Body Management: A New Issue for Human Rights Research' (2020) *Harvard Human Rights Journal* (Online).

¹⁰⁷⁸ Lisbeth Klastrop, 'Death and Communal Mass-Mourning: Vin Diesel and the Remembrance of Paul Walker' (2018) *Social Media + Society* pp. 1-11; Lisbeth Klastrop, 'I didn't Know Her, but...': Parasocial Mourning of Mediated Deaths on Facebook RIP Pages' (2015) *New Review of Hypermedia and Multimedia* Vol. 21 146-161; Cf. M.D Irwin, 'Mourning 2.0—Continuing Bond Between the Living and the Dead on Facebook' (2015) *OMEGA—Journal of Death and Dying* Vol. 72 No. 2 pp. 119-150.

¹⁰⁷⁹ Karina Horsti, 'Digital Materialities in the Diasporic Mourning of Migrant Death' (2019) *European Journal of Communication* Vol. 34 No. 6 pp. 671-681.

¹⁰⁸⁰ Victor Toom, 'Whose Body Is It? Techno-legal Materialization of Victims' Bodies and Remains after the World Trade Center Terrorist Attacks (2016) *Science, Technology and Human Values* Vol 41 No. 4 pp. 686-708. Cf. Tony Walter *et al*, 'Does the Internet Change How We Die and Mourn? Overview and Analysis' (2012) *Journal of Death and Dying* Vol. 64 No. 4 pp. 275-302.

¹⁰⁸¹ Gerhild Perl, 'Uncertain Belongings: Absent Mourning, Burial and Postmortem Repatriations at the External Border of the EU in Spain' (2016) *Journal of Intercultural Studies* Vol. 37 No. 2 pp. 195-209; S.E Wagner, *To Know Where He Lies. DNA Technology and the Search for Srebrenica's Missing* (Berkeley: University of California Press, 2008) p. 243.

¹⁰⁸² Sigmund Freud, note 391 pp. 237-258. Pauline Boss note 46 p. 553; Pauline Boss, note 47 p. xvii.

phenomenon of melancholia or depression whereby the “bereaved person adjusts to the reality of their loss, enabling them to disengage from the deceased and reinvest in new relationships.”¹⁰⁸³ As discussed in Chapter 4, one powerful outward manifestation of the psychosocial impact of deaths and loss on the mourner is grief. It was C.M Parkes, who in his psychosocial elaboration of bereavement stated that “grief is the price we pay for love”.¹⁰⁸⁴ Evidence gathered from the interviews demonstrates how Parke’s words often powerfully draw tears from families of migrants whose relatives are reported missing in migration; more so, when they have yet to hear any news about the fate of their missing relatives and no dead body to mourn. They express deep grief and a sense of desperation to go looking for their missing relatives wherever they may be, even if on the ocean floor. A mother of a missing man expressed her grief in the following words,

‘...my son is a man now, 18 years old, he’s a man! I can’t forget him, impossible. If they tell me he’s in the middle of the sea. I’m ready, I go there walking, to the bottom of the sea. I get where I can, I don’t care whether I live or die’ (P10, Mother of man, missing since 14/03/2011)

Excerpts such as this demonstrate the ways that mourning and grief overwhelm the families of missing migrants on learning of the disappearance of their relatives in migration. And with no dead bodies to mourn, they remain in a state of ambiguity about their loss. There is little comfort for them while they remain in pain and anguish, unable to process the news of the going missing of their members. In that ambiguous situation where there is no hint about the fate of the missing, that pain and grief will remain with them for the rest of their lives. When families are trapped in a situation of ambiguity as to the fate of their missing loved ones, neither of Ross’s five stages of grief,¹⁰⁸⁵ nor Rando’s six R’s of mourning,¹⁰⁸⁶ nor Worden’s four tasks of mourning,¹⁰⁸⁷ nor even Parkes and Bowlby’s four phases of grief,¹⁰⁸⁸ all discussed earlier in Chapter 4, can take place; they become frozen. Thus, by remaining in the situation of ambiguous loss described by Boss, the families of missing migrants live a life that can be likened to one hung on a rope or pendulum.

¹⁰⁸³ Shirley Thompson, ‘Theories Around Loss and Bereavement’, Presentation on 25 & 26 May 2016 p. 6, available: <https://www.sth.nhs.uk/clientfiles/File/Theory%20of%20Loss%20%20bereavement.pdf> (accessed 8/5/2020).

¹⁰⁸⁴ C.M Parkes, *Bereavement: Studies of Grief in Adult Life* (International Universities Press, 1972).

¹⁰⁸⁵ Elizabeth Kubler-Ross, note 412 pp. 31-112; Elizabeth Kubler-Ross, *Encountering Death and Dying*, note 412 pp. 1-4 & 40-50.

¹⁰⁸⁶ T.A Rando, *Treatment of Complicated Mourning* (Champaign Ill: Research Press, 1993).

¹⁰⁸⁷ J.W Worden, *Grief Counselling and Grief Therapy: A Handbook for the Mental Health Practitioner*, 4th Edition (New York: Springer Publishing Company, LLC, 2009) pp. 39-53.

¹⁰⁸⁸ John Bowlby, ‘Process of Mourning’ (1961) *International Journal of Psychoanalysis* XLII pp. 317-340; John Bowlby, Process of Mourning (1961) *Psychoanalytic Quarterly* Vol. 31 p. 576.

From one end, they express the hope that their relatives might perhaps one day return home and on the other, they give up hope, knowing that their loved ones may have died tragically.

9.5 **Theme III: Hope and Despair Pull in Opposite Directions**

'When I hear a knock at the door, right away I think that he's come back! I always thought, and still think, that he'll come back! As soon as I hear some news, I hurry to try to understand if there are news of him. I always thought and still think that he'll come back!...I still believe that my son is alive, and I pray he is. I always dream he'll come back! I'm very confident my son is alive and that he'll come back to me!' (P6, Mother of Man, Missing since 24/05/2007)

From the interviews gathered, as the excerpt above shows, one of the most critical symptoms of ambiguous loss that families of missing migrants consistently demonstrate is the marked difficulty accepting the death and/or disappearance of their missing relatives. There is always disbelief in their expressions that the missing person is dead even when available evidence points to this fact. They are trapped between hope that their missing members might still be alive and the despair that they may have died. Despite the absence of news about the whereabouts of the missing and the increased likelihood of their death, so long as there is no dead body to bury, nor funeral rites observed, no gravesite to visit and no final answers given, families live in limbo and continue to cling to and build their hope on nothing less than that the missing may one day return.¹⁰⁸⁹ As the wife of a missing person recounted,

'I live in the constant hope that he'll be back; I always hope that one day he'll come knocking on the door' (P3, Wife of Man, Missing since 6/09/2012)

This suggests that in many cases, the affect, emotion and feelings (ineffable as they might be) of potential hope as against loss registered in the minds of the waiting families tend to becloud their sense of 'reason and logic' in terms of the way families try to make meaning out of and cope with the sudden disappearance of their relatives. Emotion as defined earlier in the literature review deals with the relatively conscious feelings such as feeling of sadness and loss usually expressed when individuals grapple with situations that they consider personally significant to their lives.¹⁰⁹⁰ This is closely related to 'affect' which refers to the embodied and lived, unconscious feeling that happens in situations of profound grief described in terms of melancholia by Freud.¹⁰⁹¹ As 'affect'

¹⁰⁸⁹ M.J Klinkner, 'Towards Improved Understanding and Interaction Between Forensic Science and International Criminal Law in the Context of Transitional Justice' (2009) PhD Thesis, BU p. 121.

¹⁰⁹⁰ Lita Crociani-Windland and Paul Hoggett, note 414 p. 164.

¹⁰⁹¹ Sigmund Freud, note 391 p. 245.

is a “more bodily based indeterminate level of experience”,¹⁰⁹² there is always that tendency for the grieving families of missing migrants to disavow or yield to denial of reality of the loss when thinking about what gets repressed and cannot be mourned because there is simply ‘no object in mind to grieve over’.¹⁰⁹³ The act of disavowal of loss in situation of profound grief may be seen as a way of managing the passivity of ambiguous loss, and the inability of grieving families to do something about their loss—what Klein calls “manic defence”.¹⁰⁹⁴

In many cases, the conflicting feeling of loss and hope expressed by the affected families are observed through their distressing review of the images/memories of the deceased in their minds, crying and persistent longing for the dead, preoccupations about how the missing person may have died, anger over the loss, as well as a desire to die with the deceased. Others include attempts to avoid reminders of the tragic loss, feeling of life as meaningless without the deceased, desire to detach oneself from others and go into loneliness, diminished sense of one’s identity and maladaptive appraisal of oneself in relation to the missing/dead person.¹⁰⁹⁵ When ambiguity over the fate of missing migrants remains unresolved and hope and despair for the families continue to pull in opposite directions, this has grave systemic effects (discussed in the section below) on the psychosocial wellbeing of the affected families, individuals and communities.

9.6 **Theme IV: Systemic Effects of Ambiguous Loss on Affected Families**

One of the underlying assumptions of ambiguous loss theory is that there exists a psychological family in the human mind.¹⁰⁹⁶ Taking into account the differing perceptions and empowerments among the different families of missing migrants contained in the interviews, the systemic effects of ambiguous loss can be seen and felt through a psychosocial lens comprising of psychological and social elements.¹⁰⁹⁷ With regard to the psychological element, the ambiguity and lack of concrete information about the fate of the missing blocks cognition, meaning-making and adaptations that are crucial for developing necessary resilience mechanisms and resolving loss.¹⁰⁹⁸

¹⁰⁹² Lita Crociani-Windland and Paul Hoggett, note 414 pp. 164-165.

¹⁰⁹³ Sigmund Freud, note 391 p. 245.

¹⁰⁹⁴ Melanie Klein, ‘Mourning and its Relation to Manic-Depressive States’ (1940) *International Journal of Psychoanalysis* Vol. 21 pp. 125-153.

¹⁰⁹⁵ American Psychiatric Association, *Diagnostic and Statistics Manual of Mental Disorders*, 5th ed. (American Psychiatric Association, 2013).

¹⁰⁹⁶ Pauline Boss, note 449 p. 526.

¹⁰⁹⁷ *Ibid* p. 526.

¹⁰⁹⁸ Pauline Boss note 430; Pauline Boss *et al*, *Family Stress Management*, 3rd edition (Thousand Oaks, CA: 2016).

Grief is complicated,¹⁰⁹⁹ and the process of mourning, coping and decision-making become frozen.¹¹⁰⁰ As for the social element, the ambiguity fundamentally alters the family structure and function; family boundaries become unclear about who is in and out of a particular family. Important roles and responsibilities in the family system too may change, sometimes with severe consequences for the survivors. As the wife of a missing man responded,

'One thing I would have loved to do with my husband, but I did it alone and it was very painful...And he wasn't there. The void he left is very noticeable. Because he cared about enjoying and interacting with his children.' (P1, Wife of Man, Missing since 29/03/2011).

In addition, the likelihood of family conflict and alienation increases, and decision-making at the family level may become frozen. In such ambiguous situations where families have no dead body to mourn and dispose of in a culturally acceptable way, they become helpless and find it difficult to accept their loss, and their communities too may not recognise their loss. Although ambiguous loss affects individuals and families, it also produces a multiplicity of interconnected effects that psychosocially impacts not only the individuals and families directly involved but also their local communities.¹¹⁰¹ Thus, the psychosocial implications or impact of migrant deaths and migrants going missing in ambiguous circumstances for those left behind exist at three levels: individual, family and community—considered briefly below.

i. On the Individual Level

On the individual level, the lack of concrete information and the frozen and complicated grief that comes with the ambiguity of loss of a missing relative means the brother, sister, spouse or other distant relations of the missing migrants could suffer severe psychological trauma that could lead to mental health problems.¹¹⁰² The risk involved in such situations is the tendency of the waiting individual to gradually develop depression and isolate themselves from human connections as their sorrow and grief over the disappearance of their relatives deepens.¹¹⁰³ The mother of a missing man interviewed recounts her ordeal in the following words;

'I'm so worried I can't sleep. My son is always in my thoughts...I will confess something nobody knows; I spend my nights crying...Our

¹⁰⁹⁹ Pauline Boss, 'The Trauma and Complicated Grief of Ambiguous Loss' (2010) *Pastoral Psychology* Vol. 59 No. 2; Theo Hollander, note 436.

¹¹⁰⁰ Pauline Boss, note 430.

¹¹⁰¹ Pauline Boss, note 449 pp. 524-526.

¹¹⁰² *ibid* p. 525

¹¹⁰³ *ibid*.

lives are like a constant funeral!’ (P5, Father of Man, Missing since 02/12/2016)

Thus, the ambiguity over the whereabouts of missing migrants produces lethal psychosocial effects on the waiting individual members of their families, especially in relation to their health and mental well-being. A father of a missing man expressed this psychological impact on his health and the mental well-being of his family when stating,

‘...since my son disappeared, I became diabetic...I feel upset, I have a heart problem. I have three veins obstructed near the heart and his mother died. His mother cried out her son’s name when she was dying. Do you think I can forget my son? My children are my life.’ (P12, father of man missing since 24/05/2007)

In the same way that the unresolved ambiguity over the status of missing migrants produces a lethal psychosocial effect on the individuals affected, so also, it produces a tremendous impact on their families as a foundational unit of society.

ii. On the Family Level

As mentioned earlier, one of the core assumptions that underlie the ambiguous loss theory is the existence of a psychological family. At the family level, the challenge remains the boundary ambiguity that is created in the family structure following the sudden disappearance of one of their own.¹¹⁰⁴ For example, where the head of the family or a husband is the one that goes missing, this could lead to an unhealthy shakeup in the hierarchy of authority in terms of decision making in the family. An ambiguous loss could rupture family relationships and create unhealthy tension and rivalry among members, and in most extreme cases could totally disintegrate a family.¹¹⁰⁵ In addition, the widows of missing migrants may face persecution and harassment and may have their position threatened by some members of their families as long as the circumstances surrounding the disappearance of their husband remain ambiguous and unresolved.¹¹⁰⁶ The wife of a missing man expressed the fear of this threat implicitly when saying,

‘I’m in a state of limbo, I don’t know if I’m a widow or married. You cannot say that I’m a widow and you cannot say that I’m married. I’m in a state of limbo. I feel like a lioness, who does like this.’ (P3, Wife of Man, Missing since 6/09/2012)

¹¹⁰⁴ Pauline Boss, ‘Ambiguous Loss Theory: Challenges for Scholars and Practitioners’ (2007) *Family Relations* Vol. 56 No. 2.

¹¹⁰⁵ Pauline Boss, note 47.

¹¹⁰⁶ F.B Attia *et al* note 305 p. 4.

Under the laws of some states, death is presumed if the missing person is not found after seven years.¹¹⁰⁷ In many cultures around the world, widows of missing persons cannot remarry as long as the remains of their spouse are not brought home for proper customary burial and observance of post burial rites. Sometimes families and their individual members together experience another type of grief that psychologist calls ‘anticipatory grief’, as opposed to post-death grief,¹¹⁰⁸ that is, the emotional response that is experienced before the actual loss,¹¹⁰⁹ the feeling of potential death or loss of their loved one in migration. Put differently, it is grief that comes before the actual event that is predicted to bring about the grief happens. This feeling of anticipatory grief was very evident in the responses of some of the interviewed families as they warned their relatives against deadly sea migration. The families demonstrate some intense affective and emotional response to a loss they suspect will likely happen, often including expressions of deep mourning, sorrow, regret, denial, anger, resentment, and a sense of desperation to prevent the anticipated loss from happening. The father of a missing man stated what this anticipatory loss and grief is like, thus,

‘I tell him: ‘Don’t do it. You see everyone come and go’. They brought people back, children from our neighbourhood, dead bodies. They died during crossing. He calmed down. We said: ‘Is that what you want, to come back dead?’ (P4, Father of Man, Missing since 6/09/2012)

Thus, from the above response of a family of missing migrants, it goes without saying that the ambiguous loss of their relatives can rip up a family and create a vacuum that only public policy empowered therapeutic and psychosocial support approaches can help address.

iii. On the Community Level

At the community level, ambiguous disappearances of migrants from their communities could affect the social solidarity that unites that community and the families of missing migrants

¹¹⁰⁷ For example, see Section 164 of the Nigerian Evidence Act, 2011.

¹¹⁰⁸ C.K Aldrich, ‘Some Dynamics of Anticipatory Grief’ in B Schoenberg *et al*, *Anticipatory Grief* (New York: Columbia University Press, 1974) p. 4; H.N Sweeting, ‘Anticipatory Grief: A Review’ (1990) *Soc. Sci. Med.* Vol. 30 No 10 pp. 1073-1080; Irwin Gerber, ‘Anticipatory Grief and Aged Widows and Widowers’ (1975) *Journal of Gerontology* Vol. 30 No. 2 pp. 225-225; Linda Reynold and Derek Botha, ‘Anticipatory Grief: Its Nature, Impact, and Reasons for Contradictory Findings’ (2006) *Counselling, Psychotherapy and Health* Vol. 2 No. 2 p. 15; Felice Zilberfein, ‘Coping with Death: Anticipatory Grief and Bereavement’ (1999) *Journal of the American Society on Aging* Vol. 23 No. 1 p. 69; K.B Rogalla, ‘Anticipatory Grief, Proactive Coping, Social Support and Growth: Exploring Positive Experiences of Preparing for Loss’ (2020) *OMEGA—Journal of Death and Dying* Vol. 81 No. 1 p. 108.

¹¹⁰⁹ Julia Carl Shore *et al*, ‘Anticipatory Grief: An Evidence-Based Approach’ (2016) *Journal of Hospice and Palliative Nursing* Vol. 18 No. 1 p. 15.

together. For example, in many cultures and traditions of the developing regions of Africa, where Mediterranean migration to Europe often originate from, the core societal values, religion and beliefs about death, mourning and grief are shared with families in those communities. By necessary implication, where the fate of the missing migrants remains ambiguous, the communities may refuse to recognise the ambiguous loss of families.¹¹¹⁰ With necessary rituals missing and not observed for the missing dead, the culture of the relevant community may not even recognise a remarriage of any spouse if the fate of their spouse is not clarified. This may affect the affected families' social attachment to community groups, and peers and family members may choose to stay isolated from the rest of the community, in the notion that that is the best way to grapple with their loss and grief.

However, where there is some news (even if unconfirmed) about the fate of the missing migrants within the community, the difference is clear; the communities will rally around the affected bereaved families. The testimony of one father of a missing man in the Mediterranean showed the emotional response of members of the community as the news of the sinking of a boat where the missing man is believed was onboard broke out;

'The next day I saw people in the neighbourhood standing together in groups. Something was strange. Groups here and there. I asked, and they said: 'Yesterday's boat, it sank'. But after that, the whole situation turned to chaos?' (P4, Father of Man, Missing Since 6/09/2012)

It is argued that these multiple levels of psychosocial effects of ambiguous loss on individuals, families and communities demonstrate that a psychosocially responsible, informed and compliant UK migration policy in relation to missing migrants is expected to be person-centred, family-centred and community-centred.

9.7 Theme V: Legal-Psychosocial Needs of Families

Given the social and psychological effects of the ambiguous loss that families grapple with following the going missing of their relatives in transnational migration, they have what I have called 'legal-psychosocial needs' that states should address. Empirical evidence from the interviews points to at least three such key needs: (a) the need to know the fate of the missing, (b) the need for access to the human remains and (3) emotional/psychosocial need.

¹¹¹⁰ Pauline Boss, note 449 p. 525.

9.7.1 The Need to Know the Fate of the Missing

Families need information and clarification about the fate of their missing relatives in order to assist with closure and coping mechanisms. Without any information about the whereabouts of their missing relatives, families of missing migrants live in a permanent state of confusion and limbo; uncertain and unsure of what has become of their missing relatives. The interviews considered showed the existentialism of waiting on the part of the affected families of missing migrants, and feelings of powerlessness on the part of the individual members of those families that are waiting. As one family interviewed stated agonisingly,

'We want peace of mind, knowing that they are alive to remove this doubt of not knowing if they are alive or dead. If we had his body, we would have accepted God's destiny for him, and we would have resigned ourselves. We don't know if he is dead or alive.' (P5, Father of Man, Missing since 02/12/2016)

The mother of a missing man also stated,

'we do not ask for the impossible, we want our children...whatever the price, whatever situation they are in. Were they sentenced to 20 years in prison? Let us see them wherever they are. Did they die? Then give them back to us. They lost arms, legs, eyes...it doesn't matter! The important thing: give us peace. We want to rest.' (P10, mother of man missing since 14/03/2011)

Information relating to the fate of the missing remains key to attending to the psychosocial needs of grieving families while ambiguous loss lasts. Although states are sometimes also in the dark as to the whereabouts of migrants reported dead or missing, the legal obligation as stated in Chapter 7 to take effective steps to gather information to explain the fate of those missing and provide concrete answers to their families rest squarely with the states.

9.7.2 The Need for Access to the Human Remains

'If we had been able to bury him, we would have accepted God's destiny. We would have visited him at the graveyard like everyone else. We are neither alive nor dead. We're in a very difficult predicament...' (P2, Mother of Man, Missing since 15/03/2007)

When migrants go missing and/or are reported dead, we just wonder why having the dead body for burial is so important for their families. So, why do the dead matter? Was Diogenes the Cynic, the ancient Greek philosopher still with us, he would have no problem telling us, the dead body no longer matters; it is nothing but a rotting organic matter that should be thrown to the wild beasts

to feed on.¹¹¹¹ Thomas Laqueur argues that if Diogenes had not existed, we would have invented him to insist that “the dead do not matter so that we can respond with reason for why they do”.¹¹¹² The evidence in the interviews in this study proves Laqueur right. The demand for the return of bodies of the dead for proper funeral and burial dominated the response of the families of missing migrants interviewed. Like those expressed by the mother of a missing man in the excerpt above, another mother of a missing man said,

‘I asked boys on Lampedusa whose numbers were discovered. They said: ‘The man with three children, he swam with us, but then he gave up. He couldn’t go on’. I thought, even if he drowned, they’ll bring him back. So that we can bury him and come to rest. But there was no corpse, nothing. Until now, there’s nothing.’ (P3, Wife of Man, Missing since 6/09/2012)

Despite the fact that the cynicism about the dead bodies and the lack of responsibility thereof can actually be read as a manic defence for families against the shame of abjection and the fear of mortality that such bodies represent, those families nonetheless remain psychologically attached to those missing bodies. Two hypotheses can explain this phenomenon, argues Boss.¹¹¹³ First, like all cultures deep-rooted in the history of societies dating back to the days of Sophocles’ Antigone, who defied the king’s order and faced death as a price in order to retrieve and bury her brother’s body, traditions relating to respect for the dignity of the dead remain relevant not only from the cultural point of view but also from a legal point of view. Second, seeing the remains of the dead provides families with a cognitive certainty of death, invalidates all other speculations and allow families to reconstruct their image, identity and place of the dead in their family.¹¹¹⁴ Recovering dead bodies allows grieving families to bury their dead, break any lingering ‘cultural denial of death and loss’, let go of the dead and to say goodbye to their departed loved ones.¹¹¹⁵

That is to say, having a dead body recovered allows families of dead migrants to mourn and grieve over their beloved object and prevent, to recall, Freud’s words ‘melancholia’ and depression that the families and their members often face. Although, in Europe, some states have developed initiatives to mourn and memorialise dead migrants,¹¹¹⁶ the families of those missing migrants still have difficulty accepting that their relatives are truly dead without their volitional

¹¹¹¹ T.W. Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton: Princeton University Press, 2015) p. 35, available: <https://www.jstor.org/stable/j.ctvc77h3r> (accessed 5/5/2020).

¹¹¹² *ibid.*

¹¹¹³ Pauline Boss, ‘Ambiguous Loss: Working with Families of the Missing’ (2002) *Family Process* Vol. 41 p. 15.

¹¹¹⁴ Pauline Boss, *ibid* p. 15.

¹¹¹⁵ Pauline Boss, note 46 p. 561-562.

¹¹¹⁶ Karina Horsti, note 1079 pp. 671-681.

participation in such diasporic burial and mourning ceremonies. The need to have the body of the deceased to facilitate the mourning and grieving process also illustrates the emotional attachment of the living to their dead that is consistent with Bowlby's attachment and loss theory.¹¹¹⁷ Framed as a biological process, Bowlby's theory, stated earlier in Chapter 4, reflects the intense yearning for and despair faced by families when the object they were emotionally attached to for the most part of their life is lost yet not recovered to be mourned. This emotional attachment of the living to the dead is so powerful that the traditions and culture of some families of missing migrants allow them to believe that even nature or the high sea would not be so unkind as to withhold the bodies of their dead ones from them. One mother of a missing man captured this traditional belief and emotional attachment when stating,

*'...And we asked, how come there aren't even any corpses?!
The sea would have given them back. How come there isn't
even one corpse?!' (P9, mother of man missing since
24/05/2007)*

Thus, in a situation of absence of a dead body to bury, the inability of families to mourn and grieve for their missing relatives, as well as resistance against closure and feeling of ambivalence, are all natural reactions to the loss and boundary ambiguity that the disappearance of their relatives has created in their families.¹¹¹⁸ In such an ambiguous situation, the psychosocial well-being of the families becomes a key need required by families to help them grapple with their situation.

9.7.3 The Psychosocial Need (Well-Being) of Families

Psychosocial well-being, as a value of human dignity, relates to the degree of comfort and health of the individual, families and communities affected by the ambiguous loss. According to Prilleltensky "well-being may be defined as a positive state of affairs in which the personal, relational, and collective needs and aspirations of individuals and communities are fulfilled".¹¹¹⁹ The support for psychosocial wellbeing (both physical and mental wellbeing) of families requires integrating the 'values of empowerment',¹¹²⁰ into the social policy action framework for assessing

¹¹¹⁷ John Bowlby, note 409.

¹¹¹⁸ Pauline Boss, note 1113 p. 15.

¹¹¹⁹ Isaac Prilleltensky, 'Promoting Well-being: Time for a Paradigm Shift in Health and Human Services' (2005) *Scandinavian Journal of Public Health* Vol. 33 (Suppl. 66) p. 54; Isaac Prilleltensky, 'Wellness Without Fairness: The Missing Link in Psychology' (2013) *South African Journal of Psychology* Vol. 43 No. 2 p. 148.

¹¹²⁰ Isaac Prilleltensky, 'The Immigration Experience of Latin American Families: Research and Action on Perceived Risk and Protective Factors' (1993) *Canadian Journal of Community Mental Health* Vol. 12 No. 2 p. 105; Isaac Prilleltensky, 'Values, Assumptions, and Practices: Assessing the Moral Implications of Psychological Discourse and Action' (1997) *American Psychologist* Vol. 52 No. 5 p. 526; Isaac Prilleltensky,

the needs of families in such a way that the affected families are given a voice over a critical matter that affects their lives directly. Whether viewed through the lens of migration or otherwise, the value of empowerment implies respect for the rights and dignity of families as well as “compassion and responsible caring”¹¹²¹ in such ways that predominantly “promote the personal, collective and relational wellness”¹¹²² of the families affected by the loss of their relatives in migration. In order to strategically position the UK’s national migration policy to recognise and promote the value of ‘well-being of migrants’¹¹²³ and their families, having a grasp of the essential constituents of well-being described below (Section 8.10) is critical and can prove very decisive.

However, while addressing the wellbeing of families in situations of ambiguity is key to getting families back on their feet, it is also important to recognise that the grief that families of missing migrants go through in their ambiguous situations can have long-lasting effects and therefore, there may be no real definite closure for this kind of loss. And therefore, families have limited or no ability to lead the life they would hope for. Even in situations where there is a dead body recovered to be mourned, Silverman and Klass’ *continuing bond theory* does not accept that grief is capable of being fully resolved such as to culminate into definite closure and recovery.¹¹²⁴ For them, rather than letting go, families keep negotiating and renegotiating the meaning of their loss over time insofar as death is a permanent loss that remains in the minds and memories of the surviving families. This fact of the continuing bond was manifestly evident in the interviews. The mother of one missing man said,

‘Since that moment, 11 years have passed but we never stopped looking for them....Our lives since he left...His presence never left the house! We get up talking to him....Wherever I turn, I see his image. When I sleep, I always see him in my dreams...His absence is ever-present. We will never forget M9. Almost 11 years have gone by, but it’s as if he left yesterday. This tragedy is still alive.... It seems like he left yesterday. And we have not forgotten him!’ (P9, mother of man missing since 24/05/2007)

‘Critical Psychology Foundations for the Protection of Mental Health’ (1999) *Annual Review of Critical Psychology* Vol. 1 pp. 100-118 p. 102.

¹¹²¹ Isaac Prilleltensky *et al*, ‘Clinicians’ Lived Experience of Ethics: Values and Challenges in Helping Children’ (1999) *Journal of Educational and Psychological Consultation* Vol. 10 No. 2 pp. 323-324.

¹¹²² Isaac Prilleltensky, ‘Value-Based Praxis in Community Psychology: Moving Toward Social Justice and Social Action’ (2001) *American Journal of Community Psychology* Vol. 29 No. 5 p. 753; Isaac Prilleltensky and Ora Prilleltensky, ‘Synergies for Wellness and Liberation in Counselling Psychology’ (2003) *The Counselling Psychologist* Vol. 31 No. 3 pp. 273-279.

¹¹²³ Isaac Prilleltensky, ‘Migrant Well-Being is a Multilevel, Dynamic, Value-Dependent Phenomenon’ (2008) *American Journal of Community Psychology* Vol. 42 pp. 359-364.

¹¹²⁴ Silverman and Klass, ‘Continuing Bonds: New Understandings of Grief’ in Dennis Klass *et al*, (eds.) *Continuing Bonds: New Understandings of Grief* (USA: Taylor and Francis, 1996) pp. xviii, 16 & 22.

The continuing bond feeling was also demonstrated by some of the families, sometimes through retaining and displaying the pictures or photographs of the missing person or recalling memories of events and ceremonies they shared together with the missing person. As the wife of a missing man recounted the memories she and her children shared with their missing husband and father,

'A wedding, an event reminds them of him. They often take his pictures of the wall and hang it again. Yesterday we heard a song which the father often listened to. We listened to the song and all of us cried. We wept for their father.' (P3, Wife of Man, Missing since 6/09/2012)

Another mother of a missing man shared the same experience thus,

'...during Ramadan, I always keep M11's picture right in front of us while we eat. His brothers asked me 'why do you do that?'. I said, 'maybe he is watching over us while we are breaking the fast' (P11, mother of man missing since 15/03/2007)

Stroebe and Schutt suggest that people who are grieving for and mourning the sad loss of their loved ones ostensibly keep oscillating between orientation and restoration which could be a real source of distress and anxiety.¹¹²⁵ By necessary implication then, developing resilience and coping strategies or mechanisms in order to negotiate and construct/reconstruct the meaning of life in the *absence* of the dead in situations of ambiguous loss where ambivalence clearly prevails and the fate of the missing migrant remains unknown is therefore very important for families.

9.8 Theme VI: Coping and Resilience Mechanisms of Families

As explained above, one stark reality of ambiguous loss for families of missing migrants is that there may be no definite closure available to them for this kind of loss, which may lead to erosion of the social and psychological well-being of the affected families. Thus, families developing resilience and coping abilities becomes very imperative in a situation of ambiguous loss—a family/social adversity where the main conditions leading to human well-being (understood as, *answer as to the fate of the missing*) are either not forthcoming, not favourable or are not met.¹¹²⁶ According to Prilleltensky and Prilleltensky, resilience entails “the ability to cope with family and

¹¹²⁵ Margaret Stroebe and Henk Schutt, 'The Dual Model of Coping with Bereavement, Rational and Descriptive' (1999) *Death Studies* Vol. 23 No. 3 pp. 197-224.

¹¹²⁶ Isaac Prilleltensky *et al*, 'The Role of Power and Control in Children's Lives: An Ecological Analysis of the Pathways Towards Wellness, Resilience and Problems' (2001) *Journal of Community and Applied Social Psychology* Vol. 11 p. 150.

social adversity”.¹¹²⁷ All the twelve interviews cited in this study demonstrate how families desperately struggle to cope and develop resilience mechanisms in the face of unresolved uncertainties that would live with them for the rest of their lives. But how do the families cope with the absence of a dead body to mourn and the absence of psychosocial support?

In her theory, Boss develops six guidelines for living with ambiguous loss: finding meaning, adjusting mastery, reconstructing identity, normalising ambivalence, revising attachment and discovering new hope,¹¹²⁸ embedded in psychosocial practices consistent with what experts describe as a ‘therapeutic project’.¹¹²⁹ From the interviews, it is observed that while the individuals and families affected try to get their heads around these coping and resilience mechanisms, overall, in situations of ambiguous loss, it is their certain personality traits and strong faith in God as well as their unique individual abilities that enable those affected to find a common ground between two opposing situations of loss and hope. The mother of a missing man expressed this faith in God in the following words,

‘...I pray to God that in his mercy he may soften the hearts of those who are holding our sons. That every missing person may return to their family. We believe in God and day and night we ask God that that blessed moment may come. May every missing person return to their family. May God soften the hearts of these people who are holding them...’ (P6, mother of man missing since 24/05/2007).

The abilities of such personality traits stand out as key factors predictive of their resilience in the face of ambiguous loss since “we do not necessarily move on with grief, we grow around it”.¹¹³⁰

9.9 Situating the Interviews Within the Broader Theoretical Frameworks

In order to position the analysis of the interviews and narratives that I have identified with the wider legal, policy and the psychosocial context in which this research is situated, it is important to further analyse the interviews in light of the broader theoretical frameworks that underpin this research.

¹¹²⁷ Isaac Prilleltensky and Ora Prilleltensky, ‘Beyond Resilience: Blending Wellness and Liberation in the Helping Professions’ in Michael Ungar (ed.) *Handbook for Working with Children and Youth: Pathways to Resilience Across Cultures and Context* (Thousand Oaks, CA: SAGE Publications, 2005) p. 89.

¹¹²⁸ Pauline Boss, note 449 p. 533.

¹¹²⁹ Barry Richards *et al*, note 1072 p. 242.

¹¹³⁰ Lois Tonkin, ‘Growing Around Grief—Another Way of Looking at Grief and Recovery’ (1996) *Bereavement Care* Vol. 15 Issue 1 p. 10.

9.9.1 The New Haven School

At the centre of understanding each of the themes is the impact of the ambiguous loss of migrants in migration on the psychosocial 'well-being' of families of those missing migrants. As demonstrated above, human *well-being*, one of the eight key values of human dignity that the New Haven School advances, represents a core psychosocial need of families in their quest to make sense of and resolve the ambiguities surrounding the deaths and going missing of their relatives. I already argued earlier in Chapter 5 that when families of missing migrants have no information about the whereabouts of their missing relatives, their value of *respect* (i.e., respect for their right to know) and *well-being* (including their mental, physical and collective well-being), as well as those of the migrants themselves, stands ruptured since it brings exhausting mental suffering on the families affected. As the mother of a missing man recounted in excruciating pain,

'We try everything to at least find out if he is dead or alive. That's what we need now. Even if he is dead, they should bring us the body. That will bring us some relief because until now we are still not there...I went searching for him everywhere. I became depressed. I even had to go to a psychiatric hospital' (P8, Mother of Man, Missing since 23/04/2011)

Thus, the question of how UK policies might aid families in maximising access to and meeting this key need is crucial. It is argued that more value-based, value-dependent and psychosocially inclusive UK migration policies that are transnationally effective in terms of positive outcomes are more likely to recognise the impact of the ambiguous loss of families of missing migrants and their psychosocial needs both within and outside the UK. When the shared values of human dignity of migrants, in particular, the value of wellbeing, is ruptured by sovereign power, the victims become *bare life*, life deprived of human values necessary for survival. When they die as an effect of such dehumanised form of life, the result is the *bare dead body*: a body capable of being deprived of recognition and dignified disposal by the sovereign biopolitical.

9.9.2 Agamben's Biopolitics Theory

One of the striking features of biopolitics as demonstrated in Chapter 5 is the capacity of states to abandon life and dead bodies deemed unmournable, which disrupts the psychosocial well-being of the people affected. I argued that those governed as *bare life* in life fated to the juridical status *killable or removable body*, such as migrants, translate into *bare bodies* fated to the juridical status *disposable* upon death. To a reasonable extent, that explains the biopolitics of migrant

deaths and going missing in the Mediterranean and at external borders of Europe and the drawing of lines between mournable and unmournable bodies. In the interviews, the families of missing migrants voice their frustration about how state authorities fail to and/or abandon the search for their missing relatives and fail to respect their right to have the bodies of their dead and to observe mourning rituals. The families also protest the extreme exercise of governmental powers against their missing relatives in consigning them to prisons, a prison being a good example of a space of exception when viewed through the lens of Agamben. One father of a missing man lamented this violence against their relatives when stating,

'I went to the police station and to the coast guard to ask for help. For a week I asked for help everywhere. Nothing. Then, it all became clear. I heard that one group of people made it to the UK and another to Italy. A third group was sent back here. The only boat missing was the one with my son on board...We turned to the Italian authorities. Nothing! If you ask me, there were taken to some secret prison in Tunisia. Otherwise, they would have turned up. Who can fix this injustice?' (P7, father of man, missing since 17/4/2007).

In addition, from evidence in the interviews, it would appear that once irregular migrants disappear in migration, states may not always be willing to be responsible or may delay taking responsibility either because legal obligation and jurisdiction are lacking or the resources needed to search for the missing are lacking, which may result in a situation where no one takes responsibility. The testimony of a mother of a missing man points to this fact thus,

'...the Tunisian military said that they didn't know anything...Every now and then they came back with some pieces of news that said that our sons were stopped, taken to the hospital and then to jail! But the Tunisian authorities kept refuting and denying any information...The Tunisian authorities don't want to admit anything, and they continue to deny us the truth.' (P9, mother of man missing since 24/05/2007).

It is argued that it can only take a juridically institutionalised protection of migrants' shared value of well-being and the right to have rights to create an emancipatory pathway to overcoming the drawing of lines between different forms of lives in human societies.

9.9.3 Arendt's Theory of Right to Have Rights

The cornerstone of Arendt's argument in her theory of right to have rights is that in order to be truly a bearer of rights, one must have a place in the world such that one's *actions*, *speech* and

opinions become meaningful and significant.¹¹³¹ One constant and common feature of the response of the families of the missing migrants is their continuous feeling that state authorities do little or nothing to respect their opinions and voice in the sense of their right to know the truth of what has become of their missing relatives including their right to have the remains of their relatives returned and right to have the grieve-worthiness of their dead relatives recognised. A father of a missing man remarked thus,

'Until now we are demonstrating and protesting. At the Ministry of Foreign Affairs, at Social Affairs, at the Kasbah square and on the avenue. We also did many things in Europe. But until now, we have had no response.' (P4, Father of Man, Missing Since 6/09/2012)

One can argue that the right of families to know the fate of their missing relatives should be read as part of the wider notion of right to have rights proposed by Arendt. The first limb of 'right' (i.e., in the *singular*) in Arendt's theory of '*right* to have *rights*' means the right to have all other rights (i.e., rights in the *plural*) that is accruable to human beings under international law in every conceivable area of our lives. The right to a place in the world is to have one's *voice*, *action* and *opinion* represented in matters that affect their rights, and this right includes not just one's membership of and/or place in the political community but also their psychosocial well-being. For families to maximise the shared value of well-being, their right to know the *truth* about the fate or whereabouts of their missing relatives, the right to mourn their dead and enjoy full and definite closure has to be recognised. As the wife of a missing man stated of her husband,

'My wish is to know the truth, to be able to answer the children' (P3, Wife of Man, Missing since 6/09/2012)

The right of families of missing migrants to know the truth of what happened to their missing relatives is inextricably tied to their right to the shared value of well-being. Not knowing what happened to a missing relative and not being able to mourn their passing (if reported dead) is a painful way that families experience a rupture of their individual and collective wellbeing, especially their mental wellbeing since the human mind does not permit a relinquishing of one's attachment to the missing person without an internal struggle.¹¹³² Also, the right to know is inseparable from the right to identity of the dead and that right transcends death.¹¹³³

¹¹³¹ Hannah Arendt, note 153 p. 376.

¹¹³² V.D Volkan, note 390 p. 6.

¹¹³³ O.A Villagran, note 1066.

9.10 Towards Defining a More Value-Based, Value-Dependent and Psychosocially Responsible UK Migration Policy in Relation to Missing Migrants

From the totality of the psychosocial analysis, how should we define a psychosocially responsible national migration policy in relation to missing migrants and their families? If we start from the premise that the term 'psychosocial' refers to the connection between the psychological aspects of our experiences (e.g., our thoughts, emotions, behaviour, memory and perceptions) and our wider social experiences (e.g., our relationships, traditions, culture and values, families and communities),¹¹³⁴ then two key aspects of this broad definition prove vitally important in defining a psychosocially informed UK migration policy in relation to missing migrants. They are: (a) policy recognition of the emotions and psychosocial well-being of families of missing migrants expressed through the diagnostic lens of *loss*, *mourning* and *grief*. As Yates argues, increased emphasis on the 'value of emotional wellbeing' not only features in the political rhetoric, culture and identity of UK politicians but also in UK government policy since 1997.¹¹³⁵ The latter is represented in the policy recognition of the *legal-psychosocial needs* of families, as expressed through their search for information and knowledge about the whereabouts of their missing relatives. In the latter case, the policy, as the foregoing interview analyses indicate, should recognise at least three of those key psychosocial needs: (i) need to know the fate of the missing; (ii) need for human remains; and (iii) psychosocial support to aid resilience and coping mechanisms of affected families.¹¹³⁶

So, put simply, for our context, a UK migration policy that is psychosocially informed and compliant would mean policies initiated within the UK in which the transnational protection of the well-being (physical and mental) of migrants and families of missing migrants abroad is put at the centre. By *well-being*, it is meant "a positive state of affairs in which the personal, relational and collective needs and aspirations of individuals and communities are fulfilled".¹¹³⁷ I argue that in order for the UK policy to be defined as psychosocially responsible and compliant and to maximise its positive impact for the benefit of families of missing migrants, its centeredness on the shared value of human well-being must recognise the four constituents of well-being described by Isaac Prilleltensky in his integrated '4S' model of well-being consisting of (i) sites of well-being; (ii) signs of well-being; (iii) source of well-being; and (iv) strategies of well-being.¹¹³⁸ The *sites of well-being*

¹¹³⁴ Maryanne Loughry and Carola Eyber note 44 p. 1; M. Salih and G. Samarasinghe note 1065 p. 502.

¹¹³⁵ Candida Yates, 'Introducing Emotion, Identity and the Play of Political Culture' in Peter Redman *et al*, (eds.) *Studies in the Psychosocial Series*, (London: Palgrave Macmillan, 2015) pp. 1 & 19.

¹¹³⁶ In support, see Simon Robins, 'Addressing the Needs of Families of the Missing: A Test of Contemporary Approaches to Transitional Justice' (2011) *PhD Thesis, University of York*, pp. 159-170.

¹¹³⁷ Isaac Prilleltensky, note 1119 p. 54.

¹¹³⁸ *Ibid* p. 54.

refer to 'location of well-being'; it is about 'where' exactly in any relevant context can well-being be situated.¹¹³⁹ Given that wellbeing as a shared value of human dignity is individually, relationally, collectively and physically centred, it follows that relevant sites of well-being in our context will also be personal, relational, collective¹¹⁴⁰ and physical sites.

Conceived in this way in relation to missing migrants, the relevant *transnational sites* of wellbeing where the UK policy may be directed at include the 'Mediterranean shores', 'border spaces', 'refugee camps' etc (together taken as 'physical sites'). In addition, the 'relationships', 'persons' and 'migrant communities' both in the origin, transit and destination states (together taken as 'personal, relational/family and collective sites'). Closely linked to *sites* of well-being is *signs of well-being*. This refers to the practical manifestations and/or expressions of the value of well-being in those relevant sites that I have identified (e.g., feeling of contentment, satisfaction, happiness etc). Through analysis of the secondary narrative interviews collected from the families of missing migrants at both sides of the Mediterranean which are being used in this study, I have examined some indicators that could tell from the affect, emotion and feelings of families whether their value of well-being was met, is being met or has not been met at all. From the interviews, it is clear that where families have no idea about the fate of their missing relatives, the psychosocial wellbeing is hugely diminished. There is neither emotional containment, understood as conditions necessary to manage anxiety and loss and to live with ambivalence, to mourn and to manage complexity;¹¹⁴¹ nor are there any satisfaction and happiness for the families whose relatives are missing. Instead, what they experience is sadness, depression and a feeling of worthlessness of life without their missing loved ones.

In the same vein, by *source of well-being* in our context, we mean particular sources from where the shared value of well-being can be derived such as to empower families to resolve their ambiguous loss situations. Here, I position the UK migration policy that is psychosocially informed, compliant and transnationally effective as a real source and/or potential source of *well-being* and empowerment to families of missing migrants in the relevant sites described above and when this empowerment is substantially realised, the signs of well-being will demonstrate it. The last of the four constituents of well-being is *strategies of well-being*. They refer to psychosocial interventions and support services that are specifically and strategically deployed to address the psychosocial

¹¹³⁹ Ibid p. 54.

¹¹⁴⁰ Ibid p. 54.

¹¹⁴¹ Barry Richards *et al*, note 1072 pp. 242-254.

needs of the persons, families and communities in the relevant sites of well-being identified whilst also attending to the signs and sources of well-being at the same time in those sites.

If we integrate all the four constituents of well-being (sites, signs, sources and strategies) together into an operational model that can be built into the UK policy framework, they should present the following syllogism: the realisation and maximisation of the value of well-being in each of the four sites (personal, relational, community and physical) is reflected in the sign (wellness) shown by the psychosocial quality of life of migrants and families in those sites; which derives from a particular source (the UK policy); and promoted by a strategy of empowerment in the form of rendering therapeutic psychosocial interventions and support services to families facing ambiguous loss at those sites.¹¹⁴² The value of well-being recall is one of the eight shared values of human dignity advanced by the New Haven School. Overall, in light of this conceptualisation of a psychosocially responsible UK policy in relation to missing migrants following the interview analysis, the main argument advanced in this chapter is that given the impact of ambiguous loss on the psychosocial well-being of individuals, families and communities of missing migrants, a psychosocially informed UK policy should be person-centred, family-centred and community-centred. It also follows from this definition that there is a psychosocial structural connection between the experience of grief at the individual, social and political levels. Not least because grief which is denied at individual levels may also be denied at the wider social level; what group analyst Earl Hopper refers to as the “social unconscious”,¹¹⁴³ and the disavowal of grief at national levels can arguably shape social and migration policy.

9.11 Finding New Hope in the Law and UK Policy

If framed and defined in value terms as conceptualised in the section above, then, it can be argued that journeying migrants and families of those missing can potentially find some new hope in the law and UK national migration policies in relation to missing migrants. However, it is often argued by legal and social science scholars that the law is never practised as written.¹¹⁴⁴ While laws may have been written to perform some special social function in the society, in particular, addressing

¹¹⁴² I am immensely thankful to Professor Isaac Prilleltensky from whose integrated model of well-being, I adapted and developed my own ideas in a way that is specific to the problem of missing migrants. Generally, Prilleltensky's model is far wider understandably because it is designed to cover the subject of well-being in diverse contexts and through diverse means and strategies. See Isaac Prilleltensky, note 1119 p. 56.

¹¹⁴³ Earl Hopper, 'The Social Unconscious: Theoretical Considerations' (2001) *Group Analysis* Vol. 34 Issue 1 pp. 10-13.

¹¹⁴⁴ L.A. Bunt, 'A Quest for Justice in Cuzco, Peru: Race and Evidence in the Case of Mercedes Ccorimanya Lavilla' (2008) *PoLAR* Vol. 31 No. 2 p. 290.

human needs and protecting human values; in practice, experience shows that they may fail to meet those needs nor protect human values maximally as they should. So, in the context of this study, it is worth asking what new hope the law and UK policy can bring to families of missing migrants in order to resolve their ambiguous loss. How can an ‘individual, family and community centred’¹¹⁴⁵ UK policy be used to assist missing migrants’ families to resolve their ambiguous loss when there is no confirmation of the death of their missing relatives or a body to bury and mourn whilst also meeting their psychosocial needs? This question, I suspect, preoccupied the minds of human rights activists who docked images of life jackets of migrants (figure 1 below) in 2016 at parliament square London “to remind politicians and the public of the number of refugees and migrants who drown in the Mediterranean; many of them flee war, terror and persecution”.¹¹⁴⁶

Figure 1: Images of Refugees’ Life Jackets in Parliament Square London



Source: Howard Lake/Flickr.CC (by-sa)¹¹⁴⁷

It is argued that a UK national migration policy that is psychosocially informed, value-based and value-dependent (in terms of the protection of the wellbeing of families of missing migrants) can actually be exported to relevant sites and states abroad for lesson-drawing to improve the quality and efficiency of migration policy-making in relevant foreign jurisdictions—what experts call ‘policy transfer’.¹¹⁴⁸ So, what aspects of the UK national migration policy can be transferred or exported? It is argued that core areas relating to norms of policymaking, family/community centred psychosocial support services, knowledge of administrative arrangements, institutional practices

¹¹⁴⁵ Pauline Boss, note 47; Simon Robins, ‘Constructing Meaning from Disappearance: Local Memorialisation of the Missing in Nepal’ (2014) *International Journal of Conflict and Violence* Vol. 8 No. 1; Pauline Boss, ‘Healing Loss, Ambiguity and Trauma: A Community-Based Intervention with Families of Union Workers Missing after the 9/11 Attack in New York City’ (2003) *Journal of Marital and Family Therapy* Vol. 29 No. 4.

¹¹⁴⁶ Howard Lake, ‘Refugees Life Jackets in Parliament Square London’ (2016); O.A Villagran note 1066.

¹¹⁴⁷ Howard Lake, note 1146.

¹¹⁴⁸ D.P Dolowitz and David Marsh, ‘Learning from Abroad: The Role of Policy transfer in Contemporary Policy-Making (2000) *Governance: An International Journal of Policy and Administration* Vol 13 No 1 p. 5.

and ideas in the UK can be deployed to relevant *sites* and *places* abroad to support families whilst also responding to the problem of missing migrants as a wider social concern. Such practice facilitates ‘lesson-drawing’,¹¹⁴⁹ but it is also about the adaptation of evidence.¹¹⁵⁰ In the UK, the importation of policy norms, practices, institutions and administrative structures for lesson-drawing from international laws, policies and practices across different sectors of life to enhance the quality of national policymaking is not new. The Cabinet Office consistently advises the UK government to draw on any outward-looking policy-making norm that ‘learns lessons from other countries and takes account of developments in the European and international spheres’.¹¹⁵¹

Thus, in relation to missing migrants, UK policy ideas that are value-based, psychosocially responsible and transnationally effective can actually be transferred and/or exported abroad to address the problem of missing migrants occurring in remote lands. The fact that in the UK, policy implementation already indicates good practice when responding to the issue of missing migrants, enhances the ‘opportunity structures’¹¹⁵² for such transfer/lesson-drawing to occur. At present, the interview analysis shows that the psychosocial *well-being* of families of missing migrants is inadequately cared for in transnational terms in the existing policy frameworks of the UK. One key attribute of ambiguous loss is that there is usually no official recognition of the loss, which makes it difficult to find closure.¹¹⁵³ It is argued that a more value-based national migration policy that has all the eight shared values of human dignity built into it is more likely to recognise the loss experiences of families and the need to provide support to address their psychosocial needs.

9.12 Conclusion

The thematic analysis of the secondary interview data above reinforces the imperatives of states fulfilling their legal obligations to investigate deaths and facilitate the search, identification and repatriation of bodies, and to promote family outreach, as considered earlier in this work. In this chapter of the thesis, I have set out to provide a ‘normative analysis’ (as opposed to settled policy statement given the limited UK policy materials available) of the question of how psychosocially compliant and informed UK migration policies in relation to missing migrants are, using secondary

¹¹⁴⁹ Richard Rose, ‘What is Lesson-Drawing’ (1991) *Journal of Public Policy* Vol. 11 Issue 1 p. 3.

¹¹⁵⁰ Timothy Legrand, ‘Overseas and Over here: Policy Transfer and Evidence-Based Policy-Making’ (2012) *Policy Studies* p. 7.

¹¹⁵¹ ‘Professional Policy Making for the Twenty First Century’ Report by Strategic Policy Making Team, Cabinet Office (1999) section 5.1.

¹¹⁵² Timothy Legrand, note 1150 p. 7.

¹¹⁵³ Pauline Boss, note 47.

interviews with families of missing migrants. With the aid of psychosocially attentive secondary narrative interview data, key themes that emerged from them were analysed and used to evaluate the UK policy in order to identify areas of improvement. Given that the project analysis is carried out using a multi-theoretical framework that combines insights from the New Haven School and other complementary socio-legal theories that connect both Agamben, Boss and Arendt to the New Haven School, it was necessary to also situate the analysis of the interviews data within this broader theoretical framework. Overall, I argued that a more value-based, value-dependent and psychosocial responsible UK migration policy is more likely to recognise the ambiguous loss experiences of families of missing migrants. The analysis demonstrates the need for authorities at the national level to adopt appropriate legal and policy response approaches that respect and maximises human access to the shared value of well-being.

Chapter 10

Summary, Recommendations and Conclusion

10.1 Introduction

This research has been conducted on the grounded belief that the subject and problem of missing migrants matters and that states adopting legal and policy frameworks and response measures that honour their legal obligations in practice is key to addressing the problems. This concluding chapter of the thesis presents a summary of the study findings, recommendations and conclusion. In bringing the thesis to a close, it is crucial to briefly recount the transnational problem of missing migrants and the five principal lines of inquiry pursued in this study. This is summed up essentially in the thesis's rigorous analysis of the legal and policy frameworks and responses and obligations of states towards missing migrants and their surviving families from legal, policy and psychosocial perspectives in the context of the Europe migrant crisis. This is then followed by critical reflections on the essential elements of the research and the underpinning theoretical and methodological approaches adopted to progress the work, the discussion of key findings and their relationship to existing research and the central arguments made. This also includes the outline of the contributions of the research to knowledge, the limitations of the study and directions for future research. The conclusion drawn from the study is informed by the critical analysis of the research questions and findings, interpretations and discussions contained in the study.

10.2 The Subject and Problem of Missing Migrants Matters

There is no gainsaying the fact that the subject/problem of missing migrants matters. Throughout this thesis we have seen how the phenomenon of missing migrants poses exceptional legal, policy and psychosocial challenges for international law and states, families and the whole international community. For international law and states, the first and foremost challenge remains migration's transnational scale—involving a large number of migrants from origin states crossing the sea and state borders in a desperate attempt to enter transit and destination states.¹¹⁵⁴ As earlier stressed, migrants through crossing national borders, challenge an international system built on the premise

¹¹⁵⁴ Gabriella Citroni, note 64 pp. 735-737; Miriam Farhi-Rodrig 'Global Migration: A Transnational Problem' in L.E Grinin *et al* (eds) *"Globalistics and Globalisation Studies: Global Transformations and Global Future"* (Volgograd: 'Uchitel' Publishing House, 2016) p. 178.

of state sovereignty and throws national jurisdiction and international law into crisis. On the one hand, as this research shows, migrant flows leading to increased deaths at sea, borders and other liminal spaces expose the existing inadequacies and gaps in the international legal frameworks for migration governance. For example, the rights of dead and missing migrants and those of their families are not directly addressed by existing international norms¹¹⁵⁵ except to the extent that such rights can be deduced from the provisions of international human rights law and international humanitarian law which both recognise the duty of states to search for missing persons generally.

While conducting this research, every step of the way, I consistently observed one critical fact—the contrast and wide line of difference between the degree of attention given by states and international law to the transnational problem of missing migrants (seemingly considered *ordinary*) and that given to comparable global problems considered *extraordinary*. This discovery struck me a lot especially as I pondered over the powerful psychosocial symbolism and cultural cosmologies that the shocking images of bodies of dead migrants washed off the shores of the Mediterranean carry that often comes back to haunt human societies. As some scholars argue, international law and states are often traditionally concerned with those global problems and events we often see as exceptional and extraordinary while neglecting as immaterial and ordinary the small problems and events that in fact determine the meaning or fate of our everyday life.¹¹⁵⁶ In relation to missing migrants, it is as though the more we affirm the inherent legal obligations of states towards missing migrants in global discourses, the more they are denied in practice. This striking paradox leaves us wondering if the transnational problem of missing migrants is beyond the reach of international law and the political will of states. Better still, whether there is something inherently self-defeating in international law that contributes to the endless ripping apart of its own professed principle of saving human lives or whether it is simply the politics of states that have stripped it of the power and capacity to resolve the question of missing migrants.

This, on the other hand, raise specific concerns about how international law should adapt, evolve and develop in light of the transnational problem of missing migrants. Yet still, there is the issue of what should be the appropriate response of states to the problem, e.g., response through legislations/treaty-making, policies/protocols or through consensus building and action plans. The GCM captures the latter idea of response through consensus building and action plans whereby

¹¹⁵⁵ Syd Bolton and Catriona Jarvis, note 281.

¹¹⁵⁶ See for e.g., Luis Eslava 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) *London Review of International Law* Vol. 2 Issue 1 pp. 1-2.

states commit to and agree *inter alia* to cooperate to search and rescue migrants, prevent migrant deaths and injury, identify dead and missing migrants and establish designate contact points to assist families searching for their relatives missing in migration.¹¹⁵⁷ The drawback though is that the GCM fails to clearly define and/or stipulate the type or level of cooperation that is required of states in any case. As a result, insofar as the problem of missing migrants is concerned, what we have is more paper commitments by states than taking concrete state actions that honour their obligations in practice. The second problem relates to the immense cost¹¹⁵⁸ and other practical challenges that states face in the process of search, investigation, identification and repatriation of dead migrants to their families. The third problem follows from the first and second and it relates to the apparent transnational ineffectiveness¹¹⁵⁹ and psychosocial irresponsibility of states' national migration policies in response to the problem.

For these and other challenges, research on missing migrants is vital. Yet until this point, prior to this research, relatively little was known about the many migrants who die and go missing in migration daily, what the needs of their families are and the responses and obligations of states thereto.¹¹⁶⁰ Thus, my focus/aim in this research has been to draw attention to the lack of a specific and well-developed legal and policy framework and concrete state actions/plans relating to missing migrants by conducting an analysis of the specific obligations and responses of states to these challenges from a legal, policy and psychosocial perspective in the context of the Europe migrant crisis. And to elaborate on the central thesis that states as primary agents of responsibility in relation to missing migrants have to recognise and pay more attention to the magnitude of this problem and move from the mere paper commitments that currently dominate state responses to the problem to taking concrete state actions that honour their obligations in practice. Taking such concrete actions, I argue, will ultimately require all states making their national migration policies more transnationally effective and psychosocially responsible such as to adequately *protect, fulfil and respect* the migrants' shared values of human dignity and right to have rights.

However, these challenges I stressed are indeed multifaceted and do not lend themselves to simple solutions. The extensive body of literature on missing migrants especially those outside

¹¹⁵⁷ GCM, Objective 8.

¹¹⁵⁸ Ruairi Connolly *et al*, note 557 p. 4; David Miller, 'Our Responsibilities to Refugees' *supra* p. 40.

¹¹⁵⁹ Lara Olivieri *et al*, 'Challenges in the Identification of Dead Migrants in the Mediterranean: The Case Study of the Lampedusa Shipwreck of October 3rd, 2013' (2018) *Forensic Science International* Vol. 285 pp. 121-128.

¹¹⁶⁰ See generally Tara Brian and Frank Laczko, (eds.) *Fatal Journeys: Tracking Lives Lost During Migration* (IOM) p. 11.

the discipline of law most of which I thematically surveyed in Chapter 4 tells us in clear terms that the transnational problem of missing migrants is not only complex and multi-layered in nature but also sometimes ambiguous and elusive to grasp. It raises many issues and overlaps in ways that can make addressing them an opaque affair. With the stakes that high, there is the risk of begging many questions. Consequently, for analytical clarity, in this thesis, I only tease out five small but principal lines of inquiry (which translates into the main research questions) as the focus of the study: (a) what the appropriate legal and policy responses of states to missing migrants should be; (b) why migrants die and go missing in migration; (c) what specific obligations states have towards missing migrants and their families; (d) how transnationally effective the UK migration policies in relation to missing migrants are; and (e) how psychosocially responsible the UK migration policies in relation to missing migrants are.

These lines of inquiry traced how international law and states' migration policies engage with missing migrants in the context of the Europe migrant crisis. They exemplify how the condition and lived experiences of migrants who die and go missing and the needs of their surviving families are shaped and mediated through the concepts of '*shared values of human dignity*', '*right to have rights*' and '*bare life*'. The result of the thesis's analysis of these principal lines of inquiry indicates that the effect of international law when being deployed by states to tackle the problem of missing migrants is often (but not always) negative. It is often negative in the sense that for all its promise and vision of protecting human beings, international law has not made visible the experiences of migrants who die and go missing at sea and state borders when attempting to reach international destinations neither are the psychosocial implications of migrants going missing for their families and the psychosocial needs of families thereto visibly captured or expressed in the language and texture of international law. It is not always negative in the sense that in some cases states have deployed international law to enforce measures aimed at search and rescue of seaborne migrants most notably Italy's *Operation Mare Nostrum*¹¹⁶¹ rescue mission and the EU's operation *Triton* which saved the lives of thousands of migrants at high sea. As Brownsword argues, the shocking images of migrants whose bodies are often washed off the seashores do not always suggest that the international community is slow to respond to the global migration crisis.¹¹⁶² Except that while

¹¹⁶¹ Experts estimate that the Mare Nostrum program resulted in the rescue of more than 100,000 migrants stranded at sea. See Carlo Motta, *Italy's Rescue Operation Mare Nostrum Shuts Down with No Real Replacement: EU's Triton Instead Might Put Lives at Risk*, *The European Sting Political Newspaper* (Nov. 4, 2014), available: <https://europeansting.com/2014/11/04/italys-rescue-operation-mare-nostrum-shuts-down-with-no-real-replacement-eus-triton-instead-might-put-lives-at-risk/> (accessed 16/8/2021).

¹¹⁶² Roger Brownsword 'Migrants, State Responsibilities, and Human Dignity' (2021) *Ratio Juris* Vol. 34 No. 1 pp. 7 & 22-23.

the response approaches adopted by states seek to entrench respect for human rights generally; those response mechanisms including those ingrained in the two UN Global Compacts—one for Migration (GCM 2018) and the other for Refugees (GCR 2018) engage very little with the more specific and fundamental question of respect for the human dignity of migrants and how the value of human dignity bear on the responsibilities of states when confronted by migrants¹¹⁶³ In these ways, the thesis to some reasonable extents engaged with the visibility (*presences*) and invisibility (*absences*) of international law in relation to missing migrants and their families and how perhaps international law might be repositioned to tackle the problem of missing migrants more effectively.

It is argued that the often (but not always) negative effect of international law when being deployed by states to address the problem of missing migrants is a direct result of how, on the one hand, states frame, view and interpret their legal obligations towards missing migrants under international law and on the other hand, the extent to which most states either recognise, receive, accept and/or reject their obligations following from their interpretation of same. In the same vein, it is submitted that the nature and contents (negative or otherwise) of the current legal and policy frameworks adopted by states in response to missing migrants as analysed in this work are clearly a mirror or reflection of how states view or interpret their obligations to missing migrants and their families especially if we see state migration policies as interpretative outcomes that derive directly from the process of states making and applying international and national law relating to migrants. As the New Haven School Policy-Oriented theory of international law holds, policies are an integral part of law-making itself and cannot be separated from the law¹¹⁶⁴ in so far as “international law rules are intended to reflect the needs of international policy arguments.”¹¹⁶⁵

These canvassed points reinforced by the peculiarities, the diversity and breadth of the context, perspectives and materials utilised in this thesis including the narrative interviews data provided by missing migrants’ families underscore the imperatives and urgency of asking the fundamental research questions analysed in this thesis. And how perhaps, the transnational issue of missing migrants can find more visible expression in the language of international law and state migration policies. From legal, policy and psychosocial synergetic perspectives (considered in

¹¹⁶³ Roger Brownsword ‘Migrants, State Responsibilities, and Human Dignity’ *ibid* p. 7.

¹¹⁶⁴ Molly Land, ‘Reflections on the New Haven School’ (2013-2014) *New York Law School Review* Vol. 58 pp. 919 and 921.

¹¹⁶⁵ H.H Koh, ‘Commentary: Is There a ‘New’ New Haven School of International Law’ *supra* p. 563 citing M.S McDougal and W.M Reisman ‘International Law in Policy-Oriented Perspective’ in Ronald St. John McDonald and Douglas Johnston (eds) *“The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory”* (The Hague: Martinus Nijhoff, 1983).

more specific terms in the following sections below), this thesis has attempted to address those research questions.

10.3 Critical Reflections on the Legal, Policy and Psychosocial Perspectives of the Research and the Synergies

As specified from the outset, the context and perspectives of this research comprise legal, policy and psychosocial elements—designed to sit together in synergy and complementarity. Although to some readers, assessing the thesis from the beginning, it would appear like the legal and policy frames of the research are somewhat privileged over the psychoanalytical, they, in fact, go hand in hand, wherein I explored the extent of the redemptive power of international law to address the problem of missing migrants that have psychosocial implications for affected families. I frame, for example, the needs of families of missing migrants as “legal-psychosocial” in nature because of what I consider should be the appropriate social role of the law when being deployed by states to address the problem of missing migrants. My idea is that if there are actually “needs” of families for states to address (and certainly there are) in relation to missing migrants as we saw in chapter 9, then those needs must be conceived of as both “legal” and “psychosocial” mainly because of their legal, social and psychological features and therefore, there are legal and moral obligations incumbent on states under international law to address them as such. And if there are obligations incumbent on states to address those needs, then it presupposes that there are “rights” not just of the migrants but also of their families to be guaranteed and protected; and if there are rights to be guaranteed and protected; then states are duty-bound under international law to enforce those rights and provide the necessary “remedies” when a breach occurs.

10.3.1 The Legal Perspective

As observed in the foregoing sections, the transnational problem of missing migrants is as much a legal problem as it is a policy and psychosocial one, and it is tied to the fundamental question of state responsibility.¹¹⁶⁶ Although framing migrant deaths and migrants going missing at sea and

¹¹⁶⁶ For e.g., the text of the ICMP Declaration on the Role of the State in Addressing the Issue of Missing Persons as a Consequence of Armed Conflict and Human Rights Abuses expressly recognise addressing the problem of missing persons as a ‘*responsibility of the state*’. See the Declaration on the Role of the State in Addressing the Issue of Missing Persons as a Consequence of Armed Conflict and Human Rights Abuses (2014), available at: <https://www.icmp.int/wp-content/uploads/2014/08/signed-declaration-2.pdf> (accessed 19/8/2018)

state borders as a violation of international law and failure of state responsibility has never been a straightforward task,¹¹⁶⁷ it is also true that failure to frame it as such, at least within the meaning of the right to life, will not assist in bridging the current accountability gap in the international legal frameworks relating to missing migrants. We cannot however miss the point that part of the reason why states sometimes fail to accept their legal obligation to protect migrants is the apparent lack of clarity as to the territorial scope of the obligations of states towards migrants. More so, in cases where migrants are still in transit at sea and pre-border zones and have yet to reach the borders of either transit or destination states.¹¹⁶⁸ For international law scholars, this should not necessarily be a difficult fact to admit or argue insofar as the international law of the sea does not explicitly create a reciprocal relationship between migrants facing distress at sea and state flagged ships. The circumstances under which migrant boats get into distress at sea are not those for which the sea treaties were originally negotiated by states.

Hence, the drowning seaborne migrants often find themselves in an increasingly hostile sea space of migration where the law, geopolitics and sovereign power clash and where multiple states are keen to deconstruct, shift or trade-off their obligations in relation to migrants. However, as I also argue, despite these limitations in the law, the high sea where the migrants are drowning remains a space of global migration where international humanitarian law, international human rights law, refugee law and maritime law impose various legal obligations on states, including but not limited to the duty to search and rescue migrants at sea, the duty to investigate migrant deaths and duty to repatriate migrant bodies and respect the rights of their families. While the contents of these obligations, the breach of which would give rise to state responsibility and the conditions under which states may be imputed with responsibility are not entirely clear in international law, what is more imperative I submit is the need to formulate clear criteria for allocating, distributing, sharing and assigning these obligations to a plurality of states on the international level. This is so because the contents of the obligations and conditions for imposing them on states should ideally constitute an intrinsic part of the criteria for sharing and assigning the obligations to states in any case and circumstance.

To this end, what I have argued for in this work is a responsibility attribution approach that unfolds in three ways. The first will be differentiated responsibility attribution based on each state's

¹¹⁶⁷ Itamar Mann, note 505 (abstract).

¹¹⁶⁸ María-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited* (2006) *International Journal of Refugee Law* Vol. 18 pp. 571-572.

level of contribution to the collective bad migration outcomes in cases where multiple states act together as members of a collective group ('bad outcomes' understood in this work as 'migrant deaths', 'migrants going missing' and the resultant 'psychosocial consequences' faced by affected families). This approach should fit into the existing notion of shared responsibility under international law. The second will be responsibility attribution to a collective group of states acting as 'collectives' under the umbrella of a supranational union of states such as the EU (this should be consistent with the notion of joint responsibility). And the third will be responsibility attribution to individual states when the relevant state is acting alone and independently of other collective groups in relation to missing migrants.¹¹⁶⁹ It is suggested that building these responsibility attribution approaches into future international law and transnational migration policy instruments of states relating to missing migrants could contribute to bridging the current responsibility gap at EU and national levels.

10.3.2 The Policy Perspective

Migration policies of states I have established are inextricably interlinked with the law itself (in this context, international and national laws relating to migrants), and viewed from that perspective, it would only be logical to state that the policy angle of this research follows from the legal analysis of the obligations and responses of states to missing migrants and their families. This policy angle of the research is two-limb. On the one hand, it aimed to examine to what extent state migration policies comply with international legal requirements in terms of states realising, complying and/or honouring their legal and moral obligations to missing migrants and what effect they may have on migrants when embarking on their often-dangerous journeys. On the other hand, it also aimed to examine to what extent the national migration policies of states may be said to be psychosocially responsible or informed. The latter (the psychosocial perspective) is considered separately in the corresponding section below. With regard to the first limb, that is, the extent to which states honour their legal obligations to migrants and comply with international law, the Inter-Parliamentary Union maintains that "migration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law."¹¹⁷⁰ Throughout this study, a good number of existing research surveyed suggest a low level of compliance of

¹¹⁶⁹ See Chapter 7 of this thesis for more detailed discussion and analysis of these responsibility attribution approaches and the conditions for assigning them to states in any case.

¹¹⁷⁰ Inter-Parliamentary Union "Migration, Human Rights and Governance: Handbook for Parliamentarians" (Inter-Parliamentary Union and the International Labour Organisation and the United Nations, 2016) p. 40, available: <https://www.refworld.org/docid/57b6e1697.html> (accessed 14/6/2020).

states with their obligations to missing migrants and their families.¹¹⁷¹ Existing studies largely attribute the apparent failure of states to honour their obligations and commitments to missing migrants to a policy gap at national, regional and international levels.¹¹⁷²

Given the implication of this fact, what I have argued for in this thesis is that bridging this manifest policy gap at all levels of migration governance will not only require the proper allocation and distribution of responsibilities to states as I argued in Chapter 7 but would also as I canvassed in Chapter 8 ultimately require that national migration policies of states go transnational both in outlook, function and enforcement. A transnational policy approach will allow for national policies to connect all the relevant governmental, inter-governmental and non-governmental transnational networks abroad at EU and UN levels in pursuit of a common goal—the safety and protection of migrants on the one hand, and the search and trace of those dead and missing as well as reaching out to affected families on the other hand. Of course, it should no longer be a legally burdensome argument to make or such an unusually difficult story to tell that we now live in an interdependent migration world where states are increasingly adopting extra-territorialised/externalised migration policies and procedures as well as outsourcing of migration controls beyond national borders in a frantic bid to govern, regulate and police the transnational mobile society of migrating people. This presupposes that migration generally and the problem of missing migrants specifically is a transnational legal and policy issue that requires states to adopt national migration policies with transnational effects.

It is argued that the degree or extent of the transnational effectiveness of states' national migration policies constitutes a fundamental metric for measuring or determining states' level of compliance with their international legal obligations towards missing migrants and their families. In other words, the more transnationally effective the national migration policies of states are, the more likely such national migration policies will be validly rated as compatible and compliant with international legal requirements. Especially where, on the one hand, the policies are informed by open, honest and transparent national debate supported by evidence¹¹⁷³ and on the other hand, geared towards enabling states to enforce their obligations to missing migrants. Overall, using the example of the UK policies in relation to missing migrants, the thesis has attempted to draw

¹¹⁷¹ See for e.g., F.B Attia *et al* note 22 p. 5.

¹¹⁷² See for e.g., Giorgia Mirto, note 517 pp. 28-31.

¹¹⁷³ House of Commons Home Affairs Committee "Immigration Policy: Basis for Building Consensus: Government and office for National Statistics Responses to the Committee's Second Report", Fifth Special Report of Session 2017-19, HC 961, Published on 18th April 2018 p. 2.

up a working definition of the transnational effectiveness of national migration policies that focuses on how the UK and other states can use their national migration policies to address the problem of missing migrants in remote lands.¹¹⁷⁴

10.3.3 The Psychosocial Perspective

Following on from the foregoing reflection on the legal and policy perspectives of this research, it is argued as a corollary that there is no such thing as states truly responding to the transnational problem of missing migrants and/or effectively fulfilling their legal obligations to missing migrants without addressing the psychosocial implications of migrants dying and going missing for their families. Analysis of the narrative interviews shows that there is no doubt that families of missing migrants remain the chief information seekers when it comes to searching and finding answers to questions as to the fate/whereabouts of their missing relatives. The interviews analysis disclosed distressing evidence of the structural, social and psychological challenges that missing migrants' families face in their desperate search for their missing relatives, a situation exasperated by the ambiguities that often surround the loss of their members in migration. The families overwhelmed with feelings of powerlessness and hopelessness often expressed through words like depressed, sorrow, anxiety, anger, fear, shock and trauma were common and recurrent across all six themes extracted from all the interviews participants' accounts. These and other negative feelings should remind states that the ambiguous loss of migrants in transnational migration has dire psychosocial consequences for their surviving families and highlights the imperatives of putting families at the epicentre of all state efforts to search and trace missing migrants and identify the dead.¹¹⁷⁵ These feelings carry a range of negative meanings that could have a disruptive and rupturing effect on the individual and collective life and identity as well as the sense of self, belonging and well-being of the members of the affected families and even their communities.

Thus, in this thesis, I have argued that in order for these psychosocial consequences that missing migrants' families face to be truly recognised and find expression in the policy agenda of states, the national migration policies of states in relation to missing migrants have to become more psychosocially responsible and compatible. However, despite the abundance of literature on loss, grief, mourning and bereavement which I surveyed in Chapter 4 indicating the imperatives

¹¹⁷⁴ See Chapter 8 of the thesis for detailed discussion of this theory of transnational effectiveness of UK national migration policies in relation to missing migrants.

¹¹⁷⁵ F.B Attia *et al* note 22 p. 2.

of states recognising and addressing the psychosocial consequences of migrants going missing for their families¹¹⁷⁶, there is still limited evidence about the psychosocial responsibility of state policies in relation to missing migrants. Therefore, using the example of the UK migration policies, in this research, I have proposed a value-based, value-dependent working definition of what a psychosocially responsible national migration policy could look like. I based my working definition on the six key narrative themes that emerged from the analysis of the interviews and on Prilleltensky's integrated '4S' model of well-being: *sites*, *signs*, *source* and *strategies* of well-being¹¹⁷⁷ taking into account the legal-psychosocial needs of families. Taken together, the foregoing reflections on the legal, policy and psychosocial elements of the research sum up the main task that this study set out to accomplish. In the following sections below, I reflect on the theoretical and methodological approaches adopted to progress the research.

10.4 Reflections on the Theoretical and Methodological Approaches

Given the ontological and epistemological tensions that surround how the question of missing migrants and the responses and obligations of states thereto are framed in the current literature, in this thesis, I had to draw up my own unique and conceptually rich framework of interdisciplinary legal analysis that brings the legal, policy and psychosocial perspectives of the project together. Theoretically, the theoretical premises of the work were drawn from the jurisprudence of the New Haven School and the works of Agamben, Arendt and Boss. The New Haven School concept of "shared values of dignity" was used as a unifying conceptual frame to provide an analysis of the legal and policy frameworks and specific responses of states to missing migrants and suggest that states empowering migrants to have enhanced access to the shared values of human dignity is key to preventing migrant deaths and migrants going missing at sea and border spaces.

Following the New Haven School analysis, I then drew on Agamben's concept of *bare life* to uncover the insidious effects of sovereign power in determining the subjects of law and those excluded from law's protection¹¹⁷⁸ and argues that the biopoliticised policies of states not only strip migrants of their human dignity values and render them *bare life* and *rightless* but also make void and ineffective the legal obligation and responses of states to missing migrants. A critical response to the *bare life* condition of migrants was provided through Arendt's idea of 'right to have

¹¹⁷⁶ See Chapters 4 & 9 respectively of this thesis for details of this study's engagement with these scholars.

¹¹⁷⁷ Ibid p. 54.

¹¹⁷⁸ O.W Lembcke, note 149.

rights' and canvassed for new guarantees for the human dignity of migrants in the world.¹¹⁷⁹ However, the struggles of migrants for survival and safety have seen thousands of them die and go missing, leaving their families unaware of what has become of their relatives. Pauline Boss ambiguous loss theory was then used to analyse the psychosocial consequences of migrants going missing in ambiguous circumstances for their families.

Methodologically, this thesis adopted a mix of two research methods—New Haven School and thematic analysis of secondary narrative interviews with families of missing migrants to guide and open up interpretative spaces to engage with the analysis of the responses and obligations of states towards missing migrants and their families. One of the main advantages that this thesis benefitted from was the fact that the first methodology—the New Haven School—also doubled as a theory of international law focusing on promoting and maximising human access to the shared values of human dignity.¹¹⁸⁰ I specifically deployed the value of *well-being*, one of the eight shared values of human dignity, as a unit of analysis to analyse the psychosocial implications of migrants going missing for their families. This is where the first method—New Haven School complements the second method—thematic analysis of secondary interviews. The methods combine together to shed more light on the experiences of families of missing migrants and how they make meaning out of their situation when there is no news about the fate of their missing relatives.

10.5 Research Findings and Discussions

This section presents the research findings and discussion of the same in light of existing literature following on from the thesis's analysis of the main research questions.

1. *Legal and Policy Responses of States to Missing Migrants*

The RQ1 analysed in chapter 5 of the thesis was aimed at understanding what should be the appropriate international legal and policy responses of states to the problem of missing migrants. Following a painstaking international law and policy analysis through the lens of the New Haven School's concept of "shared values of human dignity", the research finds that on the international level, the legal and policy responses of states to the problem of missing migrants have not been effective enough such as to achieve the international community's goal of securing a safe, orderly

¹¹⁷⁹ See generally Chapters 1, 4 and 7 of the thesis for more detailed engagement with the refugee works of Hannah Arendt.

¹¹⁸⁰ W.M Reisman, 'A Policy-Oriented Approach to Development' (2006) *Journal of International and Comparative Law* Vol. 3 Issue 1 pp. 141-148.

and regular migration world founded on the principles of human dignity and public order. EU states responses through humanitarianism, securitisation, externalisation and solidarity measures were all designed to address migrant flows into the EU more generally. Their use to respond to missing migrants exist only at the level of *embeddedness* devoid of specificity. This finding to an extent explains the claim of scholars like Tamara Last who argue forcefully that what happens to migrant bodies in the European frontiers ‘is very much in the dark as it has never been included in any national or EU policy agenda.’¹¹⁸¹ As can be observed from these response measures considered in this thesis, the closest the policies came to addressing the problem of missing migrants was the declaration by the EU in the European Agenda on Migration pledging to save lives at sea.

There are, I suggest, many factors that could account for this ineffectiveness. First, while there may be acceptable legal and political rationales/basis for the EU to adopt the various policy measures, the practical approaches to the enforcement of the policies tend to shift focus away from the intended human dignity goals described earlier in Chapters 5 against which the transnational effectiveness of national migration policies discussed in Chapter 8 can be measured. Second, there is no regional or global decision process that is so consistently certain, predictable, and effective as to command the same level of authority and compliance as would a national policy governance system where there is a sovereign, authoritative decision-maker capable of enforcing compliance. As a result, at the EU and international level “the ‘ownership’ of public problems is often characterised by a policy vacuum.”¹¹⁸² As there is no such thing as a regional or global state, implementation of transnational policies is often predicated on the implicit, sometimes misleading, assumption that states will comply, cooperate, recognise, or act in a manner not inconsistent with the objectives and aspirations pursued through such policies.

2. *Why Migrants Die and Go Missing in Transnational Migration*

The RQ2 analysed in Chapter 6 was aimed at understanding why migrants die and go missing in transnational migration. Drawing evidence from a range of sources including analysis of the left-to-die boat case through the lens of Agamben’s biopolitical concept of *bare life*, the research finds that the biopoliticised national migration policies of EU and EU states that disregard migrants’

¹¹⁸¹ Tamara Last ‘Who is the Boat Migrant? Challenging the Anonymity of Death by Border-Sea’ in Moreno Lox Violeta and Papastavridis Efthymios (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Leiden, Netherlands: Brill | Nijhoff, 2017) pp. 79-80.

¹¹⁸² Diane Stone, Global Public Policy, Transnational Policy Communities, and Their Networks 13 (2008) University of Warwick Institutional Repository.

shared values of human dignity and right to have rights, explain the biophysical violence against migrants at migration spaces and have structural connections to migrant deaths and migrants going missing in those spaces. Prior to this research, the dominant impression in current literature is that migrant deaths and disappearances at sea and borders are a direct result of deterrent and militarised migration policies of states against migrants. However, what we knew little about is why the deterrent and restrictive policies are the way they are and how in very striking ways, state policies become political tools for producing *bare life* rather than dignifying, humanising and giving meaning to life and also making void state obligations to migrants rather than giving effect to it.

In this regard, as I conducted this research and sought to understand the key factors that enable the deterrence nature of migration policies both in tone, language and operation, the case of the *left-to-die boat migrants* in which 63 migrants died in the Mediterranean Sea struck me a lot. This case demonstrates the tendency and willingness of states to neglect their obligations to migrants at sea when states hold the view that rescuing migrants at sea will not only invite more migrants to attempt the deadly journeys but will also force states to incur the financial cost required to search, rescue and investigate the deaths of migrants at sea. The May 2021 Report of the Office of the United Nations High Commissioner for Human Rights which argued that the endless death of migrants in the Central Mediterranean Sea “represents a serious human rights protection gap that impacts migrants, their families and communities”¹¹⁸³ supports this finding. This report framed migrant deaths in the Mediterranean as a “lethal disregard” and failure of states to honour their obligations to assist migrants facing distress at sea.¹¹⁸⁴

3. *Obligations of States Towards Missing Migrants and their Families*

The RQ3 analysed in Chapter 7 of the thesis aimed to understand what specific obligations states have towards missing migrants and their families and how should we assign and allocate them to states in practice. The study finds that while scholars generally agree that states have obligations under international law towards missing migrants and their surviving families¹¹⁸⁵, the obligations are however highly fragmented and not well-defined. The obligations are scattered across a wide range of international legal sources and such fragmentation undermines the understanding and interpretation of existing norms and obligations of states and the consistency of the legal and

¹¹⁸³ Office of the United Nations Higher Commissioner for Human Rights (OHCR), “*Lethal Disregard*”: *Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea*, May 2021 pp. 6-11.

¹¹⁸⁴ OHCR *ibid* pp. 1 & 6-11.

¹¹⁸⁵ Catriona Jarvis, ‘Last Right: Cross-Border Deaths—Towards a New Framework’ (2017) p. 131.

policy debates based on them. The laws merely prescribe the obligations and cooperation that are required of states but do not provide any guidance as to how to assign and allocate the obligations to multiple states in practice, neither do they define in explicit terms the level of cooperation that is required of any states in any case when dealing with missing migrants.¹¹⁸⁶ In addition, the study also found that migrant deaths and going missing in migration spaces across Europe as well as collection and repatriation of dead bodies to their families are rarely framed as the responsibility of any state except in the context of armed conflict¹¹⁸⁷ despite the abundance of international laws recognising state responsibility in this regard.

4. *Transnational Effectiveness of UK Migration Policies in Relation to Missing Migrants*

The RQ4 analysed in chapter 8 sought to understand if, from a transnational law perspective, the UK national migration policies in relation to missing migrants are transnationally effective such as to facilitate the enforcement of the UN Global Compact and other related international instruments nationally. The study finds that while the UK migration policies may be adjudged as very effective domestically within the UK, the same could not be said about the *transnational effectiveness* of the policies relating to missing migrants. This study suggests that the transnational ineffectiveness of the policies is in part due to the fact that at the UK level, the existing migration policy frameworks were not specifically designed with missing migrants and needs of their families in mind. In what appears to be a striking coincidence, in April 2021, shortly after submitting this thesis for final viva, the IOM published a research report about the problem of missing migrants in the UK which in many respects confirmed the key findings of this research especially in relation to the absence of a specific UK national legal framework, policies or agencies that deal with investigation of missing migrants cases, management, burial and repatriation of migrant dead bodies to their families.¹¹⁸⁸

5. *Psychosocial Responsibleness of the UK Policies in Relation to Missing Migrants*

The RQ5 analysed in chapter 9 of the thesis aimed to understand how psychosocially responsible the UK national migration policies in relation to missing migrants and their families are. The study finds that the UK migration policies may be affirmed as psychosocially responsible to some extent

¹¹⁸⁶ See Chapter 7 for details of the legal analysis giving rise to this finding.

¹¹⁸⁷ Eleni Papapanou, 'Confronting the 'Out of Sight, Out of Mind' Attitude Surrounding Migrant Deaths' (2019) *Brown Political Review*.

¹¹⁸⁸ Samuel Okyere and Sia Kondeh 'Families of Missing Migrants in the UK: Their Search for Answers, the Impacts of Loss and Recommendations for Improved Support' (Geneva: IOM, 2021) pp. 4 and 29-30.

in relation to migrants missing or dead *inside* the UK. This finding is supported by evidence of the UK's prompt and effective response to at least two notable past cases of migrants missing within the UK—the case of the 23 Chinese migrants who drowned picking cockles in Morecambe Bay¹¹⁸⁹ and the recent case of the 39 Vietnamese migrants who died in Essex lorry¹¹⁹⁰ both of which were discussed in Chapter 8. In each of these two cases, the UK's investigations into the deaths went transnational and the families of those involved were promptly and effectively engaged by the UK authorities. While these two cases may not necessarily be used to generalise or assume that the way the UK dealt with these cases is the same way it has dealt with other cases or will deal with future cases, they nonetheless, demonstrate the psychosocial awareness of the UK policies and the imperatives of engaging the families of migrants who face the psychosocial consequences of their relatives dying or going missing in migration. However, the UK has not replicated the effectiveness of this practice in the case of migrants dead or missing *outside* or *en route* to the UK despite the fact that migrant deaths in most cases occur at sea and borders that may fall outside the territory of the UK.

10.6 Legal and Policy Implications of the Findings and Arguments

The findings of this research present a number of legal and policy implications for states, families and organisations working on finding a widely acceptable solution to the transnational problem of missing migrants. First of all, this current study contributes to contemporary policy debates about missing migrants in a UK context where there is clearly a policy gap—no clear and definite policy statement and transnational response to missing migrants and the needs of their families. In terms of normative prescriptions that can inform policy changes, the study presents many opportunities for UK policymaking and response in relation to the problem of missing migrants, especially as to the transnational effectiveness and psychosocial responsibility of the UK policy. The study represents a major call for national decision-makers at the UK level to adopt a transnational legal and policy approach to address the issue of missing migrants as against the current approach where policies are only directed at cases of migrants missing within the territory of the UK. In addition, the study exposed the deficits of the international legal and policy frameworks designed to respond to migration challenges of the time. The demand for such policy changes is justified because the analysis is based on a widely tested and trusted New Haven School Policy-Oriented approach that lends itself to the study of the law and state policies as a social process of

¹¹⁸⁹ Simon Robins *et al*, note 1028 p. 14; Simon Robins, note 140 p. 72.

¹¹⁹⁰ The Telegraph, note 1031.

authoritative and controlling decision-making, designed to promote the shared values of human dignity and world public order.¹¹⁹¹ This policy approach recognises that national decision-makers are central to the enforcement of international legal norms transnationally in relation to questions such as the issue of missing migrants. The study adds weight to the ongoing global debate that calls for reform of the global migration governance such as to take missing migrants into account. As the topic of missing migrants is a pressing globally relevant discourse, the findings of this research could assist the UK and most EU member states to develop national guidance and benchmarks to enable their national agencies, institutions as well as relevant NGOs and policymakers to make better and informed decisions towards the protection of migrants and to account for missing ones. As the research has strived to clarify state obligations to protect migrants and locate the missing, the findings can contribute to informing the UK government how to develop a comprehensive legal regime to address the problem of missing migrants.

In addition, the result of the project can assist to inform families of missing migrants within and outside the UK about where and how to seek help to deal with their situations legally and psychosocially. Such engagements will contribute to answering the difficult questions of families of migrants about what happened to their missing relatives, why it happened, who is responsible and for the states, how a lasting solution can be achieved to reduce the risk of humanitarian crises occasioned by migrant journeys around the world. Moreover, given that many governments within the EU including the UK have identified migrants' risky journeys as a major cause of transborder deaths around the world and noting that a lasting solution to the problem is urgently and desperately needed, the findings of this study can assist to trigger state policy interest and open opportunities for international law and migration researchers (the author inclusive) to work with governments, intergovernmental organisations and NGOs to develop impact cases on migrants' journeys both within the UK and internationally.

10.6.1 Summary of Central Arguments in the Thesis

Overall, in light of the foregoing findings of the research and the discussions thereto and in order to progress theory and practice, the research makes three mutually reinforcing central arguments

¹¹⁹¹ W.M Reisman *et al*, note 151 pp. 575-582; P.S Berman 'A Pluralist Approach to International Law' (2007) *The Yale Journal of International Law* Vol. 32 pp. 301-310; M.S MacDougal 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study' (1956) *Natural Law Forum Paper* 6 pp. 53-72.

that permeates the entire strata of the thesis. Firstly, states play a dominant role in the dialectic interactions between them and migrants on the journey, their families and other agents involved in transnational migration, and as such, they have the primary responsibility to account for missing migrants and respect the rights and needs of their families—*the buck stops at the table of states*. Secondly, since states play the most dominant role, they are under a higher-order obligation under international law to protect, fulfil and respect migrants' *values of human dignity* and *right to have rights*, by virtue of their humanness and membership in the political community. And thirdly, states can demonstrate that they accept their obligations to missing migrants and are politically willing to enforce them, by making their national migration policies more transnationally effective and psychosocially responsible; advancing international best standards and developing more value-based, value-dependent state migration policies that take the psychosocial aspects of missing migrants into account.

10.7 Highlights of the Research Contributions

Building on the underpinning theoretical and methodological approaches, the study findings and central arguments canvassed in this study, this thesis makes original and significant contributions to knowledge in the ways set out below:

10.7.1 Contributions to General Body of Knowledge

Firstly, a critical look at existing literature on the legal and policy responses of states to missing migrants examined in this study showed that one common thread connects together the major response approaches. This is that they were all informed by doctrines of legal positivism, viewing law solely as a body of rules for which the moral value of obedience is assumed. A policy-oriented approach, where law becomes a theory for making social choices is highly neglected. Therefore, from a New Haven School policy-oriented perspective, this thesis has contributed to existing knowledge by considering what, at the regional and international levels, the legal and policy responses of states to missing migrants have been and what normative claims and values for the legitimacy and acceptability of current and future trends in decisions would be required. Secondly, while existing studies largely attribute the high migrant death rate at sea and state borders to the deterrence-oriented control policies of states based on empirical statistics and figures; there was little or no inclusion of theory grounded evidence to understand the phenomenon. Therefore, building on Agamben's biopolitical concept of *bare life*, this study has contributed to socio-legal

literature on missing migrants by including theory grounded evidence to explain the phenomenon of migrant deaths at sea and borders as well as explaining the invalidating effects of biopoliticised migration policies of states on the obligations and responses of states to missing migrants.

10.7.2 *Practical Contributions*

Firstly, while some attempts have been made in existing literature to develop a legal protocol that outlines the core obligations of states towards missing migrants, there were fewer studies on how those obligations may be assigned, shared and allocated to multiple states in practice. Therefore, through a combination of and close dialogue with the law, political philosophy and political theory methods of framing responsibility and in order to progress theory and practice, this thesis has contributed to bridging this gap in knowledge by drawing up a responsibility-based argument that focuses on how responsibility may be distributed, shared or allocated to multiple states in practice in relation to missing migrants.¹¹⁹² Secondly, I pointed out that there is to date no single known body of law on missing migrants to refer to as an authoritative legal document on the international level. Instead, the laws are scattered across a wide field of international laws which transcend the gamut of international human rights law and international humanitarian law. The fragmentation of the legal norms creates a major gap between the law, theory and practice. Thus, part of what this project has done was to take stock of the disparate legal sources and provisions and piece them together into a more coherent and contextual working framework to aid a practical understanding of them and provide some legal-curative solutions to the fragmentation of the legal norms.¹¹⁹³

10.7.3 *Interdisciplinary Contributions*

By adopting an innovative interdisciplinary approach that ensures that law, policies, practice and psychosocial aspects of missing migrants are analysed and contrasted for compatibility, this study has added a novel 'policy and psychosocial' interdisciplinary dimension to the legal analysis of missing migrants by considering the specific question of whether the UK policies in relation to missing migrants are psychosocially compliant or aware. In other words, through a psychosocial analysis of existing secondary interviews about the experiences of families of missing migrants and evaluating the psychosocial implications of that experience through the lens of loss, grief and

¹¹⁹² See Chapter 7 of the thesis for details of this responsibility sharing argument.

¹¹⁹³ See Chapter 5 of the thesis for detailed engagement with these arrays or sources of international law.

mourning, the project ensured that on a micro-level, previously unobserved factors in legal and policy analysis in previous research on missing migrants are made visible in this present research.

10.7.4 Theoretical Contribution

While previous scholarship most of which were surveyed in this thesis has examined the domestic effectiveness of state migration policies in relation to migration generally, there was no research in the UK context to explain the transnational effectiveness of national migration policies in relation to missing migrants. This thesis, from a transnational law perspective, has contributed to bridging this gap in knowledge by analysing how transnationally effective the UK migration policies are in relation to missing migrants. The project has attempted to draw up on the basic level a new theory of transnational effectiveness of national migration policies using the example of the UK national migration policies in relation to missing migrants.

10.8 Recommendations

Against the backdrop of the findings of this study and in order to progress theory and practice, this research makes a number of recommendations that I hope should contribute to enhancing the efforts and capacity of states to develop effective legal, policy and psychosocial approaches to addressing the problem of missing migrants.

1. Turning Policy into Practice—From Paper Commitments to Concrete State Actions

One of the key problems identified in this research is the fact that states adopt migration policies or soft laws either at the national or international level that are no more than paper commitments pledging to save migrant lives, search, trace, identify and repatriate migrant bodies and reach out to their families, but these commitments are not always supported with concrete state actions that honour these obligations in practice. At present, evidence from the 2020 GCM Review Report submitted by states shows a staggering low level of implementation of Objective 8 of the GCM at the national level and is not even a policy priority for most states.¹¹⁹⁴ This is certainly a disturbing development because the GCM represents the current agreement of states and the international community on how best to address the transnational problem of dead and missing migrants on

¹¹⁹⁴ Danai Angeli 'The Dead, the Missing and the Bereaved: Is Objective 8 still a Priority' (2021) *RLI Blog on Refugee Law and Forced Migration*. See also *The GCM Review Report of States* (2020).

the international and national level. Therefore, it is suggested that states take more practical and effective steps that demonstrate their political will to turn their national policies relating to missing migrants into practice such as to honour their obligations to migrants. In this thesis, I have argued the most effective and practical way that states can demonstrate this political will is by adopting national migration policies that are both transnationally effective and psychosocially responsible in relation to missing migrants.

2. *A Uniform Legal Protocol beyond Objective 8 of the GCM for Missing Migrants at the International Level*

The absence of a uniform law that is specific to missing migrants on the international level is also one of the challenging problems identified in this thesis. Therefore, states agreeing to a uniform international soft law/protocol that is specific to missing migrants and founded on the fundamental principle of respect for the human dignity of migrants beyond the general human rights obligations of states entrenched in the GCM (Objective 8) and the 2030 Sustainable Development Agenda of the UN (Goal 10.7) could be a good starting point. As Brownsword has argued, if the GCM and GCR respectively adopted by states were ever “intended to be applications of *human dignity* to a pressing global problem, they do not advertise this fact.”¹¹⁹⁵ Therefore, in order to enhance the effectiveness of international law, policy and practice relating to missing migrants and to uphold migrants’ values of human dignity, the proposed protocol should outline what, on the institutional level, feasible migration governance relating to missing migrants should look like; what in political terms, the basis and consensus for such a governance regime should be; and what normative claims for the legitimacy/acceptability of that governance regime would be required.

3. *Migration to the United Kingdom: Proposal for a Transnationally Effective and Psychosocially Responsible UK National Missing Migrants Protocol*

The transnational problem of missing migrants poses a new kind of national challenge to the UK and thus, requires a new kind of transnational legal and policy response from the UK. While the UK adopting the “cross-cutting”¹¹⁹⁶ “whole of government”¹¹⁹⁷ and “whole of society approach”¹¹⁹⁸

¹¹⁹⁵ Roger Brownsword ‘Migrants, State Responsibilities, and Human Dignity’ supra p. 7.

¹¹⁹⁶ See Karen Hargrave “*Policy into Practice: Implementing the Humanitarian Priorities in the Global Compact for Safe, Orderly and Regular Migration*”, UK Roundtable Discussion Series Summary Reports, 2019 pp. 4 & 13.

¹¹⁹⁷ Karen Hargrave ibid pp. 4 & 12.

¹¹⁹⁸ See HM Government “*The Global Compact for Migration European Regional Review, Submission by the United Kingdom*”, available: https://migrationnetwork.un.org/sites/default/files/docs/uk_submission_-_gcm_european_regional_review_.pdf (accessed 23/8/2021) p. 2.

to implementing the GCM at the national level is quite commendable, nonetheless, a specific and more transnationally effective and psychosocially responsible UK national legal/policy protocol for missing migrants that can be enforced separately or as part of the broader migration governance responsibility of the Home Office should be introduced. Existing research already acknowledge the lack of a UK specific framework for dealing with the issue of missing migrants in the United Kingdom, thereby, forcing families searching for their missing relatives to rely on general human rights law when seeking UK state assistance to help find their missing relatives.¹¹⁹⁹ Therefore, by introducing a remedying national missing migrants protocol, the UK is positioned to adopt a policy stance geared towards optimising the compatibility of its migration policies with international law and setting important agendas for the future whilst also catering for migrants that already have reached its territory. This approach might be contrary to the current deterrence-oriented policies that are more targeted at pushing back migrants and discouraging them from embarking on risky journeys, but an approach is required that will take into account international law when formulating the UK migration policies and practices in relation to missing migrants.

4. Capacity Building Mechanisms and Institutional Preparedness at the UN, EU and National Levels

The success of the foregoing recommendations if implemented by states will be highly dependent on the extent to which states build national, regional and international capacity mechanisms and institutions dedicated to tackling the problem of missing migrants and reaching out to affected families. As W.W Burke-White and Ann-Marie Slaughter argue, at the national level “the all-too-often inadequate domestic response to transnational threats has three separate but related causes: a lack of domestic governance capacity, a lack of domestic will to act, and new problems that exceed the ordinary ability of states to address”.¹²⁰⁰ Consequently, it is proposed that building formidable national institutions saddled with clearly defined responsibility for dealing with the issue of missing migrants can enhance the domestic capacity and institutional preparedness of states to comply with their international obligations towards missing migrants. Building strong and well-structured national institutions that will work together with transnational networks at the EU and UN levels could be so powerful as to influence or even compel/mandate domestic actions geared towards responding to the transnational problem of missing migrants. These recommendations

¹¹⁹⁹ Samuel Okyere and Sia Kondeh note 1203..

¹²⁰⁰ William W. Burke-White and Anne-Marie Slaughter ‘The Future of International Law is Domestic (or, The European Way of Law)’ (2006) *Harvard International Law Journal* Vol. 47 No. 2 pp. 333-334.

(not in any way exhaustive) may be tailored in whole or in part, after a well-considered and context-specific analysis of all issues involved in addressing the issue of missing migrants.

10.9 Limitations of the Research and Directions for Future Research

Although this thesis' analysis of missing migrants and the psychosocial implications for affected families as well as the obligations and responses of states thereto may be adjudged as thorough and robust, there are nonetheless a number of limitations that cannot be overlooked. The *first limitation* to mention is the small size of the secondary narrative interview data used for analysing the psychosocial implications of migrants going missing for their families. It could be argued that even though the amount of data used still represents a fair reflection of the experiences of families facing uncertainties about the fate of their missing relatives for purpose of policymaking, doing fresh primary fieldwork could have enlarged the amount of data and thereby enrich the quality and credibility of analysis based on them. The thesis admits that it is difficult to fully capture the full texture of the social issue of missing migrants by relying on secondary data alone despite the fact that analysis of the secondary data through a new interpretative lens could turn the data into primary data. The *second limitation* relates to the apparent dearth of UK policy materials that are specific to missing migrants that clearly define the UK's definite stand on the issue of missing migrants beyond political statements, declarations and parliamentary debates/briefings. However, this was itself identified in this research as a major policy gap on missing migrants which prompted this thesis' investigation into the transnational effectiveness and psychosocial awareness of the UK policy in relation to missing migrants in the first place. The policies were not made with missing migrants in mind on the transnational level. Nonetheless, the current findings of the research on the UK policy could still be accepted on the normative level since my analysis aligns more with what the policy 'ought to be' as opposed to 'assertive statements' about the policies. Given these limitations, the study suggests a number of directions for future research on missing migrants.

First, empirical, multisited, cross-border study to delimit the psychosocial implications of missing migrants for their families and the needs of the families thereto could be carried out. The benefits of multisited research that use transnational methodologies to connect individuals and families across borders and their imperatives in the field of transnational migration has already been stressed in the literature.¹²⁰¹ Very often, surviving families do not know the fate of their loved

¹²⁰¹ Margit Fauser, 'Mixed Methods and Multisited Migration Research: Innovations from a Transnational Perspective' (2018) *Journal of Mixed Methods Research* Vol. 12 No. 2 pp. 394-412.

ones who undertake migrant journeys because they reside far away from where their relatives are believed to have died or gone missing. Also, ethnographic methods that conduct interactive interviews within a bounded population could be adopted to inquire into the experiences of how families of missing migrants cope with the trauma of their relatives going missing and what those experiences mean to them.

Again, researches that focus on the use of digital dead body management' procedures¹²⁰², medianisation of mourning,¹²⁰³ and digital materialities¹²⁰⁴ as new forms of commemoration and memorialisations¹²⁰⁵ can be further explored as modern tools to help families manage the impact of the ambiguous loss of loved ones. For example, new studies can explore how social media Digital Dead Body Management (DDBM) practices feed into the problem of migrants missing. Further research whether qualitative, quantitative or a combination of both can address questions like 'does DDBM exasperate or facilitate information when families of missing migrants are searching for their missing relatives'? In addition, one of the basic premises of ambiguous loss theory is that family belief and value systems contribute to the ability of families to develop resilience and coping abilities when their relatives die or go missing in migration. To that end, drawing up concepts that belong to the domain of family systems theory and the intersection of ambiguous loss theory could contribute to a better theoretical understanding of social factors that enhance or stymie coping and resilience strategies/abilities of families of missing migrants. Again, the relationship between state responsibility and the transnational effectiveness of national migration policies in relation to missing migrants appears interesting and could be explored in future research.

10.10 Conclusion and Final Comments

This research started with missing migrants and their families and is ending with missing migrants and their families. Seated at the centre of this narrative are states as the primary unit of analysis. This study set out to investigate the obligations and responses of states towards missing migrants and the psychosocial implication for their surviving families from a legal, policy and psychosocial

¹²⁰² K.B Sandvik, note 1077.

¹²⁰³ Lisbeth Klastorp, note 1078 pp. 1-11 and pp. 146-161; and M.D Irwin, note 1078 pp. 119-150.

¹²⁰⁴ Sarah Pink *et al*, 'Empathic Technologies: Digital Materiality and Video Ethnography' (2017) *Visual Studies* Vol. 32 No. 4 pp. 371-381; Juhee Park and Anouska Samms 'The Immateriality of the Immaterial: Collecting Digital Objects at the Victoria and Albert Museum' (2019) MW19.

¹²⁰⁵ Victor Toom, note 1080 pp. 686-708; and Tony Walter *et al*, note 1080 pp. 275-302.

perspective drawing upon multi-theoretical lenses and methods that bring together conceptual insights from law, psychosocial studies and other social science fields. In order to contextualise and set the scene for the rest of the research, this thesis first reviewed the current literature on missing migrants based on five themes that were carefully delimited by the topic of the research and which translated into the five substantive chapters of the thesis. This concluding chapter has highlighted the findings of the research and the legal implications of the findings for policy, theory and practice as well as the original contributions of the study to knowledge. This study comes to the conclusion that whilst states have made some efforts to address the transnational problem of missing migrants, they nonetheless have not fully lived up to their obligations to missing migrants and their families. There is clearly a disconnect between the issue of the missing migrants and existing legal and policy frameworks at the UK, EU and international levels. Nonetheless, there is room for future improvement in the legal and policy responses of states to missing migrants. Finally, in view of the limitations of the study which are highlighted herein, the study has suggested a number of potential and inviting investigative areas that future research can explore in relation to missing migrants.

Bibliography

[A] PRIMARY SOURCES

LEGISLATIONS

UK LEGISLATIONS

- UK-France Foreign Policy and Development Compact, Sandhurst, 18 January 2018.
- UK-EU Trade and Cooperation Agreement, Summary Explainer, December 2020.
- United Kingdom Coroners and Justice Act of 2009, Chapters 1 and 2.
- United Kingdom Guardianship (Missing Persons) Act, 2017 (Chapter 27).

EU LEGISLATIONS

- African Union, the 'EU-Africa Joint Valletta Action Plan—Conclusions 2018' available: <https://www.africa-eu-partnership.org/en/stay-informed/news/joint-valletta-action-plan-conclusions-2018> (visited 17/9/2019).
- Charter of Fundamental Rights of the European Union, 2000 (hereinafter CFREU), *Official Journal of the European Communities*, (2000/C 364/01).
- Consolidated Texts of the EU Treaties Amended by the Treaty of Lisbon (2008).
- Council and Repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJL 251, 16.9.2016.
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, (2002) *Official Journal of the European Communities*, 328, 5.12.2002.
- Council Framework Decision 2002/946/JHA on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence, (2002) *Official Journal of the European Communities*, 328, 5.12.2002.
- Dublin III Regulation, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (2013) *Official Journal of the European Union*, L 180/31.
- EU Action Plan on Migrant Smuggling (2015-2020), COM (2015) 285 Final.
- EU Readmission Agreements (EURAs).

- EU-Turkey Statement 2016, Council of the EU Press Release 144/16.
- European Council and Council of the European Union ‘A New Strategic Agenda (2019-2024)’, released in June 2019.
- European Union, Agreement between the Governments of the States of the Benelux Economic Union, Schengen Agreement, 14 June 1985, *Official Journal* L 239, 22/09/2000 P. 0013 - 0018, 42000A0922(01).
- Exchange of Information with Third Countries—Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004.
- IOM, EU-Horn of Africa Migration Route Initiative (Khartoum Process), 2014, available at; <https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process> (seen 22/5/2019).
- Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1), establishing Frontex.
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament.
- Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 (EU Sea Borders Regulation).
- The Bilateral and Regional Frameworks for Dialogue and Cooperation, European Commission, COM (2011) 292 final, 24.5.2011.
- Treaty on the Functioning of the European Union (TFEU—Lisbon Treaty), Articles 67 & 80.

COUNCIL OF EUROPE LEGISLATIONS

- Convention for the Protection of Human Rights and Fundamental Freedoms esp. pmbl 4 Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 (Article 2 of Protocol 4).
- Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data [Convention 108, CETS NO. 108, 1981].
- Council of Europe Agreement on the Transfer of Corpses 1973, Council of Europe, European Treaty Series No. 80, Strasbourg , 26.X. 1973.
- Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, ETS No 164, 1997.

INTERNATIONAL LEGISLATIONS/TREATIES/UN RESOLUTIONS

- African Charter on the Rights and Welfare of the Child, adopted by the Twenty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), Addis Ababa, Ethiopia - July 1990.
- Arrangement Concerning the Conveyance of Corpses 1937 (hereinafter 'the Berlin Arrangement'), League of Nations Treaty Series 189 No. 4391 (1938).
- Arrangement Concerning the Conveyance of Corpses 1937 (hereinafter 'the Berlin Arrangement'), League of Nations Treaty Series 189 No. 4391 (1938).
- Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.
- Charter of the United Nations 1945.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment esp. pmbl. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.
- Convention Concerning the Status of Refugees Coming from Germany of 10 February 1938 (League of Nations Treaty Series, Vol. CXCI, No. 4461).
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) adopted 12 August 1949, 75 UNTS 31 (Arts 16-17).
- Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Second Geneva Convention), adopted 12 August 1949, 75 UNTS 85 (Arts 19-20).
- Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels (Collision of Vessel at Sea Convention) 1910.
- Convention on the High Seas, Geneva, 29 April 1958, entry into force, 30 September 1962, in accordance with Article 34, UNTS No. 6465.
- Convention on the Rights of the Child esp. pmbl. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.
- Convention Relating to the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910, entry into force 1 March 1913, 37 Stat. 1658; Treaty Series 576.
- Convention Relative to the Protection of Civilian Persons in Time of War, (Fourth Geneva Convention), adopted 12 August 1949, 75 UNTS 287 (Arts 136-141).
- Convention Relative to the Treatment of Prisoners of War, (Third Geneva Convention), adopted 12 August 1949, 75 UNTS (Arts 122-124).

- Declaration on the Role of the State in Addressing the Issue of Missing Persons as a Consequence of Armed Conflict and Human Rights Abuses (2014).
- First Additional Protocol to the Geneva Convention (hereinafter AP I), Arts 32-33.
- Guiding Principles for the Search for Disappeared Persons Adopted Pursuant to the International Convention for the Protection of all Persons from Enforced Disappearance, CED/C/7, 8 May 2019.
- ICJ Statute 1949 (Article 38)
- ICRC Customary International Humanitarian Law Study (Rules 112, 116 and 117).
- ILC Draft Article on the Responsibility of States for Internationally Wrongful Acts 2001 (Article 2)
- Inter-American Convention on the Forced Disappearance of Persons adopted at Belem do para, Brazil ON 06/09/94 Conf/Assem/meeting: twenty-fourth regular session of the general assembly to the Organisation of American States, entry into force 03/28/96.
- International Convention for the Protection of all Persons from Enforced Disappearance 2010.
- International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (2006).
- International Convention for the Safety of Life at Sea, 1974 UNTS 18961.
- International Convention on Maritime Search and Rescue (ICMSR), 1979 UNTS 23489.
- International Convention on Maritime Search and Rescue, 1979 (Chapters II, IV and V).
- International Covenant on Civil and Political Rights (1966), Article 12.
- International Covenant on Civil and Political Rights 1966 (Art 24).
- International Covenant on Civil and Political Rights esp. pmbl. 2, Mar. 23, 1976, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.
- International Covenant on Economic, Social and Cultural Rights esp. pmbl. 2, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3.
- New York Declaration for Refugees and Migrants Adopted by the United Nations General Assembly Resolution A/RES/71/1 on 19 September 2016.
- OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, adopted by the Assembly of Heads of States and Governments at its Sixth Ordinary Session in Addis Ababa, 1969.
- Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982 (Article 12(2)).

- Organisation of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 Nov. 1969 (Article 22).
- SAR Convention (Regulations 1.3.1 & 1.3.2).
- Second Additional Protocol to the Geneva Convention (hereinafter AP II), Art. 8.
- UN 2030 Agenda for Sustainable Development (Goal 10.7).
- UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Texts of the Draft Convention and the Draft Protocol to Be Considered by the Conference: Note by the Secretary-General*, 12 March 1951, A/CONF.2/1.
- UN Convention on the Declaration of Death of Missing Persons after the World War II (1939-1945) Ch—XV—I, Vol—2, Lake Success New York 1950, United Nations, Treaty Series, Vol. 119.
- UN Convention Relating to the Status of Refugees (Refugee Convention 1951), Article 33(1).
- UN Draft Articles on the Responsibility of International Organisations 2011 adopted by the International Law Commission at its Sixty-Third Session (2011).
- UN General Assembly, *Draft Convention Relating to the Status of Refugees*, 14 December 1950, A/RES/429, available at: <http://www.refworld.org/docid/3b00f08a27.html> (accessed 12/2/2018).
- UN Global Compact for Safe, Orderly and Regular Migration, 2018 (Objective 8).
- UN Resolution 248 (IX) of August 1949.
- United Nations Convention on the Law of the Sea, Montego Bay, opened for signature at Montego Bay, Jamaica, on 10 December 1982, entry into force on 14 November 1994, UNTS, 1833.
- United Nations Convention on the Rights of the Child (Art 22).
- United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.
- United Nations Universal Declaration of Human Rights (UDHR) 1948 (G.A. Resolution 217 A).
- UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organised Crime (2000), UNTS, Vol. 2241; Doc. A/55/383.
- Universal Declaration of Human Rights (1948), Articles 13 & 14.

FOREIGN STATUTES

- Alien Tort Claims Act (ACTA), 1789.
- Bosnia and Herzegovina '*Law on Missing Persons*' adopted the Parliamentary Assembly of Bosnia and Herzegovina Pursuant to (Article IV 4a) of the Constitution of Bosnia and Herzegovina.
- Iraq Law on Protection of Mass Graves (Law No. 5) made pursuant to items A and B of the Article No. 33 of the Law of Administration for the State of Iraq for the Transitional Period.
- Italian Inter-Ministerial Decree n. 150 of 7 April 2020.
- Italian Penal Code (Arts. 407-413).
- Nigerian Evidence Act, 2011 (Section 164).
- Republic of Kosovo Law on Missing Persons (Law No.04/L-023) made pursuant Article 65(1) of Constitution of the Republic of Kosovo.

CASES

- *A & others v Secretary of State for the Home Department* [2004] UKHL 56.
- *Ahmet Ozkan and Ors v Turkey* [2004] case no 21869/93 ECtHR.
- *Akpınar and Altun v Turkey* (56760/00) 2007 [ECtHR].
- *Al-Skeini v. United Kingdom*, [2011] App. No. 55721/07 [GC, ECtHR].
- *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)* ICJ Reports 116 (1951).
- *Banković and Others v. Belgium and Others*, Application No. 52207/99, [GC, ECtHR] 2001-XII.
- *Elberte v Latvia*, [2015] ECtHR, Application No: 61243/08.
- *ERT case* (Case C-260/89).
- *Genner v Austria* (55495/08), 2016 [ECtHR].
- *Hirsi Jamma & Ors v Italy* (GC), Application No. 27765/09.
- *Ilhan v Turkey* [2000] Application No 22277/93 ECtHR [GC].
- *Kadi case* (Joined Cases C-402/05 P and C-415/05 P).

- *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, Judgment [GC], 1995 (ECtHR).
- *Medvedyev and Others v France* [Grand Chamber] App No 3394/03 ECtHR, 29 March 2010.
- *Moiwana Village v Suriname* (Inter-Am Ct. H.R., (Ser. C) No. 145 (2005).
- *Nzolameso v City of Westminster* [2015] UKSC 22.
- *Pannullo and Forte v France* [2001] Application No. 37794/97 [ECtHR].
- *Paul and Audrey Edwards v UK* [2002] Application No 46477/99.
- *Rantzen v Mirror Group Newspapers* (1986) Ltd [1994] QB 670.
- *Re Sarah Pope* [1851] 15 Jur. 614.
- *Sabanchiyeva and Others v Russia* [2013] Application No. 38450/05 [ECtHR].
- *Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Incorporated* 509 US 155 (1993).

[B] SECONDARY SOURCES

BOOKS

- Agamben G, *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Roazen (Trans) (Stanford: Stanford University Press, 1998).
- Agamben G, *State of Exception* (University of Chicago Press, London, 2005).
- Akkerman M, *Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme*, Nick Buxton and Wendela de Vries (eds.) (Amsterdam: Transnational Institute, 2018).
- Allen J.G, *Coping with Trauma: Hope Through Understanding*, 2nd edition (Washington DC, London England: American Psychiatric Publishing Inc, 2005).
- American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5) 5th Edition* (Washington DC, London England: American Psychiatric Association, 2013).
- Arendt H, *The Human Condition* (Chicago: University of Chicago Press, 1958).
- Arendt H, *The Jewish Writings*, J. Kohn and R.H. Feldman (eds.) (New York: Schocken Books, 2007a).

- Arendt H, *The Origins of Totalitarianism* (Harcourt Brace, New York, 1973).
- Arendt H, 'The Perplexities of the Rights of Man' in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham and London: Duke University Press, 2013).
- Arendt H, 'We Refugees' in Marc Robinson (ed.) *Altogether Elsewhere, Writers on Exile* (Boston, London: Faber and Faber, 1943).
- Aristotle, *Nicomachean Ethics*, W.D. Ross (trans) Kitchener (Batoche Books, 1999).
- Aristotle, *Nicomachean Ethics*, David Ross (trans), Revised with an Introduction and Notes by Lesley Brown (Oxford: Oxford University Press, 2009).
- Aristotle, *Politics* (trans) by Ernest Barker, R.F Stalley (ed.) Book 1 (Oxford: Oxford University Press, 1998).
- Barkan E, *The Guilt of Nations* (New York: W.W. Norton, 2000).
- Bauman Z, *Liquid Fear* (Cambridge: Polity Press, 2006).
- Bauman Z, *Wasted Lives: Modernity and its Outcasts* (Cambridge: Polity Press, 2004).
- Beitz C.R, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).
- Benhabib S, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: CUP, 2004).
- Benjamin W, *Selected Writings Volume 1 (1913-1926)* Marcus Bullock and M.W. Jennings (eds.) (Cambridge, Massachusetts: Harvard University Press, 1996).
- Beyleveld D. and Brownsword R, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001).
- Blair T, *A Journey* (London: Hutchinson, 2010).
- Boss P, *Loss, Trauma and Resilience: Therapeutic Work with Ambiguous Loss* (New York: W.W. Norton, 2006).
- Boss P, *Ambiguous Loss: Learning to Live with Unresolved Grief* Cambridge, MA: Harvard University Press, 1999).
- Boss P. et al, *Family Stress Management, 3rd edition* (Thousand Oaks, CA: 2016).
- Bouteillet-Paquet D, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (New York: United Nations, 2011).
- Bowlby J, *Attachment and Loss: Loss Sadness and Depression Volume III* (New York: Basic Books, 1980).

- Brettel C.B and Hollifield J.F, *Migration Theory: Talking Across Disciplines, English Book edition* (London; New York: Routledge, 2000).
- Brian T. and Laczko F, 'Counting Migrant Deaths: An International Overview' in Frank Laczko *et al.* (eds.) *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva: IOM, 2014).
- Brownsword R, 'Migrants, State Responsibilities, and Human Dignity' (2021) *Ratio Juris* Vol. 34 No. 1.
- Brownlie I, *Principles of International Law, 7th edition* (Oxford: OUP, 2008).
- Butler J, *Precarious Life: The Powers of Mourning and Violence* (New York: Verso, 2004).
- Cane P, *Responsibility in Law and Morality* (Oxford—Portland Oregon: Hart Publishing, 2002).
- Chappell R. (ed.) Office for National Statistics, *Focus on Migration and People, 2005 Edition* (Palgrave: Palgrave Macmillan, 2005).
- Coleman J.L, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992).
- Connolly W.E, *Democracy, Pluralism and Political Theory*, Chambers S.A. and Carver T. (eds.) (London and New York: Routledge, 2008).
- Cordourier-Real C.R, *Transnational Social Justice* (Palgrave Macmillan, 2010).
- Cripps E, *Climate Change and the Moral Agent: Individual Duties in an Interdependent World* (Oxford: Oxford University Press, 2013).
- D'Amato A, *Jurisprudence: A Descriptive and Normative Analysis of Law* (Leiden: Martinus Nijhoff, 1984).
- Davidson D, *Plato's Philebus Vol 10* (London and New York: Routledge, 1990).
- De León J, *Land of Open Graves, Living and Dying on the Migrant Trail* (California: University of California Press, 2015).
- Doná G, *The Marginalised in Genocide Narratives* (Abington-on-Thames: Routledge, 2019).
- Dunant H, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1939).
- Elliott J, *Using Narrative in Social Research: Qualitative and Quantitative Approaches* (London: Sage, 2005).
- Edmund Burke, *Reflections on the French Revolution* (1790).

- Esmeir S, *Juridical Humanity. A Colonial History* (California, Stanford University Press, 2012).
- Fanon F, *The Wretched of the Earth*, Richard Philcox (Trans from French) with Commentary Jean-Paul Sartre and Homi K. Bhabha (New York: Grove Press, 1963).
- Foucault M, *The Birth of Biopolitics*, Graham Burchell (trans) (New York: Palgrave Macmillan, 2008).
- Foucault M, *The History of Sexuality: An Introduction Vol. 1* Robert Hurley (Trans) (Pantheon Books, 1978).
- Foucault M, *Security, Territory and Population, Lectures at the Collège de France 1977-1978*, Senellart M. (ed.), Burchell G. (trans) (Palgrave Macmillan, 1978).
- Foucault M, *Society Must be Defended*, Lectures at the Collège de France (1975-1976), Mauro Bertani and Alessandro Fontana (eds.), David Macey (trans) (New York: Picador, 2003).
- Foucault M, *The History of Sexuality: The Will to Knowledge Vol. 1*, Robert Hurley (trans) (London: Penguin Books, 1998d).
- Freud S, *Mourning and Melancholia, The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XIV (1914-1916): On the History of the Psycho-Analytic Movement, Papers on Metapsychology and Other Works*.
- Gavshon D, *The Dead, the 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015).
- Genn D.H. et al, *Law in the Real World: Improving Our Understanding of How Law Works* (London: The Nuffield Foundation, 2006).
- Goodin G, *Social Welfare and Individual Responsibility* (Cambridge: Cambridge University Press, 1998).
- Goodwin-Gill G, *The Refugee in International Law 2nd edition* (Oxford: Clarendon Press, 1996).
- Hardt M. and Dumm T, *Sovereignty, Multitudes, Absolute Democracy: A Discussion between Michael Hardt and Thomas Dumm about Hardt and Negri's Empire* (Harvard: Harvard University Press, 2000).
- Hardt M. and Negri A, *Empire* (Cambridge, Massachusetts: Harvard University Press, 2000).
- Hart C, *Doing a Literature Review: Releasing the Social Science Research Imagination* (London, Thousand Oaks, New Delhi: Sage Publications, 1998).
- Henkin L, *How Nations Behave: Law and Foreign Policy' 2nd Edition* (Columbia: Columbia University Press, 1979).

- Hicks F.C, *Materials and Methods of Legal Research* (New York: The Lawyers Co-operative Publishing Company, 1942).
- Honneth A, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Joel Anderson (Trans) (Cambridge: MIT Press, Cambridge, Massachusetts, 1995).
- Honoré T, *Responsibility and Fault* (Oxford: Hart Publishing, 1999).
- Huysmans J, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (London: Routledge, 2006).
- Inter-Parliamentary Union “Migration, Human Rights and Governance: Handbook for Parliamentarians” (Inter-Parliamentary Union and the International Labour Organisation and the United Nations, 2016).
- Jacobs M, *Sigmund Freud—Key Figures in Counselling and Psychotherapy Series Editor: Windy Dryden 2nd Edition* (London: SAGE Publications, 2003).
- Jean-Luc N, ‘Abandoned Being’ in ‘*The Birth to Presence*’, Brian Holmes (trans) (Stanford CA: Stanford University Press, 1993).
- Jessup P, *Transnational Law* (New Haven: Yale University Press, 1956).
- Jones H, *The Imperative of Responsibility: In Search of Ethics for the Technological Age* (Chicago: University of Chicago Press, 1984).
- Kesby K, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford: Oxford University Press, 2012).
- Kim K, *Postcolonial Grief: The Afterlives of the Pacific Wars in the Americas* (Duke: Duke University Press, 2019).
- Klabbers J, *International Law* (Cambridge: Cambridge University Press, 2013).
- Klass D. et al. (eds.) *Continuing Bonds: New Understandings of Grief* (Phil.PA, USA: Taylor and Francis, 1996).
- Koser K, *International Migration: A Very Short Introduction* (Oxford: Oxford University Press, 2007).
- Ktistakis Y, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter, A Handbook for Legal Practitioners* (Council of Europe Publishing, 2013).
- Kubler-Ross E, *Encountering Death and Dying* (USA: Chelsea House Publishers, 2005).
- Kubler-Ross E, *On Death and Dying, 40th Anniversary Edition* (New York: Macmillan, 1969).
- Kuner C. *European Data Protection Law, Corporate Regulation and Compliance, 2nd edition*, (Oxford: Oxford University Press, 2007).

- Laqueur T.W, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton, New Jersey: Princeton University Press, 2015).
- Larking E, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (London and New York: Routledge, 2016).
- Likierman M, *Melanie Klein: Her Work in Context* (London-New York: Continuum, 2001).
- Loughry M. and Eyber C. (eds.) *Psychosocial Concepts in Humanitarian Work with Children: A Review of the Concepts and Related Literature*, National Research Council, (Washington: The National Academies Press, 2003).
- Lucas J.R, *Responsibility* (Oxford: Oxford University Press, 1995).
- Mann I, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge: Cambridge University Press, 2016).
- Marino S, *Mediating the Refugee Crisis: Digital Solidarity, Humanitarian Technologies and Border Regimes* (Palgrave Macmillan, 2021).
- McCrudden C, *Understanding Human Dignity* (ed.) (Oxford: Oxford University Press, 2014).
- McDougal M.S. et al, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven and London: Yale University Press, 1980).
- McIlwraith H, *Coping with Bereavement* (Oxford: Oneworld Publications, 1998).
- Michel-Ralph T, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press Books, 1995).
- Milanovic M, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011).
- Miller D, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).
- Miller D, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge, Massachusetts: Harvard University Press, 2016).
- Moyn S, *The Last Utopia, Human Rights in History* (Belknap Harvard: Harvard University Press, 2010).
- Nickel J.W, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987).
- Nollkaemper A. & Plakokefalos I (eds.) *Principles of Shared Responsibility in International Law: An Appraisal of State of the Art* (Cambridge: Cambridge University Press, 2016).

- Nollkaemper A. & Plakokefalos I (eds.) *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017).
- Oberoi P. et al, *International Migration, Health and Human Rights* (Switzerland: IOM, 2013).
- Oppenheim L.F, *International Law: A Treatise Vol. 1, 2nd Edition* (London: Longmans, Green and Co, 1912).
- Parkes C.M, *Bereavement: Studies of Grief in Adult Life* (New York: International Universities Press, 1972).
- Parkes C.M. and Prigerson H.G, *Bereavement: Studies of Grief in Adult Life* 4th Edition (London: Routledge, 2010).
- Pogge T, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms, 2nd Edition* (Cambridge: Polity Press, 2008).
- Rando T.A, *Treatment of Complicated Mourning* (Champaign III: Research Press, 1993).
- Rawls J, *A Theory of Justice, Revised Edition* (Harvard: Harvard University Press, 1971).
- Rawls J, *The Law of Peoples; With the Idea of Public Reason Revisited* (Harvard, Massachusetts: Harvard University Press, 1999).
- Riddervold M, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Switzerland: Palgrave Macmillan, 2018).
- Rose N, *The Psychological Complex: Psychology, Politics and Society in England 1869-1939* (London: Routledge and Kegan Paul Plc, 1985); 1989).
- Ryan B. and Mitsilegas V. (eds.) *Extraterritorial Immigration Control* (The Netherlands: Koninklijke Brill, 2010).
- Said E, 'Travelling Theory' in *The World, the Text, and the Critic* (Harvard: Harvard University Press, 1983).
- Said E.W, *Orientalism* (New York: Vintage Books, 1978).
- Schain M.A, *Shifting Tides: Radical-Right Populism and Immigration Policy in Europe and the United States* (Washington, DC: Migration Policy Institute, 2018).
- Schmitt C, *Political Theology, Four Chapters on the Concept of Sovereignty*, George Schwab (Trans), (Cambridge, Massachusetts, and London, England: The MIT Press, 1985).
- Schoenberg B et al, *Anticipatory Grief* (New York: Columbia University Press, 1974).
- Scott J.C, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven and London: Yale University Press, 1985).

- Segal J, *Melanie Klein—Key Figures in Counselling and Psychotherapy Series Editor: Windy Dryden, 2nd Edition* (London: SAGE Publications, 2004).
- Shelton D. (ed.) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011).
- Shue H, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy, 2nd edition* (Princeton, New Jersey: Princeton University Press, 1996).
- Sigmund Freud, *Mourning and Melancholia* (London: The Hogarth Press, 1917).
- Stonebridge L, *Placeless People: Writing, Rights and Refugees* (Oxford: Oxford University Press, 2018).
- Strayer J.R, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 2005).
- Tazzioli M, *Spaces of Governmentality: Autonomous Migration and the Arab Uprisings* (USA: Rowman and Littlefield International, Ltd).
- Vaughan-William N, *Border Politics: The Limits of Sovereign Power* (Edinburgh: Edinburgh University Press, 2009).
- Vaughan-Williams N, *Europe's Border Crisis: Biopolitical Security and Beyond* (Oxford: Oxford Scholarship Online, 2015).
- Verdery K, *The Political Lives of Dead Bodies: Reburial and Post Socialist Change* (New York: Columbia University Press, 2000).
- Volkan V.D. and Zintl E, *Life After Loss: The Lessons of Grief* (New York: Charles Scribner's Sons, 1993).
- Volkan V.D, 'Immigrants and Refugees: Trauma, Perennial Mourning, Prejudice, and Border Psychology' (London: Karnac Books Limited, 2017).
- Wagner S.E, *To Know Where He Lies. DNA Technology and the Search for Srebrenica's Missing* (Berkeley: University of California Press, 2008).
- Wallace D, *Human Rights and Businesses: A Policy-Oriented Perspective* (Leiden | Boston: Brill | Nijhoff, 2014).
- Walter C.A. and Judith L.M, *Grief and Loss Across the Lifespan: A Biopsychosocial Perspective* (New York: Springer Publishing Company, 2009).
- Walzer M, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).
- Weaver O, 'Securitisation and Desecuritization' in *On Security* (New York: Columbia University Press, 1995).
- Webber M, *Economy and Society, Vol. 1* (1914).

- Weber L. and Pickering S, *Globalization and Borders: Death at the Global Frontier* (Hampshire: Palgrave Macmillan, 2011).
- Whyte J, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (New York: State University of New York Press, 2013).
- Worden J.W, *Grief Counselling and Grief Therapy: A Handbook for the Mental Health Practitioner, 4th Edition* (New York: Springer Publishing Company, LLC, 2009).

BOOK CHAPTERS

- Affolder N, 'Transnational Law as Unseen Law' in Peer Zumbansen (ed.) *"The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal"* (Cambridge: Cambridge University Press).
- Agamben G, 'Introduction to Homo Sacer: Sovereign Power and Bare Life' in Campbell T. and Sitze A. (eds.) *Biopolitics: A Reader* (London: Duke University Press, 2013).
- Agamben G, 'Beyond Human Rights' contained in the sub-part: 'Means Without End, Notes on Politics' in Sandra Buckley *et al.* (eds.) Binetti V. and Casarino C. (trans.) *Theory Out of Bounds Vol. 20* (Minneapolis/London: University of Minnesota Press, 2000).
- Aldrich C.K, 'Some Dynamics of Anticipatory Grief' in B Schoenberg *et al.* *Anticipatory Grief* (New York: Columbia University Press, 1974).
- Appleby K, 'Global Compact on Migration: Issues at Play' in Appleby K. *et al.* (eds.) *International Migration Policy Report: Perspectives on the Content and Implementation of the Global Compact for Safe, Orderly, and Regular Migration*, A Report of Scalabrini Migration Study Centres (2018).
- Arendt H, 'We Refugees' in Robinson M. (ed.) *Altogether Elsewhere, Writers on Exile* (Boston, London: Faber and Faber, 1943).
- Arnason A, 'Individuals and Relationships: On the Possibilities and Impossibilities of Presence' in Davies D. and Parkes C.W. (eds.) *Emotion, Identity and Death: Mortality Across Disciplines* (Surrey: Ashgate, 2012).
- Basilien-Gainche M-L, 'Leave and Let Die: The EU Banopticon Approach to Migrants at Sea' in Moreno-Lax V. and Papastavridis E. (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Brill | Nijhoff, 2017).
- Bayertz K, 'der Verantwortung G' in Bayertz K. (ed.) *Verantwortung: Prinzipoder Problem?* Darmstadt (1995).
- Bhabha J, 'Legal Obligations of States with Regard to Child Migrant Death and Disappearances' in Laczko F. *et al.* (eds.) *Missing Migrant Children, Fatal Journeys Vol. 4* (IOM, 2019).

- Bolton S. and Jarvis C, 'Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants' in Guild E. and Basaran T. (eds.) *The UN's Global Compact for Safe, Regular and Orderly Migration: Analysis of the Final Draft, Objective by Objective* (Refugee Law Initiative, 2019).
- Boss P, 'Coping with the Suffering of Ambiguous Loss' in Anderson R.E. (ed.) *World Suffering and the Quality of Life* (New York: Springer, 2015a).
- Brooks P, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds.) *Law's Stories: Narrative and Rhetoric in the Law* (Yale: Yale University Press, 1996).
- Brownsword R, 'Human Dignity from a Legal Perspective' in Marcus Duwell *et al.* (eds.) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014).
- Brownsword R, 'Human Dignity, Human Rights and Simply Trying to Do the Right Thing' in Christopher McCrudden (ed.) *Understanding Human Dignity* (Oxford: Oxford University Press, 2014).
- Candida Y, 'Introducing Emotion, Identity, and the Play of Political Culture' in Yates C *Studies in the Psychosocial Series*, Peter Redman *et al.* (eds.) (London: Palgrave Macmillan, 2015).
- Carens J.H, 'Immigration, Welfare and Justice' in Schwartz W.F. (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Chetail V, 'The Transnational Movement of Persons under General International Law—Mapping the Customary Law Foundations of International Migration Law' in Chetail V. and Bouloz C. (eds.) *Research Handbook on International law and Migration* (Edgar: 2014).
- Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (eds.) *Advanced Research Methods in the Built Environment* (United Kingdom: Wiley-Blackwell Publishing, 2008).
- Civelek H.Y, 'Biopolitical Problematic: Syrian Refugees in Turkey' in Eroğlu U.D. *et al.* (eds.) *Turkey's Syrians: Today and Tomorrow* (London: Transnational Press London, 2017).
- Coleman J.L. and Harding S.K, 'Citizenship, the Demands of Justice and the Moral Relevance of Political Borders' in Schwartz W.F. (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Cuttitta P, 'From the Cap Anamur to Mare Nostrum: Humanitarianism and Migration Controls at the EU's Maritime Borders' in Matera M. and Taylor A. (eds.) *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (Netherlands: CLEER, 2016).
- Cuttitta P, 'Inclusion and Exclusion in the Fragmented Space of the Sea Actors, Territories and Legal Regimes Between Libya and Italy' in Burroughs E. and Williams K. (eds.)

Contemporary Boat Migration: Data, Geopolitics and Discourses (London and New York: Rowman and Littlefield International, 2018).

- Cuttitta P, Preface: 'The Increasing Focus on Border Deaths' in Cuttitta P. and Last T. (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam: Amsterdam University Press, 2020).
- Cuttitta P, 'The Central Mediterranean as a Humanitarianism Space' in Sorensen N.N. and Plambech S. (eds.) *When Human Welfare Meets the Political and Security Agendas: Global Perspectives on Humanitarianism* (2019) Danish Institute for International Studies (DIIS) Reports.
- Cuttitta P. *et al* 'Various Actors: The Border Death Regime' in Cuttitta P. and Last T. (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam: University of Amsterdam Press, 2020).
- D'Aspremont, J, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Fauchald O.K. and Nollkaemper A. (eds.) *The Practice of International and National Courts and (De-)Fragmentation of International Law* (Oxford, Hart Publishing, 2012).
- Falicov C.J, 'Ambiguous Loss: Risk and Resilience in Latino Immigrant Families' in M. Suarez-Orozco and M. Paez (eds.) *Latinos: Remaking America* (CA: University of California Press, 2002).
- Farhi-Rodrig M, 'Global Migration: A Transnational Problem' in L.E Grinin *et al* (eds) *"Globalistics and Globalisation Studies: Global Transformations and Global Future"* (Volgograd: 'Uchitel' Publishing House, 2016).
- Ferreira S, 'From Narratives to Perceptions in the Securitisation of the Migration Crisis in Europe' in Karakoulaki M. *et al.* (eds.) *Critical Perspectives on Migration in the Twenty-First Century* (Bristol, England: E-International Relations Publishing, 2018).
- Foucault M, 'Confronting Government: Human Rights' in Faubion J. (ed.) *Power: Essential Works of Foucault 1954–1984, Vol. 3* (New York: The New Press, 2000c).
- Foucault M, 'The Political Technology of Individuals' in Faubion J. (ed.) *Power: Essential Works of Foucault, 1954–1984, Vol. 3* (New York: New Press, 2000b).
- Foucault M, 'Right of Death and Power Over Life' in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham and London: Duke University Press, 2013).
- Foucault M, 'Society Must Be Defended' in Timothy Campbell and Adam Sitze (eds.) *Biopolitics: A Reader* (Durham & London: Duke University Press, 2013).
- Foucault M, 'Society Must Be Defended' *Lectures at the Collège de France 1975-1976*, Mauro Bertani and Alessandro Fontona (eds.) David Macey (trans) (New York: Picado, 2003).

- Gammeltoft-Hansen T, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration' in Moreno-Lax V. and Papastavridis E. (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Brill | Nijhoff, 2016).
- Gauci J-P. and Mallia P, 'The Migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Inter-sectionality and Multi-actor Cooperation' in Violeta M.L. and Efthymios P. (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Leiden, Netherlands: Brill | Nijhoff, 2017).
- Gerber I, 'Anticipatory Bereavement' in B Schoenberg *et al*, *Anticipatory Grief* (New York: Columbia University Press, 1974).
- Giulia S, 'Refugees or Migrants? The UNHCR's Comprehensive Approach to Afghan Mobility into Iran and Pakistan' in Geiger M. and Pécoud A. (eds.) *The Politics of International Migration Management. Migration, Minorities and Citizenship* (London: Palgrave Macmillan, 2010).
- Goodwin-Gill G.S, 'The International Law of Refugee Protection' in Fiddian-Qasiyeh E. *et al*. (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014).
- Grant S, 'Identification and Tracing' in Brian T. and Laczko F. (eds.) *Fatal Journeys Vol. 2: Identification and Tracing of Dead and Missing Migrants* (Geneva: IOM, 2016).
- Hadfield G.K, 'Just Borders: Normative Economics and Immigration Law' in Schwartz W.F. (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Hampton J, 'Immigration, Identity and Justice' in W.F. Schwartz (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Heller C. and Pezzani L, 'Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier' in De Genova N. (ed.) *The Borders of Europe: Autonomy of Migration, Tactics of Bordering* (Duke: Duke University Press, 2017).
- Hoffmann K. *et a*, 'Using Big Data to Study Rescue Patterns in the Mediterranean' in Frank Laczko *et al*. (eds.) *Fatal Journeys Vol. 3 Part 1* (Geneva: IOM, 2017).
- Horwood C, 'Deaths en Route from the Horn of Africa to Yemen and Along the Eastern Corridor from the Horn of Africa to South Africa' in Brian T. and Laczko F. (eds.) *Fatal Journeys: Tracking Lives Lost during Migration* (Geneva: IOM, 2010).
- Hunter E.J, 'Captivity: The Family in Waiting' in C.R Figley and H.I McCubbin (eds.) *Stress and the Family, Vol. II: Coping with Catastrophe* (New York: Brunner/Mazel, 1983).
- Jean-Luc N, 'The Kategorein of Excess' in *A Finite Thinking*, James Gilbert Walsh and Simon Sparks (trans), Simon Sparks (ed.) (Stanford CA: Stanford University Press, 2003).
- Jones D.W. *et al*. (2009) 'Conclusion' in Day Sclater *et al*. (eds) *Emotion: Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan, 2009).

- Klein M, 'Mourning and its Relation to Manic-Depressive States' in *Love, Guilt and Reparation and other Works 1921-1945: The Writings of Melanie Klein, Vol. 1* (London: Hogarth Press, 1940).
- Kovras I. and Robins S, 'Missing Migrants: Deaths at Sea and Unidentified Bodies in Lesbos' in Donnan H. *et al.* (eds.) *Migrating Borders and Moving Times: Temporality and the Crossing of Borders in Europe* (Manchester: Manchester University Press, 2017).
- Křepelka F, 'Death Abroad—Legal Framework and Practices' in Gołaczyński J. *et al.* (eds.) *Non omnis moriar Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane* (Wrocław: Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2015).
- Last T, 'Who is the Boat Migrant? Challenging the Anonymity of Death by Border-Sea' in Violeta M.L. and Efthymios P. (eds.) *Boat Refugees and Migrants at Sea: A Comprehensive Approach* (Leiden, Netherlands: Brill | Nijhoff, 2017).
- Last T. and Spijkerboer T, 'Tracking Deaths in the Mediterranean' in Tara Brian and Laczkó F, *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva: IOM, 2014).
- Lauterpacht E. and Bethlehem D, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller E. *et al.* *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).
- Lemberg-Pedersen M, 'Losing the Right to Have Rights: EU Externalisation of Border Control' in Erik André Andersen and Lassen E.M. (eds.) *Europe and the Americas: Transatlantic Approaches to Human Rights* (Brill | Nijhoff, 2015).
- Lingaas C, 'Judicial Responses to the Migration Crisis: The Role of Courts in the Construction of a European Identity' in Bruno G.C. *et al.* (eds.) *Migration Issues Before International Courts and Tribunals* (Rome: CNR Edizioni, 2019).
- M'charek A. and Black J, 'Engaging Bodies as a Matter of Care: Counting and Accounting for Death During Migration' in Cuttitta P. & Last T. (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality* (Amsterdam: Amsterdam University Press, 2020).
- M'charek A. and Casarelli S, 'Identifying Dead Migrants: Forensic Care Work and Relational Citizenship' (2019) *Citizenship Studies* Vol. 23 No. 7
- Martin D.A, 'Authority and Responsibility of States' in Aleinikoff, T. A. & Chetail, V. (eds.), *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press, 2003).
- Matwijkiw A. and Matwijkiw B, 'Illiberal versus Liberal State Branding and Public International Law: Denmark and the Approximation to Human(itarian) Rightlessness' in *The Global Yearbook of International Law and Jurisprudence*, Capaldo G.Z. (ed.) (Oxford: Oxford University Press, 2018).
- Mbembe A, 'Necropolitics' in Morton S. & Bygrave S. (eds.) *Foucault in an Age of Terror: Essays on Biopolitics and the Defence of Society* (Palgrave-Macmillan, 2008).

- McDougal M. & Reisman M, 'International Law in Policy-Oriented Perspective' in Ronald St. J.M. & Johnston D. (eds.) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983).
- Miller D, Immigration: 'The Case for Limits' in A.I. Cohen and C.H. Wellman (eds.) *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005).
- Miller D, 'Our Responsibilities to Refugees' in Proceedings of the 2018 ZiF Workshop *Studying Migration Policies at the Interface between Empirical Research and Normative Analysis*, Hoesch M. and Laube L. (ed.) ULB Münster (miami.uni-muenster.de).
- Mirto G. *et al*, 'Mourning Missing Migrants: Ambiguous Loss and the Grief of Strangers' in Cuttitta P. and Last T. (eds.) *Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality* (Amsterdam: Amsterdam University Press, 2020).
- O'Daniel A.J. and Latham K.E, 'Beyond Local Jurisdictions: Science in a Global Web of Relations (Introduction)' in O'Daniel A.J. and Latham K.E. (eds.) *Sociopolitics of Migrant Death and Repatriation: Perspectives from Forensic Science* (Springer, 2018).
- Perry S.R, 'Immigration, Justice and Culture' in Schwartz W.F. (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Prilleltensky I. and Prilleltensky O, 'Beyond Resilience: Blending Wellness and Liberation in the Helping Professions' in Ungar M. (ed.) *Handbook for Working with Children and Youth: Pathways to Resilience Across Cultures and Context* (Thousand Oaks, CA: SAGE Publications, 2005).
- Raz J, 'Human Rights Without Foundation' in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010).
- Reineke R, 'Los desaparecidos de la frontera (The Disappeared on the Border)' in Rubio-Goldsmith R. *et al*. (eds.) *Migrant Deaths in the Arizona Desert* (Arizona: Arizona University Press, 2016).
- Richards B. *et al* 'Conclusion: Psychosocial Studies—A Therapeutic Project' in S. Day-Sclater *et al* (eds) *Emotion: New Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan, 2009)
- Robins S, 'Migrant Bodies in Europe: Routes to Identifying the Dead and Addressing the Needs of the Families of the Missing' in Laczko F. *et al*. (eds.) *Improving Data on Missing Migrants, Fatal Journeys, Vol. 3 Part 1* (Geneva: IOM, 2017).
- Sclater S.D. *et al*, 'Introduction' in Day Sclater *et al*. (eds) *Emotion: Psychosocial Perspectives* (Basingstoke: Palgrave Macmillan, 2009).
- Silverman P.R. and Klass D, 'Introduction' in *Continuing Bonds: New Understandings of Grief* (Phil.PA, USA: Taylor and Francis, 1996).
- Sloss D, 'Domestic Application of Treaties' in D.B. Hollis (ed.) *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012).

- Small N, 'Theories of Grief: A Critical Review' in Jeanne Katz *et al.* (eds.) *Grief, Mourning and Death Ritual* (Buckingham UK: Open University Press, 2001).
- Sorensen N.N. and Plambech S, 'Introduction' in Sorensen N.N. and Plambech S. (eds.) *When Human Welfare Meets the Political and Security Agendas: Global Perspectives on Humanitarianism* (2019) Danish Institute for International Studies (DIIS) Reports.
- Spijkerboer T, 'Are European States Accountable for Border Deaths?' in Juss S.S. (ed.) *The Ashgate Research Companion to Migration Law, Theory and Policy* (London: Routledge, 2012).
- Swing W.L, 'Forward' in Brian T. and Laczko F. (eds.) *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva: IOM, 2014).
- Takle M, 'Is the Migration Crisis a Solidarity Crisis?' in Andreas Grimm (ed.) *The Crisis of the European Union* (London: Routledge, 2018).
- Thomson D.F, 'Designing Responsibility: The Problem of Many Hands in Complex Organisations' in *The Design Turn in Applied Ethics*, Van den Hoven J. *et al.* (eds.) (Oxford: Oxford University Press, 2017).
- Trebilcock M.J, 'The Case for a Liberal Immigration Policy' in Schwartz W.F. (ed.) *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).
- Vobruba G, 'The Limits of Borders' in Abram de Swaan (ed.) *Social Policy Beyond Borders* (Amsterdam: Amsterdam University Press, 1994).
- Waever O, 'The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-Sovereign Security Orders' in Kelstrup M. and Williams M.C. (eds.) *International Relations Theory and the Politics of European Integration: Power, Security and Community* (London: Routledge, 2000).
- Wissing R, 'Allocating Responsibility for Refugee Protection to States: Actual and Potential Criteria in International (Case) Law' in Bruno G.C. *et al.* (eds.) *Migration Issues Before International Courts and Tribunals* (Rome: CNR Edizioni, 2019).
- Yamamoto H, 'A Fire in Fontana [1985]' in *Seventeen Syllables and Other Stories, Revised Edition* (New Brunswick: Rutgers University Press, 2001).
- Yardley L. and Marks D.F, 'Introduction to Research Methods in Clinical and Health Psychology' in Marks D.F. and Yardley L. (eds.) *Research Methods for Clinical and Health Psychology* (London, Thousand Oaks, New Delhi: SAGE Publications, 2004).

[D] JOURNAL/ARTICLES

- Abeyratne R, 'Acceptance of Human Remains for Carriage by Air—Some Concerns in Security and Safety' (2012) *Journal of Transportation Security* Vol. 5.

- Abizadeh A, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control your Own Borders' (2008) *Political Theory* Vol. 36 No. 1.
- Achiume E.T, 'The Fatal Flaw in International Law for Migration: Model International Mobility Convention Commentary' (2018) *Columbia Journal of Transnational Law* Vol. 56.
- Agamben G, 'Beyond Human Rights' (2008) *Open, Social Engineering* No 15.
- Agamben G, 'We Refugees, Symposium' (1995) *A Quarterly Journal in Modern Literatures* Vol. 49 No. 2.
- Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2001) *International Journal of Refugee Law* Vol. 13 No. 4.
- Allsopp J. *et al*, 'Policing the Mobility Society: The Effects of EU Anti-Migrant Smuggling Policies on Humanitarianism' (2018) *International Journal of Migration and Border Studies* Vol. No. 3.
- Arendt H. 'We Refugees' (1943) *Menorah Journal* 31, No. 1.
- Arribas G.F, 'International Responsibility of the European Union for the Activities of its Military Operations: The Issue of Effective Control' (2014) *Spanish Yearbook of International Law* Vol. 18.
- Atak I. and Crepeau F, 'Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges' (2014) *Journal européen des droits de l'homme* Vol. 5.
- Attride-Stirling J, 'Thematic Networks: An Analytic Tool for Qualitative Research Tool' (2001) *Qualitative Research* Vol. 1 Issue 3.
- Baker J.E, 'Mourning and the Transformation of Object Relationships: Evidence for the Persistence of Internal Attachment' (2001) *Psychoanalytic Psychology* Vol. 18 No. 1.
- Baker P. *et al* 'A Useful Methodological Synergy? Combining Critical Discourse Analysis and Corpus Linguistics to Examine Discourses of Refugees and Asylum Seekers in the UK Press' (2008) *Discourse and Society*, Vol. 19.
- Bartels L, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) *European Journal of International Law* Vol. 25 No. 4.
- Basaran T, 'Saving Lives at Sea: Security, Law and Adverse Effects' (2014) *European Journal of Migration and Law* Vol. 16.
- Beduschi A.C, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges' (2015) *Refugee Survey Quarterly*.
- Beltrán C, 'Going Public: Hannah Arendt, and the Spaces of Appearance' (2009) *Political Theory* Vol. 37 No. 5.

- Bendixsen S.K.N 'The Refugee Crisis: Destabilising and Restabilising European Borders' (2016) *History and Anthropology* Vol. 27 No. 5.
- Benvenisti E. and Downs G.W, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) *European Journal of International Law* Vol. 20.
- Berman P.S, 'A Pluralist Approach to International Law' (2007) *The Yale Journal of International Law* Vol. 32.
- Besson S, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution' (2015) *Social Philosophy and Policy* Vol. 32 Issue 1.
- Betts A, 'The International Relations of the 'New' Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR' (2004) *Refugee* Vol. 22 No. 1.
- Betz G. and Thorngren J.M, 'Ambiguous Loss and the Family Grieving Process' (2006) *The Family Journal: Counselling and Therapy for Couples and Families* Vol. 14 No. 4.
- Bigo D, 'Security and Immigration: Toward a Critique of the Governmentality of Unease' (2002) *Alternatives* Vol. 27 (Special Issue).
- Bogdandy A.V. and Venzke I, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) *European Journal of International Law* Vol. 23.
- Bonjour S, 'The Power and Morals of Policy Makers: Reassessing the Control Gap Debate' (2011) *International Migration Review* Vol. 45 No. 1.
- Borgen C.J, 'Whose Public, Whose Order? Imperium, Region and Normative Friction' (2007) *The Yale Journal of International Law* Vol. 32.
- Boss P, 'Ambiguous Loss Research, Theory, and Practice: Reflections After 9/11' (2004) *The Burgess Award Lecture, Journal of Marriage and Family* Vol. 66.
- Boss P, 'Ambiguous Loss Theory: Challenges for Scholars and Practitioners' (2007) *Family Relations* Vol. 56 No. 2.
- Boss P, 'Ambiguous Loss: Working with Families of the Missing' (2002) *Family Process* Vol. 41.
- Boss P, 'Families of the Missing: Psychosocial Effects and Therapeutic Approaches' (2017) *International Review of the Red Cross* Vol. 99 No. 2.
- Boss P, 'Healing Loss, Ambiguity and Trauma: A Community-Based Intervention with Families of Union Workers Missing after the 9/11 Attack in New York City' (2003) *Journal of Marital and Family Therapy* Vol. 29 No. 4.
- Boss P, 'The Context and Process of Theory Development: The Story of Ambiguous Loss' (2016) *Journal of Family Theory and Review* Vol. 8 No. 3.

- Boss P, 'The Context and Process of Theory Development: The Story of Ambiguous Loss' (2016) *Journal of Family Theory and Review* Vol. 8.
- Boss P, 'The Trauma and Complicated Grief of Ambiguous Loss' (2010) *Pastoral Psychology* Vol. 59 No. 2.
- Boss P. & Yeats J, 'Ambiguous Loss: A Complicated Type of Grief when Loved Ones Disappear' (2014) *Bereavement Care* Vol. 33 Issue 2.
- Boss P. and Carnes D, 'The Myth of Closure' (2012) *Family Process* Vol. 51 Issue 4.
- Boss P. *et al*, 'Normative Loss in Mid-Life Families: Rural, Urban and Gender Differences' (1987) *Family Relations* Vol. 36 No. 4.
- Bowlby J, 'Process of Mourning' (1961) *International Journal of Psychoanalysis* XLII.
- Bowlby J, 'Process of Mourning' (1961) *Psychoanalytic Quarterly* Vol. 31.
- Brändle V.K. *et al*, 'Contesting the European Solidarity During the 'Refugee Crisis': A Comparative Investigation of Media Claims in Denmark, Germany, Greece and Italy' (2019) *Mass Communication and Society* Vol. 22 No. 6.
- Braun V. and Clarke V, 'Using Thematic Analysis in Psychology' (2006) *Qualitative Research in Psychology* Vol. 3 Issue 2.
- Brolan C, 'An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea' (2000) from a Refugee Protection Perspective (2002) *International Journal of Refugee Law* Vol. 14.
- Buckel S. and Wissel J, 'State Project Europe: The Transformation of the European Border Regime and the Production of Bare Life' (2010) *International Political Sociology* Vol. 4.
- Bunt L.A, 'A Quest for Justice in Cuzco, Peru: Race and Evidence in the Case of Mercedes Ccorimanya Lavilla' (2008) *PoLAR* Vol. 31 No. 2.
- Butler G, 'Legal Responses to the European Union's Migration Crisis' (2018) *San Diego International Law Journal* Vol. 19 Issue 2.
- Cantat C, 'Rethinking Mobilities: Solidarity and Migrant Struggles beyond Narratives of Crisis Intersections' (2016) *East European Journal of Society and Politics* Vol. 2 Issue 4.
- Carens J, 'Aliens and Citizens: The Case for Open Borders' (1987) *Review of Politics* Vol 49.
- Carling J. and Hernández-Carretero M, 'Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa' (2011) *British Journal of Politics and International Relations* Vol. 13.
- Casas M.N, 'The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers' (2019) *Journal of International Law and International Relations* No. 7.

- Castles S, 'The Factors that Make and Unmake Migration Policies' (2004) *International Migration Review* Vol. 38 No. 3.
- Charlesworth H, 'International Law: A Discipline of Crisis' (2002) *Modern Law Review* Vol. 65.
- Charles H. and Pezzani L, 'Death by Rescue: The Lethal Effects of the EU's Policies of Non-Assistance' (2016) *Forensic Oceanography*.
- Charnovitz S, 'Nongovernmental Organisations and International Law' (2006) *The American Journal of International Law* Vol. 100 No. 2.
- Chockler H. and Halpern J.Y, 'Responsibility and Blame: A Structural-Model Approach' (2004) *Journal of Artificial Intelligence Research* Vol. 22.
- Ciliberto G, 'Libya's Pull-Backs of Boat Migrants: Can Italy be Held Accountable for Violations of International Law' (2018) *The Italian Law Journal* Vol. 04 No. 02.
- Citroni G, 'The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants' (2017) *International Review of the Red Cross* Vol. 99 Issue 2.
- Clapham A, 'The Role of the Individual in International Law' (2010) *European Journal of International Law* Vol. 21 No. 1.
- Clewell T, 'Mourning Beyond Melancholia: Freud's Psychoanalysis of Loss' (2004) *Journal of the American Psychoanalytic Association* Vol. 52 Issue 1.
- Cole T, 'Unmournable Bodies' (2015) *Cultural Comment, The New Yorker*.
- Connolly R. et al, 'Repatriation of Human Remains Following Death in International Travellers' (2017) *Journal of Travel Medicine* Vol. 24 No. 2.
- Cornelius W.A, 'Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy' (2001) *Population and Development Review* Vol. 27.
- Costello C. and Mann I, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) *German Law Journal* Vol. 21.
- Crawley H, 'Managing the Unmanageable: Understanding Europe's Response to the Migration Crisis' (2016) *Human Geography* Vol. 9. No. 2.
- Crowth P. et al, 'Education as an Exit Strategy or Community Mental Health Nurses: A Thematic Analysis of Narratives' (2008) *Mental Health Review Journal* Vol. 13 Issue 3.
- Crociani-Windland L. and Hoggett P, 'Politics and Affect' (2012) *Subjectivity* Vol. 5 p. 161.
- Cusumano E, 'Migrant Rescue as Organised Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarian and Border Control' (2018) *Cooperation and Conflict* Vol. 00 No. 0.

- Cuttitta P, 'Delocalisation, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2018) *Antipode* Vol. 50 Issue 3.
- Cuttitta P, 'Repoliticisation Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean' (2018) *Geopolitics* Vol. 23 No. 3.
- D'Amato A, 'The Groundwork for International Law' (2014) *The American Journal of International Law* Vol. 108 No. 4.
- Dadusc D. and Mudu P, 'Care Without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity' (2020) *Geopolitics (online)*.
- Dan-Cohen M, 'Responsibility and the Boundaries of the Self' (1992) *Harvard Law Review* Vol. 105 No. 5.
- Davitti D, 'Biopolitical Borders and the State of Exception in the European Migration Crisis' (2019) *European Journal of International Law* Vol. 29 No. 4.
- De Genova N, 'Sovereign Power and the 'Bare Life' of Elvira Arellano' (2009) *Feminist Media Studies* Vol. 9 No. 2.
- De Genova N, 'Spectacles of Migrant 'Illegality': The Scene of Exclusion, the Obscene of Inclusion' (2013) *Ethnic and Racial Studies* Vol. 36 No. 7.
- De Swaan A, 'The Receding Prospects for Transnational Social Policy' (1997) *Theory and Society* Vol. 26 No. 4.
- Dikec M, 'The 'Where' of Asylum' (2009) *Environmental and Planning D: Society and Space*, SAGE, Vol 27.
- Dines N. *et al*, 'Thinking Lampedusa: Border Construction, the Spectacle of Bare Life and the Productivity of Migrants' (2015) *Ethnic and Racial Studies* Vol. 38 No. 3.
- Dolowitz D.P. and Marsh D, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making' (2000) *Governance: An International Journal of Policy and Administration* Vol. 13 No 1.
- Doná G, 'The Psychological Impact of Working in Post-Conflict Environments: A Personal Account of Intersectional Traumatization' (2014) *Intervention: International Journal of Mental Health, Psychosocial Work and Counselling in Areas of Armed Conflict* Vol. 12 No. 1.
- Doty R.L 'Bare-Life: Border Crossing Deaths and Spaces of Moral Alibi' (2011) *Environment and Planning D: Society and Space* Vol. 29 Issue 4.
- Dowd R. and MacAdam J, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How' (2017) *International and Comparative Law Quarterly* Vol. 66.

- Downey A, 'Zones of Indistinction: Giorgio Agamben's Bare Life and the Politics of Aesthetics' (2009) *Third Text* Vol. 23 Issue 2.
- Dulitzky A.E, 'The Latin-American Flavour of Enforced Disappearances' (2019) *Chicago Journal of International Law* Vol. 19 No. 2.
- Dunn K.M, 'A Paradigm of Transnationalism for Migration Studies' (2005) *New Zealand Population Review* Vol. 31 No. 2.
- Elliot T.D, 'The Bereaved Family' (1932) *Annals of the American Academy of Political and Social Science* Vol. 160 Issue 1.
- Eschbach K. *et al*, 'Death at the Border' (1999) *International Migration Review* Vol. 33 No 2.
- Eslava L, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) *London Review of International Law* Vol. 2 Issue 1.
- Esmeir S, 'On Making Dehumanization Possible' (2006) *The Humanities in Human Rights: Critique, Language, Politics (PMLA)* Vol. 121 No 5.
- Falk R.A, 'Casting the Spell: The New Haven School of International Law, 1991, 1997' (1995) *Yale Law Journal* Vol. 104.
- Fauser M, 'Mixed Methods and Multisited Migration Research: Innovations from a Transnational Perspective' (2018) *Journal of Mixed Methods Research* Vol. 12 No. 2.
- Ferstman C, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent Irregular Migration: European Union and United Kingdom Support to Libya' (2020) *German Law Journal* Vol. 21.
- Field N.P. and Filanosky C, 'Continuing Bonds, Risk Factors for Complicated Grief, and Adjustment to Bereavement' (2009) *Death Studies* Vol. 34 Issue 1.
- Fleming S, 'Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility' (2017) *International Theory* Vol. 9 No. 3.
- Floersch J. *et al*, 'Integrating Thematic, Grounded Theory and Narrative Analysis: A Case Study of Adolescent Psychotropic Treatment' (2010) *Qualitative Social Work* Vol. 9 Issue 3.
- Follis K.S, 'Responsibility, Emergency, Blame: Reporting on Migrant Deaths on the Mediterranean on the Council of Europe' (2015) *Journal of Human Rights* Vol. 14 Issue 1.
- Frelick B. *et al*, 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) *Journal on Migration and Human Security* Vol. 4 No. 4.
- French R.R, 'Of Narrative in Law and Anthropology' (1996) *Law and Soc'y Rev.* Vol. 30.

- Friedmann A, 'Declarations of Deaths—A New International Convention' (2013) *St. John's Law Review* Vol. 25 Issue 1, 1950.
- Gardell M, 'Torture, Terror and Truth: On the Meaning of Guantánamo and the Future of Global Order' (2008) *Temenos* Vol. 44 No. 1.
- Gerber I, 'Anticipatory Grief and Aged Widows and Widowers' (1975) *Journal of Gerontology* Vol. 30 No. 2.
- Ghandhi P.R. and Macnamee E, 'The Family in UK Law and the International Covenant on Civil and Political Rights 1966' (1991) *International Journal of Law, Policy and Family* Vol. 5 Issue 2.
- Ghezelbash D. *et al*, 'Securitisation of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) *International and Comparative Law Quarterly* Vol. 67 Issue 2.
- Gieseken H.O, 'The Protection of Migrants under International Humanitarian Law' (2017) *International Review of the Red Cross* Vol. 99 Issue 1.
- Gil-Bazo M-T, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) *International Journal of Refugee Law* Vol. 18 Issue 3-4.
- Giuffré M, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya' (2013) *International Journal of Refugee Law* Vol. 24 No. 4.
- Glennon M.J, 'How International Rules Die' (2005) *The Georgetown Law Journal* Vol. 93.
- Golafshani N, 'Understanding Reliability and Validity in Qualitative Research' (2003) *The Qualitative Report* Vol. 8 No. 4.
- Goldenziel J.I, 'Checking Rights at the Border: Migrant Detention in International and Comparative Law' (2019) *Virginia Journal of International Law* Vol. 60 Issue 1.
- Goodhart M, 'Interpreting Responsibility Politically' (2017) *Journal of Political Philosophy* Vol. 25 No 2.
- Goodman S. *et al*, 'How a Photograph of a Drowned Refugee Child Turned a Migrant Crisis into a Refugee Crisis: A Comparative Discourse Analysis' (2018) *for(e)dialogue* Vol. 2 Issue 1.
- Goodwin-Gill G.S, 'Refugees and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific' (2003) *Pacific Rim Law and Policy Journal* Vol. 12 No. 1.
- Grant C. and Osanloo A, 'Understanding, Selecting and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for your House' (2014) *Administrative Issues Journal: Connecting Education, Practice, and Research* Vol. 4 Issue 2 p. 13.

- Grant S, 'Identity Unknown: Migrant Deaths at Sea' (2011) *Forced Migration Review* Issue 38.
- Grant S, 'Migrant and Refugee Border Deaths: Defining A Human Rights Framework' (2018) *LSE Law Review* Vol. 3.
- Grant S, 'Recording and Identifying European Frontier Deaths' (2011) *European Journal of Migration and Law* Vol. 13 No. 2.
- Gregory D. 'The Black Flag: Guantánamo Bay and the Space of Exception' (2006) *Geogr. Ann.*, 88B (4).
- Gruchalla-Wesierski, 'T, A Framework for Understanding Soft Law' (1984) *McGill Law Journal* Vol. 30.
- Guild E, 'The UN's Search for a Global Compact on Safe, Orderly and Regular Migration' (2017) *Germany Law Journal* Vol. 18 No. 07.
- Guild E, 'Unsafe, Disorderly and Irregular Migration? Examining the Assumptions Underlying the United Nations' New York Declaration' (2018) *The Canadian Journal of Peace and Conflict Studies* Vol. 50 Issue 1.
- Hakimi M, 'State Bystander Responsibility' (2010) *European Journal of International Law* Vol. 21 Issue 2.
- Hakimi M, 'The Theory and Practice at the Intersection Between Human Rights and Humanitarian Law' (2017) *The American Journal of International Law* Vol. 111 Issue 4.
- Hakimi M, 'The Work of International Law' (2017) *Harvard International Law Journal* Vol. 58 No. 1.
- Hakimi M, 'Toward a Legal Theory on the Responsibility to Protect' (2014) *The Yale Journal of International Law*, Vol. 39 Issue 247.
- Hay C.S, 'Neither Real nor Fictitious but 'As if Real': A Political Ontology of the State' (2014) *British Journal of Sociology* Vol. 65 No. 3.
- Heijer M.D. *et al*, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) *Common Market Law Review* Vol. 53.
- Heise M, 'The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' (2002) *University of Illinois Law Review* Vol. 2002 No. 4.
- Higgins R, 'Policy Considerations and the International Judicial Process' (1968) *International and Comparative Law Quarterly* Vol. 17 No. 1.
- Hollander T, 'Ambiguous Loss and Complicated Grief: Understanding the Grief of Parents of the Disappeared in Northern Uganda' (2016) *Journal of Family Theory and Review* Vol. 8 No. 3.

- Hongju Koh H.H, 'Why Do Nations Obey International Law' (1994) *The Yale Law Journal* Vol. 106.
- Hopper E, 'The Social Unconscious: Theoretical Considerations' (2001) *Group Analysis* Vol. 34 Issue 1.
- Horsti K, 'Digital Materialities in the Diasporic Mourning of Migrant Death' (2019) *European Journal of Communication* Vol. 34 No. 6.
- Ibrahim Y, 'The Unsacred and the Spectacularized: Alan Kurdi and the Migrant Body' (2018) *Social Media + Society*.
- Ingleby D. *et al*, 'The Words We Use Matter—Why We Shouldn't Use the term 'Illegal Migrant'' (2018) *The BMJ Opinion*.
- Ingram J.D, "Right to Have Rights'? Three Images of the Politics of Human Rights' (2008) *The American Political Science Review*, Vol. 102, No. 4.
- Irwin M.D, 'Mourning 2.0—Continuing Bond Between the Living and the Dead on Facebook' (2015) *OMEGA—Journal of Death and Dying* Vol. 72 No. 2.
- Jackson A, 'The Inevitable—Death: Oregon's End-of-Life Choices' (2008) *Willamette Law Review* Vol. 45.
- Jarvis C, 'Last Right: Cross-Border Deaths—Towards a New Framework' (2017) *Journal of Immigration, Asylum and Nationality Law*, Vol. 31.
- Judd R, 'Contribution to Collective Harms and Responsibility' (2012) *Ethical Perspectives* 19(4).
- Jumbert M.G, 'Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea' (2018) *Disasters* Vol. 42 No. 4.
- Kanetake M, 'The Interfaces Between the National and International Rule of Law: A Framework Paper' (2015) *Amsterdam Centre for International Law - Working paper*.
- Kirkwood S, 'The Humanisation of Refugees: A Discourse Analysis of UK Parliamentary Debates on the European Refugee Crisis' (2017) *Journal of Community and Applied Social Psychology* Vol. 27.
- Klabbers J, 'Reflections on Role Responsibility: The Responsibility of International Organisations for Failing to Act' (2017) *European Journal of International law* Vol. 28 No. 4.
- Klastrup L, 'Death and Communal Mass-Mourning: Vin Diesel and the Remembrance of Paul Walker' (2018) *Social Media + Society*.
- Klastrup L, "I didn't Know Her, but...': Parasocial Mourning of Mediated Deaths on Facebook RIP Pages' (2015) *New Review of Hypermedia and Multimedia* Vol. 21.

- Klein M, 'Mourning and its Relation to Manic-Depressive States' (1940) *International Journal of Psychoanalysis* Vol. 21.
- Koh H.H, 'Commentary: Is There a 'New' New Haven School of International Law' (2007) *The Yale Journal of International of Law* Vol. 32.
- Koh H.H, 'Why Transnational Law Matters' (2006) *Penn State International Law Review* Vol. 24 Issue 4.
- Koser K, 'Introduction: International Migration and Global Governance' (2010) *Global Governance* Vol. 16.
- Kovras I. and Robins S, 'Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU's Mediterranean Frontier' (2016) *Political Geography* Vol. 55.
- Krause M, 'Undocumented Migrants: An Arendtian Perspective' (2008) *European Journal of Political Theory* Vol. 7 No. 3.
- Krept S.E. and Arend A.C, 'Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes' (2006) *Duke Journal of International and Comparative Law* Vol. 16 Issue 331.
- Kumm M, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) *Virginia Journal of International Law* Vol. 44.
- Laczko F, 'New Directions for Migration Policy in Europe' (2002) *Phil. Trans. R. Soc. Lond. B*.
- Lagnado D.A. and Channon S, 'Judgments of Cause and Blame: The Effects of Intentionality and Foreseeability' (2008) *Cognition* Vol. 108.
- Land M, 'Reflections on the New Haven School' (2013–2014) *New York Law School Law Review* Vol. 58.
- Larkin A, 'Italy and the Aquarius: A Migrant Crisis' (2019) *Pace International Law Review* Vol. 32 Issue 1.
- Lasswell H, 'The Emerging Conception of Policy Sciences' (1971) *Policy Sciences* Vol. 1 No.1.
- Last T. *et al*, 'Deaths at the Borders Database: Evidence of Deceased Migrants' Bodies Found along the Southern External Borders of the European Union' (2017) *Journal of Ethnic and Migration Studies* Vol. 43 No. 5.
- Legrand T, 'Overseas and Over Here: Policy Transfer and Evidence-Based Policy-Making' (2012) *Policy Studies*.
- Leube K, 'Can the EU be Held Accountable for Financing Development Projects that Violate Human Rights' (2017) *Georgetown Journal of International Law* Vol. 48.

- Levitt P, 'Transnational Migrants: When 'Home' Means More than One Country' (2004) *Migration Policy Institute (MPI)*.
- Lindemann E, 'Symptomatology and Management of Acute Grief' (1944) *American Journal of Psychiatry* Vol. 101.
- Little A. and Vaughan-Williams N, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2017) *European Journal of International Relations* Vol. 23 No. 3.
- Long K, 'When Refugees Stopped being Migrants: Movement, Labour and Humanitarian Protection' (2013) *Migration Studies* Vol. 1 Issue 1.
- Luper S, 'The Moral Standing of the Dead' (2018) *Phil. Trans. R. Soc. B* Vol. 373 Issue 1754.
- MacDougal M.S, 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study' (1956) *Natural Law Forum* Paper 6.
- Maciejewski P.K. *et al*, 'An Empirical Examination of the Stage Theory of Grief' (2007) *Journal of American Medical Association* Vol. 297 No. 7.
- Mann I, 'Dialectic of Transnationalism: Unauthorised Migration and Human Rights, 1993-2013' (2013) *Harvard International Law Journal* Vol. 54.
- Marfleet P, 'Refugees and History: Why We Must Address the Past' (2007) *Refugee Survey Quarterly* Vol 26 Issue 3.
- Markard N, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) *European Journal of International Law* Vol. 27.
- Martinez G.A, 'Philosophical Considerations and the Use of Narratives in Law' (1998) *Rutgers Law Journal* Vol. 30.
- Martins D.A, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy' (1989) *The International Migration Review* Vol. 23 No. 3.
- Massey D.S. *et al*. 'Theories of International Migration: A Review and Appraisal' (1993) *Population and Development Review*, Vol. 19 No. 3.
- Masten A.S, 'Resilience in Developing Systems: Progress and Promise as the Fourth Wave Rises' (2007) *Development and Psychopathology* Vol. 19 Issue 3.
- Mathew P, 'Australian Refugee Protection in the Wake of the Tampa' (2002) *American Journal of International Law*, Vol. 96, No. 3.
- Mathiesen K, 'We're all in this Together: Responsibility of Collective Agents and their Members' (2006) *Midwest Studies in Philosophy*, XXX.
- Mattson D.J. and Clarke S.G, 'Human Dignity in Concept and Practice' (2011) *Policy Sciences* Vol. 44 No. 4.

- Mayblin L, Colonialism, 'Decolonisation and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) *Journal of Historical Sociology* Vol. 27 No. 3.
- Mbembe A, 'Necropolitics' (2003) *Political Culture* Vol. 15 No. 1.
- McAlphine L, 'Why Might you Use Narrative Methodology? A Story About Narrative' (2016) *Eesti Haridusteaduste Ajakiri, nr = Estonian Journal of Education* 4(1).
- McDougal M, 'Jurisprudence for a Free Society' (1961) *Georgia Law Review* Vol. 1.
- McDougal M. *et al*, 'Human Rights and World Public Order: A Framework for Policy Oriented Inquiry' (1969) *The American Journal of International Law* Vol. 63.
- McDougal M. *et al*, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1967-1968) *Virginia Journal of International Law* Vol. 8 No. 2.
- McDougal M.S, 'International Law, Power and Policy: A Contemporary Conception' (1953) *RECUEIL DES COURS* Vol. 82.
- McDougal M.S, 'Law and Power' (1952) *The American Journal of International Law* Vol. 46.
- McDougal M.S. and Reisman W.M, 'The Prescribing Function in World Constitutive Process: How International Law Is Made' (1980) *Yale Studies in World Public Order* Vol. 6.
- McDougal M.S. *et al*, 'Human Rights and World Public Order: Human Rights in Comprehensive Context' (1978) *Northwestern University Law Review* Vol. 72 No. 2.
- Meeteren M.V, 'Transnational Activities and Aspiration of Irregular Migrants in Belgium and the Netherlands' (2012) *Global Networks* Vol. 12 No. 3.
- Menkel-Meadow C, 'Why and How to Study 'Transnational' Law' (2011) *UC Irvine Law Review* Vol. 1 No. 1.
- Miller D, 'Distributing Responsibilities' (2001) *Journal of Political Philosophy* Vol. 9 No. 4.
- Miller D, 'Immigrants, Nations, and Citizenship' (2008) *Journal of Political Philosophy* Vol.16 No.4.
- Miller D, 'Justice in Immigration' (2015) *European Journal of Political Theory* Vol. 14 No. 4.
- Mirto G, 'Between Exclusion and Familiarity: An Ethnography of the Mediterranean Missing Project' (2018) *Practicing Anthropology*, Vol. 40 No. 2.
- Mishler E.G, 'Models of Narrative Analysis: A Typology' (1995) *Journal of Narrative and Life History* Vol. 5 Issue 2.

- Modell S, 'Theoretical Triangulation and Pluralism in Accounting Research: A Critical Realist Critique' (2015) *Accounting, Auditing and Accountability Journal* Vol 28 Issue 7.
- Moreno-Lax V, 'Between Life, Security and Rights: Framing the Interdiction of 'Boat Migrants' in the Central Mediterranean and Australia' (2019) *Leiden Journal of International Law* Vol. 32 No. 4.
- Moreno-Lax V. and Lemberg-Pedersen M, 'Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalisation' (2019) *Questions of International Law* Vol. 56 Issue 1.
- Moreno-Lax V. *et al*, 'Between Life, Security and Rights: Framing Interdiction of 'Boat Migrants' in the Central Mediterranean and Australia' (2019) *Leiden Journal of International Law* Vol. 32 No. 4.
- Mose K.N. and Wriedt V, 'Mapping the Construction of EU Borderspaces as Necropolitical Zones of Exception' (2015) *Birkbeck Law Review* Vol. 3 Issue 2.
- Mountz A, '(In)Visibility and the Securitisation of Migration: Shaping Publics through Border Enforcement on Islands' (2015) *Cultural Politics* Vol. 11 Issue 2.
- Mulvey G, 'When Policy Creates Politics: The Problematising of Immigration and the Consequences for Refugee Integration in the UK' (2010) *Journal of Refugee Studies* Vol.23 No.4.
- Murray S.J, 'Thanatopolitics: Reading in Agamben a Rejoinder to Biopolitical Life' (2008) *Communication and Critical/Cultural Studies* Vol. 5 No. 2.
- Nasir M.A, Biopolitics, 'Thanatopolitics and the Right to Life' (2017) *Theory, Culture and Society* Vol. 34 Issue 1.
- Nollkaemper A, 'The Duality of Shared Responsibility' (2018) *Contemporary Politics* Vol 24 No. 5.
- Nollkaemper A. and Jacobs D, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) *Michigan Journal of International Law* Vol 34 Issue 2.
- Nováky N, 'The Road to Sophia: Explaining the EU's Naval Operation in the Mediterranean' (2018) *European View* Vol. 17 Issue 2.
- Noyes J.E. and Smith B.D, 'State Responsibility and the Principle of Joint and Several Liability' (1988) *Yale Journal of International Law* Vol 13 Issue 2.
- Nyers P, 'No One is Illegal Between City and Nation' (2010) *Studies in Social Justice* Vol. 4 Issue 2.
- Olivieri L. *et al*, 'Challenges in the Identification of Dead Migrants in the Mediterranean: The Case Study of the Lampedusa Shipwreck of October 3rd, 2013' (2018) *Forensic Science International* Vol. 285.

- Oman N, 'Hannah Arendt's 'Right to Have Rights': A Philosophical Context for Human Security' (2010) *Journal of Human Rights* Vol. 9 No. 3.
- Oudejans N, 'The Right Not to Have Rights: A New Perspective on Irregular Migration' (2019) *Political Theory* Vol. 47 No. 4.
- Owen D, 'Taking Up the Slack in the Context of Refugee Protection' A Reply to Mattias Hoesch' (2018) *ZEMO* Vol. 1.
- Owens P, 'Reclaiming Bare Life: Against Agamben on Refugees' (2009) *International Relations* Vol. 23 Issue 4.
- Özel Y. and Özkan B, 'A Psychosocial Approach to Loss and Mourning' (2020) *Psikiyatride Güncel Yaklaşımlar-Current Approaches in Psychiatry* Vol. 12 Issue 3.
- Pallis M, 'Obligations of States toward Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes' (2002) *International Journal of Refugee Law*, Vol. 14 (2-3).
- Pallister-Wilkins P, 'Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders' (2017) *Global Policy* Vol. 8.
- Papailias P, '(Un)seeing Dead Refugee Bodies: Mourning Memes, Spectropolitics, and the Haunting of Europe' (2019) *Media, Culture and Society* Vol. 41 Issue 8.
- Papapanou E, 'Confronting the 'Out of Sight, Out of Mind' Attitude Surrounding Migrant Deaths' (2019) *Brown Political Review*.
- Papastavridis E.D, 'Is There a Right to be Rescued at Sea? A Skeptical View' (2014) *Questions of International Law* Vol. 4.
- Parker N. and Vaughan Williams N, 'Critical Border Studies: Broadening and Deepening the Lines in the Sand Agenda' (2012) *Geopolitics* Vol 17.
- Parkes C.M, 'Bereavement as a Psychosocial Transition: Processes of Adaption to Change' (1988) *Journal of Social Issues* Vol. 44 Issue 3.
- Pascale G, 'Is Italy Internationally Responsible for the Gross Human Rights Violations Against Migrants in Libya' (2019) *Questions of International Law* Vol. 56.
- Pasetti F. and Garcés-Mascreñas B, 'Who is Responsible, for What and to Whom? Patterns of Politicisation on Refugees and the European Solidarity Crisis' (2018) *CEASEVAL, Research on the European Common Asylum System*, No. 16.
- Pati R, 'Human Trafficking: An Issue of Human and National Security' (2013) *University of Miami National Security and Armed Conflict Law Review* Vol. IV.
- Pati R, 'Trading in Humans: A New Haven Perspective' (2012) *Asia Pacific Law Review* Vol. 20 No. 2.
- Perekh S, 'A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights' (2004) *Journal of Human Rights* Vol 3 No. 1.

- Perl G, 'Uncertain Belongings: Absent Mourning, Burial and Postmortem Repatriations at the External Border of the EU in Spain' (2016) *Journal of Intercultural Studies* Vol. 37 No. 2.
- Pettit P, 'Responsibility Incorporated' (2007) *Ethics* Vol. 117.
- Pink S. *et al*, 'Empathic Technologies: Digital Materiality and Video Ethnography' (2017) *Visual Studies* Vol. 32 No. 4.
- Plakokefalos I, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) *European Journal of International Law* Vol. 26 No. 2.
- Pollock G.H, 'Mourning and Adaptation' (1961) *International Journal of Psychoanalysis* Vol. 42.
- Prilleltensky I, 'Critical Psychology Foundations for the Protection of Mental Health' (1999) *Annual Review of Critical Psychology* Vol. 1.
- Prilleltensky I, 'Meaning-Making, Mattering, and Thriving in Community Psychology: From Co-optation to Amelioration and Transformation' (2014) *Psychosocial Intervention* Vol. 23 No. 2.
- Prilleltensky I, 'Migrant Well-Being is a Multilevel, Dynamic, Value-Dependent Phenomenon' (2008) *American Journal of Community Psychology* Vol. 42.
- Prilleltensky I, 'Promoting Well-being: Time for a Paradigm Shift in Health and Human Services' (2005) *Scandinavian Journal of Public Health* Vol. 33 (Suppl. 66) p. 54.
- Prilleltensky I, 'The Immigration Experience of Latin American Families: Research and Action on Perceived Risk and Protective Factors' (1993) *Canadian Journal of Community Mental Health* Vol. 12 No. 2.
- Prilleltensky I, 'Value-Based Praxis in Community Psychology: Moving Toward Social Justice and Social Action' (2001) *American Journal of Community Psychology* Vol. 29 No. 5.
- Prilleltensky I, 'Values, Assumptions, and Practices: Assessing the Moral Implications of Psychological Discourse and Action' (1997) *American Psychologist* Vol. 52 No. 5.
- Prilleltensky I, 'Wellness Without Fairness: The Missing Link in Psychology' (2013) *South African Journal of Psychology* Vol. 43 No. 2.
- Prilleltensky I. and Prilleltensky O, 'Synergies for Wellness and Liberation and Counselling Psychology' (2003) *The Counselling Psychologist* Vol. 31 No. 3.
- Prilleltensky I. *et al*, 'Clinicians' Lived Experience of Ethics: Values and Challenges in Helping Children' (1999) *Journal of Educational and Psychological Consultation* Vol. 10 No. 2.

- Prilleltensky I. *et al*, 'The Role of Power and Control in Children's Lives: An Ecological Analysis of Pathways Toward Wellness, Resilience and Problems, (2001) *Journal of Community and Applied Social Psychology* Vol. 11.
- Pugh M, 'Drowning not Waving: Boat People and Humanitarianism at Sea' (2004) *Journal of Refugee Studies* Vol. 17 No. 1.
- Pylypa J, 'Power and Bodily Practice: Applying the Work of Foucault to An Anthropology of the Body' (1998) *Arizona Anthropologist* Vol. 13.
- Quinne E, 'The Refugee and Migrant Crisis: Europe's Challenge' (2016) *An Irish Quarterly Review* Vol. 105 No. 419.
- Rajaram P.K. and Grundy-Warr C, 'The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia and Thailand' (2004) *International Migration* Vol. 42 Issue 1.
- Ramji-Nogales J. & Spiro P.J, 'Introduction to Symposium on Framing Global Migration Law' (2017) *American Journal of International Law (Unbound)* Vol. 111.
- Rao N, 'Public Choice and International Law Compliance: The Executive Branch is a 'They' not an 'It'' (2011) *Minnesota Law Review* Vol 96.
- Ratner S. and Anne-Marie S, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) *American Journal of International Law* Vol. 93 No. 2.
- Ravenstein E.G, 'The Laws of Migration' (1885) *Journal of the Statistical Society of London* Vol. 48 No. 2 (Part I).
- Ravenstein E.G, 'The Laws of Migration' (1889) *Journal of the Statistical Society of London* Vol. 52 (Part II).
- Reisman W.M 'Theory About Law: Jurisprudence for a Free Society' (1999) *Yale Law Journal* Vol. 108.
- Reisman W.M, 'A Policy-Oriented Approach to Development' (2006) *Journal of International and Comparative Law* Vol. 3 Issue 1.
- Reisman W.M, 'International Law-Making: A Process of Communication' (1981) *Proceedings of the American Society of International Law* Vol. 75 pp. 101.
- Reisman W.M, 'Legal Responses to Genocide and Other Massive Violations of Human Rights' (1996) *Law and Contemporary Problems* Vol. 59 No. 4.
- Reisman W.M, 'The View from the New Haven School of International Law' (1992) *ASIL Proceedings*.
- Reisman W.M, 'The Vision and Mission of The Yale Journal of International Law' (2000) *Yale Journal of International Law* Vol. 25.

- Reisman W.M. 'A Jurisprudence from the Perspective of the Political Superior' (1996) *Northern Kentucky Law Review* Vol. 23 No. 3.
- Reisman W.M. *et al*, 'The New Haven School: A Brief Introduction' (2007) *Yale Journal of International Law* Vol. 32.
- Reiter A, 'Victims of Human Rights Violations and Victims of Human Rights Restrictions' (2014) *TEMIDA*.
- Reynold L. and Botha D, 'Anticipatory Grief: Its Nature, Impact, and Reasons for Contradictory Findings' (2006) *Counselling, Psychotherapy and Health* Vol. 2 No. 2.
- Robins S, 'Ambiguous Loss in a Non-Western Context: Families of the Disappeared in Postconflict Nepal' (2010) *Family Relations* Vol. 59 No. 3.
- Robins S, 'Constructing Meaning from Disappearance: Local Memorialisation of the Missing in Nepal' (2014) *International Journal of Conflict and Violence* Vol. 8 No. 1.
- Robins S, 'Discursive Approaches to Ambiguous Loss: Theorising Community-Based Therapy After Enforced Disappearance' (2016) *Journal of Family Theory and Review* Vol. 8 No. 3.
- Robins S, 'Missing in Migration: From Research to Practice' (2018) *Practicing Anthropology*, Vol. 40 No. 2.
- Robins S, 'The Affective Border: Missing Migrants and the Governance of Migrant Bodies at the EU's Southern Frontier' (2019) *Journal of Refugee Studies* Vol. 0 No. 0.
- Robins S. and Kovras I, 'Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU's Mediterranean Frontier' (2016) *Political Geography* Vol. 55.
- Rodríguez E.G, 'The Coloniality of Migration and the Refugee Crisis: On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism' (2018) *Refuge* Vol. 34 No. 1.
- Roeben V, 'Responsibility in International Law' (2012) *Max Planck Yearbook of United Nations Law* Vol. 16.
- Rogalla K.B, 'Anticipatory Grief, Proactive Coping, Social Support and Growth: Exploring Positive Experiences of Preparing for Loss' (2020) *OMEGA—Journal of Death and Dying* Vol. 81 No. 1.
- Roht-Arriaza N, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations under International Law' (1990) *California Law Review* Vol. 78 Issue 2.
- Rose J. and Johnson C.W, 'Contextualising Reliability and Validity in Qualitative Research: Toward More Rigorous and Trustworthy Qualitative Social Science in Leisure Research' (2020) *Journal of Leisure Research* Vol. 51 No. 4.
- Rose R, 'What is Lesson-Drawing' (1991) *Journal of Public Policy* Vol 11 Issue 1.

- Ross A, 'The Agamben Effect: Introduction' (2008) *South Atlantic Quarterly* Vol. 107 No. 1.
- Ryngaert C, 'Non-State Actors: Carving out a Space in a State-Centred International Legal System' (2016) *Netherlands International Law Review* Vol. 63.
- Saberi H, 'Between the Scylla of Legal Formalism and the Charybdis of Policy Conceptualism: Yale's Policy Science and International Law' (2014) *Osgoode Legal Studies Research Paper Series* No. 33 Vol. 10 Issue 08.
- Salih M. and Samarasinghe G, 'Families of the Missing in Sri Lanka: Psychosocial Considerations in Transitional Justice Mechanisms' (2017) *International Review of the Red Cross* Vol. 99 Issue 2.
- Sampson R, 'Reframing Immigration Detention in Response to Irregular Migration: Does Migration Deter' (2015) *International Detention Coalition* No. 1.
- Sandvik K.B, 'Digital Dead Body Management: A New Issue for Human Rights Research' (2020) *Harvard Human Rights Journal (Online)*.
- Sarkin J, 'Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human rights Approach to Save Lives and Find Missing Persons' (2018) *International Journal of Human Rights* Vol. 22 No 2.
- Schimmelfennig F, 'European Union Integration' (Theory) in Times of Crisis: A Comparison of the Euro and Schengen Crisis (2018) *European Journal of Public Policy* Vol. 25 No. 7.
- Schindel E, 'Deaths and Disappearances in Migration to Europe: Exploring the Uses of a Transnationalised Category' (2019) *American Behavioral Scientist* 00(0).
- Schindel E, 'Border Matters: Death Mourning and Materiality at the European Borderlands' (2020) *EuropeNow: A Journal of Research and Art* Issue 33
- Schinkel S, 'Illegal Aliens and the State, or: Bare Bodies vs the Zombie' (2009) *International Sociology* Vol 24 No 6.
- Schreuer C, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law' (1993) *European Journal of International Law* Vol. 4.
- Schuster L. and Solomos J, 'Asylum, Refugee and Public Policy: Current Trends and Future Dilemmas in the UK' (2001) *Sociological Research Online* Vol. 6 No. 1.
- Schwartz-Marin E. and Cruz-Santiago A, 'Pure Corpses, Dangerous Citizens: Transgressing the Boundaries Between Mourners and Experts in the Search for the Disappeared in Mexico' (2016) *Social Research: An International Quarterly* Vol. 83 No. 2.
- Shaffer G, 'Transnational Legal Process and State Change' (2012) *Law and Policy Inquiry* Vol. 37 Issue 2.

- Shaffer G.C. and Pollack M.A, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) *Minnesota Law Review* Vol. 94.
- Shear M.C. *et al*, 'Complicated Grief and Related Bereavement Issues for DSM-5' (2011) *Depression and Anxiety* Vol. 28 No. 2.
- Shields P, 'The Human Cost of European Union's External Border Regime' (2015) *Peace Review: A Journal of Social Justice* Vol. 27.
- Shimane K, 'Social Bonds with the Dead: How Funerals Transformed in the Twentieth and Twenty-first Centuries' (2018) *Phil. Trans. R. Soc. B* Vol 373 Issue 1754.
- Shore J.C. *et al*, 'Anticipatory Grief: An Evidence-Based Approach' (2016) *Journal of Hospice and Palliative Nursing* Vol. 18 No. 1.
- Shue H, 'Mediating Duties' (1988) *Ethics* Vol. 98 No. 4.
- Silverstein A.J, 'Emigration: A Policy Oriented Inquiry' (1974) *Syracuse Journal of International Law and Commerce* Vol. 2 No. 2.
- Slaughter A-M. and Burke-White W, 'The Future of International Law Is Domestic or the European Way of Law' (2006) *Harvard International Law Journal* Vol. 47.
- Smolensky K.R, 'Rights of the Dead' (2009) *HOFSTRA Law Review* Vol 37.
- Spijkerboer T, 'Moving Migrants, States and Rights: Human Rights and Border Deaths' (2013) *The Law and Ethics of Human Rights* Vol. 7 No. 2.
- Spijkerboer T, 'The Human Cost of Border Control' (2007) *European Journal of Migration and Law* Vol. 9.
- Spijkerboer T, 'Wasted Lives: Borders and the Right of People Crossing Them' (2017) *Nordic Journal of International Law* Vol. 86.
- Squire V, 'Acts of Desertion: The Ambiguities of Abandonment and Renouncement Across the Sonoran Borderzone' (2015b) *Antipode* Vol. 47 Issue 2.
- Squire V, 'Governing Migration through Death in Europe and the US: Identification, Burial and the Crisis of Modern Humanism' (2017) *European Journal of International Relations* Vol. 23 No. 3.
- Steinhilper E. and Gruijters R.J, 'A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranean' (2018) *Sociology* Vol. 52 No. 3.
- Stierl M, 'A Fleet of Mediterranean Border Humanitarians' (2017) *ANTIPODE, A Radical Journal of Geography* Vol. 50 Issue 3.
- Stilz A, 'Collective Responsibility and the State' (2011) *The Journal of Political Philosophy* Vol. 19 No. 2.

- Stock I. *et al*, 'Externalisation at Work: Responses to Migration Policies from the Global South' (2019) *Comparative Migration Studies* Vol 7 No. 48.
- Strik T, 'The Global Approach to Migration and Mobility' (2017) *Groningen Journal of International Law* Vol. 5 No. 2.
- Stroebe M. and Schut H, 'To Continue or Relinquish Bonds: A Review of Consequences for the Bereaved' (2005) *Death Studies* Vol. 29 Issue 6.
- Stroebe M. and Schutt H, 'The Dual Model of Coping with Bereavement, Rational and Descriptive' (1999) *Death Studies* Vol. 23 No. 3.
- Suzuki E, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) *Yale Journal of International Law* Vol. 1 No.1.
- Sweeting H.N, 'Anticipatory Grief: A Review' (1990) *Soc. Sci. Med.* Vol. 30 No 10.
- Tasioulas J, 'Towards a Philosophy of Human Rights' (2012) *Current Legal Problems* Vol. 65.
- Thomson D.F, 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) *The American Political Science Review* Vol. 74 No. 4.
- Tipson F.S, 'Lasswell–McDougal Enterprise: Towards a World Public Order of Human Dignity' (1973-74) *Virginia Journal of International Law* Vol. 14.
- Tonkin L, 'Growing Around Grief—Another Way of Looking at Grief and Recovery' (1996) *Bereavement Care* Vol. 15 Issue 1.
- Toom V, 'Whose Body Is It? Techno-Legal Materialization of Victims' Bodies and Remains after the World Trade Center Terrorist Attacks' (2016) *Science, Technology and Human Values* Vol. 41 No. 4.
- Trevisanut S, 'Is There a Right to be Rescued at Sea? A Constructive View' (2014) *Questions of International Law* Vol. 4.
- Turtiainen K, 'Recognising Forced Migrants in Transnational Social Work' (2018) *International Journal of Migration, Health and Social Care* Vol. 14 No. 2.
- Tzevelekos V.P. and Proukaki E.K, 'Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?' (2017) *Nordic Journal of International Law* Vol. 86.
- Vaughan-Williams N, 'We are not Animals: Humanitarian Border Security and Zoopolitical Spaces in Europe' (2015a) *Political Geography* Vol. 45.
- Vaughan-Williams N, 'The Generalised Biopolitical Order? Re-conceptualising the Limits of Sovereign Power' (2009) *Review of International Studies* Vol. 35.
- Velasco A.C, 'The International Convention on Maritime Search and Rescue: Legal Mechanisms of Responsibility Sharing and Cooperation in the Context of Sea Migration' (2015) *The Irish Yearbook of International Law* Vol. 10.

- Villagran O.A, 'Nameless and Un-Mourned: Identifying Migrant Bodies in the Mediterranean' (2018) *Open Democracy*.
- Volkan V.D, 'The 'Linking Objects' of Pathological Mourners' (1972) *Archives of General Psychiatry* Vol. 27.
- Volkan V.D, 'Unending Mourning and Its Consequences' (2011) *Psychotherapie – Wissenschaft* Vol. 2.
- Walter T. *et al*, 'Does the Internet Change How We Die and Mourn? Overview and Analysis' (2012) *Journal of Death and Dying* Vol. 64 No. 4.
- Whitley L, 'The Disappearance of Race: A Critique of the Use of Agamben in Border and Migration Scholarship' (2017) *Borderlands e-Journal* Vol 16 No 1.
- Wiessner S, 'Professor Myres Smith McDougal: A Tender Farewell' (1998-1999) *St Thomas Law Review* Vol. 11.
- Wiessner S, 'The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law' (2010) *Asia Pacific Law Review*, Vol. 18 No. 1.
- Wiessner S. and Willard A.R, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) *The American Journal of International Law* Vol. 93 No. 2.
- Wiessner S. 'International Law in the 21st Century: Decision Making in Institutionalised and Non-Institutionalised Settings' (1997) *THESAURUS ACROASIUM* Vol. 26.
- Wittemore R. *et al*, 'Validity in Qualitative Research' (2001) *Qualitative Health Research* Vol. 11 No. 4.
- Worster W.T, 'Relative International Legal Personality of Non-State Actors' (2016) *Brooklyn Journal of International Law* Vol. 42 Issue 1.
- Wortman C.B. and Silver R.C, 'The Myths of Coping with Loss' (1989) *Journal of Consulting and Clinical Psychology* Vol. 57 Issue 3.
- Young I.M, 'Responsibility and Global Labour Justice' (2004) *The Journal of Political Philosophy* Vol 12 No 4.
- Ziarek E.P, 'Bare Life on Strike: Notes on the Biopolitics of Race and Gender' (2008) *South Atlantic Quarterly* Vol. 107 No. 1.
- Zilberfein F, Coping with Death: 'Anticipatory Grief and Bereavement' (1999) *Journal of the American Society on Aging* Vol. 23 No. 1.
- Zohrabi M, 'Mixed Method Research: Instruments, Validity, Reliability and Reporting Findings' (2013) *Theory and Practice in Language Studies* Vol. 3 No. 2.

[E] OTHER SECONDARY SOURCES

PUBLIC LECTURES/INSTITUTIONAL DOCUMENTS/CONFERENCE PAPERS

- 'Decision' of the Ministers' Deputies in its 1364th meeting of 15 January 2020 (*CM/Del/Dec(2020)1364/4.3*).
- Aleinikoff T.A, 'International Organisation for Migration International Dialogue on Migration No. 3 International Legal Norms and Migration. An Analysis', *International Organisation for Migration* (Geneva: IOM, 2002).
- Amnesty International, 'Unlawful and Unworkable—Amnesty International's Views on Proposals for Extraterritorial Processing of Asylum Claims'.
- Amnesty International, 'Amnesty International's Blueprint for Action to end Refugee and Migrant Deaths in the Med' (2015).
- Amnesty International, 'Europe's Sinking Shame: The Failure to Refugees and Migrants at Sea' 22 April 2015.
- Boats 4 People, '*Dead and Missing at Sea, Information Guide for Families and their Supporters: Italy and Central Mediterranean*' (2017).
- Charles H. and Pezzani L, 'Death by Rescue: The Lethal Effects of the EU's Policies of Non-Assistance' (2016) *Forensic Oceanography*.
- Cogolati S, 'Migrants in the Mediterranean: Protecting Human Rights' (2015) Directorate-General for External Policies, Policy Department, European Parliament.
- Council Conclusions on the Global Approach to Migration and Mobility, Council Document No 9417/12, 3 May 2012.
- Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED Operation Sophia) *OJ L 122, 19.5.2015*.
- Del Corral M, 'The Role of Forward-Looking Responsibility in Collective Responsibility for Omission' (UNED).
- Deroose P, 'Repatriation of Mortal Remains: A Practical Guide for Managers of a Global Mobile Workforce' (2019) *International Corporate Health Leadership Council*.
- Dionis M.S. *et al*, 'COVID-19 Compounds Families' Painful Search for Missing and Disappeared Migrants', Reliefweb, IOM.
- Ellermann A, 'Undocumented Migrants and Resistance in the State of Exception' (2009), Paper Presented at the European Union Studies Association Meeting in Los Angeles, CA, April 2009.

- EU Parliament, 'Migratory Flows in the Mediterranean, with Parliament Attention to the Tragic Events off Lampedusa' European Resolution (2013/2827(RSP)), (2016/C/ 208/13), P7_TA(2013)0448, (2013).
- European Commission, 'A European Agenda on Migration' (2015) European Commission Brussels, COM (2015) 240 Final.
- European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration' (2015) European Commission Brussels, COM (2015) 240 Final.
- European Commission, Communication from the Commission to the Council and the European Parliament, 'On Regional Protection Programmes', COM (2005) 388 final, 1.9.2005.
- European Commission 'The Global Approach to Migration and Mobility, COM/2011.0743 final'.
- European Council and Council of the European Union 'A New Strategic Agenda (2019-2024)', released June 2019.
- European Union Commission 'Managing Migration in all its Aspects: Progress under the European Agenda on Migration', Communication from the Commission to the European Parliament, European Council and the Council, Brussels, 4.12.2018 COM(2018) 798 Final.
- Guadagno L, 'Migrants and the COVID-19 Pandemic: An Initial Analysis' (2020) IOM Migration Research Series No. 60.
- Holzer V, 'The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (2012) *Legal and Protection Policy Series*, (PPLA/2012/05) UNCHR.
- Honoré T, 'Being Responsible and Being a Victim of Circumstance' Maccabaeian Lecture in Jurisprudence (1998).
- Hood A. and Kieller A.N, 'A Survey of the UK Benefit System' (2016) Institute for Fiscal Studies.
- Human Rights Watch, 'The Mediterranean Migration Crisis, Why People Flee, What the EU Should Do' June 2015.
- ICRC, 'Forensic Identification of Human Remains' (2013).
- Independent Commission for Aid Impact (ICAI), 'The UK's Aid Response to Irregular Migration in the Mediterranean Sea: A Rapid Review', March 2017.
- International Organisation for Migration (IOM), Council 106th Session, *Migration Governance Framework*, C/106/40, (Geneva, 2015).

- IOM, 'Mixed Migration Flows in the Mediterranean and Beyond: Flow Monitoring Data Analysis', reporting period (May 2016 to September 2016).
- IOM, 'Shipwreck off Coast of Libya Pushes Migrant Deaths on the Mediterranean Past 20,000 Mark' (2020).
- Jimenez M, 'Humanitarian Crisis: Migrant Deaths at the U.S-Mexico Border' (2009) *American Civil Liberties Union of San Diego and Imperial Counties and Mexico's National Commission of Human Rights*.
- Klinkner M. and Smith E, 'The Bournemouth Protocol on Mass Grave Protection and Investigation' (2020).
- Liebscher S. and Fisher I, 'Mapping Safe Passages: Real-Time Interventions at the Maritime Borders of Europe', available: <https://doi.org/10.14361/9783839445198-006> (accessed 3/3/2020).
- Macdonald M, 'Migrants Crossing the English Channel' (2019) House of Commons Library, available: <https://commonslibrary.parliament.uk/home-affairs/immigration/migrants-crossing-the-english-channel/> (accessed 17/11/2019).
- Miller D, 'Global Justice and Climate Change: How Should Responsibilities be Distributed', The Tanner Lectures on Human Values Delivered at Tsinghua University, Beijing, 24-25 March 2008.
- Oxford Migration Observatory, 'Calais and Clandestine Migration into the UK: Concerns and Context', *Commentary* (2014).
- Parker L.M, 'The Ethics of Migration and Immigration, Key Questions for Policy Makers' Markkula Centre for Applied Ethics, Santa Clara University.
- Parliamentary Assembly of the Council of Europe, *Resolution 1872* entitled 'Lives Lost in the Mediterranean: Who is Responsible' (2012).
- García Andrade P *et al*, 'EU Cooperation with Third Countries in the Field of Migration' (2015) Study for the LIBE Committee, European Parliament.
- Piquer N. and Aguirre M.Z, (eds.) 'Humanitarian Consequences of Family Separation and People Going Missing' (2019) ICRC.
- Royal Navy, 'Operation Sophia Mediterranean', available: <https://www.royalnavy.mod.uk/news-and-latest-activity/operations/mediterranean-and-black-sea/operation-sophia> (accessed 2/12/2019).
- Sanchez G. *et al*, 'A Study of Communication Channels Used by Migrants and Asylum Seekers in Italy with a Particular Focus on Online and Social Media', European Commission (2018).
- Smiley M, 'Collective Responsibility' (2005) *Stanford Encyclopedia of Philosophy*.

- Strik T, 'Lives Lost in the Mediterranean Sea: Who is Responsible', Parliamentary Assembly of the *Council of Europe Report of the Committee on Migration, Refugees and Displaced Persons*.
- Türk V, 'Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalised Violence' Paper delivered at the 60 years Anniversary of the 1951 Refugee Convention.
- UN Department of Economic and Social Affairs, Population Division (2011), 'International Migration Report 2009: A Global Assessment' (United Nations: ST/ESA/SER.A/316).
- UNCHR, 'Refugee and Migrant Arrivals to Europe in 2019' (Mediterranean), available: <https://data2.unhcr.org/en/documents/download/72161> (accessed 7/2/2020).
- UNHCR, 'Mediterranean Death Toll Soars, 2016 is the Deadliest Year Yet' (2016).
- UNHCR, 'Refugees' and 'Migrant'—Frequently Asked Questions (FAQs), March 2016 available at <http://www.unhcr.org/en-us/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html> (accessed 11/8/2017).
- U.N Department of Economic and Social Affairs (2019) 'International Migration', Expert Symposium on International Migration and Development, 26th Feb. 2019, UN Headquarters, New York.
- Wallis E, 'Frontex: Fluctuating Trends for Migrant Arrivals to Europe' (2018) INFO MIGRANTS.
- Webber F, 'Respecting the Dead' (2017) Institute of Race Relations.
- Woods D, 'Controlling Britain's Borders: The Challenge of Enforcing the UK's Immigration Rules' (2019) CIVITAS.
- Yayboke E, 'Five Ways COVID-19 is Changing Global Migration' (2020) Centre for Strategic and International Studies, 25 March 2020.
- Yayboke E, *et al* 'Seeking Path to Europe, Refugees and Migrants Ultimately Turned Back by COVID-19' (2020) Centre for Strategic and International Studies, 2 April 2020.

[F] SPECIAL REPORTS/ADVISORY OPINIONS/PRESS RELEASES/OPINIO JURIS

- Aghazarm C, *et al*, *Migrants Caught in Crisis: The IOM Experience in Libya* (Geneva: IOM, 2012).
- Attia F.B. *et al*, 'Like a Part of a Puzzle which is Missing: The Impact on Families of a Relative Missing in Migration Across the Mediterranean' *Report on the Situation of Families*, (MMP) (2016).

- Attia F.B. *et al*, 'Understanding the Needs of Families and Obligations of States' Mediterranean Missing Migrants Project *Italy Country Report* (Long Version) (2016).
- Attia F.B. *et al*, 'Understanding the Needs of Families and the Obligations of States', Mediterranean Missing Migrants Project *Summary Report* September (2016).
- Attia F.B. *et al*, 'Missing Migrants: Management of Dead Bodies in Lesbos' *Greece Country Report* (2016) *Background Briefing* (MMP).
- Australian Government, *Report of the Expert Panel on Asylum Seekers*, August 2012.
- Berry M. *et al*, 'Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries' (2015) *Report Prepared for the United Nations High Commission for Refugees*.
- Bogenschneider K. *et al*, (eds.), 'Building Policies that Puts Families First: A Wisconsin Perspective' Wisconsin Family Impact Seminars Briefing Report, First Edition, Centre for Excellence in Family Studies University of Wisconsin-Madison (1993).
- Callamard A, 'Unlawful Death of Refugees and Migrants' (2017) Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, A/72/335 Submitted Pursuant to General Assembly Resolution 71/198.
- Citroni G, 'Clarifying the Fate and Whereabouts of Missing Migrants: Exchanging Information Along Migratory Routes' (2019) Workshop Report 15-16 May 2019, Antigua, Guatemala.
- CJEU Opinion Pursuant to Article 218(11) TFEU.
- Crawley H. *et al*, 'Destination Europe: Understanding the Dynamics and Drivers of Mediterranean Migration in 2015' (*MEDMIG*) *Final Report*, November (2016).
- D'Angelo A. *et al*, 'Mapping Refugee Reception in the Mediterranean' (2017) First Report of the EVI-MED Project.
- Donald A. *et al*, 'The UK and the European Court of Human Rights' (2012) Equality and Human Rights Commission Research Report 83.
- ECJ Opinion 2/94, Opinion Pursuant to Article 228 of the EC Treaty.
- European Commission 'Progress Report on the Implementation of the European Agenda and Migration' COM(2019) 481 Final, Brussels, 16.10.2019.
- European Commission 'The EU and the Migration Crisis' (2017) European Commission, available: <https://op.europa.eu/webpub/com/factsheets/migration-crisis/en/> (accessed 20/12/2019).
- Foreign Affairs Committee Report, 'Responding to Irregular Migration: A Diplomatic Route, UK and Africa' (2019).

- Grant S. *et al*, 'Dead and Missing Migrants: The Obligations of European States under International Human Rights Law' (2016) *IHRL Briefing*.
- Grant S. *et al*, 'Last Rights Project, Cross-Border Deaths on the Journey to Europe: Towards a Legal Framework' (2016) *Report of Legal consultation*, LSE Centre for Study of Human Rights (CSHR).
- Heller C. *et al*, 'Report on the Left-to-Die Boat', *Forensic Oceanography*, available: <https://www.fidh.org/IMG/pdf/fo-report.pdf> (accessed 5/10/2019).
- House of Commons, 'Responding to Irregular Migration: A Diplomatic Route', First Report of Session 2019, Report Together with Formal Minutes Relating to the Report.
- House of Commons, 'Immigration Policy: Basis for Building Consensus' (2018) House of Commons Home Affairs Committee, *Second Report of Session 2017-19*, HC 500.
- House of Commons Home Affairs Committee, 'Immigration Policy: Basis for Building Consensus: Government and Office for National Statistics Responses to the Committee's Second Report', Fifth Special Report of Session 2017-19, HC 961, Published on 18th April 2018.
- House of Commons Home Affairs Committee, 'Migration Crisis', *7th Report of Session 2016-17*, July 2016.
- House of Lords European Union Committee, *14th Report of Session 2015-16* entitled 'Operation Sophia, the EU's Naval Mission in the Mediterranean: An Impossible Challenge' HL Paper 144, 3 May 2016.
- IACHR: 'Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico' Inter-American Commission on Human Rights (IACHR) Rapporteurship on the Rights of Migrants, OEA/Ser.L/V/II. Doc. 48/13 30 December (2013).
- ICRC Report: The Missing and their Families, Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (2003).
- International Commission on Intervention and State Sovereignty (ICCSIS) Report (2001).
- IOM, 'Towards Safer Migration in Africa: Migration and Data in Northern and West Africa—Calculating 'Death Rates' in the Context of Migration Journeys: Focus on the Central Mediterranean', Global Migration Data Analysis Centre Briefing Series.
- IOM, 'Migration and Transnationalism: Opportunities and Challenges' (2010) *International Dialogue on Migration Intersessional Workshop Background Paper*, 9-10 March 2010.
- Kerasiotis V. and Spiliotakara M, 'Missing and Dead Migrants at Sea: The Legal Framework in Greece', *Greece Legal Briefing*, September 2016.
- Koskeniemi M, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) *Report of the Study Group of the International Law Commission* Submitted to the Fifty-Eighth Session Geneva, 2006.

- McAuliffe M. and Khadria B, 'Report Overview: Providing Perspective on Migration and Mobility in Increasingly Uncertain Times' in Marie McAuliffe and Binod Khadria (eds.) *'World Migration Report 2020'* (Geneva: IOM, 2020).
- Mediterranean Missing Migrants Project, 'Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis' (2016) *Summary Report*.
- OHCHR, 'Who's Responsible: Attributing Individual Responsibility for Violations of International Human Rights and Humanitarian Law in United Nations Commissions of Inquiry, Fact-Finding Missions and Other Investigations' (2018) United Nations (OHCHR) HR/PUB/18/3.
- Parker S.F. *et al*, 'Precarious Trajectories: Understanding the Human Cost of the Migration Crisis in the Central Mediterranean' (2016).
- Pillai P, 'COVID-19 Symposium: COVID-19 and Migrants—Gaps in the International Legal Architecture? (2020) *Opinio Juris*, In Association with International Commission of Jurists (2020).
- 'Professional Policy Making for the Twenty First Century' Report by Strategic Policy Making Team, Cabinet Office (1999).
- Report of the Secretary-General, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels', UN Doc. A/66/749 (16 March 2012).
- Robin S. 'Missing Migrants and Deaths at the EU's Mediterranean Border: Humanitarian Needs and State Obligations' *Mediterranean Missing Migrants Project Summary Report* (2015).
- Robins S. 'Analysis of Best Practices on the Identification of Missing Migrants: Implications for the Central Mediterranean', Central Mediterranean Route Thematic Report Series (IOM, 2019).
- Robins S. and Kovras I, 'Missing Migrants and Deaths at EU's Mediterranean Border: Humanitarian Needs and State Obligations' (2016).
- Robins S. *et al*, 'Addressing Migrant Bodies in Europe's Southern Frontier: An Agenda for Research and Practice' (2014).
- Romano S, 'The Italian Legal Framework for the Management of Missing Persons and Unidentified Dead Bodies, and the Rights of the Relatives' *Italian Legal Briefing*, September 2016.
- Singleton A, 'Memorials to People Who Have Died and to those Missing During Migration: A Global Project' available at: <https://wun.ac.uk/wun/research/view/memorials> (accessed 7/1/2020).
- Singleton A. *et al*, (2016) 'Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis. Summary Report'.

- Squire V. *et al*, 'Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experience' (2017), *Final Project Report*.
- Strik T, 'Lives Lost in the Mediterranean Sea: Who is Responsible', Parliamentary Assembly of the Council of Europe, Report of the Committee on Migration, Refugees and Displaced Persons.
- Triandafyllidou A, 'Undocumented Migration: Counting the Uncountable, Data and Trends Across Europe' (2009) *European Commission CLANDESTINO PROJECT Final Report* p. 18, available: https://cordis.europa.eu/docs/results/44/44103/126625701-6_en.pdf (accessed 27/3/2020).
- UN General Assembly Human Rights Council, Seventh Session, *Report of the Working Group on Arbitrary Detention*, A/HRC/7/4, (Geneva, 2008).
- UNCHR, 'Figures at a Glance', Report entitled 'Global Trends: Forced Displacement in 2018' (2019).
- UNDESA, (2017) International Migration Report 2017: Highlights (ST/ESA/SER.A/404).
- United Kingdom Parliament Joint Committee on Human Rights—Third Report, Session 2004-05, 8 December 2004.
- United Nations Office of the High commissioner for Human Rights, '*Detained and Dehumanised*' (2016) Report on Human Rights Abuses Against Migrants in Libya, 13 December 2016.
- UNSMIL and OHCHR 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (2018) *Joint Report of the United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights*.
- Villagran O.A, 'Identifying Migrant Bodies in the Mediterranean' (2018) *Policy Report, Migration, Social Inclusion and Peaceful Societies* No. 2.
- Yasar S, (Rapporteur) 'Missing Refugee and Migrant Children in Europe' (2007) Parliamentary Assembly of the Council of Europe, Report by the Committee on Migration, Refugees and Displaced Persons, Doc. 14417, Reference 4343 of 24 November 2017.

[G] PARLIAMENTARY BRIEFINGS/SPECIAL RESOLUTIONS/DECLARATIONS/TREATY SERIES

- Fella S. 'United Nations Global Compact for Migration' (2019) House of Commons Briefing Papers CBP-8459.
- Foreign and Commonwealth Office (ERM0006) paras. 29 and 64.

- HM Government 'EU Exit: Taking Back Control of our Borders, Money and Laws while Protecting our Economy, Security and Union', Presented to Parliament by Prime Minister (2018), Cm 9741.
- House of Commons, *Oral Evidence: English Channel Migrant Crossing*, HC, 1900, 22nd Jan. 2019.
- House of Commons, *Oral Evidence: English Channel Migrant Crossing*, HC, 1900, 26th Feb. 2019.
- House of Commons, *Responding to Irregular Migration: A Diplomatic Route, First Report of Session 2019*.
- Joint Action Plan Between the UK and France on Combating Illegal Migration Involving Small Boats in the English Channel, Agreed in London on 24 January 2019.
- Joint Action Plan Between the UK and France on Combating Illegal Migration Involving Small Boats in the English Channel, Addendum September 2019.
- Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom.
- Sturge G. 'Migration Statistics' (2020) House of Commons Library, *Briefing Paper* Number CBP06077.
- Supplementary Evidence from the National Crime Agency (ECM0003), February 2019.
- Treaty Between the Government of the United Kingdom and Great Britain and Northern Ireland and the Government of the French Republic Concerning the Reinforcement of Cooperation for the Coordinated Management of their Shared Border, 2018.
- United Kingdom-France Summit Communique, Royal Military Academy Sandhurst, 18 January 2018.
- Written Evidence by Rossella Pagliuchi-Lor, UNCHR Representative to the United Kingdom Submitted by UNCHR (ECM0006).
- Written Evidence Submitted by Care4Calais (ECM0002), February 2019.

[H] THESES FOR AWARD OF DEGREES

- Diana M, 'The 'Where' of Sovereign Power and Exception: Palestinian Life and Refugee Camps in Lebanon' PhD Thesis, University of Durham (2012).
- Dinsmore G.L, 'A Place in the World: Hannah Arendt and the Political Conditions of Human Rights' PhD Thesis, Cornell University, (2011).
- Fulcomer D.M, 'The Adjustive Behaviour of Some Recently Bereaved Spouses: A Psycho-Sociological Study' (1942) Unpublished PhD Thesis, Northwestern University.

- Hebing M, 'Refugee Stories in Britain: Narratives of Personal Experiences in a Network of Power Relations' (2009) PhD Thesis (Unpublished), City University London.
- Heller C, 'Liquid Trajectories: Documenting Illegalised Migration and the Violence of Borders' (2015) PhD Thesis, Goldsmiths University of London.
- Klinkner M.J, 'Towards Improved Understanding and Interaction Between Forensic Science and International Criminal Law in the Context of Transitional Justice' (2009) PhD Thesis, Bournemouth University.
- Kovner N.Z, 'Migration in a Warming World: On the Responsibility and Obligations of States Towards Climate Change Immigrants' (2017) PhD Thesis LSE London.
- Last T, 'Deaths Along Southern EU Borders' PhD Thesis (2018) Vrije Universiteit Amsterdam.
- Pearce C, 'Recovering Normal: A Qualitative Study of Grief following Bereavement' (2016) PhD Thesis, The Open University.
- Pezzani L, 'Liquid Traces: Spatial Practices, Aesthetics and Humanitarian Dilemmas at the Maritime Borders of the EU' (2015) PhD Thesis, Goldsmith University of London.
- Robins S, 'Addressing the Needs of Families of the Missing: A Test of Contemporary Approaches to Transitional Justice' (2011) PhD Thesis, University of York.
- Schweitzer R, 'The Micro-Management of Migrant Irregularity and Its Control: A Qualitative Study of the Intersection of Public Service Provision with Immigration Enforcement in London and Barcelona' (2017) PhD Thesis, University of Sussex.
- Spencer L-H.C, 'Does the State Have Moral Duties? State Duty-Claims and the Possibility of Institutionally held Moral Obligations' (2012) PhD Thesis, University of Iowa USA.
- Tangseefa D, 'Imperceptible Naked-Lives and Atrocities: Forcibly Displaced Peoples and the Thai-Burmese in-Between Spaces' (2003) PhD Thesis, University of Hawai'i USA.
- Wels W, 'Dead Body Management in Armed Conflict: Paradoxes in Trying to Do Justice to the Dead' (2016) Graduate Thesis, Leiden University.

[I] WORKING PAPERS/POLICY PAPERS/BRIEFINGS/RESEARCH BLOGS/RESEARCH SERIES

- A Story Map 'The Migrant Crisis and the Rise of Populism in Europe (ESRI), available: <https://www.arcgis.com/apps/Cascade/index.html?appid=d63ba0dce8c346bab133ca055180e455> (accessed 8/2/2020).
- Albahari M. 'Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe' (2006) *Working Paper 136*, University of California Centre for Comparative Immigration Studies.

- Allinson K. *et al*, 'GCM Commentary: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International Law and UK Law' *Refugee Law Initiative Blog on Refugee Law and Forced Migration*, School of Advanced Study, University of London.
- ALS Society of Canada 'Coping with Grief: Strategies for People Living with ALS', Fact-Sheet.
- Anderson B, and Blinder S, 'Who Counts as Migrant: Definitions and their Consequences' (2017) The Migration Observatory University of Oxford Fifth Revision.
- Angeli D, 'The Dead, the Missing and the Bereaved: Is Objective 8 still a Priority' (2021) RLI Blog on Refugee Law and Forced Migration, School of Advanced Study University of London.
- Apap J, *et al*, 'The Migration Issue', (2019) Briefing EU Policies—Delivering for Citizens, European Parliament; European Parliamentary Research Service.
- Attia F.B. *et al*, 'Missing Migrants: Management of Dead Bodies in Sicily, Italy Summary Report, Mediterranean Missing Project' (2016) *Background Briefing*.
- Beckett J, 'Critical International Legal Theory' (2012) *Oxford Bibliographies*.
- Betts A, 'The UK and Global Migration Governance' (2011) *Policy Primer, The Migration Observatory University of Oxford*.
- Betts A, 'Towards a Soft Law Framework for the Protection of Vulnerable Migrants' (2008) New Issues in Refugee Research, UN Refugee Agency, Research Paper No. 162.
- Betts A. and Kainz L, 'The History of Global Migration Governance' (2017) *Working Paper Series No. 122, Refugee Studies Centre, University of Oxford*.
- Beutin R. *et al*, 'Migration and Public Perception' (2006) Bureau of European Policy Advisers (BEPA) European Commission, Brussels.
- Bhabra G.K, 'The Refugee Crisis and Our Connected Histories of Colonialism and Empire' Sicherheits Politik-Blog, 2015.
- Black J. and Dionis M.S, 'Statistics versus Stories: The Invisibility of Missing Migrants', IOM-UN Migration Statistics, June 2018.
- Buddenbaum M. and Rap S, 'Lost in Migration: Working Together to Protect Children from Disappearances, from European Priorities to Local Realities' (2018).
- Carlin J, 'Refugees are also Migrants: All Migrants Matter' (2015) *Border Criminologies Blog*, 9 September, Oxford: Faculty of Law, University of Oxford.
- Carrera S. *et al*, 'Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update' (2018).

- Chou M-H, 'EU and the Migration-Development Nexus: What Prospect for EU-Wide Policies?' (2006) *Working Paper No. 37*, Centre on Migration, Policy and Society, University of Oxford.
- Clayton J. and Holland H. 'Over One Million Sea Arrivals Reach Europe in 2015' (2015) UNCHR.
- Cogolati S, 'Migrants in the Mediterranean: Protecting Human Rights' (2015) Directorate-General for External Policies, Policy Department, European Parliament.
- Coralli A.S. and Manganini I, 'International Legal Obligations of States Concerning the Search for Missing Migrants: A Possible Way Forward' (2019) *International Law Blog*.
- Crawley H, 'Unravelling the Mediterranean Migration Crisis' (2016) MEDMIG, available: <http://www.medmig.info/> (accessed 17/11/2019).
- Crawley H. *et al*, 'Unpacking a Rapidly Changing Scenario: Migration Flows, Routes and Trajectories Across the Mediterranean' *MEDMIG Research Brief No. 1*, March 2016.
- Czaika M. and De Haas H, 'Determinants of Migration to the UK' *The Migration Observatory Policy Briefing (2nd Revision)*, University of Oxford, 2017.
- De Haas H, 'Lampedusa: Only the Dead Can Stay' (2013) *Blog Article*.
- De Vries L.A. *et al*, 'Legal Pathways to Protection: Towards the Provision of Safe, Legal and Accessible Routes for Refugees and Vulnerable Migrants' (2018) *Policy Brief*, British Institute of International and Comparative Law.
- Den Hertog L, 'Two Boats in the Mediterranean and their Unfortunate Encounters with Europe's Policies Towards People on the Move' (2012) *Centre for European Policy Studies (CEPS) Paper in Liberty and Security in Europe No. 48/July 2012*.
- Dimitriadi A. and Malamidis H, 'Talking of Values: Understanding the Normative Discourse of EU Migration Policy—On (Value-Based) EU Policies on Migration' (2019) *NOVAMIGRA D2.1 Paper on the (Value-Based) EU Policies on Migration*.
- Dionis M.S, 'Resisting Invisibility: Mothers of Missing Migrants' (2018) *In Border Criminologies Blog*.
- European Commission, 'Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions' (2017) *EPSC Strategic Notes*, Issue 22.
- Fairbairn C, 'Missing Persons, Guardianship and the Presumption of Death' Briefing Paper No. 04890, 5 July 2017, House of Commons Library.
- Fargues P. and Bonfati S, 'When the Best Option is a Leaky Boat: Why Migrants Risk their Lives Crossing the Mediterranean and What Europe is Doing About It' (2014) *Migration Policy Centre Brief*.
- Fella S, 'The United Nations Global Compact for Migration', (2019) *Briefing Paper Number 8459*, House of Commons Library.

- G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 2 (Dec. 20, 2006) and ICRC 'Missing Migrants and their Families: The ICRC's Recommendations to Policy Makers', *Policy Paper*.
- Gammeltoft-Hansen T. and Aalberts T.E, 'Sovereignty at Sea: The Law and Politics of Saving Lives in the Mare Liberum' (2010) *DIIS Working Paper 18*.
- GCM Review Report of States (2020), available: <https://migrationnetwork.un.org/country-regional-network/europe-north-america> (accessed 4/7/2021).
- Glynn I, 'Comparing Europe's Recent Reaction to Boat Refugees Across Time and Space', (2017) Council for European Studies (CES).
- Grandi F, 'Managing the Refugee and Migrant Crisis: The Role of Governments, Private Sector and Technology' (2016) *PWC Global Crisis Centre*.
- Guild E. *et al*, 'Documenting the Migration Crisis in the Mediterranean: Spaces of Transit, Migration Management and Migrant Agency', CEPS Paper in Liberty and Security in Europe No. 94 (2016).
- Guzman A.T, 'The Consent Problem in International Law' (2011) *Berkeley Program in Law and Economics Working Paper Series*.
- Hargrave K, "*Policy into Practice: Implementing the Humanitarian Priorities in the Global Compact for Safe, Orderly and Regular Migration*", UK Roundtable Discussion Series Summary Reports, 2019.
- Hettige S.T. *et al*, 'Understanding Psychosocial Issues Faced by Migrant Workers and their Families', *Background Paper* (2012).
- Honoré A. and Garner J, 'Causation in the Law' (2010) *Stanford Encyclopaedia of Philosophy*, available: <https://plato.stanford.edu/entries/causation-law/#CauRelConCauFac> (21/4/2019).
- House of Commons Home Affairs Committee "Immigration Policy: Basis for Building Consensus: Government and office for National Statistics Responses to the Committee's Second Report", Fifth Special Report of Session 2017-19, HC 961, Published on 18th April 2018.
- HM Government (UK) "*The Global Compact for Migration European Regional Review, Submission by the United Kingdom*", available: https://migrationnetwork.un.org/sites/default/files/docs/uk_submission_-_gcm_european_regional_review_.pdf (accessed 23/8/2021).
- Huddleston T. and Sharif H, 'Who is Reshaping Public Opinion on the EU's Migration Crisis?' (2019) Research Social Platform on Migration and Asylum (ReSOMA) *Discussion Policy Brief*.

- Human Rights at Sea, 'Legal and Policy Matters Arising from the Increased Criminalisation of Civil Society Search and Rescue Activities in the Mediterranean' (2019) *HRAS Briefing Note*.
- IOM Global Migration Data Analysis Centre (GMDAC) Briefing Series, 'Towards Safer Migration in Africa: Migration and Data in Northern and West Africa'.
- Kervyn E. and Shilhav R, 'An Emergency for Whom: The EU Emergency Trust Fund for Africa—Migratory Routes and Development Aid in Africa', Oxfam Briefing Note, November 2017.
- Last Rights Project, 'The Dead, the Missing and the Bereaved Europe's International Borders, Proposal for a Statement of the International Legal Obligations of States', May 2017.
- Lembcke O.W, 'Giorgio Agamben's Political Theory' (2018) *Oxford Research Encyclopedias*.
- Liebl J. *et al*, 'A Safe Haven? Britain's Role in Protecting People on the Move' (2016) *Joint Agency Briefing Note, Published by Oxfam GB on 14th April 2016*.
- Lilienkamp M. & Saliba S, 'EU Readmission Agreements: Facilitating the Return of Irregular Migrants', Briefing, European Parliamentary Research Service, April 2015.
- Lone F, 'The New Haven School of International Law' (2019) *Oxford Bibliographies*.
- Long K, 'From Refugee to Migrant: Labour Mobility's Protection Potential', Transatlantic Council on Migration (Migration Policy Institute, 2015).
- Mańko R, 'EU Accession to the European Convention on Human Rights (ECHR)', European Parliament Briefing July 2017.
- Martin M, 'Prioritising Border Control Over Human Lives: Violations of the Rights of Migrants and Refugees at Sea' (2014) Policy Brief, Euro-Mediterranean Network (EMHRN).
- Mayer M.M. and Mehregani M, 'Improving the Responses to the Migration and Refugee Crisis in Europe' *Vision Europe Summit, Calouste Gulbenkian Foundation Lisbon*, 21-22 Nov. 2016.
- Messineo F, 'The Left-to-Die Boat': Whose Responsibility for the Death of 63 Migrants in the Mediterranean' (2012) *EJIL Talk, Blog of the European Journal of International Law*.
- Miller D, 'Border Regimes and Human Rights' (2012) *CSSJ Working Papers Series, SJ021*, University of Oxford.
- Miller D, 'Is There a Right to Immigrate' (2015) *CSSJ Working Papers Series, SJ033*, University of Oxford.
- Mortera-Martinez C. and Oppenheim B, 'Why Europe Needs Legal Migration and How to Sell it' (2018) *Open Society European Policy Institute*.

- Office of the United Nations Higher Commissioner for Human Rights (OHCR), *“Lethal Disregard”: Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea*, May 2021.
- Okyere S and Kondeh S, *Families of Missing Migrants in the UK: Their Search for Answers, the Impacts of Loss and Recommendations for Improved Support* (Geneva: IOM, 2021).
- Park J. and Samms A, ‘The Immateriality of the Immaterial: Collecting Digital Objects at the Victoria and Albert Museum’ (2019) MW19.
- Pelliconi A.M, ‘COVID-19: Italy is not a ‘Place of Safety’ Anymore: Is the Decision to Close Italian Ports Compliant with Human Rights Obligations’ (2020) *EJIL Talk, Blog of the European Journal of International Law*.
- Perkowski N, ‘A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex’ (2012) *Refugee Studies Centre, University of Oxford Working Paper Series No. 81*.
- Phillips J, ‘The ‘Pacific Solution’ Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island’ *Background Note, Social Policy Section—Department of Parliamentary Services of the Parliament of Australia 4th September 2012*.
- Powles J, ‘Life History and Personal Narrative: Theoretical and Methodological Issues Relevant to Research and Evaluation in Refugee Contexts’ (2004) *Working Paper No 106 in New Issues in Refugee Research*, UNCHR Evaluation and Analysis Unit.
- Raz J, ‘Human Rights Without Foundation’ (2007) *University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 14/2007*.
- Sherraden M, ‘Developing Transnational Social Policy: A North American Community Service Program’ (2001) Centre for Social Development Global Service Institute Working Paper 01-10.
- Somek A, ‘The Social Question in a Transnational Context’ (2011) LSE ‘Europe in Question’ Discussion Paper Series, Paper No. 39/2011, June 2011.
- Squire V, ‘Human Dignity and Biophysical Violence: Migrant Deaths Across the Mediterranean Sea’, part of the research project entitled ‘Crossing the Mediterranean Sea by Boat’ (2018).
- Steinhilper E. and Gruijters R, ‘Border Deaths in the Mediterranean: What Can We Learn from the Latest Data’ (2017) *Border Criminologies Blog*.
- Stone D, Global Public Policy, Transnational Policy Communities, and Their Networks 13 (2008) University of Warwick Institutional Repository.
- Terlizzi A, ‘Border Management and Migration Controls in Italy’, *Research Report, Working Paper on ‘Global Migration: Consequences and Responses’ Paper 2019/17, June 2019*.

- Thompson S, 'Theories Around Loss and Bereavement', Presentation on 25 & 26 May 2016.
- UNCHR, 'The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees' (2015).
- Volkan V.D, 'What Some Monuments Tell Us About Mourning and Forgiveness' (2003) *Paper for a Collection of Essays Based on the Apologies Conference at Claremont Graduate University in February 2002*.
- Waldron J.J, 'Is Dignity the Foundation of Human Rights' (2013) *New York University Public Law and Legal Theory Working Papers* 374.
- Western T, 'Sonopolis: Sound, Citizenship, and Migrant Activisms in Athens', Public Seminar Series: Everyday Resistance to the European Governance of Migration; Refugees Studies Centre, University of Oxford, 29 May 2019; Podcast 30 May 2019.
- Wolff S, 'Migration and Refugee Governance in the Mediterranean: Europe and International Organisations at a Crossroads' (2015) *Istituto Affari Internazionali (IAI) Working Papers* 15/42.
- Zellentin A, 'Outcome Responsibility: Fallible Beings Acting in an Uncertain World' (2018) *SPIRe Working Paper* WP07, School of Politics and International Relations, UCD, Ireland.

[J] SPEECHES/NEWS MEDIA/NEWSPAPERS

- Ahmed A. and Semple K. 'Photo of Drowned Migrants Captures Pathos of Those Who Risk It All' (2019) *The New York Times*.
- Anelay B, 'UK will not Support Rescue of Mediterranean Migrants', available at <http://www.telegraph.co.uk/news/uknews/immigration/11192027/UK-will-not-support-rescue-of-Mediterranean-migrants.html> (accessed 10/20/17).
- BBC News, 'Dozens of Migrants Die in Shipwreck off Libya—UN', BBC News of 19 August 2020, available: <https://www.bbc.co.uk/news/world-africa-53842742> (accessed 19/8/2020).
- BBC News of 19 June 2000, '58 Dead in Port Lorry', available: <http://news.bbc.co.uk/1/hi/uk/796791.stm> (accessed 9/12/2019).
- BBC News of 28 December 2018, available at <https://www.bbc.co.uk/news/uk-46705128> (accessed 28/12/2018).
- BBC News, 'Spain to Accept Disputed Migrant Ship Aquarius', 12 June 2018. Available at <https://www.bbc.co.uk/news/world-europe-44441386> (accessed 5/7/2018).
- Beckett A, 'Is Britain Full? Home Truths about the Population Panic' *the Guardian*, Tuesday 9 February 2016.

- Bowcott O, 'ICC Submission Calls for Prosecution of EU over Migrant Deaths' the *Guardian* 3 June 2019.
- Brokenshire J, 'Migrant Rescue Operations Must be Stopped at Earliest Opportunity', the *Guardian*, Thursday 30th October, 2014 available at <https://www.theguardian.com/uk-news/2014/oct/30/home-office-minister-rescue-migrants-must-be-stopped-mediterranean> (accessed 22/5/2019).
- Eddy M, 'For 60th Year, Germany Honours Duty to Pay Holocaust Victims' *The New York Times*.
- Farrell N, 'Italy is Killing Refugees with Kindness: The Mare Nostrum Policy Has Acted as a Magnet for Boat People; the Crisis is Only Growing' (2014) *The Spectator*.
- Hernandez V. and Stylianou N, 'Buried without a Name, the Untold Story of Europe's Drowned Migrants' *BBC News* 10 May 2016.
- Jones S, 'Channel Migrants: Migrant Crossing Figure Reaches New High', BBC News 25 May 2019, available: <https://www.bbc.co.uk/news/uk-england-kent-48408471> (accessed 25/5/2019).
- Koutonin M.R, 'Why are White People Expats When the Rest of us are Immigrants', *The Guardian*, March 2015.
- Lockett J, 'We Lost Him Quickly, Migrant, 28, Who Drowned Trying to Reach the UK in Toy Dinghy Tried to Clutch on but Couldn't Make it, Friend Reveal' (2020) *The Sun* of 21 August 2020.
- Lubbers R, 'Put an End to their Wandering', *The Guardian* 20 June 2003; available: <https://www.theguardian.com/politics/2003/jun/20/immigration.immigrationandpublicservices> (accessed 28/5/2019).
- Motta C, 'Italy's Rescue Operation Mare Nostrum Shuts Down with no Real Replacement: EU's Triton instead Might put Lives at Risk' *The European Sting Political Newspaper*, November 4, 2014.
- Refugee Council, 'UK Government Refuses to Help Rescue People at Sea', available: https://www.refugeecouncil.org.uk/latest/news/4183_uk_government_refuses_to_help_rescue_people_at_sea/ (accessed 3/6/2019).
- Shenker J, 'Aircraft Carrier Left us to Die, say Migrants' (2011) *The Guardian*, Sunday 8 May 2011.
- Shenker J, 'Migrants Left to Die After Catalogue of Failures, Says Report into Boat Tragedy', *The Guardian* 28 March 2012.
- Sky News, 'Boris Johnson tells migrants not to cross English Channel as we will send you back', 23 August 2019, available: <https://news.sky.com/story/migrants-on-boat-intercepted-off-dover-coast-11791867> (accessed 19/4/2020).

- Solomon E. 'Priti Patel's Two-tier Asylum Plan Treats Refugees with Cold Indifference', *The Guardian*, 24 March 2021
- Souter J, 'Why the UK Has a Special Responsibility to Protect its Share of Refugees' (2015) *The Conversation*.
- Specia M, 'Migrants Crossing the English Channel to the UK Increased Six-fold in 2019' *The New York Times* 3 January 2020.
- Speech by Her Majesty Queen Noor, ICMP Commissioner, at the Hague Conference on Missing Persons, entitled 'Missing Persons: An Agenda for the Future' 29 Oct-1 Nov 2013.
- Stieri M, 'EU Sued at International Criminal Court Over Mediterranean Migration Policy—as More Die at Sea' *The Conversation* 4 June 2019.
- Teather S, quoted in the Guardian 'Outcry as the UK opts Out of Migrant Rescue—As it Happened'; available: <https://www.theguardian.com/politics/live/2014/oct/28/outcry-as-the-uk-opts-out-of-migrant-rescue-politics-live-blog?page=with%3Ablock-544f84aae4b01631ca85f5b2> (30/9/2019).
- Text of Queen's Message to New York at the Prayer Service in St Thomas Church New York, in the Aftermath of the 9/11 Attacks, Friday 21 September 2001.
- The Guardian, 'Italy Declares Victory as Spain Accepts Rescue Boat' 11th June 2018 available at <https://www.theguardian.com/world/2018/jun/11/un-calls-for-migrant-ship-to-be-allowed-to-dock-in-italian-port> (accessed 5/7/2018).
- The Guardian, 'Let the Migrants Drown in the Mediterranean: We Have Lost Our Sense of Common Humanity' Tuesday 28 October 2014.
- The Telegraph, 'All 39 Migrants Found Dead in Essex Lorry Confirmed as Vietnamese Nationals', 2 November 2019, available: <https://www.telegraph.co.uk/news/2019/11/02/39-migrants-found-dead-essex-lorry-confirmed-vietnamese-nationals/> (accessed 15/5/2020).
- Williamson L, 'Essex Lorry Deaths: The Vietnamese Risking it All to Get to the UK' BBC News of 26 October 2019.
- Yardley J, 'Migration Crisis Puts Europe's Policy Missteps into Focus, Experts Say' *The New York Times*, April 24, 2015.

[K] INSTITUTIONAL DATA PORTALS AND OTHER RESEARCH PROJECT SOURCES

- Death at the Borders Database, available: <http://www.borderdeaths.org/> (accessed 24/1/2020).
- Fortress Europe Blog, available: http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html (accessed 24/1/2020).

- Frontex Risk Analysis Data for the years 2016 and 2019, available: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2019.pdf.
- IOM Data Migration Portal 2018; available <https://missingmigrants.iom.int/latest-global-figures> (accessed 3/12/2019).
- IOM Missing Migrants Data Portal— <https://missingmigrants.iom.int/region/mediterranean> and here: <https://migration.iom.int/europe?type=arrivals> (accessed 20/1/2020).
- Last Rights Project, available at: <http://lastrights.net/> (accessed 7/1/2020).
- List of Death, available here: <http://www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/> (accessed 24/1/2020).
- Migrant Death Mapping, available: <https://humaneborders.org/migrant-death-mapping/> (5/3/20).
- Mixed Migration Monitoring Mechanism Initiative (4Mi), available: <http://www.mixedmigration.org/4mi/> (accessed 5/3/2020).
- Royal Navy, available at <https://www.royalnavy.mod.uk/what-we-do/preventing-conflict> (accessed 2/12/2019).
- The 'Migrant File', available here: <http://www.themigrantsfiles.com/> (accessed 24/1/2020).
- The Australian Border Deaths Database'—see here: <https://www.monash.edu/arts/border-crossing-observatory/research-agenda/australian-border-deaths-database> (accessed 5/3/2020).
- UN Migration Agency IOM's Global Migration Data Analysis Centre— <https://gmdac.iom.int/> (accessed 13/1/2020).
- UNCHR Missing Migrants Data Portal— <https://data2.unhcr.org/en/situations/mediterranean> (accessed 7/1/2020) and here: <https://data2.unhcr.org/en/dataviz/95?sv=0&geo=0> (accessed 15/2/2020).
- UNCHR Operational Data Portal, available here: <https://www.unhcr.org/uk/figures-at-a-glance.html>, here: <https://www.unhcr.org/uk/data.html> and here: <https://www.unhcr.org/globaltrends2018/> (8/2/2020).
- United Against Refugee Deaths, available at: <http://unitedagainstreugeedeaths.eu/> (accessed 21/9/2019).
- UNITED: 'Death by Policy: Time for Change', available at: <http://www.unitedagainstracism.org/wp-content/uploads/2019/07/ListofDeathsActual.pdf> (accessed 21/9/2019).
- Watch the Mediterranean Sea, available here: <http://watchthemed.net/> (accessed 24/1/2020).

[L] NON-GOVERNMENTAL INTERNATIONAL SOFT LAWS/GUIDELINES

- ICRC, 'Guidelines for Investigating Deaths in Custody' (Geneva Switzerland, 2013).
- ICRC, 'Guiding Principles/Model Law on the Missing' (2009).
- Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys Signed on 11th May 2018.

[M] LITERARY WORKS

- Foscolo U, *The Sepulchres: Addressed to Ippolito Pindemonte from the Italian of Ugo Foscolo* (1820).
- Sophocles, *Antigone*, Greek Tragedy (442 BCE), Jebb R.C. (Translated into English) available at <http://classics.mit.edu/Sophocles/antigone.html> (accessed 19/7/2018).

[O] APPENDICES

Appendix I: Transcribed Secondary Interviews with Families of Missing Migrants

S/N	Name of the Missing Migrant	Duration of Absence	Name & Relationship of the Respondent to the Missing	The Interviewees Response
1	M1	Missing Since 29/03/2011	P1 —(wife of the missing)	<p>My name is P1. I am the wife of a missing person, 2, born on September 8th, 1978, Al-Jerissa, Al-Kef province, Tunisian Republic. He worked for many companies. The last one was a building company Nouri Chaabane. He was a blacksmith. We have three children. When he left I was pregnant and he didn't know it. One thing I am very proud of is that my children do well in school. Our income is very low, but we live pretty well and happily. Because money is not everything. Peace of mind, that is everything. I used to like doing a lot of things with my husband. Going out with him I liked going to the market together and grocery shopping with him. We shared family responsibilities, inside and outside the home. Suddenly, one morning, I woke up and didn't find my husband next to me. Ever since he was very young, before we got married, he thought about emigrating. His idea was to go to Italy or France. He has to get there! After the revolution, all young people wanted to leave. They said, "this is my opportunity, when will I get another one?". My husband did too. He said, "I'm getting on the boat". My husband is a sailor, after all. Before we got married he worked in the port city of Sfax. The sister of Aziza's son, Maher, came to me. Maher boarded with my husband. She said: "Did your husband inform you?" I answered: "Of what?" She said: "You didn't know?" I answered: "No". She said: Your husband went on board with my brother and some other people". I said: "What?!" She says: "I swear". I was stunned. Really! My husband left with 73 other people of which, 34 were from the Kabiria neighbourhood. My husband left on a boat named "Ahmed", from Sidi Mansour beach, in Sfax. When he informed his</p>

				<p>brother, at midnight of March 29th, 2011, he had already left, by then. He told him: "We are offshore on a boat. We are planning on reaching Italy". Normally, he should have gotten there Wednesday that is, March 30th, at night. All signs of them were lost. None of them called a loved one again. We waited. Some corpses were found Sfax. We went back to check. We took DNA tests. On April 4th we started looking on the internet, on Facebook, on YouTube. We tuned in to satellite TV like Hotbird to watch Italian channels in the hope of finding something. Someone spotted his cousin in a video on the internet. He left with my husband. That someone taped the video, copied it to a CD and brought it to us so we could see it. I recognised my husband on the boat, and 17 other people recognised their relatives. We have another video, from the news program of TG5 in which I recognised my husband among those who disembarked at Manduria. <u>In my opinion, these people are not in jail in Italy. It's impossible! Why would Italy do this? Why would they keep them prisoners for 7 years without allowing them to speak out? Even if they had committed a crime, Italy would have allowed them to talk. It's the law. Is there something behind it? I don't know.</u> In my opinion, there's a 90% chance they were kidnapped by the mafia. We went to the International League for Human Rights and we handed them a dossier about our children. They told us to the Ministry of Foreign Affairs, to give them the dossier, and that they would act to look for our missing children. "We at the International League for Human Rights are an organisation within a civil society and cannot do anything". Then we went to the Ministry of Interior, and again we told our story. They told us: "You have to deliver the DNA samples to us". And we did that. The with some from the International League for Human Rights, we went to the Red Cross to leave our dossier. Our most important achievement is that after 4 or 5 years a Select Committee was formed in Tunisia. We feel like a bouncing ball. We are bounced between Italy and Tunisia.</p>
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				<p>But we still have not obtained any results. One thing I would have loved to do with my husband, but I did it alone and it was very painful. The day I celebrated my son's circumcision. And he wasn't there. The void he left is very noticeable. Because he cared about enjoying and interacting with his children. <i>His absence is the greatest pain. Because you don't know where your husband is. If he's alive or dead...</i></p>
2	M2	Missing Since 15/03/2007	P2 —(Mother of the Missing)	<p>M1, son of P2, known as [.....] We worked hard to raise him and educate him. That is why when he grew up we asked him to follow in brothers' footsteps, to get married, like they did. He told us: "I don't want to get married because I don't have a job". At the Haddjar they asked him for money if he wanted to be hired! Since he is devoted man, he said: "I don't want to earn my pay illicitly!" My son was an upright person, very devoted, there's nothing to say about that. He tried to find work through City Hall, with social services. They made some promises. Every time they told him: "Next month there will be an opening". But every time, they hired someone else. When he got on the boat, in 2007, unemployment was very high. He took some vocational courses. He didn't find a job anyway. Then he started selling clothes at the market, in the suburb of Annaba, close to where his sister lives. There, he met these young men who were thinking about going to Italy on a boat. They convinced him to go. Given that he was unemployed he told himself: "I am 25 and I don't have a future". He became impatient and decided to leave. He only told his brothers. To me and his mother he didn't say anything. At times, he mentioned the fact that he did not have a job and that he wanted to leave. He never told me personally. He told his brother. I told him not to do it! After that, we didn't talk about it again. A few days went by and I heard him talk to his friend. I warned him about hanging around those friends. I told him: "Watch out, they will trick you and take you with them!" He said: "It's not true, mom, I won't leave". I informed his brother. I asked him to talk to him. He told</p>

				<p>me: "I would like to go to Italy, so I can buy you a trip to Mecca". I replied that I didn't want the gift of a pilgrimage if it had to come from Italy. "The best pilgrimage would be to stay with me, my son". For a couple of days, he pretended nothing happened. He went to spend the night at his sister's. Then he went to his niece Samira's house. That night, his friends came to get him, and they all left. I didn't realise anything. The next morning, he did not come home. I asked if Ali had come back and they told me: "No, he must be out somewhere". At prayer's time they told me that maybe he had gone to the mosque. I was waiting for him to come back from the mosque. I was just waiting for him to come back! But he wasn't coming! His brothers said to me: "Don't tell me he left!" Right away, we went to Sidi Salem beach. And we looked for the two Bouchenak brothers, with whom he was supposed to leave. Their mom confirmed that they left, that they ate and got everything ready at their house. And that her son, the oldest, went with them till they reached the boat at Sidi Salem beach. Later that evening, the younger Bouchenak called his brothers on the boat to find out where they were. The he went to his mother to calm her down, saying that he had spoken to his brothers [...]. He spoke to his brothers, who were with my son. They told him that they had the Tunisian coast at their back. They asked their brothers to pray for them. He heard loud noises during the conversation. Then they said to ask their mom to pray for their safety. He could hear the boys yelling! Since that moment, we've had no more news. Some people say they in Tunisia, others say they are in Italy! Our lives have completely changed. We miss everything about him. Everything! When I walk in the street I imagine his face on the walls. Our daily life has changed so much that we act like we went crazy. What would you say: can anyone have peace of mind living without a piece of his family? Because of his disappearance I got diabetes and my wife has heart problems. <u>We have no more life, we have no more hope. Our hope is to see him again, then we can</u></p>
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				<p><u>even die! What's the point of living without our children? If we had been able to bury him, we would have accepted God's destiny. We would have visited him at the graveyard like everyone else. We are neither alive nor dead. We're in a very difficult predicament. No one understands our cries. We don't know whom to turn to. We don't know which path to follow! We feel like we're missing everything! Do you think if your son disappears, you can go in and out of your house quietly, like nothing happened?!</u> When I eat, I see Ali in my plate! I can't even eat. This tragedy devastated us!</p>
3	M3	Missing Since 6/09/2012	P3 —(Wife of the Missing)	<p>When we got married, we had a good life. The first three years he travelled between Italy and Tunisia. He could work there legally. We had a piece of land, we built a house on it. We were just about to move in. He worked in Italy. He went back and forth legally. Then he got himself into problems in Italy. His permit was taken away. He came back. He wanted to go back to Italy and work. As there is no work Tunisia, there is nothing. Especially when we had children. He was unemployed for 14 years. I was the one working. I did Henna paintings on bridges and worked in other households. He didn't work, his siblings supported him. In his free-time he met with friends from the neighbourhood. They went to the sea together. Once a week they played soccer. They played soccer in the square outside. He had the habit to take the little one to the café every afternoon. Always when he managed to raise 2 or 3 Dinar he came running, bought a few vegetables and said: "cook me something nice". Even if he didn't work, he contributed to the atmosphere in the house. Why did he want to cross? There is no work here. How is he supposed to care for three children and their mother? He can't. If he keeps asking his brother and mother, someday they'll be fed up. Should they keep supporting him forever? He wants to take care of himself. He was accustomed to a good life, when he worked in Italy, he was fine. He had money. Back in Tunisia it was very different. The situation burdened him. He is a person who foregoes food</p>

				<p>and gives it to his children. When he raised a Dinar, he spent it on his children. He bought eggs and cooked oja for them. It didn't work. He wanted to cross. He didn't want to stay in Tunisia. Because there's nothing here. There's nothing in Tunisia. It went so far that [...] didn't have shoes. [...] caught me sewing her shoes at night with a large needle. So, she could wear them to school the next day. I still can't forget the day he went across. He wore shorts, got a haircut, showered and put on perfume. He turned to his eldest daughter and said: "What do you think?" She said: "Dad you look like a bridegroom". After her words, he stayed another 15 minutes, kissed the children and said goodbye to me. He said: "This time I'll cross and arrive on the other side". "If I make it, it's good. If they deport me, I'll never try again". They went on board around 9 in the evening. He kept calling me, as long as he had a network. He called me to say: "Dalila, we're onboard, we're leaving. Wish me good luck. Inshallah, we will arrive". I was unconcerned. Earlier he had often crossed and reached Lampedusa. He stayed for three months, then he was deported as they had his fingerprints. They brought him back. This time they wanted to go to Mazara on Sicily, and not to Lampedusa, because from Mazara one can travel onwards without being discovered. He was unconcerned, so was I. I was used to him coming and going. I didn't think about the boat sinking or something happening. I slept well, I didn't have any worries. The next morning, I did henna paintings on a bridge. I was on my way back, when a woman came towards me in the street. She said: "A Tunisian boat sank yesterday". I was shocked, I collapsed. For half an hour they tried waking me. I came to. Later we went to the Ministry of Foreign Affairs. Others showed me a posted video. One could recognise him clearly. There was a list of survivors. He wasn't on it. I asked boys on Lampedusa whose numbers were discovered. They said: "The man with three children, he swam with us, but then he gave up. He couldn't go on". I thought,</p>
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				<p>even if he drowned, they'll bring him back. So that we can bury him and come to rest. But there was no corpse, nothing. Until now, there's nothing. A lot has changed. My eldest daughter lived for 4 to 5 months with her grandmother. She said: "I won't go into the house, if dad is not there. I won't go into a house with no laughter". Her father had always cared for her. And the little daughter, she didn't speak for a while. There are times when we laugh and we're doing fine. And then there are horrible times, the son is crying, the daughter is crying. A wedding, an event reminds them of him. They often take his pictures of the wall and hang it again. Yesterday we heard a song which the father often listened to. We listened to the song and all of us cried. We wept for their father. <u>I'm in a state of limbo, I don't know if I'm a widow or married. You cannot say that I'm a widow and you cannot say that I'm married. I'm in a state of limbo. I feel like a lioness, who does like this. I want to show that I am strong, but inside I'm not strong, I'm weak. I pretend to be strong, to protect myself and my children. My wish is to know the truth, to be able to answer the children. I live in the constant hope, that he'll come back. I always hope that one day he'll come knocking on the door.</u></p>
4	M4	Missing Since 6/09/2012	P4 —(Father of the Missing)	<p>M4 was like all kids, a normal young boy. We were proud of him, he grew up. He came, saw them standing together and stuck his head out in the middle. He liked motorbikes. His passion was football. Since he was small, five years old. I brought him to training. Midget, junior, and when he had to pass to the next level he stopped. Everything stopped. He changed. Sniffing glue, all kinds of things. He took a wrong turn. Teenager things. Before he had hobbies, he was calm, he was nice, and he seemed bright. I brought him to box-thai trainings. Thai boxing. He was good. His trainers were proud of him, because he was bright and active. When he was small, we came here all together [beach]. My daughter, my other son, and him. We sat here, they went swimming, they picnicked, and we went back home.</p>

				<p>Once or twice a week, depending on my time. Every summer I bring them here. Then one moment he doesn't want anymore. You know how they are, teenagers, youngsters. Usually coming here with two motor bikes. Hang out together, like teenagers do, flirting with girls, drinking beer, swimming and they go back home. He made his decision in 2011. In 2011 we managed to soothe him. I told him: "No. I'll find a way for you. I'll contact friends in Europe". Then I tell him: "Don't do it. You see everyone come and go". They brought people back, children from our neighbourhood, dead bodies. They died during crossing. He calmed down. We said: "Is that what you want, to come back dead?" He calmed down. He went to their funerals. Yes, he took part. Was it the first one after the revolution? Yes. The first boat crossing after the revolution. It was March 2011. He understood. He gave up on the idea, but it came back. I tried to calm him down. I introduced to a friend living in Europe. He explained to him not to go, he's still young. I said: "When you're older I will find a way for you to go to a foreign country". Then he did something and had to go to juvenile prison. He said: "Dad, that's it. I'll find a job, I'll start working". Just one month after he got out of prison. He said: "Dad, there's a possibility to go, I will go. If I don't leave, I will end up hurting myself". He was convinced about his decision. On the 6th of September he left. "Didn't you call him when he was on the boat? [wife asking husband regarding their son] He called from another phone. He told you: "Dad, I can see lights of Italy. We're almost there. Once we arrive I can't call you anymore". That was the last time he called. Then in the morning, when did they arrive? I contacted the man, remember? They called the smuggler. He said: It's done, they've nearly arrived". They arrived and so on. The first time I called the man, he told me to call him midday. I called in the afternoon. He told me: "it's done. Can at 4 pm". Then you called him. He called you back at 8 pm. He said: "As I told you, it's done. They're good". That was the smuggler. But when</p>
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				<p>I went out others said: "If he had arrived, he probably would have called you". The next day I saw people in the neighbourhood standing together in groups. Something was strange. Groups here and there. I asked, and they said: "Yesterday's boat, it sank". But after that, the whole situation turned to chaos. When we went to the Ministry of Foreign Affairs, they said: "God bless them. We will bring you the bodies of your children". We came back the next day, they said: "They didn't drown, they disappeared. We searched for them and couldn't find anything. So, we nothing about them. We will search for them, they disappeared". <u>We don't know what to do. One person says, they are alive, others say they are fighting with Daesh. Everyone says something different. The last time they told us: "They are in Syria. You have no idea what happened to your child. One day they say he's alive, the next day they say he drowned. That means we're stuck. If you have a death, on the first day one dies, on the second day one's buried. On the third day, laughter comes back into the house. Step by step one forgets. We're still in the first two days. From 2012 until 2017, for 5 years, we didn't get out of the first two days of a death. Since the accident, we live like a person with a full body, who has had a leg or arm cut off as if a part of the body is missing. Imagine, he was part of the family. He was part of us. Until now we are demonstrating and protesting. At the Ministry of Foreign Affairs, at Social Affairs, at the Kasbah square and on the avenue. We also did many things in Europe. But until now, we have had no response. We've got 1200km coastline, Europe is 130km away from us and they say: "Don't come here". Why? When they come here, we welcome them generously. And why can't we go? Teenagers must be able to see things, get out, broaden their horizon. That's one of their rights. Article 13 states, you have the right to go, to leave and to see. If you don't like it, go home. That's it. Our only demand is: "Open the borders".</u></p>
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5	M5	missing since 02/12/2016	P5—(Father & Mother of the missing)	<p>My son was born in 1988. He attended school through 8th grade. In his everyday life, he's a perfectly normal young man. He made it through middle school. He did not have any problems after middle school. Not in school, and not with anyone else. Not with neighbours either. He grew up with his brothers, and when he was grown he enlisted in the army on his own. His first tour was 6 years. Although one of his arms was a little crooked. After the first 6 years, they did not allow him to reenlist because of that arm. That was one of the reasons he left. So, he was still unemployed. He looked for work everywhere with no success. He evaluated his circumstances, and he decided to leave. The main reason, I think was basically the lack of work. He had no problems at home, or with neighbours, or the state. There's only the matter of a job and the desire to feel accomplished. That's all. He saw that with my small income. I could not support such a large family. These are the reasons that pushed him to leave. I'm just a driver. [brother now speaking]—my brother sort of worked occasionally, in some yard. Sometimes he would go out to fish, with his friends who are fishermen for extra money. The last time he went out, he left at five in the morning. We thought he had gone out with his friends to fish. [mother speaking]—I got up at five and didn't find him. I looked for him, we called his friends who told us that they did not see him. [father speaking] Around one o'clock, I asked some fishermen and they told me they had not yet come back to shore. Speaking with the first of the returning fishermen, they told us that Amar had left on a boat for Italy early that morning! I was told by a neighbour, about my son's leaving. We have been looking for him since then to this day. He was 28 when he left, now that a year has passed, he is 29. Four of them left together. We called all of them, but none of them answered. Nobody answered. On the phone we always heard recording from the Tunisian phone service provider. Then the recording disappeared completely. Two days later, we received some calls from</p>
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				<p>Tunisian numbers, on our phones. When we tried to call back, they picked up the phone but didn't speak and hung up. 15 more days go by, a month, a week, and they are still calling from the same number. When my father went to Tunisia and spoke to the Tunisian coast guard about these calls out of Tunisia, they confirmed that those were Tunisian numbers, but they did not know whose. My question is: how did they get my number, my father's number, and the numbers of my whole family? Always the same number! Wait, dad! We are sure our son is alive, in Tunisia, and that he was stopped by the Tunisian coast guard. The coast guard of the Tabarka province in Tunisia. Why did they arrest him? Why doesn't our government do anything about it? Why? I just ask for one thing: that the Algerian authorities intervene. Why do they put them in jail? Why? They arrest them just because they are at sea! What was the charge? Terrorism? They are not terrorists. Were these young men armed? No, they were not! On what charge? Tell us at least if they are in Tunisia. We'll hire an attorney, but at least we'd have confirmation that they are alive. We would accept it. We ask our institutions do all they can to bring them back or find another solution. Tell us if they are in Tunisian jails! <u>We want peace of mind, knowing that they are alive to remove this doubt of not knowing if they alive or dead. If we had his body, we would have accepted God's destiny for him, and we would have resigned ourselves. We don't know if he is dead or alive.</u> If they are in Tunisia, give us permission to see them. We accept that they be sentenced to 3 or 4 years, as long as we learn that they are alive. Our lives have become so terrible! [mother crying] I'm so worried I can't sleep. My son is always in my thoughts. We spend all the holidays being sad. Believe me, we spend them without joy. <u>I will confess something nobody knows: I spend my nights crying.</u> The festival of sacrifice looked more like a funeral. Have mercy on us! The day of the Festival she was crying, my daughters were crying. Even the neighbours came</p>
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				by to comfort us. Our lives are like a constant funeral!
6	M6	missing since 24/05/2007	P6 —(mother of the missing)	<p>M6 was fun, very extroverted, he was always joking. He worked with us. He was very good and honest. He used to pray. He even leads the call to prayer at the mosque. When he was about to leave, he played a tape with religious songs that said: God forgive me and forgive my parents. He did not tell us he was leaving. He hid the whole thing from us! The day he got on the boat, I felt something, but I couldn't understand what it was that troubled my heart so much. The day he left, he cleaned the whole house for me because I didn't feel very good. I made lunch. I don't even remember if he ate with us. I will a bit ill. That's why I don't remember exactly. When his father got here, he asked me: Where is Karim? And he asked his brothers too. They called him on the phone right away. After several attempts, his brother Hamid was to speak with him where he was. Karim answered that he boarded a boat and he was in open water! He was a lot of fun and a great worker. I only have good memories of this son of mine. The reason he left is that he wanted to find some fulfilment. He liked to be okay. He liked money too. And the group of friends he frequented greatly influenced his thoughts about migrating to Italy. I was saying he wanted to work to be fulfilled. These are the reasons. Frankly, I didn't get to enjoy this son of mine. As for me, I would not change this country of mine, of ours, not even for the whole world. But what can I say? Our lives have changed a lot. We're always worried. We talk about him all the time. The holidays without him are not holidays. After he left, his brothers got married. But we didn't even celebrate. We didn't feel happy. Just sadness. It looked like a funeral! Sad all the time. <u>When I hear a knock at the door, right away I think that he's come back! I always thought, and still think, that he'll come back! As soon as I hear some news, I hurry to try to understand if there are news of him. I always thought and still think that he'll come back! I have pictures in front of me</u></p>

				<p><u>always. From dawn to dusk, they never leave me! I still believe that my son is alive, and I pray he is. I always dream he'll come back! I'm very confident my son alive and that he'll come back to me!</u></p> <p>When we buried one of the young men who was with him on the boat, an officer of the Algerian Coast Guard told me: "madam, don't cry: your son is alive. It is a matter of 20 days and we will bring him back from Tunisia". My other son can attest to that. And he confirmed that anything ever lost at sea sooner or later will turn up! He was with the Algerian Coast Guard. That's exactly what he told me. And he gave us his number. After that, we tried calling him many times, but nobody answered! I wouldn't even know where that number is anymore or who that person was! I pray to God that in his mercy he may soften the hearts of those who are holding our sons. That every missing person may return to their family. We believe in God and day and night we ask God that that blessed moment may come. May every missing person return to their family. May God soften the hearts of these people who are holding them. That's all.</p>
7	M7	Missing since 17/4/2007	P7 —(father of the missing)	<p>My name is P7, I was born in 1957 in Annaba. M7, Born in 1983 in Annaba. I work as a street vendor. I have five sons and two daughters. My children had a good life. We lived in a neighbourhood called Boukhadra; it's nice there. He's an actor! He likes to joke around. He's very curious and interested in everything! Before he left, we had jogged together: 14 or 15Km. Does he like? Yes! He likes Rai and music in general. After that, he started to work for himself, as a vendor. Every now and then the police stop him and confiscate his merchandise and the money from his sales. They find his merchandise and they confiscate it? Yes, and sometimes they beat him. You know how young men are! They can't stand this abuse of power. So, he made up his mind to leave. One day he says to me: "I have to tell you something, but don't get mad". "I've made up my mind to leave. I can't live here anymore". I said: "why don't you</p>

				<p>have here?" He replied: "I have to go away". He wanted to go to his uncle in Switzerland. They left the 17th of April 2006? No, they left the 17th of April 2007. One night he calls me and says: "I'm not coming home tonight. We found a boat. We need the money to buy it". I said: "That's not a problem". The steersman who drove them is a cool guy. I know his brothers, they're all sailors. They had dinner and left around 9:00pm. One of the crew who lives a bit far was running late. So, they waited for him. They left the beach around 10:10:30 at night. They finally left around 1 o'clock in the morning. When I called him, around two in the morning, he said they were offshore. That morning I called him, but nothing. I got worried. <u>I went to the police station and to the coast guard to ask for help. For a week I asked for help everywhere. Nothing. Then, it all became clear. I heard that one group of people made it to the UK and another to Italy. A third group was sent back here. The only boat missing was the one with my son on board. We contacted the Algerian Consulate in Tunisia and the Tunisian justice authorities. We turned to the Italian authorities. Nothing! If you ask me, there were taken to some secret prison in Tunisia. Otherwise, they would have turned up. Who can fix this injustice?</u> We are tired! Believe me! What did your son's disappearance mean? It has impacted my whole family. He took responsibility for his family. He didn't back out. He wanted to help his family. I like that about Redouene. Let's hope he comes back. He always jokes around with everybody, he likes to chit chat! <u>If we could find them, dead or alive. But we're not finding them. That's the problem. You won't forget your children? We'll never stop looking for them! You can't abandon your own child!</u></p>
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8	M8	Missing since 23/04/2011	<i>P8—(mother of the missing)</i>	<p>M8 is always quiet. Very patient, he goes fishing. Because his father's passion is fishing at sea. He goes with his father and sometimes alone. He plays football sometimes. He studied. He did an apprenticeship in Bizerte and later in Tabarka. He got his bus driving license. He had a good relationship with his siblings. He is not very talkative, but even so they had a very close relationship. He wants to build a future, start a family, settle down. He couldn't find a job. So, he got a taxi driving license, after his bus driving license. He could not find a job in public transportation or anywhere else. So, he got at a taxi company. An employee gets a quarter of the income. In Bizerte you get a quarter. When he makes 60 Dinar, he keeps 15. When he makes 40 Dinar, he keeps 10. The 10 Dinar are his daily spending. He doesn't give me anything. I let him keep it. For cigarettes, coffee the daily necessities. Sometimes I give some extra money as long as he stays out of trouble. He applied for a visa twice. They didn't give it to him. He wanted to go to his brother. He has a brother in France. All young people study, study, study. Then, they found themselves without a job, in the pub or in prison. This is how our boys end up! If he had been the son of a doctor, a policeman or a politician, they would deliver the visa to his home. And he could go abroad and come back whenever he wants. But our children, not. Our children are the ones that die. I didn't expect that one day he would cross by boat. Even now I don't know where he got the money from. I don't know. I didn't give him money and I would not because I know about crossings. "Who leaves on the sea is gone, who comes out of the sea is born." The sea, I know it. I don't how my son could take this step. God condemn those responsible. One day I noticed that he watched the weather forecast on TV all day. I said to him: "why are you only watching this?" He said: "I'm checking the weather because I want to go fishing". I believed that was the reason. That day I went to work. When I came home, his grandma, God bless her, sat there on the</p>
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				<p>balcony. I asked if M8 had come home. She said: "Yes he came, he took his backpack, and left. He waved goodbye and left". I thought he must have gone fishing or to play football. I had no idea. It turned 20:30, 21:00. I asked my youngest son: "where is M8?" He said he didn't know. He knew, but he didn't tell me. It turned midnight...half past. Everyone slept, while I walked back and forth. I phoned him, it was turned off. At 01:00 I woke one of his brothers. I asked: "why hasn't your brother come home?" He said: "is she a girl you need to worry about? Don't worry. He will come". The morning came, "where is your brother?" He said: "I called him, he is with his friend". That calmed me down and I went to work. I came back midday. "Did M8 come?" His grandma said, he hasn't come home. I went back to work, we work in double shifts. When I came back at 18:00 I heard that he arrived home at 17:45. I saw my people standing in front of the house. I guessed that he got into a fight. She asked me: "Did they arrive?" A grandma of another boy. I replied: "Who arrived? Arrived where?" She said: "Don't you know?" I said: "I don't know anything". "They crossed on a boat. M8, together with our sons". My world exploded. "When?" She said: "Yesterday". My son, I haven't forgotten him, I can't forget him. A man of 32 years when he left. A man. He was born in 1982. So, now he would be how old? 35? He went he was 28, 29 years old. His younger brother is married now. My God, his wedding was hard to bear. My God. I don't like to stay at home. I prefer to always be out and about. Then at least I have a distraction. The more I stay at home, the more desperate I get. I feel the pain. His brothers feel it too. Because of their brother. [brother speaking]—<u>We try everything to at least find out if he is dead or alive. That's what we need now. Even if he is dead, they should bring us the body. That will bring us some relief, because until now we are still not there. Now it's a bit bitter. Especially the first year, we were all...I lost my job, I lost everything. I went searching for him everywhere. I became</u></p>
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				<p><u>depressed. I even had to go to a psychiatric hospital.</u> Our destiny is in the hands of God, but the government still has to do its job. And the other side too. They are doing nothing. How come the foreigners can come here with just an ID card and without paying? While we have to apply for a visa and pay for it. And in the end we don't even get the visa. Why? Are their children better than ours? Maybe they are better than our children. If one of them were to be kidnapped here, the whole world would be looking for them. The whole world. And our children, what about them?</p>
9	M9	Missing Since 24/05/2007	<i>P9 (Mother of Missing Man)</i>	<p>M9 was born on September 27th, 1979, he grew with his brothers. As a young child, he was very vivacious. He loved to play. He attended school till the second year of higher education. He dropped out because of the house where we lived. We stayed with an uncle of his and the place was very small, so this situation did not allow him to finish his studies. When we moved to this house, he had dreams, like all young people his age. He wanted to work, to dress well. He was very nice and very sweet. It wasn't clear that he wanted to leave. He wanted to live a normal life, like all of his brothers. But unfortunately, all the doors became closed off to him. And in the crossing, he saw the only and the opportunity to leave. To go Europe to make a future for himself. Even today, I don't know what could have been the real reasons for his leaving. Because he lived a normal life together with his brothers. They all were in the same situation, they ate, they slept. There was their father's pension and with that little, we all tried to survive! Sometimes he worked, sometimes not. He became somewhat nervous and began to say; "I don't want to live like this. I don't want to always ask mom for our father's pension money! I want to feel fulfilled, I want to work, I want to help my mom who tired herself out to raise us. Especially since our father died and our mom raised us by herself. poor mom. We must give her something back, at least". He had dreams like all the young people of his age. Here in Algeria, there is</p>

				<p>no work, he couldn't even get his father's job. He sent so many applications, everywhere without any result unfortunately! He saw, in the crossing, the only solution to make something of himself. He didn't warn me of his leaving, he had a stand, it was going pretty well. He didn't say anything to me about his leaving. Only on the day he left, his brother told me: "Look, Mom, M9 left on a boat". Over five days, we waited and looked for news of him. There was no communication. Finally, on the fifth day he called and told me. Mom, our boat has stopped, we're stuck in the middle of the sea. He don't really know where we are. Tunisia, it looks like. We've stopped, but I don't know where. He called us right on the phone, at midnight. He spoke with me and asked me to pray for them! I asked him, should we warn someone. He said, Mom, pray for us. And I put his brother on the phone. He talked to him, too. And he told him that it was seven of them and that they had been blocked, but they didn't know where or by whom! From that moment, communication has stopped and we don't have any more news of him! He told me personally, he kept saying, "pray for us because we've been arrested". The next day, his brother went, Boubekeur from the collective of parents of missing people to the Coast Guard command. They started a search and someone from the Coast Guard told them: We received a bulletin which says that it looks like your children were stopped in Tunisia! So, his brother and Boubekeur to Tunisia. When they arrived, the Tunisian military said that there had been no bulletin! We know nothing of these young men! It was 7 of them on the boat, all together, when the Tunisian guard stopped them. They took them to the hospital, where then they declared that on the boat there was only one person who was actually dead! The Tunisian Guard informed the parents of the deceased young man. In the meantime, my son, together with Boubekeur told the Tunisian military "Look: the deceased young man was with our sons!" They replied, <u>"Your sons are shipwrecked, and we have no</u></p>
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				<p><u>news of them!" And we asked "How come there aren't even any corpses?! The sea would have given them back. How come there isn't even one corpse?!"</u> The Tunisian military said that they didn't know anything! Mister Boubekur, together with my son M9, during those days, went back and forth to Tunisia. Every now and then they came back with some pieces of news that said that our sons were stopped, taken to the hospital and then to jail! But the Tunisian authorities kept refuting and denying any information. <u>Since that moment, 11 years have passed but we never stopped looking for them. Mr. Boubekur and my M9, they had no more news! The Tunisian authorities don't want to admit anything and they continue to deny us the truth. Our lives since he left...His presence never left the house! We get up talking to him. I often get mixed up and call his brothers by his name, M9. I had pictures of him on all the walls. But because his brothers were getting upset when they saw these pictures, I took them down! Wherever I turn, I see his image. When I sleep, I always see him in my dreams. We don't spend any holiday in a merry way. His absence is ever-present. We will never forget M9. Almost 11 years have gone by, but it's as if he left yesterday. This tragedy is still alive.</u> No holiday goes by as it normally would. We always miss M9. Because I don't to upset his brothers, I put on a brave face and hold back. Since M9 left, I no longer cook dishes he liked. My poor children, I took away from them all the dishes that M9 liked because every time I would talk their heads off, saying "M9 liked this". When he was here, he was a lot of fun. He was the funniest one in the house! There was a lot of happiness in this house. And he really was the jokester in the family. He was very sweet, and responsible too and selfless with his brothers. <u>It seems like he left yesterday. And we have not forgotten him!</u></p>
10	M10	Missing since 14/03/2011	P10 (Mother of Missing Man)	My name is P10, I was born on September 18 th , 1962. I have 6 children, 3 boys and 3 girls. I used to be a driving school instructor. My children and I were

				<p>living in Tunisia, while my husband has been living in France for 30 years. M10 is the most lively among my children. He only does what he likes and does not listen to anyone. Even if he knows he will be punished, he does it anyway. He says 'I do as I like, you are free to punish me'. The day he left home he was 18. He was studying to be a hairdresser and he was able to take a diploma in hairdressing. I have a daughter living in France; she is a hairdresser too. His dream was to reach her and open a men's and women's hair salon together. The day when he left home, he knew where he wanted to go, not left or right. He was going to Paris, to his sister's. When my son left at 5 am, he phoned me. I thought he was at his uncle's. He phoned and told me "give me your blessing, I'm at sea. Then I understood. Question: Did he phone you from the sea? He phoned me from the sea. At 9:30 pm he phoned us again and said "we arrived safely thank God". We are on a hill, we'll phone you later and communication cut off. Then there has been no more news. Everyday, we used to go to the Ministry of Foreign Affairs, hoping they had information. After 25 days, a video was released on Euronews channel, the one I gave you. My children and grandchildren first watched it in Germany. My grandchildren sent it to my children in France. They later tell me 'Mom, open Facebook. What's up? What's not there? When we open Facebook, we see those images with our son putting his hand to his throat and he says 'No Tunisia, Tunisia no!' What does the hand like this mean? It means kill me, but I don't go back to Tunisia. My son meant: you can kill me, but I will not go back to Tunisia'. How do we live now? We do not celebrate holidays as people do, so other Muslims do. We are in exile in a foreign land. We knocked on many doors and no one told us 'come in, welcome. No one had mercy on us. No one asked about us. Neither grown-ups nor children as if we were not Tunisians nor human beings'. Does human blood have so little value. <u>We do not ask for the impossible, we want our children. This is the message</u></p>
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				<p><u>I want to pass on, we want our children. We want our children, whatever the price, whatever situation they are in. Were they sentenced to 20 years in prison? Let us see them wherever they are. Did they die? Then give them back to us. They lost arms, legs, eyes...it doesn't matter! The important thing: give us peace. We want to rest. We are tired, we are very tired. My son is a man now, 18 years old, he's a man! I can't forget him, impossible. If they tell me he's in the middle of the sea. I'm ready, I go there walking, to the bottom of the sea. I get where I can, I don't care whether I live or die. I don't need anything in this world except for the truth about my son.</u></p>
11	M11	Missing Since 15/03/2007	P11 (Father and Mother of Missing Man)	<p>M11, my son was born in Annaba on August 1, 1984. He lived with us. Everything was fine. He didn't have any problems. He is a very even-tempered boy. Everyone liked him very much. Our neighbours cared for him. As for his education, he got as far as the 8th grade. He was into school very much like most boys his age. He did some small jobs here and there. The, one year, I took him to work with me as apprentice carpenter. After he finished his apprenticeship, unfortunately, he couldn't find a steady job. He was a very kind boy, very calm and pleasant. He always smiled. The neighbours cared for him, you can ask anyone. He was always glad to give a hand to neighbours. He was generous. [MOTHER SPEAKING NOW]...When I see people in the neighbourhood, they have only good things to say about him. I shun their words, I don't want to hear them talking about him, poor boy! Because he only dreamed to achieve something in life. He always said he wanted to achieve something in life. He could not stay in this situation. He said 'look at what other boys my age have become, how far they got and I'm still here'. That's it. I grew tired of reassuring him, of telling him to be patient. I thought he was just saying that, but he meant it. I kept encouraging him 'be patient, be patient'. Unfortunately, tragedy struck. That day, I came back from work around</p>

				<p>half past four in the evening and he wasn't there. [FATHER SPEAKING NOW]...I asked his brothers where he was but they covered for him. They didn't tell me anything. The eldest brother pretended not to know a thing. Instead, the youngest one told me that M11 had left the day before on a boat. I asked him 'How did he do that?' And he answered 'they left at 2 o'clock in the morning. I carried his bag, the one he had hidden in the shower some days before'. I felt disoriented. I felt lost. I was speechless! Then some boys called me, saying I should tune in the decoder to an Italian channel showing some guys who got off a boat in Italy. In fact, a boy told me he saw on the same channel, some boats that had reached Italy. One of these boats was the first of the three that had left here together. The second one didn't make it and turned back, while the third, the one with my son on board was lost. At that point, his brother left for Tunisia right away to look for him. My passport had expired, so his brother went. That day in 2007 was a religious holiday for us. M11's brother was with the relatives of other boys who were on the same boat. When they arrived at the Tunisian Coast Guard command, they were told 'no visits today, come back tomorrow and you have to bring an authorisation from a judge. My son and the others questioned the prison guards to make sure our kids were there. The guards told them it was not possible. Our people insisted and at some point, a lady officer showed up, I can't tell if she was a supervisor or one of the prison directors. Our people asked again if they could check whether our kids were there. She told them it was not visiting time. The only thing she said was that there were two very young boys of the same age who were together in the same cell while others were staying separately. One of the relatives who was there said 'may I show you a photograph, just to see if my son is one of them?' She looked at the picture and confirmed that it was him. That boy had left with my son. She said 'Tomorrow, bring the authorization and you can visit them'. They went back as</p>
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				<p>soon as an authorisation was arranged through a local attorney. The prison's directors stopped them from entering the jail. And they denied having said all those things, they denied everything, everything. In May, I went back myself with an Algerian attorney who had some contacts with a local Tunisian law firm. Right after we got to that attorney's office, his secretary said 'I was just looking for you, counsel'. The Algerian attorney answered 'don't say anything to me. Here's the father of the one of those boys, you can say everything to him'. She asked me my son's name and I gave her the file. She told me 'your children are fine, they have been stopped here in Tunisia. There are two younger boys who are together and other four, the older ones who are together too. They have everything they need, they ran into some trouble, some unpleasant issues. I can't tell you whether it was torture or something like that. Anyway, the tricky part is over. Yesterday, they were transferred to an unknown location. We don't know where, something to do with National Security, with terrorism. Don't look for them anymore'. They said this to me. After that my family has been very upset. Nobody knows what to do anymore. The happiness we had, the way we felt before, it's all gone. Like we say in Algeria 'mind your own business'. A holiday may come around, and we don't realise it. [MOTHER SPEAKING NOW]...we would prefer that the holiday did not come at all. We'd rather not have holidays, there's no point. <u>During Ramadan, I always keep M11's picture right in front of us while we eat. His brothers asked me 'why do you do that?'. I said 'maybe he is watching over us while we are breaking the fast'. We're tired. My heart can't take it anymore. I don't know which way to turn. We don't know what else to do.</u> We tried in every way we could. We looked for him all over Tunisia but nothing. <u>I've crying for 10 years now, I have almost gone blind. Ten years, I've been crying, I have no more tears. Everything has changed. This is hell. A hell that I can't even explain to you, that you can't even imagine.</u></p>
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12	M12	Missing since 24/05/2007	<i>P12 (Father of Missing Man)</i>	<p>My name is P12. I was born in 1948. I live in Annaba. I have 4 sons and one daughter. All my children studied, M12 too. He started working as a bus ticket collector. He worked in a company for a while, then in another one. You know illegal employment is. M12 was calm, even-tempered and enjoyed joking a lot. He confided in his mother. He told her he wanted to go abroad. He told her 'my friend is a sailor and works on a liner; avoiding telling her he was going by boat. If he had told her he was going by boat, she would not have let him go. Four months later he mentioned again his intention of going abroad with his sailor friend. "When I get there safe and sound, I'll call you'. On May 24 I came back home and he had already planned to leave that evening. There were seven of them. I learnt later on that day they are seven. His brother Soufian came into the house and stared at his mother. I asked him 'what's wrong with you?'. He turned to his mother and said 'why should he leave in May when he knows that the weather is always so bad?'. That's how I learnt my son had taken a boat. They left on May 24, nothing on 25, nothing on 26, nothing on 27, nothing on 28. On May 29, at 11:22 pm a friend who was in the same boat as M12 called his brother. And when he called, he spoke both with his mother and his brother. He told them 'call for help'. Around midnight or just after midnight, this brother came to my house. He informed me and we went to the Annaba Coast Guard to alert them. We found a Coast Guard commander. He told us that there was nothing on the Algerian side. He also told us 'I have a Tunisian colleague I could call'. When he called him, he told him 'Yes there is one boat found near Kelibia. There are seven people on board and one of them is very tired. When we went to Kelibia in Tunisia, we were told they had found only one person called HadeF Riad. What about the other six people? It seemed they were being held in custody to be interrogated. We have been going everywhere, in Tunis, Tunisian lawyers. <u>Since my son disappeared, I became diabetic and I take</u></p>
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				<u>insulin. I have hypertension, cholesterol, arthritis and I feel upset, I have a heart problem. I have three veins obstructed near the heart and his mother died. His mother cried out her son's name when she was dying. I have lots of memories of my son. I remember how he behaves, how he sits down at a table and has his breakfast. Sometimes when I come home and I find him eating, he tells me 'Dad come and eat with me'. Do you think I can forget my son? My children are my life.</u>
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Appendix II: Table Keys Showing the Interview Participants and the Missing Migrants

Names of Interview Participants (Anonymised)	Names of the Missing Migrants (Anonymised)
P1 — Interview Participant 1	M1 —Missing Migrant 1
P2 — Interview Participant 2	M2 — Missing Migrant 2
P3 — Interview Participant 3	M3 — Missing Migrant 3
P4 — Interview Participant 4	M4 — Missing Migrant 4
P5 — Interview Participant 5	M5 — Missing Migrant 5
P6 — Interview Participant 6	M6 — Missing Migrant 6
P7 — Interview Participant 7	M7 — Missing Migrant 7
P8 — Interview Participant 8	M8 — Missing Migrant 8
P9 — Interview Participant 9	M9 — Missing Migrant 9
P10 —Interview Participant 10	M10 —Missing Migrant 10
P11 —Interview Participant 11	M11 —Missing Migrant 11
P12 —Interview Participant 12	M12 —Missing Migrant 12

Appendix III: Table Showing the Compositions of the Interviews

Element	Source	Method of Analysis	Access	No of Interviews Analysed	Nationality of Families Interviewed
Secondary Interviews with Families of Missing Migrants	Missing at the Borders Website	Thematic Analysis of the Secondary Narrative Interviews	Public Domain	12	Tunisia & Algeria

Appendix IV: Key Themes that Emerged from the Secondary Narrative Interviews

S/N	Key Themes
1	Clouds of Ambiguity Over the Status of the Missing: Alive or Dead
2	Freezing of the Process of Mourning, Grief and Closure
3	Hope and Despair Pull in Opposite Direction
4	Systemic Effects of Ambiguous Loss on Affected Families
5	Legal-Psychosocial Needs of Families
6	Coping and Resilience Mechanisms of Families

Appendix V: Bournemouth University Ethics Checklist Approval



Research Ethics Checklist

About Your Checklist	
Ethics ID	35595
Date Created	18/01/2021 01:35:34
Status	Approved
Date Approved	01/02/2021 11:21:02
Date Submitted	19/01/2021 22:17:56
Risk	Low

Researcher Details	
Name	Luke Eda
Faculty	Faculty of Media & Communication
Status	Postgraduate Research (MRes, MPhil, PhD, DProf, EngD, EdD)
Course	Postgraduate Research - FMC
Have you received funding to support this research project?	Yes
Is this external funding?	No
Is this internal funding?	Yes
Please provide the Internal Funding Body	BU PhD Studentship

Project Details	
Title	Missing Migrants: Legal Obligations and Psychosocial Implications for Families
Start Date of Project	18/09/2017
End Date of Project	18/03/2021
Proposed Start Date of Data Collection	29/01/2021
Original Supervisor	Melanie Klinkner
Approver	Christopher Pullen
Summary - no more than 500 words (including detail on background methodology, sample, outcomes, etc.)	
<p>This research is an analysis of the responses and obligations of states towards missing migrants and their surviving families from a legal, policy and psychosocial perspective in the context of the Europe migrant crisis. The study considers, in general, the legal and policy frameworks and specific responses of states to missing migrants at the international (UN), regional (EU) and national (UK) levels. Governed by the UK migration policies in relation to missing migrants, five principal lines of inquiry are pursued in the study: (a) what should be the appropriate legal and policy responses of states to the problem of missing migrants; (b) why migrants die and go missing in transnational migration; (c) what obligations states have under international law towards missing migrants; (d) how transnationally</p>	

2 of 2

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effective the UK migration policies are towards missing migrants; and (e) how psychosocially responsible/aware the UK migration policies are in relation to missing migrants. The research utilises a mix of two research methods namely—the New Haven School and Thematic Psychosocial Legal Analysis of Secondary Narrative Interviews with families of missing migrants. The project is principally desk-based research and although the research involves an analysis of secondary narrative interviews data that are already in the public domain, it does not involve a fresh interview of human participants or fresh collection of primary data in any way.

None of the filter questions apply to my study

I am confirming that my proposed project does not:

- Involve human participants
- Involve the use of human tissue
- Involve medical research requiring NHS ethical / REC Approval
- Involve the use of animals (or tissues/fluids derived from animals)
- Involve access to identifiable personal data for living individuals not already in the public domain
- Involve increased danger of physical or psychological harm for researcher(s) or subject(s)
- Raise any ethical issues associated with the use of genetically modified organisms

On this basis, my proposed project does not require a formal ethics review.

If any changes to the project involve any of the criteria above, I undertake to resubmit the project for formal ethical approval.