

LEGAL FRAMEWORK CONCERNING MISSING AND DECEASED MIGRANTS TRAVELING FROM AFRICA TO SOUTH- WEST EUROPE



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EuroMed Rights, founded in 1997, is a network that brings together 68 organizations from 30 countries. Its work aims to promote and protect human rights and democracy in the southern and eastern Mediterranean regions, while also influencing the policies of key European actors towards these regions. The network pursues its mission through networking and exchange among its members and partners, capacity-building to improve their skills, monitoring and documenting human rights violations and abuses, as well as advocacy work.

EAAF (Equipo Argentino de Antropología Forense) is an Argentine nonprofit, non-governmental organization that applies forensic sciences to cases of human rights violations by providing independent forensic investigations to help victims' families access their rights to justice and truth and potentially recover the remains of their missing relatives. Since its founding in 1984, just months after the fall of the last Argentine dictatorship, EAAF has pioneered the application of forensic sciences to human rights investigations in over 60 countries, primarily focusing on enforced disappearances. The Team has made thousands of identifications of victims of human rights violations and provided answers to their families; supplied evidence to justice proceedings that have imprisoned dictators and senior military officers in nine countries; trained thousands of victims' families, government forensic practitioners, judges, police, human rights defenders, and journalists; and contributed to the improvement of numerous internationally accepted forensic protocols, including those regarding the investigation of femicides and the deaths of missing migrants. EAAF's investigation of disappearances under democracy dates to its first days as a team.

University of Chicago Law School Global Human Rights (GHRC) works alongside partners and communities to advance justice and address the inequalities and structural disparities that lead to human rights violations worldwide. The GHRC uses diverse tactics and interdisciplinary methods to tackle pressing and under-addressed human rights issues. The work of the GHRC varies but includes investigating and advancing accountability for mass atrocities and armed conflict, addressing the impacts of colonialism, advocating for equality and non-discrimination, and advancing socio-economic rights.


The University of Chicago Law School Immigrants' Rights Clinic is a U.S.-based university legal clinic that provides legal representation to immigrant communities in Chicago and around the country, including individual representation of immigrants in removal proceedings, immigration-related complex federal litigation, and policy and community education projects on behalf of community-based organizations.

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I. INTRODUCTION

Thousands of persons go missing or die each year attempting to cross international borders in Africa and to Europe in search of safety and better opportunities.¹ Migrant trends from Africa have been steadily increasing for the past two decades², and are expected to continue to grow due in part to climate disasters, conflict, inequality, socio-economic harms, and human rights violations. As a result of this increase in migration, receiving and transit countries are increasingly becoming more restrictive, leading to migrants taking ever more dangerous routes.

Despite the broad recognition among States of the importance and need to address the situation of missing and deceased migrants, there is a lack of formal coordination and procedures among all relevant stakeholders relating to missing migrants, and in some instances, even within countries, poor or non-existent information sharing. This is exacerbated by a lack of strong legal frameworks which protect missing and deceased migrants.

This report, analyzing existing legal frameworks concerning missing and deceased migrants traveling from Africa to South-West Europe, draws upon an examination of relevant international law, including international refugee law, international human rights law, international humanitarian law, international criminal law, and international maritime law. It also looks at regional frameworks in both Europe and Africa. Finally, it draws on legal case studies in Morocco, Senegal, Spain, Tunisia, and The Gambia.

This report is not intended to provide a fully comprehensive overview of each potential law that pertains to missing and deceased migrants but instead aims to provide a high-level overview of the relevant legal frameworks. Specific country-level case studies related to Morocco, Tunisia, and Spain will be published in the coming months, to accompany this report.

¹ International Organization for Migration, Missing Migrants Project, <https://missingmigrants.iom.int/region/africa> (last accessed June 8, 2025). The precise number of missing migrants cross from Africa into Europe is not known, and published numbers likely represent a significant undercount. See also, INT'L COMMITTEE OF THE RED CROSS, COUNTING THE DEAD: HOW REGISTERED DEATHS OF MIGRANTS IN THE SOUTHERN EUROPEAN SEA BORDER PROVIDE ONLY A GLIMPSE OF THE ISSUE (Dec. 15, 2022) (building upon a prior study conducted by the University of Amsterdam)

² AFRICA CENTER FOR STRATEGIC STUDIES, African Migration Trends to Watch in 2023 (Jan. 9, 2023), <https://africacenter.org/spotlight/african-migration-trends-to-watch-in-2023/>

II. THE INTERNATIONAL LEGAL FRAMEWORK

A. DEFINING “MISSING MIGRANTS” UNDER INTERNATIONAL LAW

Under international law, the term ‘missing migrants’ is not defined in treaties or binding legal agreements, and thus, there are no specific provisions within treaty-law or customary international law for dealing with missing or deceased migrants.

International human rights law provides some definitions and legal frameworks for different categories of migrants – most notably refugees and asylum seekers, as well as for example, migrant workers. However, the reasons that individuals seek to live and work in countries that are not their nationality, are often varied and broader than the narrow confines of refugee rights, and may include economic or work-related reasons, climate change related reasons, and others.

Further, international humanitarian law – the body of law that pertains to situations of armed conflict - defines a person as “missing” as someone whose whereabouts are unknown as a result of armed conflict and contains requirements for parties to the conflict to take with respect to the missing and deceased. However, many migrants do not go missing in or due to armed conflict and therefore cannot in many circumstances rely upon these protections.

Thus, the protections for migrants who go missing or die while seeking to make the migratory journey from across the African continent to Southwest Europe need to be inferred from the broad protections within a range of international legal regimes, international refugee law, international human rights law, international maritime law, and where relevant, international humanitarian law and international criminal law. These are explained in greater detail below.

“Under international law, the term ‘missing migrants’ is not defined in treaties or binding legal agreements”



B. INTERNATIONAL REFUGEE LAW

Prior to the twentieth century, there were relatively few restrictions on the freedom of persons to move to and resettle in countries which were not their own. Today that ability to legally travel to and settle in other countries is significantly limited. However, international refugee law has been developed for dealing with specific categories of persons who are forced to leave their countries and thus qualify for protection under international law. The 1951 Refugee Convention, and 1967 Protocol to the Convention are the foundational documents which set out obligations owed to refugees.

Article 1 of the 1951 Refugee Convention defines a refugee as any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality” and owing to such fear is unable or unwilling to return to their country.³ Many countries have, within their national legislation, broadened the acceptable grounds for eligibility for refugee and asylum status, and clarified what may constitute “acts of persecution” under which persons may qualify for refugee status, and interpreted this definition in different ways.⁴

Critical to refugee protections is the principle of non-refoulement: which prohibits a State from returning a person to a country where they face serious threats to their life, real risks of persecution or threats of serious human rights violations.⁵

Additionally, it is impermissible to render a person “stateless” – without a legal nationality. However, at least 4.4 million persons around the world are today stateless, and thus lack basic rights.⁶ Finally, there are also special protections for unaccompanied children and minors.⁷

Around the world, States are increasingly taking measures to avoid having to host refugees and asylum seekers on their territory, including by for example intercepting boats while on international waters or making it more difficult for persons to enter their territory (although it should be noted that abandoning a person on the high seas or intercepting ships and returning them to states where they would face a risk of harm amounts to a refoulement).⁸

It should be noted that many persons who seek to migrate to other countries do not fall into the category of refugees. Instead, persons may migrate for economic reasons, due to extreme poverty, or for a myriad of other reasons. Many migrants do so using regular pathways which facilitate migration, but due to the limited number of regular pathways available, many people are forced to resort to “irregular”, dangerous ways. Increasingly, these routes are getting more precarious and may result in them losing their lives.

³ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Art 1.

⁴ See, e.g. 2024/1347, Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council.

⁵ See, Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Art 33(1). Multiple other instruments also require states to respect the principle of non-refoulement.

⁶ UNHCR, Statelessness around the world, <https://www.unhcr.org/ibelong/statelessness-around-the-world/> (last visited July 2, 2025).

⁷ Many of these derive from the Convention on Rights of the Child. See generally, INTERNATIONAL ORGANIZATION FOR MIGRATION INTERNATIONAL MIGRATION LAW UNIT, IML INFORMATION NOTE ON THE PROTECTION OF UNACCOMPANIED MIGRANT CHILDREN (Oct. 2016), <https://www.iom.int/sites/g/files/tmzbd12616/files/2018-07/IML-Information-Note-Protection-of-Unaccompanied-Migrant-Children.pdf>

⁸ Hirsi Jamaa and others v. Italy, European Court of Human Rights (2012). For further information about the ways in which boats are intercepted regularly and set back, see e.g. BORDER FORENSICS, AIRBORNE COMPLICITY – FRONTX AERIAL SURVEILLANCE ENABLES ABUSE (Dec. 12, 2022) <https://www.borderforensics.org/investigations/airborne-complicity/>

When the international refugee architecture was created after World War II, the obligations and protections of persons who go missing or die while seeking to migrate, was not considered. Thus, within the core international refugee documents, definitions for, and the rights of, missing and deceased persons are not included.

The principle of non-refoulement prohibits a State from returning a person to a country where they face serious threats to their life, real risks of persecution or threats of serious human rights violations.

C. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law sets out the broad protections which States are required to respect for all persons subject to their jurisdiction or on their territory. In general, human rights are protections which States owe to persons simply by virtue of being human beings, and apply irrespective of nationality, race, religion, gender, or other aspects of identity.

At the outset, it is important to note that all persons have liberty of movement, and are free to leave any country, including their own.⁹ Further, persons in a country not their own lawfully may only in general be expelled from that country as a result of a decision reached in accordance with the law.¹⁰ However, in practice, the closing of borders makes it significantly more difficult for individuals to be able to meaningfully exercise their right to leave their own countries, which contributes to increasing numbers of missing and deceased migrants.

Second, violations of human rights are serious drivers of migration. Violations of the right to life, liberty and security of the person; cruel, inhuman or degrading treatment; discrimination; a failure to meaningfully address socio-economic rights, among other issues, cause people to leave their countries in search of better opportunities.

Although not exhaustive, some key human rights which apply to missing migrants include:

THE RIGHT TO LIFE

The right to life is considered to be a fundamental right of international law, from which derogations are not permitted.¹¹ States' duty to protect the right to life consists of both a substantive obligation which sets out the extremely limited and strict instances in which a deprivation of a life might be permissible, which must be set out in law; and a procedural obligation to investigate potentially unlawful, or suspicious, deaths.¹² States must respect the right to life – i.e. refrain from engaging in conduct which would result in someone being foreseeably killed, and take positive measures to protect individuals from being killed by others subject to the States' jurisdiction.

The Human Rights Committee, the mechanism charged with monitoring treaty compliance for the International Covenant on Civil and Political Rights (which enshrines the right to life in international law), has developed interpretive guidance for what is required to ensure that the right to life is upheld. In this guidance it notes that States must take "special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence."¹³ Among those who are included are unaccompanied migrant children, displaced persons, asylum seekers, refugees, and stateless persons.

The 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council, and the 2016 revised Minnesota Protocol on the Investigation of Potentially Unlawful Death set out the investigative standards, procedures, and

guidelines for the proper investigation under international law. A State's duty to investigate is triggered where it knows or should have known of any potentially unlawful death,¹⁴ even when suspicious deaths are caused by unknown or private persons, regardless of suspected state involvement or criminal action. Suspicious death investigations must be (i) prompt, (ii) effective and thorough, (iii) independent and impartial, and (iv) transparent.¹⁵ The revised Minnesota Protocol notes that ensuring the participation of family members is crucial to an effective investigation and sets out ways in which family participation can be achieved.¹⁶ This includes ensuring that family members are not subject to threats or intimidation; that when the identity of a deceased person is determined, family members are immediately notified; and that following necessary investigative procedures "human remains should be returned to family members, allowing them to dispose of the deceased according to their beliefs."¹⁷

Thus, given that many migrants may have died under what may qualify as an unlawful killing under international law, there are both obligations to prevent these deaths, and where they occur, requirements to effectively search for and investigate these deaths. This process must also include family members in the process.

¹⁴ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 15.

¹⁵ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 22.

¹⁶ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 35-37.

¹⁷ The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), 37.



⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art 12.

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art 13.

¹¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 6. See also, Hum. Rts. Comm., General Comment No. 36, Art. 6 (Right to Life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

¹² Hum. Rts. Comm., General Comment No. 36, Art. 6 (Right to Life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018); Christof Heyns, et al., Investigating Potentially Unlawful Death under International Law: The 2016 Minnesota Protocol, 52, THE INTERNATIONAL LAWYER 47-80 (2019).

¹³ Hum. Rts. Comm., General Comment No. 36, Art. 6 (Right to Life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018)23 (citation omitted).

FREEDOM FROM TORTURE OR CRUEL, INHUMAN, AND DEGRADING TREATMENT

The absolute prohibition against torture, or cruel, inhuman, and degrading treatment (CIDT) requires States to take measures to both refrain from and prevent torture or CIDT.

Under international law, torture is defined as: “act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁸

During their journey, many migrants suffer from torture or CIDT at some point. For example, they may be kept in detention sites, where they are subjected to horrific conditions, including severe pain and suffering. Their families may also not know about their fate and whereabouts and suffer tremendous anguish.

Thus, the prohibition against torture and CIDT provides some protection to the migrant themselves. However, it can also extend to family members – especially for migrants who are missing and deceased. Courts have found that in instances where the body of a missing person was significantly mistreated, or where the State had forcibly disappeared and killed someone and continued to hide the body, the impact of the family may be so severe that it amounts to CIDT under international law.¹⁹

FREEDOM FROM ENFORCED DISAPPEARANCES

A particular instance, in which there may be overlap with migrants, is the situation of enforced disappearances – which refers to “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”²⁰

Disappearances in the context of migration are becoming an increasingly more common occurrence, especially due to the fact that they are often fleeing armed conflict, violence, or socioeconomic hardships; crimes against migrants are often unpunished; and militarization of borders increases the vulnerability of migrants.²¹

All persons however, have a right not to be forcibly disappeared, and States must seek to immediately clarify the fate and whereabouts of a person who is presumably disappeared. The Committee on Enforced Disappearances, the mechanism charged with upholding the International Convention

18 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, Art 1.
19 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Protection of the Dead, U.N. Doc. A/HRC/56/56 (Apr. 25, 2024); Inter-American Court of Human Rights, Nicholas Blake vs Guatemala, judgment of 24 January 1998 (Merits), 112-116.
20 International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3., Art 2.
21 See generally, Bernard Duhaime and Andréanne Thibault, Protection of Migrants from Enforced Disappearance: A Human Rights Perspective, 99, INT’L REV OF THE RED CROSS (2017).

for the Protection of All Persons from Enforced Disappearance has issued guiding principles, and especially the General comment No. 1 (2023) on enforced disappearance in the context of migration CED/C/GC/1, for the search for disappeared persons, which specifically notes that the “search should take into account the particular vulnerability of migrants.”²² While legally non-binding, these principles serve as key best practices to keep in mind. In particular, taking into account the specific vulnerabilities of migrants, the principles include:

- States that send and receive migrants and refugees should adopt specific search mechanisms that take account of the difficulties associated with migration situations. They should offer guarantees and safe conditions to persons who can give testimony about enforced disappearances linked to migration.

- The States concerned should develop cooperation agreements and establish competent authorities to allow for effective coordination in the search for disappeared persons at each stage of migration. Cooperation between search authorities in countries of origin, transit and destination should ensure the rapid and secure exchange of information and documentation that may help to locate disappeared persons in the country of transit or destination. In full compliance with international standards on non-refoulement, States should ensure that the registration of migrants at border controls involves the individual examination of all applications for entry so as to allow for an effective search in the event of a person’s disappearance.

- Specific instruments are required to ensure the effective participation in search processes, from their countries of residence, of family members and persons close to persons subjected to disappearance on migration routes. Their knowledge and that of organizations with experience in supporting migrants should be included in the design of strategies and measures for the search for disappeared migrants.

- States should adopt policies for the protection of victims of enforced disappearance at all stages of migration in order to avoid their revictimization, in particular when the victims are women and/or unaccompanied minors.

Further, States can have responsibility for missing migrants when their immigration procedures cause or do not properly prevent enforced disappearances. States’ irregular and opaque migrant detention procedures can leave migrants more vulnerable to enforced disappearance – thereby triggering state responsibility.²³ Also state-directed irregular deportation can create circumstances of enforced disappearances – not registering migrants, forcing migrants to cross borders to remote areas with no means of survival, or pushing back or directly transferring the migrant back to the States of origin without proper procedures like asylum processes.²⁴

The improper detention and deportation procedures particularly trigger State responsibility to prevent enforced disappearances. The Committee on Enforced Disappearances has clarified some of the preventive mechanisms that States must undertake, including the prohibition of the secret detention of migrants; the regular and systematic collection of data and statistics to understand the scale of the missing migrants problem; the adoption of evidence-based policies to foster access to regular, safe and orderly migration; the explicit incorporation of the non-derogable principle of non-refoulement; the

22 UN Office of High Commissioner for Human Rights, Guiding Principles for the Search for Disappeared Persons, Principle 9 (Aug. 28, 2019), <https://www.ohchr.org/en/documents/legal-standards-and-guidelines/guiding-principles-search-disappeared-persons>.
23 Bernard Duhaime and Andréanne Thibault, Protection of Migrants from Enforced Disappearance: A Human Rights Perspective, 99, INT’L REV OF THE RED CROSS (2017), 577-579.
24 Bernard Duhaime and Andréanne Thibault, Protection of Migrants from Enforced Disappearance: A Human Rights Perspective, 99, INT’L REV OF THE RED CROSS (2017), 580-582.

obligation to search and investigate; the obligation to ensure that victims of enforced disappearance can access the right to truth and justice; and training and cooperation among State parties.²⁵

Thus, the protections owed to disappeared migrants and their families are robust. However, not all situations in which migrants are missing or disappeared will fall into this context, which limits the scope of applicability. Further, the relatively lower uptake of the International Convention for the Protection of All Persons from Enforced Disappearance means that in practice, many families of missing and disappeared migrants will not be able to use the protections of this Convention, except where it also amounts to customary international law.

RIGHTS OF CHILDREN

In addition to everyone's right to life, children and thus child migrants have additional rights under international law. Nearly every country has ratified the Convention on the Rights of the Child. The Convention requires that the "best interests of the child should be a primary consideration, and that states should 'respect the right of the child to preserve his or her identity, including name, ...and family relations...'"²⁶

Additionally, for unaccompanied minors, the CRC requires States to "take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border, to carry out tracing activities and, where possible and if in the child's best interest, to reunify separated and unaccompanied children with their families as soon as possible."²⁷

RIGHTS OF MIGRANT WORKERS

Finally, there are specific protections for the rights of migrant workers, under the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families²⁸. The Convention explicitly mentions obligations toward deceased migrants, and requires State parties to facilitate the repatriation to States of origin of the remains of deceased migrant workers or members of their families, where necessary.²⁹

CONCLUSION

While there are not explicit and specific obligations for missing and deceased migrants the existing human rights framework does contain requirements for all States to ensure that the fundamental rights of migrants and their families are upheld. These rights require States to take measures to search for missing migrants, identify deceased migrants, and treat their families with dignity and respect.

²⁵ U.N. Comm. on Enforced Disappearance, General Comment No. 1 on Enforced Disappearance in the Context of Migration, U.N. Doc. CED/C/GC/1 (Oct. 26, 2023), <https://www.ohchr.org/en/treaty-bodies/ced/general-comment-no-1-enforced-disappearances-context-migration>.

²⁶ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3., Art 3 and Art 8.

²⁷ Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, U.N. Doc. CRC/GC/2005/6, ¶ 13 (Sept. 1, 2005), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-6-treatment-unaccompanied-and>.

²⁸ It should be noted that this treaty has only been ratified by 58 States, and thus will not apply more broadly.

²⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3., Art 71.

D. INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (IHL), or the laws of armed conflict, is a body of law which applies to both international and non-international armed conflicts and sets obligations toward all parties to the conflict (not just States). While other bodies of international law, including international refugee law and international human rights law continue to apply in situations of conflict, however, where there are two overlapping laws, IHL takes precedence during times of conflict.

Around the world, war and conflict is one of the major drivers of migration either forcibly or voluntarily. Thus, while "migrants" are not explicitly and specifically considered by IHL, many migrants may be in situations where IHL applies. This is because they either find themselves in a country which is experiencing ongoing armed conflict, or may benefit from continued obligations on parties to the conflict in the country which they are fleeing from.

Of significant importance are IHL obligations toward respect for the family, including the specific obligations towards the missing and the deceased, which are clearly defined under IHL.³⁰ While the specific rules differ slightly between international and non-international armed conflicts, in general the obligations stem from the right to respect of family life. Parties to both international and non-international armed conflict must take steps to account for persons who are reported as missing as a result of armed conflict, and to inform families of their fate.³¹ Further, all parties to the conflict must treat the dead with respect, which includes searching for missing and deceased persons, collecting their bodies, and recording all available information to facilitate identification, and respectfully handling the bodies of deceased persons.³²

³⁰ For a general overview of the International Humanitarian Law which applies to missing and deceased migrants, see, Helen Obregón Gieseken, The protection of migrants under international humanitarian law, 904 INTERNATIONAL REVIEW FOR THE RED CROSS (April 2017).

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, art 32; see also, Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 413 (Int'l Comm. of the Red Cross 2005) (Rule 113).

³² Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 413 (Int'l Comm. of the Red Cross 2005) (Rule 113).

Application of IHL to migrants

IHL may apply to migrants in the following situations:

Migrants located in a third country (not their own) experiencing armed conflict: in these situations, if migrants are not combatants (and thus are civilians), they are afforded the general protections owed to civilians in conflict. Some categories of migrants, including some refugees, may also have special protections in international armed conflicts.

Migrants fleeing conflicts: may benefit from obligations to take feasible measures to search for the missing, clarify their fate and whereabouts, restore family links, and account for the deceased.

E. INTERNATIONAL CRIMINAL LAW

International criminal law provides for *individual criminal accountability* (as opposed to the obligations upon the State or parties to the conflict in international human rights law and IHL respectively), for specifically defined crimes. These include war crimes, crimes against humanity, and genocide. Missing or deceased migrants may also have been subjected to these crimes, and thus their relatives may be able to seek accountability through international criminal law mechanisms.

Murder, committed with knowledge as part of a widespread or systematic attack against any civilian population, is considered to be a crime against humanity.³³ Further, “willful killing” and “outrages upon personal dignity” within both international and non-international armed conflicts are considered war crimes.³⁴ Outrages upon personal dignity include humiliating and degrading treatment, and can apply to a deceased body.

33 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90., Art 7(1)(a).

34 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90., Art 8(2)(a)(i); Art 8(2)(b)(xxi); Art 8(2)(c)(ii).



F. INTERNATIONAL MARITIME LAW

Where migrants go missing or die during sea crossings, International Maritime Law may apply. Under international law, masters of a ship have a duty to rescue – an obligation to assist “those in distress at sea” and governments have to coordinate and cooperate to release masters from obligations.³⁵ The International Convention on Maritime Search and Rescue divides seas into Search and Rescue Zones (SARs), directing Coastal States to take primary responsibility for responding to search and rescue incidents that occur within a certain region. The SAR Convention requires States to provide “overall coordination of such SAR zones, on receiving information that a person is in distress within their SAR zone, to take urgent steps to provide the most appropriate assistance available.”³⁶ Further, States who rescue persons at sea must then also ensure that they are treated according to other international laws, and thus migrants who qualify for refugee status cannot be expelled or returned to a country where they may face serious risk of persecution.

G. REGIONAL LAW PROTECTIONS

In addition to the international protections owed to migrants, regional law – both in Africa and Europe may apply, depending on the circumstances, nationality, and location of the migrant. As with the international legal framework, there is no specific binding treaties or provisions specific to “missing migrants.” Many of the protections within regional law mirror those in the international legal framework. This report does not address the regional legal framework in detail.

Two key initiatives and resolutions, while not legally binding (and thus considered “soft law”), are worth mentioning here.

First, in 2021, the African Commission on Human and Peoples’ Rights passed its “Resolution on missing migrants and refugees in Africa and the impact on their families.”³⁷ Among other things, the Commission resolution:

4. Calls on States Parties to take all possible measures to prevent migrants and refugees transiting or residing on their territory or under their jurisdiction from going missing, including preventing the separation of families, reuniting them where possible, as well as endeavoring to identify dead or missing persons, in accordance with applicable legal frameworks;

...

9. Calls upon the authorities of countries of origin, transit and destination, in collaboration with other States and concerned stakeholders, to standardize the collection and exchange of relevant information, to establish effective coordination mechanisms for the search for and identification of missing and deceased migrants and refugees, between authorities and concerned entities within and between countries, and to facilitate interaction with their families, in accordance with internationally accepted standards of data protection and privacy and further calls on States Parties to strengthen their forensic system capacity and standards and centralize data on missing persons and unidentified bodies at the national level, in

35 UNHCR, Rescue at Sea, 4-5, 11-12 (2015)

<https://www.unhcr.org/us/media/rescue-sea-guide-principles-and-practice-applied-migrants-and-refugees>; United Nations Convention On The Law Of The Sea (UNCLOS Art 98 (1)) (1982); International Convention For The Safety Of Life At Sea (SOLAS Convention regulation V/33.1) (1974).

36 OHCHR, Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea, 7 (2021).

37 Resolution on missing migrants and refugees in Africa and the impact on their families, ACHPR/Res. 486 (EXT.OS/XXXIII) 2021.

accordance with international norms and standards of forensic practice and data protection;

...

11. Further calls on States Parties to fulfil the right of the families of migrants and refugees to know the truth and to find answers in order to mourn and to end the climate of total impunity for human rights violations;

The resolution also calls for States to consider the impacts of their laws, policies, and actions on causing persons to go missing, and to work collaboratively with international experts and non-State actors to respond to the needs of missing migrants. Although this resolution is not legally binding upon States, it sets out a strong framework under which States can and should take action to search for, identify, and reunite missing migrants with their families, and in the event that they are deceased, identify and return their bodies to their families.

Second, at the European level, in 2024, the Parliamentary Assembly of the Council of Europe adopted Resolution 2569, entitled “Missing Migrants, Refugees, and Asylum Seekers – A Call to Clarify their Fate.”³⁸ The Resolution notes that:

5. The Assembly recalls that, pursuant to Article 2 of the European Convention on Human Rights (ETS No. 5), member States have a duty to prevent violations of the right to life and to investigate any cases of unnatural death or unlawful killings; it is on this basis that they must define how they tackle the issue of missing migrants, refugees and asylum seekers.

6. The Assembly expresses its sympathy and solidarity with the families of the missing and acknowledges their legitimate quest for information. It recognises the right for adults to choose to not divulge their whereabouts to their families, but also the importance for families to know whether their relatives are dead or alive.

...

9. Member States must conduct search and rescue operations at sea and on land according to international law, in full compliance with the European Convention on Human Rights and the consistent case law of the European Court of Human Rights. Pushbacks are illegal practices which may also lead to disappearance and which must stop immediately.

...

15. As regards the identification and treatment of the bodies of the deceased, the Assembly underlines a critical need for additional resources to be allocated to forensic and coroners’ services, including the need for sufficient space in the morgues pending autopsy, identification, burial or repatriation.

³⁸ Council of Europe, Missing migrants, refugees and asylum seekers – A call to clarify their fate, Resolution 2569 (2024)

The resolution also contains provisions relating to human trafficking, non-criminalization of migrants searching for their missing loved ones, approaches to identification (recommending taking a disaster victim identification approach), and the need to follow international legal standards for the reliable investigation of persons unlawfully killed.

Further, the resolution recommends that member States of the Council of Europe adopt a common definition of missing migrants, guided by standards set by the International Committee for the Red Cross. The resolution recommends defining missing migrants as, “individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a consequence of armed conflict (international or non-international) or other violence or of any other situation – including disasters or migration – that might require action by a neutral and independent body.”³⁹ The resolution also contains other operational guidance for better search, management, and identification of missing and deceased migrants.

³⁹ Council of Europe, Missing migrants, refugees and asylum seekers – A call to clarify their fate, Resolution 2569, Article 25.1 (2024).



Selected Cases of the European Court of Human Rights

Alkhatib and Others v. Greece, (2024), 3566/16

In the case of Alkhatib and Others v. Greece, the European Court of Human Rights held that the 2014 firing of multiple rounds at a motorboat which had 14 migrants onboard by the Greek Coast Guard was a violation of the right to life under the European Convention of Human Rights, because it recklessly endangered the lives of those on board. The motorboat was intercepted by the authorities and had been ordered to stop by the Greek coast guard. It however did not, and started making “dangerous maneuvers,” colliding with the coast guard vehicles on a few occasions. However, the court noted that this did not justify the firing on the boat.

Safi and Others v. Greece (2022), 5418/15

On 20 January 2014 a fishing boat with 27 Afghan, Syrian and Palestinian nationals on board sank off an island in the Aegean Sea while under tow by the Greek Coast Guard, resulting in the deaths of 11 persons. The European Court of Human Rights held that the Coast Guard had not done all that could reasonably be expected to provide protection and assistance to the migrants, leading to their deaths. Further the Court found that there had been a failure to conduct an effective investigation into the violations of the right to life.

Hirsi Jamaa and Others v. Italy (2012), 27765/09

In this case, the applicants were part of a group of approximately 200 individuals who left Libya aboard three vessels to try to reach the Italian coast but were intercepted by the Guardia di Finanza of Italy and the Italian Coast Guard on May 6, 2009. Those onboard the vessels were transferred onto Italian military ships and returned to Tripoli. The European Court of Human Rights found that Italy violated the prohibition on inhuman or degrading treatment and the prohibition of collective expulsion by returning migrants to Libya without assessing the risk that they would have faced in Libya or in their countries of origin.

III. NATIONAL LEGAL FRAMEWORKS

Many of the protections relating to missing and deceased migrants can be found within national legal frameworks. While there is tremendous variance and gaps in the legal framework in all countries (addressed in greater detail in the following section), there are nonetheless important broad themes and protections. This section, which draws upon specific studies conducted in Morocco, Senegal, Spain, The Gambia, and Tunisia, highlights some key areas. This section is intended to be deliberately selective, and each case and context will require specific analysis of the applicable framework in that country.

For each of the countries surveyed, there are no specific definitions nor laws concerning missing migrants. Instead, obligations relating to missing migrants typically derive from a combination of administrative law, criminal law, health law, and the incorporation of international human rights law.



Administrative law governs aspects such as registration of births and deaths, funeral procedures, and regulations of cemeteries. These regulations typically set out procedures for reporting a death, requirements for management of bodies, carrying out final rites, and ensuring final disposal of the body. In most countries, it is mandatory to report a person as deceased within a specific period of time, and to obtain a death certificate for that person. Further, there may be restrictions on where bodies can be buried (assigned cemeteries), including specific requirements relating to burial according to religion.

In some instances, administrative codes also deal with questions relating to missing persons. For example, in Tunisia, the Tunisian Personal Status Code sets out a general definition for a “missing person” and outlines processes for authorities and others to respond to situations where a person may go missing.⁴⁰ Article 82 of the Personal Status Code sets out a two-year time limit in situations of war or extraordinary circumstance for when a missing person can be presumed to be dead, and in normal circumstances ascribes this responsibility to a judge.⁴¹

In most instances, if a person is missing or considered to be deceased under suspicious circumstances, criminal law also applies. Individuals report persons as missing to police stations, who have authority to search for them. In the case of persons who are found deceased but who are unidentified, this is also often referred to investigative authorities, who are charged with establishing information about what happened to them often in conjunction with other authorities such as medico-legal experts.

For example, in Morocco, Article 79 of the Code of Criminal Procedure provides that:

“In the event of the discovery of a corpse, whether or not it is a violent death, but if the cause is unknown, or suspicious, the judicial police officer who is notified shall immediately inform the public prosecutor, go without delay to the scene, and make the initial observations. The public prosecutor shall go to the scene if he deems it necessary and shall be assisted by persons capable of assessing the nature of the circumstances of the death. He may, however, delegate for the same purposes, a judicial police officer of his choice. The persons thus summoned shall take an oath to give their opinion on their honor and conscience. The public prosecutor may also request information to investigate the causes of death.”

A key challenge in some countries is that it is not possible for individuals to report foreign nationals who have irregular immigration status as missing at local police stations. For example, in Spain, it is not possible to register a missing migrant with irregular immigration status within the national database at a local police station. Instead, their relatives or friends must either report this person as missing within their country of origin, who must then process the case through police cooperation channels for transnational engagement, or file a complaint with their embassies accredited in Spain. A similar requirement exists in Senegal. These present significant barriers for the effective search for missing and deceased and migrants.

Third, health codes, especially related to management of the dead, also may apply especially to deceased migrants. These codes typically place requirements on forensic and medico-legal experts, and vary greatly by country. For example, in Spain, the transfer of remains of foreign citizens to other countries is regulated by the Articles 38 and 39 of the Decree 2263/1974, of July 20, approving

the Mortuary Health Police Regulations.⁴² However, in many countries both the lack of centralized systems within countries and between countries and a lack of migrant-perspective when thinking about the management of the deceased impede effective medico-legal investigations.

Finally, many countries incorporate either directly or through enabling legislation international human rights obligations. In some countries, this includes prohibitions against enforced disappearances, as well as protections for migrant workers, which draw on international treaties.

⁴² Decreto 2263/1974, de 20 de julio, por el que se aprueba el Reglamento de Policía Sanitaria Mortuoria, BOE núm. 196, de 17 de agosto de 1974, <https://www.boe.es/buscar/doc.php?id=BOE-A-1974-1358>



⁴⁰ George N Sfeir, The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah), Middle East J 11, 3: 309-318 (1957).

⁴¹ George N Sfeir, The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah), Middle East J 11, 3: 309-318 (1957).

IV. KEY CHALLENGES AND CONCERNS

While there are efforts to improve the existing laws at the local, national, regional, and international levels, there remain serious challenges which prevent the search for and identification of missing and deceased migrants. In particular, there are five broad core challenges:

1. THE INTERNATIONAL, REGIONAL, AND NATIONAL LEGAL SYSTEMS WERE NOT DESIGNED FOR MISSING AND DECEASED MIGRANTS

How to humanely, ethically, and effectively respond to missing and deceased migrants was not contemplated by any legal system. Thus, at both the international and national level, laws which were not designed for missing and deceased migrants are now being used to try to protect missing and deceased migrants. As a result, missing and deceased migrants must rely upon a patchwork of laws for protection.

The very fact that there is no definition of a missing migrant in any binding legal document (and very few references to missing migrants even in soft-law instruments) underscores this key gap. As has been highlighted above – international human rights and refugee law has some definitions of a “migrant” (although even this applies most strongly only to refugees), and international humanitarian law defines a person as “missing” in the context of armed conflict. But no mechanisms put these words and terms together – and create definitions for “missing migrants.”

This failure can lead to serious consequences in practice. For example, a person fleeing from a country not in armed conflict who travels through a region in an armed conflict will benefit from the protections owed to all civilians in that country, which include obligations to search for them if they go missing or die as a result of that armed conflict. However, if they cross over to a country not in conflict, the protections of IHL, the laws of armed conflict, may no longer apply to this person.

2. THE EXISTING INTERNATIONAL LAWS WHICH (IMPERFECTLY) PROTECT MISSING AND DECEASED MIGRANTS IN PRACTICE ARE FREQUENTLY VIOLATED

In practice, States do not comply with the laws that do exist to protect those most vulnerable, especially migrants. Around the world, including between Europe and Africa, there are examples of the myriads of ways in which States are engaging in externalization of borders to avoid compliance with refugee law.⁴³ States are increasingly willing to look the other way or tolerate massive violations against migrants, including conditions in detention, the rounding up of migrants and violations of due process, violence at borders, and the narrowing of legal pathways for migration.⁴⁴ This makes migration more dangerous and risky, which contributes to an increase in the number of migrants who go missing or die in the first place. Further, it results in fewer identifications of missing and deceased migrants.

3. THE TRANSNATIONAL NATURE OF THE PROBLEM OF MISSING AND DECEASED MIGRANTS REQUIRES INTER-STATE COOPERATION, WHICH IS FREQUENTLY LACKING

Each country involved in questions relating to persons on the move – the countries of origin, transit countries, and destination countries – seeks to avoid dealing with the problem and developing robust framework for the search for and identification of missing and deceased migrants. Instead, they often assert that the obligation is on the other states. This lack of transnational cooperation and a failure to take collective ownership means that the families of the missing and deceased are often scuttled from State to State, unable to obtain the answers that they are owed about the fate and whereabouts of their relative.

4. LAWMAKERS, JUDGES, PROSECUTORS, AND OTHERS WHO ARE CHARGED WITH BOTH MAKING AND INTERPRETING THE LAW ARE NOT IN FREQUENT CONVERSATIONS WITH THOSE ON THE FRONTLINES

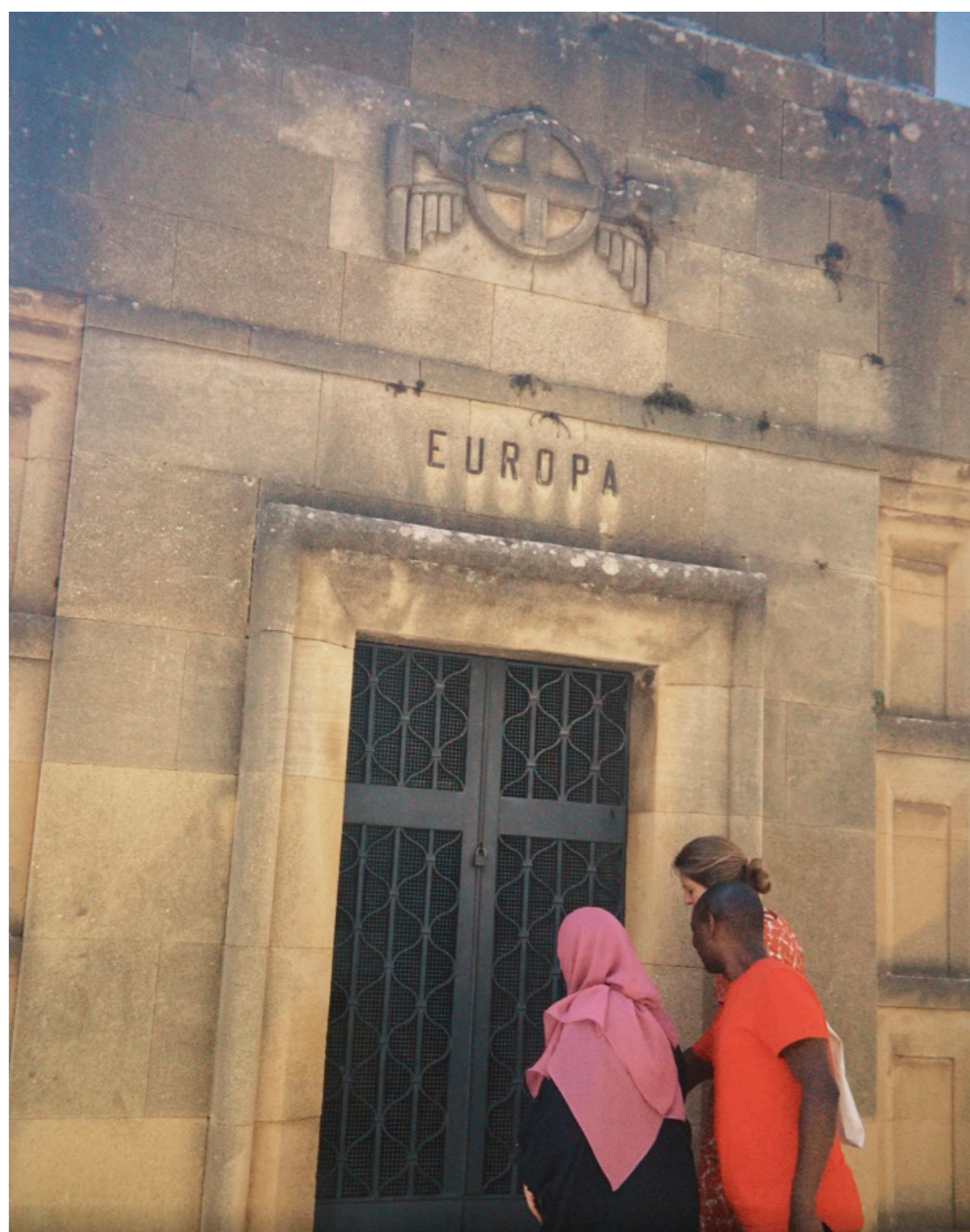
Often those on the frontlines of the migration crisis – first responders, local civil society, volunteers, families, police officers and medico-legal workers working in border areas – are acutely aware of the daily challenges and take on significant personal efforts to seek to search for and identify missing and deceased migrants. In many instances, they go significantly above what is required by them in their profession or mandate. Yet, lawmakers, judges, prosecutors, and others who have decision-making responsibilities – either for reform of the legal system at large or in individual cases – do not understand the realities of those who are grappling with large numbers of missing and deceased migrants daily. Thus, proposals for new laws and regulations are often not grounded in and guided by the perspectives of those who have the most knowledge.

⁴³ See generally, Lorena Stella Martini & Tarek Megerisi, Road to Nowhere: Why Europe's Border Externalisation Is a Dead End, EUR. COUNCIL ON FOREIGN RELS. (Dec. 14, 2023), <https://ecfr.eu/publication/road-to-nowhere-why-europes-border-externalisation-is-a-dead-end/>.

⁴⁴ Anthony Faiola et. al., With Europe's support, North African nations push migrants to the desert, THE WASH. POST (May 20, 2024), <https://www.washingtonpost.com/world/interactive/2024/eu-migrant-north-africa-mediterranean/>

5. CRIMINALIZATION OF THOSE INVOLVED IN THE SEARCH AND PROTECTION OF THOSE ON THE MOVE EXACERBATES THE EXISTING PROBLEMS

A final challenge which impedes effective responses is the criminalization of those involved in the search and identification of missing and deceased migrants. For example, families who go to report their relative as missing and who are themselves in the country irregularly may find that instead of receiving support – they receive a notice of deportation or removal. Individuals engaging in search and recovery efforts at sea are criminalized because of their work. Organizations working with families are accused of supporting traffickers, and charged. The shift toward criminalization of humanitarian efforts to support persons on the move results in a chilling effect, and further invisibilizes and marginalizes already extremely vulnerable groups. This hinders persons from being found and identified, and further compounds the stress and trauma of the relatives of missing and deceased migrants.



V. RECOMMENDATIONS

In order to better support missing and deceased migrants and their families, it is necessary to:

1. Assess laws from a transnational perspective, and where they fail to adequately address questions of missing and deceased migrants, adapt and revise them. Countries that deal with large numbers of migrants must work collaboratively to ensure that the existing gaps in the law are addressed in a manner that fosters mutual cooperation and collective responsibility.
2. States must develop a framework for international cooperation on the question of missing migrants, e.g. in the form of an international Pact for State cooperation on missing migrants. Collective action requires caring for and supporting all missing and deceased migrants, not simply nationals of one's own country. Because of the inherently complex and transnational nature of migration, it will only be possible to locate and identify as many persons as possible if all countries work collaboratively to identify all missing and deceased persons.
3. At the national level, review, revise, or develop legislation for the care and protection of missing migrants. These laws should consider the complex nature of migratory journeys, and take a family-first focused perspective.
4. In seeking to identify missing migrants, draw on existing models and approaches that bring together State and non-State actors. All key stakeholders involved in responding to and working with missing and deceased migrants should be included in law and policy efforts.

VI. FURTHER RESOURCES

For a general overview of multiple issues relating to Missing Migrants, see:

- EuroMed Rights, <https://euomedrights.org/theme/migration-refugees-and-asylum-seekers/>, for example:
 1. https://euomedrights.org/wp-content/uploads/2023/07/EuroMed-Rights_Tracing-and-Identifying-Missing-Migrants_EN-1.pdf
 2. <https://euomedrights.org/wp-content/uploads/2024/12/FR-Contribution-sur-le-phenomene-des-migrants-disparus.pdf>
- International Committee for the Red Cross, Missing Migrants and Their Families: The ICRC's Recommendations to Policy-Makers (2020)
- International Committee for the Red Cross, Guidelines on Coordination and Information-Exchange Mechanisms for the Search for Missing Migrants (2021)
- Stefanie Grant, 'Irregular Migration and Frontier Deaths, Acknowledging a Right to Identity', in Marie-Benedicte Dembour and Tobias Kelly (eds), ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES (ROUTLEDGE, 2011)
- Nina H.B. Jørgensen, Missing Migrants and the Right to Identification, Nordic Journal of Human Rights, 43(1), 40–58 (2024)
- Council of Europe, Missing migrants, refugees and asylum seekers – A Call to Clarify their Fate, Doc. 16037 (2024)
- African Commission on Human and Peoples' Rights, Resolution on Missing Migrants and Refugees in Africa and the Impact on Their Families, ACHPR/Res. 486 (EXT.OS/XXXIII) 2021
- Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Morris Tidball Binz: Protection of the Dead, U.N. Doc. A/HRC/56/56 (Apr. 25, 2024)
- Report of the Special Rapporteur on the Human Rights of Migrants, Gehad Madi: Phenomenon of Migrants Going Missing or Subjected to Enforced Disappearance – Human Rights Analysis, U.N. Doc. A/HRC/59/49 (Apr. 28, 2025)
- Helen Obregón Gieseken, The protection of migrants under international humanitarian law, 904 INT'L REV. RED CROSS (April 2017)



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