

# No Anonymous Crosses the Styx: The Right to Identification of the Unidentified Dead Migrant According to International Law Principles

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## ABSTRACT

Every year a significant number of migrants die on the Mediterranean Sea as a result of drowning due to dangerous transportation methods to cross the sea. Many of those migrants remain unidentified because of a lack of ante mortem information. In this research international legal and literary sources were assessed to analyse the existence of a right to identification for drowned migrants. The analysed international law principles and the rationale of those legal rules, reflect the implicit existence of a right to identification. This right to identification exists from a twofold perspective. Namely, from the perspective of the deceased and from the perspective of the surviving relatives. These rights to identification, following from the right to have a name, the right to life and the right to truth can only be invoked if states are willing to take their responsibility.

**Keywords:** The right to identification, ante mortem information, drowned migrants, the right to have a name

## INTRODUCTION

Many Europeans will remember the picture of the three-year-old Syrian boy who was found dead on the coast. The boy had a face and a name, Alan Kurdi, and the world was shocked. Over the past decade many migrants have been travelling overseas, which did not only cause an influx of migrants in Europe and other continents, but also caused the new phenomenon of the ‘washed-up dead migrant’. According to the International Organization for Migration, there were 7,189 migrant deaths in 2016; 4,812 of them died on the Mediterranean Sea.<sup>1</sup>The (dead) immigrant problem is an ongoing problem. According to the Migration Flow Monitoring device 96, 217 migrants have

entered Europe in 2020. <sup>2</sup>In this period 1,368 migrants were reported dead or missing on the Mediterranean Sea, not including the non-reported dead migrants. On 23<sup>rd</sup> January 2021 already 2,953 migrants have entered Europe, 2,736 arriving by sea; already 86 of them were reported dead or missing.<sup>3</sup>Many of the dead immigrants remained unidentified.<sup>4</sup> Although the journalists have lost their interest in the

<sup>2</sup>International Organization for Migration. IOM: Flow Monitoring: Europe. Available from: <http://migration.iom.int/europe?type=arrivals> [Accessed January 23rd 2021].

<sup>3</sup> ibid.

<sup>4</sup>International Organization for Migration. IOM: Migrant Deaths Worldwide Top 7,100 – Over Half in the Mediterranean. Available from: <https://www.iom.int/news/migrant-deaths-worldwide-top-7100-over-half-mediterranean> [Accessed January 23<sup>rd</sup> 2021].; International Organization for Migration. IOM: The Mediterranean Missing Project. Available from: <https://gmdac.iom.int/mediterranean-missing-project> [Accessed January 23<sup>rd</sup> 2021].; Cattaneo C. The forgotten tragedy of unidentified dead in the Mediterranean. To be published in Forensic Science International 2015.

<sup>1</sup>International Organization for Migration. IOM: Migrant Deaths Worldwide Top 7,100 – Over Half in the Mediterranean. Available from: <https://www.iom.int/news/migrant-deaths-worldwide-top-7100-over-half-mediterranean> [Accessed January 23<sup>rd</sup>2021]. ; International Organization for Migration. IOM: The Mediterranean Missing Project. Available from: <https://gmdac.iom.int/mediterranean-missing-project> [Accessed January 23<sup>rd</sup> 2021].

drownings migrants, this does not mean that the problem is solved. Without any doubt, during the upcoming years, migrants will drown because of overfilled rickety boats and life vests that are made of paper, often organised by human traffickers.

Attempts have been made to regulate and optimize the identification process, consisting of comparing ante mortem and post mortem information. The identification process is seriously impaired by the fact that the drowning are 'mini open disasters'. Since there is no idea who are on these boats, identification is practically impossible because of a lack of ante mortem information. Beside these problems, the will to identify is minimal; this human tragedy seems to be nobody's concern. The first step that should be taken before regulating the practical aspect of identification activities, is formulating a right laid down in law (e.g. a right to identification). Therefore, the question this research article will address is: Is there a right to identification for drowned migrants according to international law principles?

### METHOD

This research was conducted by assessing international legal and literary sources. The legal sources included primary legislation as well as legal commentaries. In order to have a thorough understanding of the identification process of deceased persons, immigrants, practical and international guidelines on identification were analysed also. The right to identification can be approached from two perspectives, the perspective of the deceased and the perspective of the surviving relatives. The right for the deceased appears to reflect the right to have a name. The right for the surviving relatives appears to come down to the right to know why and how their loved one has died. Therefore, for this study the following search queries were used: right to life, identification of deceased, right to an identity, right to truth, management of death bodies, general rights with regard to identification.

### RESULTS

In no international convention the right to identification after dead is explicitly laid down. Can a right to identification be derived from international conventions nevertheless?

### The Right to Have a Name

The European Court of Human Rights has interpreted 'private life' of article 8 European Convention on Human Rights (ECHR) as encompassing the right of every individual to a name, i.e. identity.<sup>5</sup> Consequently, based on article 8 ECHR, when a corpse is found the surviving relatives have the right to receive the deceased's body. This is confirmed in *Pannullo and Forte v. France*.<sup>6</sup> The European Court of Human Rights ruled in *Girard v. France* that this should be done in a 'timely manner'.<sup>7</sup> As a result of interpretation, it can be argued that in order to be able to receive the deceased's body, prior identification should take place in order to match the corpse to the surviving relatives. This results in an obligation of states to identify, and a right of the deceased to identification. Additionally, in cases of disaster victims specifically, deceased have 'the right not to lose their identities after death', hence the deceased have the right to an identity, which was generally accepted to extend to the period after death, as agreed upon in Interpol's General Assembly Resolution of 1996.<sup>8</sup> According to this Resolution, this international customary law right should be given effect by means of identification activities.<sup>9</sup> Therefore, deceased disaster victims have a right to identification.

### The Right to Life

Article 2 of the European Court on Human Rights, the right to life, comprises the duty of states to investigate in situations of 'unlawful or suspicious deaths'. This does not merely entail deaths allegedly caused by the involvement of

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<sup>5</sup> Council of Europe/ECtHR 'Guide on Article 8 of the European Convention on Human Rights' (31 August 2018), p.41.

<sup>6</sup>*Pannullo and Forte v France* App no 37794/97 (ECtHR, 20 October 2001) para. 34-35.

<sup>7</sup> Council of Europe/ECtHR (n 13); *Girard v France* App no 22590/04 (ECtHR, 30 June 2011).

<sup>8</sup>Cattaneo C. The forgotten tragedy of unidentified dead in the Mediterranean. To be published in Forensic Science International 2015.; Interpol. Disaster victim identification. GA Res AGN/65/RES/13, 1996, p.1.

<sup>9</sup>Interpol. Disaster victim identification. GA Res AGN/65/RES/13, 1996, p.1.

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state authorities, but also cases of ‘suspicious deaths’ unlawfully caused by other persons.<sup>10</sup> As interpreted in case law, this duty to investigate encompasses the identification of the deceased.<sup>11</sup> Article 6(1) International Covenant on Civil and Political Rights is a *lex specialis* of the right to life as laid down in article 2 ECHR. Accordingly, states have a duty to investigate in cases of breaches of the right to life, i.e. the loss of one’s life by the wrongdoing of a state (authority) or anyone private.<sup>12</sup> However, additionally, article 6(1) ICCPR was interpreted as including the right for relatives of the deceased person to know the truth about the cause of death of the deceased person.<sup>13</sup>

### The Right to Truth

The ECHR has no explicit *lex scripta* on the right to truth. On the basis of interpretations of case law, the right to truth is embedded in the prohibition of torture, the right to life of the deceased and the right to an effective remedy and investigation of a deceased.<sup>14</sup> It results from

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<sup>10</sup>Grant S. Dead and Missing Migrants: The Obligations of European States under International Human Rights Law. Mediterranean Missing 2016, p.11.

<sup>11</sup>*Varnava and others v Turkey* Appnos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) para. 189.

<sup>12</sup>Office of the High Commissioner for Human Rights. OHCHR: General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life.

Available from: [https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf) [Accessed 23<sup>rd</sup> January 2021] p.10-11.

<sup>13</sup>*ibid* para 32.; Grant S. Dead and Missing Migrants: The Obligations of European States under International Human Rights Law. Mediterranean Missing 2016, p.9.

<sup>14</sup> Scovazzi T, Citroni G. The Struggle against Enforced Disappearance and the 2007 United Nations Convention. Nijhoff Publishers; 2007, p.353.; OHCHR, ‘Promotion and Protection of Human Rights: Study on the right to the truth’ (Economic and Social Council/Commission on Human Rights 2006), para 28.

the *Varnava and others v. Turkey* case that, based on article 3 ECHR, states have a duty to investigate a death. The European Court of Human Rights ruled that the family members of the deceased have a right to truth and had suffered from an inhuman and degrading treatment by ‘waiting for news of their loved ones for over 25 years’, resulting in a violation of article 3 ECHR.<sup>15</sup> In this case, the body of the deceased was located but, the investigation lacked with regard to establishing ‘how the victim met his fate’; no information on this was provided to the surviving relatives.<sup>16</sup> According to the European Court of Human Rights, for an investigation to be effective, at least the (un)lawfulness of the person’s death must be established.<sup>17</sup> Without identification the family cannot be informed. Thus, in order for states to comply with the required investigation resulting from the right to truth, identification of the deceased is the first step to be taken.

Beside aforementioned general principles of international law, also *lex specialis* were analysed. In situations of losses of lives as a result of an armed conflict, Protocol I of the Geneva Convention (GC) is applicable according to article 1(4) Protocol I GC. In these cases, family members have the right ‘to know the fate of their relatives’ (article 32 Protocol I GC), reflecting the right to know the truth of family members.<sup>18</sup> A similar right to truth exists for enforced disappearances. When an enforced disappearance is at stake, which constitutes the deprivation of one’s freedom by state (authorities) without acknowledging relatives

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<sup>15</sup>*Varnava and others v Turkey* App nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, ] 16072/90 and 16073/90 (ECtHR, 18 September 2009) para 200.

<sup>16</sup>*ibid.*; European Court on Human Rights. Council of Europe: Information Note on the Court’s case-law. No 122, August-September 2009. Available from: [https://www.echr.coe.int/Documents/CLIN\\_2009\\_09\\_122\\_ENG\\_860985.pdf](https://www.echr.coe.int/Documents/CLIN_2009_09_122_ENG_860985.pdf) [Accessed 23<sup>rd</sup> January 2021].

<sup>17</sup> *ibid.*

<sup>18</sup> Protocol I to the Geneva Conventions of 12 August 1949, 8 June 1977, article 32.

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who were left behind on ‘the fate or whereabouts of the disappeared person’, the right of relatives to know the truth, i.e. the fate about the disappeared person, can be based on the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (article 2 ICPPED). The main obligation of states arising from this Convention in cases of enforced disappearances is the obligation to cooperate amongst one another in order to retrieve the disappeared person. Yet, if the disappeared person is not alive anymore, states have a duty to identify and return the body nevertheless. This was explicitly laid down in article 15 ICPPED.<sup>19</sup> Thus, while the right to identification is laid down for armed conflicts, why should this right not exist for people who are a victim of human trafficking?

The last *lex specialis* analysed, concerned article 9(4) Convention on the Rights of the Child (CRC). Accordingly, when a parent and a child are separated from one another and one of them is dead, the surviving parent or child has the right to receive ‘essential information concerning the whereabouts of the absent member(s)’. This means that both have the right to truth, i.e. the right to know the fate of the other person. It is impossible to give information about the fate of a deceased person if the corpse has not been identified yet. Therefore, identification activities lie embedded in giving effect to this right, and consequently the right to identification of the surviving relatives results implicitly from article 9(4) CRC. The CRC also reflects the importance the international community attaches to the right to have an identity. Namely, according to articles 7 and 8 CRC children have the right to an identity. In this regard, ‘identity’ is interpreted as the nationality, family relations, and also the name of the child. Based on this legislation, children have the right to have a name from their birth onwards.

### DISCUSSION

It follows from the result of this research that a right to identification is not explicitly laid down

in international legal instruments. Nevertheless, there are multiple legal instruments in which a right to identification lies embedded, although applicable in specific situations only. Given the analysed legal rules as well as the rationale of the mentioned legal instruments, there is an international perception that a right to identifications exists. This is a right with two aspects: on the one hand the right for the deceased not to be buried without a name, and on the other hand the right for the surviving family to know the whereabouts of their loved ones.

The deceased as well as the surviving relatives have rights under international law from which the right to identification follows implicitly. It can be considered that the deceased him-/herself has a generally applicable, although implicit, right to identification. Namely, the cause of death is not decisive for the existence of a duty for states to investigate and identify the deceased. However, the surviving relatives have a right to identification regarding their deceased relative in limited situations only. Previously mentioned international law principles show that there is a common assumption that surviving relatives (should) have a right to identification. In some situations, this is more explicitly defined than in others.

It could be discussed whether the right to identification of the survived relatives is a dependent or independent right. If interpreted as not being an independent right, but as a right connected to a right of the deceased, it should be discussed how this right will be shaped. In this regard, it would be possible to shape this right in two forms. On the one hand, it can be stated that the deceased has a right to identification, and the surviving relatives are the ones who can practically invoke it. On the other hand, it can be said that the deceased has a certain right (e.g. right to life or right to an identity), and the surviving relatives have an independent right to know that their relative has died. What does this mean for the victims of drowning in the Mediterranean Sea? There is a right to identification, however, this right will only become a real right if European states take their responsibility and choose for humanity. Although the chance of a surviving relative of a

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<sup>19</sup> United Nations. Missing persons. GA Res 61/155, 19<sup>th</sup>December 2006, p.2.

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migrant starting a procedure at the European Court of Human Rights is very small, this should not be a reason not to do what is just.

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<sup>20</sup> UN Convention on the Rights of the Child, 2 September 1990, article 9(4). Accordingly, when a parent and a child are - separated from one another and one of them is dead, the surviving parent or child has the right to receive ‘essential information concerning the whereabouts of the absent member(s).

<sup>21</sup>Unicef. Implementation Handbook for the Convention on the Rights of the Child. United Nations Children’s Fund; 2007, p.113. Based on this legislation, children have the right to have a name from their birth onwards.