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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Living up to obligations through the International Red Cross? A critique of states' attempts to shift obligations when addressing missing persons

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Abstract

The article identifies and explains a phenomenon whereby states attempt to shift their responsibility in relation to missing persons and their families to the International Red Cross. This has dual effect: firstly, it leads to rightlessness of the missing and their families, and secondly, it diminishes the obligations of the states, which are the duty bearers. The attempted shift does not, however, lead to the International Red Cross becoming a duty bearer, despite undertaking crucial actions in the analyzed area. Two case studies, relating to two distinct types of missing persons, are used to illustrate the phenomenon: persons who disappeared during the conflict in Cyprus between 1963 and 1974, and migrants going missing in the Mediterranean.

Keywords: Committee on Missing Persons; Cyprus; ICRC; missing migrants; missing persons

1. Introduction

When the Committee on Enforced Disappearances requested in 2021 from the government of Mali to list specific measures it has taken to investigate the deaths, identify and repatriate the bodies of missing migrants, and support their relatives,¹ the authorities pointed to the action of non-governmental organizations, including the International Committee of the Red Cross (ICRC).² Similarly, when Frontex officials were asked by researchers about the collection of information relating to migrant mortality along Europe's borders, they too, described this as a task typically undertaken by non-governmental humanitarian organizations.³ By far the most influential of these, is the International Red Cross and Red Crescent movement, also known as the International Red Cross. The movement consists of the ICRC, National Red Cross and Red

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¹List of Issues in Relation to the Report Submitted by Mali under Article 29(1) of the Convention, CED/C/MLI/Q/1 (4 October 2021), Para. 30.

²Replies of Mali to the List of Issues in Relation to Its Report Submitted under Art. 29(1) of the Convention, CED/C/MLI/RQ/1 (12 August 2022), Para. 73.

³K. Franko Aas, and H. O. I. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life', (2015) 55 *British Journal of Criminology* 1, at 10.

Crescent societies, and the International Federation of the Red Cross and Red Crescent Societies.⁴ This article demonstrates how states attempt to shift their responsibility in relation to missing persons and their families to the International Red Cross and Red Crescent movement and the consequences of this phenomenon.⁵ It should be noted from the outset that this is not a criticism of the movement's work in the field of missing persons; rather it is a critical assessment of the states' reactions to this work, and in particular, their attempts to shift their legal obligations.

The article argues that this eagerness to shift responsibility from states to the International Red Cross and Red Crescent movement, firstly, leads to rightlessness of the missing and their families, and secondly, diminishes the obligations of the states, which are the duty bearers. Both consequences are negative developments in terms of the persons concerned. Two case studies, relating to two distinct types of missing persons, are used to illustrate the phenomenon: persons who disappeared in Cyprus between 1963 and 1974, and migrants going missing in the Mediterranean. We argue that these case studies are representative of a broader tendency.

While both international human rights law and international humanitarian law contain provisions relating to the search for 'missing persons', the term is not defined and may relate to different types of persons. International humanitarian law applies it to those who went missing during armed conflict or occupation.⁶ Outside of humanitarian law, the term 'missing persons' is usually used in a broader way, encompassing all individuals whose whereabouts remain unknown. This is also the perspective of the International Red Cross.⁷ A category of persons that falls within this broader definition is 'missing migrants', that is, all those who went missing in migration while being outside of their place of residence. Some missing persons are forcibly disappeared,⁸ meaning that they were deprived of their liberty with the acquiescence or support of a state, which was followed by a refusal to acknowledge the deprivation of liberty and shed light on the individuals' fate or whereabouts.⁹ Enforced disappearances can occur both during peace time and armed conflict.¹⁰ Thus, many missing persons in Cyprus and some missing migrants are victims of enforced disappearances.¹¹

⁴See Art. 1.1 (definition) of the Statutes of the International Red Cross and Red Crescent Movement, available at www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf. See also International Committee of the Red Cross, 'International Red Cross and Red Crescent Movement', available at www.icrc.org/en/international-red-cross-and-red-crescent-movement.

⁵In this article, we focus on the International Red Cross because firstly, it is the most influential non-state actor involved in the area of missing persons and secondly, states' attempted shift of responsibility is most visible with regard to this actor. However, we acknowledge that there are several non-state actors involved in missing persons, such as the International Organization for Migration, International Commission on Missing Persons (ICMP) and various NGOs. We also accept that attempted shifts of responsibility occur (although to a significantly lesser extent) with regard to these additional actors; see, for example, the statement by Frontex cited above.

⁶M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), 339; A. Petrig, 'Search for Missing Persons', in A. Clapham, P. Gaeta, and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (2015), 257 at 258.

⁷ICRC, 'Q&A: The ICRC's Engagement on the Missing and Their Families', (2017) 99 *International Review of the Red Cross* 535.

⁸Thus, while all forcibly disappeared persons are also missing, not all missing persons have been forcibly disappeared.

⁹2006 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (ICPPED), Art. 2.

¹⁰While originally the term 'enforced disappearance' was used predominantly in the context of non-international armed conflict only, this is changing (see, e.g., G. Gaggioli, 'The Prohibition of Enforced Disappearances: A Meaningful Example of a Partial Merger between Human Rights Law and International Humanitarian Law', in Kolb R., and Gaggioli G. (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013), 320 at 322).

¹¹The debate on 'missing persons' and 'enforced disappearances' has not only taken place in academic literature (see sources cited above). The ICRC has itself been involved in the approach, as evident for example by including and addressing enforced disappearance in the 'Guiding Principles/Model Law on the Missing', available at www.icrc.org/sites/default/files/document/file_list/model-law-missing-icrc-eng-pdf. See also the two General Assembly resolutions, one on enforced disappearances (A/RES/78/207 (22 December 2023)) and one on missing persons (A/RES/75/184 (28 December 2020)).

There is sometimes a transnational element in persons going missing. This is the case with regard to both case studies in this article. There are no doubts about the transnational character in cases of missing migrants as these individuals, by definition, go missing on the move. In Cyprus, many disappearances also have a transnational element, either because some victims had been transferred to Turkey, or because they disappeared in the north of Cyprus, which is currently under the effective control, and therefore jurisdiction, of Turkey.¹² However, the two types of legal obligations we decided to concentrate our analysis on in this article are straightforward with regard to territorial jurisdiction.¹³ In the context of the right to life, we analyze the obligations of states in the territory where the alleged loss of life occurred.¹⁴ With regard to enforced disappearances, the article analyzes the obligations of the state that has conducted or is alleged to have conducted the enforced disappearance. Consequently, with regard to missing migrants we focus on states where the remains of migrants are discovered, or on states that are alleged to have committed enforced disappearances; while with regard to missing persons in Cyprus, we look into the obligations of Cyprus and Turkey.

We support our argument by relying on two types of sources. The first are steps taken by states on the international level, specifically the establishment of the Committee on Missing Persons (CMP) in Cyprus, the adopting of UN General Assembly Resolutions, and the Global Compact for Safe, Orderly and Regular Migration (Global Compact on Migration).¹⁵ Examining actions taken at the international level allows us to focus on a range of different states and how they act jointly, as well as provides support that the phenomenon we identify is not isolated to the actions of a single actor. The second type of source relates to statements made by states at the international level, like state submissions to the European Court of Human Rights (ECtHR) and state responses in the reporting process to UN treaty bodies, namely the Committee on Enforced Disappearances and the Committee against Torture. These statements to international bodies are drafted by, and respond to questions from legal experts. Thus, explicitly shifting responsibility to the International Red Cross, rather than acknowledging that this lies with the state making the submissions, carries more weight than if the same had been done in a domestic forum addressing the general public.

The article is divided into six parts. Section 2 identifies states' obligations relating to missing and disappeared persons, emanating from the right to life and the International Convention on the Protection of all Persons from Enforced Disappearances (ICPPED). Section 3 introduces the two case studies from which this article draws its evidence: persons who went missing between 1963 and 1974 during the conflict in Cyprus, and migrants who have, more recently, been going missing while crossing the Mediterranean. Section 4 explores the leading role of the International Red Cross in addressing missing persons, while Sections 5 and 6 explore the phenomenon we identify and its consequences in the two case studies. Finally, Section 7 concludes.

¹²*Loizidou v. Turkey (Preliminary Objections)*, Judgment of 23 March 1995, [1995] ECHR.

¹³There are other relevant obligations under international law arising in this context that would require more discussion with regard to transnational jurisdiction. For example, the right to report an enforced disappearance under Art. 12.1 of the ICPPED can trigger an obligation also with regard to the state where the family resides. See G. Baranowska, 'Disappeared Migrants and Refugees: The Relevance of the International Convention on Enforced Disappearance in their search and protection', *German Institute for Human Rights*, 2020, 25–7.

¹⁴In rare cases, it can also occur that human remains are found on the territory of one state while the death occurred in another; for example, a person dies on the Turkish side of the border and their remains flow via the Evros River to the Greek side of the border. However, as in such a situation the state authorities cannot be sure where the loss of life occurred, the same obligations apply.

¹⁵UN GA, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195 (11 January 2019).

2. Selected international legal obligations relating to missing and disappeared persons

Precise obligations in relation to missing persons differ depending on the circumstances of the disappearance (state violence or going missing due to other reasons), the applied areas of international law (international humanitarian law or international human rights law), and – in the case of an armed conflict – its type (international or non-international).¹⁶ Obligations with regard to missing persons have a long history, as already the Geneva Conventions from 1949 contain many obligations preventing persons from going missing during armed conflict and establishing their fate when they do.¹⁷ The 1977 Additional Protocol to the Geneva Conventions significantly strengthened those obligations in international armed conflict, as well as required parties to the conflict and humanitarian organizations to be ‘prompted mainly by the right of families to know the date of their relatives’ when implementing provisions concerning missing and dead persons.¹⁸ Thus, obligations can be owed both to the missing persons and their families.¹⁹ This holds true also in international human rights law, as courts and UN treaty bodies have recognized families of forcibly disappeared persons as victims of human rights violations²⁰, which in 2010 was recognized also in the ICPPED.²¹

These obligations arise by virtue of states becoming parties to international legal instruments or through customary law. Thus, while the International Red Cross and Red Crescent movement is an important international actor when addressing missing persons – and, in practice, conducts actions addressing some of these obligations – it is not bound by them. This bears highlighting because a central tenet of our argument is that it is states, and not the International Red Cross, that are duty bearers in relation to missing persons.

Of the many state obligations with regard to missing persons enshrined in international humanitarian and international human rights law, we focus on two: the legal duty to investigate losses of life, and obligations relating to enforced disappearances. These obligations apply irrespectively of whether the persons are residing regularly in the country where they disappeared. We selected the first obligation as it stems from the right to life under provisions of treaties that are widely ratified, such as Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention on Human Rights, and Article 4 of the American Convention on Human Rights. All the relevant adjudicating bodies have developed an interpretation that there is an obligation to investigate losses of life. Thus, this obligation is currently universally applicable. The second set of obligations arise with regard to those persons who went missing by being forcibly disappeared. The prohibition of enforced disappearances has

¹⁶The obligations are specifically strengthened in international armed conflict, as the Additional Protocol 1 to the Geneva Convention contains much more specific obligations (see Arts. 32–4). The Geneva Conventions contain many provisions aiming at preventing persons from going missing during armed conflict and establishing their fate when they do.

¹⁷See, for example, 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (GC IV), Arts. 136–40; 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135 (GC III), Arts. 120, 122, and 123; 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (GC I), Arts. 15–17; 1949 Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (GC II), Arts. 19–20.

¹⁸Additional Protocol I to the Geneva Conventions, Art.32. The Article has been interpreted to ‘constitute a sort of preamble’ of the section, see M. Bothe, K. J. Partsch, and W. A. Solf (eds.), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2013), 196.

¹⁹G. Baranowska, ‘The Rights of the Families of Missing Persons: Going Beyond International Humanitarian Law’, (2022) 55(1) *Israel Law Review* 25.

²⁰G. Baranowska, *Rights of Families of Disappeared Persons. How International Bodies Address the Needs of Families of Disappeared Persons in Europe* (2021), 80–100 and 127–30; T. Scovazzi and G. Citroni, *The Struggle Against Enforced Disappearances and the 2007 United Nations Convention* (2007).

²¹See ICPPED, *supra* note 9, Art. 24.1.

been found to be a rule of customary international law by international tribunals²² and domestic courts.²³ It has been recognized as a customary rule under international humanitarian law by the ICRC study,²⁴ as well as by several UN commissions of inquiry.²⁵ William Schabas also included enforced disappearances as one of the customary human rights norms in his monograph on customary international law of human rights.²⁶ Finally, obligations have been codified in the ICPPED. While the ICPPED has not been widely ratified yet,²⁷ it can serve as *lex specialis*.

Neither all missing persons in conflict nor all missing migrants are necessarily dead. However, when they are or there is a high likelihood that this has occurred, obligations to investigate the potential loss of life kick in.²⁸ When a loss of life occurs, other than in cases of obvious or natural circumstances, states have a duty to inquire into the causes.²⁹ States should conduct an investigation immediately upon receipt of information concerning the disappearance, a time period which the ECtHR has referred to as ‘crucial early days’.³⁰ Such an investigation should also be triggered by the discovery of the remains of a person, including when this has occurred long after the disappearance, as in the case of Cyprus.³¹ Crucially, the investigation must be such that, if enough evidence is unearthed, it should lead to the prosecution of the alleged perpetrator. Finally, the families of persons should also be informed about these proceedings.³²

²²*Prosecutor v. Nuon Chea and Khieu Samphan (Case No. 002/01)*, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber Judgment of 7 August 2014, Para. 446, and notes 1321 and 1323; and Appeals Judgment of 23 November 2016, Para. 589; *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, 25 October 2017, notes 302, 304, and 311; see also HRC, Thirtieth Anniversary of the Declaration on the Protection of All Persons from Enforced Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/51/31/Add.3 (31 August 2022), Paras. 62–8.

²³Supreme Court of Justice of Peru, Acuerdo plenario No. 9/2009/CJ-116 of 13 November 2009, Paras. 8(b) and 14; Supreme Court of Justice of Mexico, Amparos en revisión No. 934/2016 of 29 March 2017, No. 835/2018 of 9 October 2019 and No. 1077/2019 of 16 June 2021, Para. 68 and note 23; Contradicciones de tesis No. 367/2016 of 10 January 2018, No. 261/2018 of 13 March 2019, and Primer tribunal colegiado en material penal del primer circuito, Amparo en revisión No. 53/2019 of 9 May 2019 (Mexico); see also HRC, *supra* note 22, Para. 69.

²⁴The prohibition of enforced disappearances is part of customary international humanitarian law, see J-M. Henckaerts, and L. Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (2005, reprinted 2009) (ICRC Study), Rule 98.

²⁵HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex II, A/HRC/25/65 (12 February 2014), Para. 5. See also HRC, Detailed Findings of the Commission of Inquiry on Human Rights in Eritrea, A/HRC/32/CRP.1 (8 June 2016), Para. 106; HRC, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine), A/HRC/36/CRP.3 (25 September 2017), Para. 99.

²⁶W. A. Schabas, *The Customary International Law of Human Rights* (2021), Paras. 138–9.

²⁷As of June 2023, 71 countries have ratified it. As for the countries relevant for the two analysed case studies, it has been ratified by some (for example Greece, Italy, Morocco), signed by others (Cyprus, Lebanon) and not signed by others (Turkey, Libya). Thus, many of the countries that have legal obligations in terms of missing migrants, do so (also) because they have ratified the ICPPED. As explained in Section 5 below, Turkey’s and Cyprus’ non-ratification of the Convention does not change the article’s overall argument.

²⁸These obligations have been developed by the main human rights courts. For an overview of ECtHR case law on the procedural aspect of the right to life, see *Finogenov and Others v. Russia*, Judgment of 20 December 2011, [2011] ECHR, Paras. 268–72. See also UN Human Rights Committee, General Comment No 36: Art. 6: Right to Life, CCPR/C/GC/36 (3 September 2019), Paras. 27–8.

²⁹The obligation extends beyond violent deaths, to all cases of death other than from natural causes. See for example, *Calvelli and Ciglio v. Italy*, Judgment of 17 January 2002, [2002] ECHR (involving medical negligence) and *Uçar v. Turkey*, Judgment of 11 July 2006, [2006] ECHR (involving suicide).

³⁰*Koku v. Turkey*, Judgment of 31 August 2005, [2005] ECHR, Para. 139.

³¹*Despina Charalambous and Others v. Turkey*, Decision of 1 June 2010, [2010] ECHR; *Nazli Gürtekin and Others v. Cyprus*, Decision of 11 March 2014, [2014] ECHR.

³²The ECtHR explained in *Varnava and Others v. Turkey*, Judgment of 18 September 2009, [2009] ECHR, Para. 191 how an effective investigation should look like. It must be ‘independent, accessible to the victim’s family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible’.

In addition to the general right to life obligations, particular legal duties arise in relation to victims of enforced disappearance. Before shortly flagging a number of chosen obligations relating to these, let us clarify that when a person disappears, it is not always certain whether this was an enforced disappearance or not. The obligations do not apply only after it has been established that an enforced disappearance, as defined under international law, has, in fact, taken place. States should conduct the search for the persons – or their remains – and support their families in line with this framework, even when the enforced disappearance has not been conclusively established yet.³³

When enforced disappearances do occur, states are under a number of obligations. For the two case studies analysed in this paper, several obligations appear to be of particular importance. The family of the disappeared person has a right to receive the remains of the person – an obligation not arising when the person disappeared in other circumstances.³⁴ Additionally, states are obliged to hold criminally liable those who have attempted, committed, ordered, solicited, or induced the commission of the enforced disappearances.³⁵ The same applies to superiors who failed to take necessary and reasonable measures to prevent them.³⁶ Any statute of limitations applied to enforced disappearances should be of long duration and take into account the continuous nature of these crimes.³⁷ States also have to ensure that individuals have the right to report alleged enforced disappearances.³⁸ When there are reasonable grounds to believe an enforced disappearance has taken place, states should undertake an investigation *ex officio*.³⁹ Importantly, all persons who have suffered harm as a direct result of an enforced disappearance, including family members, are considered victims of enforced disappearances.⁴⁰ All victims have the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person.⁴¹ They, furthermore, have the right to obtain reparation.⁴² Finally, states are under an obligation to cooperate and afford each other the greatest measures of mutual assistance in addressing enforced disappearance cases.⁴³

3. Comparing missing persons in conflict and missing migrants

The vast majority of persons who go missing in the world, do so in the two contexts that are discussed in this article: during conflict or while in the process of migrating.⁴⁴ The connections between the two and the impact of the ICRC in both contexts has been acknowledged by the ICRC itself. The ICRC Global Advisor on Migration Issues explained the organization's involvement in the area of missing migrants by noting that 'analogies can be drawn with the long-lasting

³³UN Committee on Enforced Disappearances, Guiding Principles for the Search for Disappeared Persons, UN Doc. CED/C/7 (8 May 2019).

³⁴See ICPPED, *supra* note 9, Art. 24.3; G. Baranowska, 'Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons' (2017) 99(905) *International Review of the Red Cross* Para. 709.

³⁵See ICPPED, *supra* note 9, Arts. 4 and 6.

³⁶*Ibid.*, Art. 6.

³⁷*Ibid.*, Art. 8.

³⁸*Ibid.*, Art. 12(1).

³⁹*Ibid.*, Art. 12(2).

⁴⁰*Ibid.*, Art. 24(2). See also T. Feldman, 'Indirect Victims, Direct Injury: Recognising Relatives as Victims Under the European Human Rights System', (2009) 1 *European Human Rights Law Review* 150. For a call for a broader approach see J. Sarkin, 'Why Victimology should Focus on all Victims, including all Missing and Disappeared Persons', (2019) 25(2) *International Review of Victimology* 249.

⁴¹See ICPPED, *supra* note 9, Art. 24(2).

⁴²*Ibid.*, Art. 24.

⁴³*Ibid.*, Arts. 14 and 15.

⁴⁴ICRC 2022 Annual Report, Volume I, available at [/library.icrc.org/library/docs/DOC/icrc-annual-report-2022-1.pdf](https://library.icrc.org/library/docs/DOC/icrc-annual-report-2022-1.pdf); ICRC 2022 Annual Report, Volume II, available at library.icrc.org/library/docs/DOC/icrc-annual-report-2022-2.pdf.

experience of the ICRC in clarifying the fate and whereabouts of persons who went missing in situations of armed conflict'.⁴⁵ This section explains the decision to focus on persons who went missing during the conflict in Cyprus and on migrants who did so while crossing the Mediterranean, respectively. It identifies four similarities and four differences between the case studies, and argues that lessons drawn from these are of interest more broadly.

The choice to focus on those who went missing in Cyprus in 1963–1964 and 1974, is supported by three considerations. First, the international body created to respond to missing persons in Cyprus was set up in 1980; this case study, therefore, offers an early example of the phenomenon discussed here and suggests that shifting states' responsibility to the International Red Cross is not a recent tendency. Second, the ICRC provides technical support to, and selects one of the three members of, the CMP, the mechanism that exists in Cyprus to respond to missing persons. Finally, while post-conflict states have responded to missing persons through different mechanisms, these mechanisms have generally had humanitarian objectives.⁴⁶ This is also the case with the CMP, which makes Cyprus, in this respect a typical example of how missing persons are addressed in post-conflict contexts.

The second category – missing migrants in the Mediterranean – was selected for analysis for two main reasons. First, since missing migrants, by definition, disappear while on the move, responding to them requires international initiatives. Often these are coordinated by non-governmental organizations that act regionally, or global bodies, like the Red Cross and Red Crescent movement and the International Organization for Migration (IOM).⁴⁷ This is particularly true for the Mediterranean, as several international programmes have been created to specifically address disappearances there.⁴⁸ Second, according to available data, the Mediterranean sea witnesses the deadliest migratory routes in the world,⁴⁹ thus making it an important case study for missing migrants.

As for the similarities between the two case studies, first, in both situations, a big group of persons has gone missing as a result of a single phenomenon (i.e. conflict or migration). However, each individual situation of a missing person might differ, creating varying obligations on the states – for example, some missing persons can be victims of enforced disappearances, thus triggering different obligations. In other cases, no human rights violation or crime may be at the origin of the disappearance. Still, in both instances, the state(s') response to missing persons has treated all potential victims in the same way. Second, the missing cannot be disconnected from a broader – political – context. In Cyprus, this relates to the continued division of the island; with regard to missing migrants, the broader context concerns state policies that make it almost impossible for vulnerable persons to lawfully cross state borders. Third, as the missing are high in number, there have been initiatives to address them. In both instances, initiatives include different actors, such as states, non-governmental and international organizations. While the actors in each

⁴⁵S. Le Bihan, 'Addressing the Protection and Assistance Needs of Migrants: The ICRC Approach to Migration', (2017) 99(904) *International Review of the Red Cross* 99, at 101.

⁴⁶For example, in Bosnia and Herzegovina, the emphasis was on identifying missing persons, rather than also complying with human rights obligations more broadly (such as investigating how these persons went missing or punishing the perpetrators). See J. Sarkin et al., 'Bosnia and Herzegovina. Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking', International Commission on Missing Persons, 2014. Similarly, the Missing Persons Task Team in South Africa was tasked with identifying missing persons by relying on testimonies of perpetrators who had received amnesties in exchange for the information they provided. See, J. D. Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons', (2011) 5(2) *International Journal of Transitional Justice* 262.

⁴⁷For more on the ICRC's work with regard to missing migrants, see Le Bihan, *supra* note 45, 103, 109–11.

⁴⁸See for example the Missing Migrants and Refugees Program of the International Commission on Missing Person, focusing on the Mediterranean, available at www.icmp.int/?resources=factsheet-missing-migrants-and-refugees-program.

⁴⁹I. Urquijo Sanchez, and J. Black, 'Europe and the Mediterranean', in F. Laczko, A. Singleton, and J. Black (eds.), *Fatal Journeys. Volume 3. Part II: Improving Data on Missing Migrants* (2017), 99; S. Robins, *Analysis of Best Practices on the Identification of Missing Migrants. Implications for the Central Mediterranean* (2019), available at publications.iom.int/system/files/pdf/identification_of_missing_migrants.pdf.

context vary somewhat, a crucial actor that plays a role in both contexts is the International Red Cross. Most emphasis in Cyprus is placed on the CMP, one of the three members of which is selected by the ICRC. Similarly, in the case of missing migrants, the primary role is taken by the Red Cross and Red Crescent movement, IOM, and NGOs. Fourth, to address both missing migrants and persons disappeared in international armed conflict, international cooperation is crucial.

At the same time, there are also differences between the two selected case studies. First, with regard to missing persons in Cyprus, there is extensive ECtHR case law.⁵⁰ Conversely, there is not much case law specifically on missing migrants.⁵¹ Second, the pressure that exists to address missing persons is different, both in terms of its intensity and source. Addressing persons who went missing during conflict (in Cyprus and elsewhere) is often a priority in post-conflict states, especially since a high number of citizens may have relatives who are victims.⁵² Conversely, as missing migrants and their families carry a lot less political capital, pressure to respond to them is less intense.⁵³ Third, how persons went missing or disappeared in the two case studies also differs: in Cyprus this happened as a result of violent conflict, while migrants go missing predominantly because of perilous journeys.⁵⁴ Fourth, while the International Red Cross movement is prominently active in both contexts, its role differs. In the Cypriot conflict, it has a more formalized role, endorsed by the UN to act as a mediator between the two parties and facilitate progress on missing persons. Regarding missing migrants, its role is recognized – it is explicitly mentioned as a cooperation partner in implementing the Global Compact on Migration⁵⁵ – but it also operates alongside other organizations. These differences between the two case studies suggest that the phenomenon we identify and discuss is a general one.

The comparison between the two case studies points to an important observation that is of interest more broadly: in addressing missing persons, states are taking actions to comply with their legal obligations, but they are not meeting these obligations fully. The most obvious strategy for diverting attention away from their non-compliance or partial compliance with international law would be to point the finger at other state actors and claim that they are the ones who are failing their obligations. Indeed, states have sometimes done this, for example, when Cyprus argued that it is Turkey that is to blame for the failure to identify and return to their families, persons who went missing during the conflict.⁵⁶ Yet, in both of the case studies we explore, it is far more common for states to explain, or even justify, their failure to (fully) comply with international law by pointing, and attempting to shift responsibility, to a non-state actor, such as the International Red Cross. As the numbers of persons who go missing both in conflict and during migration are not set to dissipate, this offers an additional reason for why the consequences of this phenomenon must be understood further.

⁵⁰*Cyprus v. Turkey*, Judgment of 10 May 2001, [2001] ECHR; see *Varnava and Others v. Turkey*, *supra* note 32.

⁵¹Marie-Bénédicte Dembour in her seminal book on the human rights protection of migrants has identified the deaths of irregular migrants on their way to Europe as one of the areas of ‘The Missing Case Law’ of the ECtHR. She argues that while the ECtHR is not responsible for its docket, ‘the way the Court decides the cases which do come before it either encourages or on the contrary discourages applications which have the potential for taking the case law further’. M-B. Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpart* (2015), 246–7.

⁵²In Cyprus, more than 20 per cent of persons claim that a close family member went missing during the two periods of violence. D. J. Stefanovic, N. Loizides, and C. Psaltis, ‘Attitudes of Victims towards Transitional Justice: The Case of Cyprus’, Conference Paper ‘Referendums and Peace Processes’, 26 and 27 October 2016, Nicosia, Cyprus (on file with the authors).

⁵³IOM, *Families of Missing Migrants: Their Search for Answers, the Impacts of Loss and Recommendations for Improved Support. Country report: Spain* (2021); IOM, *Families of Missing Migrants: Their Search for Answers, the Impacts of Loss and Recommendations for Improved Support. Country report: Ethiopia* (2021).

⁵⁴Notwithstanding the fact that it was state policies that made it impossible for the persons on the move to choose another way, and that they often could have been saved by states or NGOs (for example, drownings in the Mediterranean).

⁵⁵See UN Global Compact on Migration, *supra* note 15, Para. 44.

⁵⁶See *Cyprus v. Turkey*, *supra* note 50, Paras. 119 and 125.

4. The leading role of the International Red Cross in addressing missing persons

The Red Cross and Red Crescent movements are fundamental in globally dealing with missing persons and have a long history in this regard.⁵⁷ Their role is particularly important in the area of re-connecting families, but in certain contexts, the ICRC (in cooperation with states) also conducts exhumations and identification of remains. For example, in Colombia the ICRC facilitated recovery of remains and their handover to families, as well as the renovation of a morgue, and securing burial sites.⁵⁸ In Greece, it provided training, technical guidance, as well as material support for properly handling human remains.⁵⁹ Furthermore, with regard to migrants missing along the Mediterranean route, the ICRC coordinated among authorities, national Red Cross societies and other organizations to facilitate the proper handling and identification of human remains.⁶⁰ In some contexts, this cooperation is formalized, for example, when Italian authorities signed memoranda of understanding with the Italian Red Cross on collaboration concerning migrants arriving at sea.⁶¹

The analysis of the UN treaty bodies' dialogue with states demonstrates that states attach significant importance to the International Red Cross in the area of missing persons. When reporting on their actions concerning missing persons, states regularly referred to trainings provided by the ICRC,⁶² as well as of the role of the Red Cross in setting up databases.⁶³ Several states have also reported that protocols and procedures adopted by them have been 'endorsed by the ICRC'.⁶⁴ This is significant because, in addition to the technical support that the International Red Cross renders, its involvement and cooperation with these states also provides them with legitimacy. As one ICRC official acknowledged, states sometimes use the presence of ICRC delegations as evidence that their practices are in line with international law.⁶⁵

This approach by states is particularly interesting, as in the UN treaty bodies' dialogue, states are reporting on how their laws, policies and practices are in conformity with the relevant UN human rights treaty. Thus, when states invoke International Red Cross actions in this context, they suggest that these are taken instead of state action. Yet, while the International Red Cross undertakes actions addressing missing persons (it indeed has a *mandate* under IHL to do so during armed conflict⁶⁶), it does not have a *responsibility* to do so. In fact, the ICRC explicitly

⁵⁷M. Sassòli and M.-L. Tougas, 'The ICRC and the Missing', (2002) 84(848) *International Review of the Red Cross* 727. The ICRC also plays an important role in creating and interpreting international humanitarian law, see M. Milanovic and S. Sivakumaran, 'Assessing the Authority of the ICRC Customary IHL Study: How Does IHL Develop?', (2022) 104 (920–1) *International Review of the Red Cross*, 1856; Y. Shereshevsky, 'Back in the Game: International Humanitarian Lawmaking by States', (2019) 37(1) *Berkeley Journal of International Law* 1, 14–16, 45–6.

⁵⁸See ICRC 2022 Annual Report, Volume I, *supra* note 44, 234.

⁵⁹See ICRC 2022 Annual Report, Volume II, *supra* note 44, 370.

⁶⁰*Ibid.*, 379.

⁶¹European Commission, European Migration Network, 'Separated and Missing Migrants: Member States Approaches to Prevent Family Separation and Search Mechanisms for Missing Migrants', 2021, available at www.emn.sk/en/publications/emn-informs/item/637-separated-and-missing-migrants-member-states-approaches-to-prevent-family-separation-and-search-mechanisms-for-missing-migrants-2021.html.

⁶²Replies of the Niger to the List of Issues in Relation to Its Report Submitted under Art. 29(1) of the Convention, CED/C/NER/RQ/1 (26 January 2022), Paras. 23 and 53; Replies of Mexico to the List of Issues in Relation to Its Report Submitted under Art. 29, Para. 1, of the Convention, CED/C/MEX/Q/1/Add.1 (8 April 2015), Para. 172.

⁶³Replies by Bosnia and Herzegovina to the List of Issues in Relation to the Its Report Submitted under Article 29(1) of the Convention, CED/C/BIH/Q/1/Add.1 (22 July 2016), Paras. 18; see CED/C/MEX/Q/1/Add.1, *supra* note 62, Para. 35.

⁶⁴Replies of Panama to the List of Issues in Relation to Its Report Submitted under Art. 29(1) of the Convention, CED/C/PAN/RQ/1 (1 September 2021), Para. 35.

⁶⁵S. R. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War', (2011) 22(2) *European Journal of International Law* 459, at 482.

⁶⁶See for example: GC III, *supra* note 17, Art. 123 ('the International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of . . . [Central Prisoners of War Information] Agency'); see GC IV, *supra* note 17, Art. 140 ('the International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of . . . [Central Information] Agency'); 1977 Protocol Additional to the Geneva Conventions of 12

differentiates its actions from legal obligations by taking what the organization calls the 'humanitarian approach'. Human rights law and the language of humanitarianism appear, at first glance, to have common goals – at their most basic, they are both concerned with responding to human suffering.⁶⁷ However, as pointed out by Jean Pictet when outlining 'The Fundamental Principles of the Red Cross': 'One cannot be at one and the same time a champion of justice and charity. One must choose . . . The ICRC has long since chosen to be a defender of charity'.⁶⁸ For example, ICRC officials have asserted that referencing law would make access to affected populations more difficult, because 'this would transform an "act of generosity" on the part of combatants into a legal obligation'.⁶⁹ When the International Red Cross steps in to carry out actions concerning missing persons, therefore, it does so based on its humanitarian approach. Despite what they report to UN bodies, state authorities, and not the International Red Cross, ultimately remain responsible for addressing missing persons in line with international law.

By taking actions addressing missing persons, the International Red Cross does not become a duty-bearer. Some of the actions taken by it – for example, providing psychological support to families – are not state obligations under international law. Others – for example, identification of remains after violent losses of lives or providing certain trainings – are. Irrespective of whether a state is obligated under international law to take action, the International Red Cross is never under this obligation. To put it differently, the ICRC might have a mandate to intervene (which is why it often does), but it does not have a legal responsibility to do so. This is reserved for states; crucially, outsourcing the duties of states to the International Red Cross clouds this distinction.

Further, states' obligations with regard to missing persons differ depending on the circumstances of the missing; for example, states are obliged to take measures to return their remains to the families, only in cases of enforced disappearances.⁷⁰ That is why we are arguing for the need to differentiate between missing persons and forcibly disappeared persons. However, as the International Red Cross acts not based on obligations, but humanitarianism, it does not have to differentiate between different groups of missing persons. The fact that states have different obligations depending on the type of missing persons, means that the International Red Cross actions on missing persons have different effects under different circumstances in each state. For example, the purely humanitarian response to missing persons after an earthquake provided by the national International Red Cross, can replace the actions of a state. Conversely, while the ICRC cooperates with authorities on their criminal responsibilities,⁷¹ it obviously cannot fully take on

August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 33.3 ('Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.'). The Statutes of the International Red Cross and Red Crescent Movement, *supra* note 4, also specifically recognized this, by stating that the ICRC's role is, in particular, 'to ensure the operation of the Central Tracing Agency as provided in the Geneva Convention' (Art. 5.2(e)).

⁶⁷M. Barnett, 'Human Rights, Humanitarianism, and the Practices of Humanity', (2018) 10(3) *International Theory* 314, at 325.

⁶⁸Cited in B. Leebaw, 'The Politics of Impartial Activism: Humanitarianism and Human Rights', (2007) 5(2) *Perspectives on Politics* 223, at 227.

⁶⁹Conversation with ICRC official, cited in Barnett, *supra* note 67, at 329.

⁷⁰While IHL also contains provisions on returning remains, they are not obliging states to return them. Under Additional Protocol I to the Geneva Conventions (applying to international armed conflicts) returning remains is made dependent on a request and on a lack of objection by the home country (Art. 34.2(c)). According to the ICRC's study on Customary Rules of IHL 'Parties to the conflict must endeavor to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin (Rule 114), making however clear that in non-international armed conflict there is (only) a 'growing trend towards recognition'. See also Baranowska, *supra* note 34.

⁷¹See also the Model Law on the Missing, developed by the ICRC and promoted globally by the Red Cross and Red Crescent movement, which includes in Part VI two articles on criminal responsibility, including explicitly to prosecute acts 'causing enforced disappearances' (Art. 24.1 (i)).

this task. Thus, after the humanitarian actions by the Red Cross and Red Crescent movement with regard to missing persons who were forcibly disappeared, states are still required to conduct criminal investigations, punish perpetrators and provide reparation. Equating any actions of the Red Cross and Red Crescent movement in a given state with that state's compliance under international law can have detrimental consequences for missing persons and their families, as their rights might not be fully protected. These consequences are explored in more detail in the two sections that follow.

5. Missing persons from the Cyprus conflict

In Cyprus about 2,000 persons (1,490 Greek Cypriots and 502 Turkish Cypriots⁷²) went missing as a result of intra- and inter-state violence that took place during two distinct points in the island's history.⁷³ In 1963–64, intra-state violence (often conducted with the acquiescence of the Cypriot state), resulted in the first missing persons of the conflict. In 1974, a failed *coup d'état* and the Turkish military invasion of the island that followed produced a second wave of missing persons. Most of the missing persons from 1963–64 and many who went missing in 1974 are, in fact, victims of enforced disappearance.⁷⁴ In addition to ECtHR case law, we also discuss the ICPPED, even though neither Turkey nor Cyprus have ratified the Convention. In doing so, we do not argue that the two countries have legal obligations under the ICPPED. Rather, we contend that both Turkey and Cyprus have often used the existence of the CMP to justify their own inactions; this remains the case whether the CMP responds to legal norms that the two states have to comply with (under the ECHR) or that they do not (under the ICPPED).

In order to address missing persons in Cyprus, the CMP was established in 1981.⁷⁵ The CMP, which the ICRC, as a neutral intermediary, was actively involved in creating from the outset, is a humanitarian body, not one concerned with protecting human rights. This is explicitly stated on its website, which notes that the

CMP does not attempt to establish the cause of death or attribute responsibility for the death of missing persons. Its objective is a humanitarian one, bringing closure to thousands of affected families through the return of the remains of their missing relatives.⁷⁶

The ECtHR has acknowledged the humanitarian objectives of the CMP and accepted that '[i]n the context of Cyprus, the task of locating and identifying remains has been delegated by both sides of the conflict to the United Nations Committee on Missing Persons'.⁷⁷ The CMP, in turn, is arguably shaped in its composition and operations by the ICRC. Heading the CMP are three members: one Greek Cypriot and one Turkish Cypriot 'humanitarian person' and a third member who is selected by the ICRC.⁷⁸ While the third neutral member is not receiving instructions from the ICRC, they are presumably in agreement with the Red Cross's philosophy and approach to addressing missing persons. Further, the CMP and ICRC have, over the years, collaborated on a

⁷²Committee on Missing Persons in Cyprus, CMP Statistics, available at www.cmp-cyprus.org/statistics/.

⁷³For a discussion of these events and the profiles of missing persons in Cyprus, see P. Sant Cassia, *Bodies of Evidence: Burial, Memory and the Recovery of Missing Persons in Cyprus* (2005).

⁷⁴The missing persons who are also victims of enforced disappearance are those who disappeared as a direct consequence of a state's authorization or acquiescence. These include, at the very least, those who disappeared in 1963–64 (with the acquiescence of the Cypriot state) and those who disappeared while under the control of the Turkish army (and therefore, with the authorization of the Turkish state).

⁷⁵UN General Assembly Resolution 3450 (9 December 1975); UN General Assembly Resolution 32/128 (16 December 1977); UN General Assembly Resolution 33/172 (20 December 1978).

⁷⁶Committee on Missing Persons in Cyprus (CMP), 'Who We Are', available at www.cmp-cyprus.org/who-we-are/.

⁷⁷*Emin and Others v. Cyprus*, Decision of 3 April 2012, [2012] ECHR, Para. 32.

⁷⁸CMP Terms of Reference, available at www.cmp-cyprus.org/terms-of-reference-and-mandate/, Para. 1.

number of occasions. In 2019, the two organized in Cyprus an international expert workshop with 60 participants from 29 countries,⁷⁹ while in 2015, the ICRC recommended two independent experts who investigated a case of misidentification of a missing person by the CMP.⁸⁰ In 2016, the CMP members reaffirmed their intention to continue the Committee's 'close cooperation ICRC'.⁸¹ As the examples suggest, this cooperation is ongoing and regular.

The ICRC's involvement in the CMP has arguably had an impact on the way the Committee operates. The Terms of Reference of the CMP, which exactly reflect the position of the ICRC, explicitly note that the Committee will not 'attribute responsibility for the deaths' or 'make findings as to the causes of such deaths';⁸² this is despite the fact that both constitute legally binding obligations. Thus, while the CMP will return the remains of missing persons to their families (an important humanitarian gesture), its refusal to investigate the deaths and send the perpetrators to justice shows a disinterest in meeting international human rights standards.

The ICRC's influence in shaping the CMP's activities for meeting humanitarian standards, rather than complying with legal obligations, has not changed over time. For instance, in 2019, the ICRC and CMP co-published an assessment of their work, stating that the objective of the report was 'exclusively humanitarian'.⁸³ In the same report, the ICRC described itself as 'an impartial, neutral and independent organisation' with an 'exclusively humanitarian mission'.⁸⁴ This emphasis on humanitarian standards, rather than the law, is also visible in several UN General Assembly resolutions that encouraged the development of the CMP.⁸⁵ All of them explicitly refer to the ICRC: in 1975, the UN General Assembly 'appreciat[ed] the work of the International Committee of the Red Cross in this field'; in 1977, it requested the establishment of the CMP 'with the participation of the' ICRC; and in 1978, it again urged the establishment of the CMP 'with the co-operation' of the ICRC. Yet, none of these resolutions refer to the rights of missing persons or their families, and note instead the 'basic needs of families to be informed, without delay, about the fate of their missing relatives',⁸⁶ or 'the need for a speedy resolution of this humanitarian problem'⁸⁷ (emphasis added by authors).

5.1. The rightlessness of victims

Even though the CMP's Terms of Reference mention 'the investigative work of the Committee' twice,⁸⁸ families of victims cannot ask the CMP to, and the CMP does not actually investigate when there is a violent loss of life.⁸⁹ This is due to three reasons. First, formally, the CMP's mandate is limited to determining whether or not any of the missing persons on its list are dead or

⁷⁹CMP and ICRC open an International Expert Workshop on Missing Persons in Nicosia', *CMP Press Release*, 16 October 2019, available www.cmp-cyprus.org/press-release/cmp-and-icrc-open-an-international-expert-workshop-on-missing-persons-in-nicosia/.

⁸⁰CMP Press Release on the Case of Mr. Georgios Foris', *CMP Press Release*, 6 March 2015, available at www.cmp-cyprus.org/press-release/cmp-press-release-on-the-case-of-mr-georgiosforis/.

⁸¹CMP Exhibition Opens at the United Nations Headquarters in Geneva', *CMP Press Release*, 15 November 2016, available at www.cmp-cyprus.org/press-release/cmp-exhibition-opens-at-the-united-nations-headquarters-in-geneva-2/.

⁸²See CMP Terms of Reference, *supra* note 78, Para. 12.

⁸³ICRC and CMP, *Needs of Families of Missing Persons in Cyprus* (2019), available at www.cmp-cyprus.org/wp-content/uploads/2022/05/Cyprus-FNA-Public-Report-April-2019-EN-1.pdf?mc_phishing_protection_id=28047-cck8ir2du81aseq03rhg, 7.

⁸⁴*Ibid.*, at 1.

⁸⁵See UNGA Resolution 3450, *supra* note 75; see UNGA Resolution, *supra* note 75; see UNGA Resolution 33/172, *supra* note 75.

⁸⁶UN General Assembly Resolution 37/181 (17 December 1982), Preamble; UN General Assembly Resolution 36/164 (16 December 1981), Preamble.

⁸⁷See UNGA Resolution 37/181, *supra* note 86.

⁸⁸See CMP Terms of Reference, *supra* note 78, Paras. 3 and 6.

⁸⁹The obligation to investigate violent loss of life in relation to missing persons, especially in the case of Cyprus, was recognized by the ECtHR in *Cyprus v. Turkey* and *Varnava v. Turkey*.

alive.⁹⁰ In practice, the CMP has expanded its mandate and in cases where the person is found dead, it also returns the identified remains to that person's family.⁹¹ When the remains are returned, relatives are officially informed about the 'approximate time of the deaths',⁹² the location where the body was found, and whether the body had any bullet wounds or bone fractures. Nevertheless, the CMP is explicitly disempowered from determining the causes of the victim's death or concluding who was responsible for it.⁹³

Second, no information from the CMP's investigative work can be, or has been, used in the courts of Cyprus or Turkey, in either civil or criminal cases relating to missing persons.⁹⁴ In fact, the CMP has been operating with the informal promise that any information it receives will not be shared with the prosecuting authorities.⁹⁵ The CMP's informal commitment not to assist in the prosecution of any of the perpetrators has been somewhat formalized in a letter by the Attorney General of Cyprus to the international member of the CMP, dated 2 August 1990, noting that he will not prosecute anyone who has cooperated with the CMP, even if that person appears to have been a party to a crime.⁹⁶ This letter has never been challenged in court. It essentially provides complete amnesty to alleged perpetrators who cooperate with the CMP and is, therefore, in contravention to the obligation under the right to life, which requires that effective investigations lead, where possible, to prosecutions. One possible explanation for this is that international law is marred by tensions and seemingly conflicting obligations. While on the one hand, states have a legal duty to locate, identify, and return the remains of missing persons to their relatives, they must also punish the perpetrators. Yet, in practice, often the only way to find the remains is for the perpetrators to share this information, which is unlikely to happen if they know they will be punished for their actions. It is this which makes amnesties both necessary and often accepted by the relatives of missing persons.⁹⁷ While the tension undoubtedly exists, there are ways of working around it, as evidenced by post-conflict societies that have returned the remains of missing persons to their families in the absence of blanket amnesties.⁹⁸

Third, the CMP's investigative work is not fully compliant with the duty to investigate because its territorial jurisdiction only extends to the island of Cyprus. This is despite the fact that some Greek Cypriots who were detained by Turkish forces in 1974 were taken to Turkey and some of them never returned.⁹⁹ The limited territorial jurisdiction of the CMP is also undermined by the fact that it is, in practice, prevented from undertaking investigations in a large number of areas in the north of the island, which Turkey has declared to be of military significance. The CMP announces from time to time that it has been given access to some of these areas (and, therefore,

⁹⁰See CMP Terms of Reference, *supra* note 78, Para. 13.

⁹¹This is the case, despite what is stated in the CMP Terms of Reference, *ibid.*, Para. 12.

⁹²*Ibid.*, Para. 13.

⁹³*Ibid.*, Para. 11; N. Hadjigeorgiou, 'Truth and Closure in Cyprus: An Assessment of the Committee on Missing Persons', (2022) 55(1) *Israel Law Review* 3.

⁹⁴For other humanitarian bodies dealing with missing persons that explicitly cannot be used for investigations, see Colombia: B. Jones et al., 'Hiding in Plain Sight: Victim Participation in the Search for Disappeared Persons, a Contribution to (Procedural) Justice', (2023) 17(2) *International Journal of Transitional Justice* 233.

⁹⁵This is alluded to in the CMP's Terms of Reference, *supra* note 78, Para. 9, which state that 'the Committee's entire proceedings and findings will be strictly confidential. Any violation of this rule would place the work of the Committee in jeopardy.'

⁹⁶The existence of the letter is cited in M. Crettol et al., 'Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach', (2017) 99(905) *International Review of the Red Cross* 589, 603.

⁹⁷I. Kovras, *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared* (2017); see Hadjigeorgiou, *supra* note 93.

⁹⁸See for example Bosnia and Herzegovina, T. Blumenstock, 'Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina', (2006) 19 *Leiden Journal of International Law* 773. Importantly, in case of enforced disappearances the legal obligations of the state include the obligation to return the remains of the disappeared persons if they died, an obligation that was also influenced by the developments with regard to Bosnia and Herzegovina, see Baranowska, *supra* note 34, 709–733.

⁹⁹See *Cyprus v. Turkey*, *supra* note 50, Para. 25.

can now begin investigations), but this happens rarely, slowly and at the sole discretion of Turkey.¹⁰⁰ Thus, even though victims and their families are, on paper, owed specific protections emanating from the right to life, in practice, the CMP is falling far short of these obligations. This is the outcome of the decision of Cyprus and Turkey to shift their legal obligations to the CMP and, in the process, provide humanitarian relief to the relatives, rather than treat them as right holders. To put it differently, this strategy closes avenues to the victims to demand from the states that they comply with their international legal obligations. Thus, what the states seem to imply, namely that it does not matter who responds to the needs of missing persons and their families as long as someone does, is incorrect.

Since some of the Cypriot missing persons had been arrested, detained and abducted by agents of the state or persons acting with the authorization or acquiescence of the state, they are victims of enforced disappearance. For these persons, under the ICPPED, additional, and more specific protections also apply; yet these, too, remain unfulfilled by the CMP. One response to this criticism could be that non-compliance with legal duties arising from the ICPPED was to be expected, as neither Turkey nor Cyprus have ratified the Convention. The discussion that follows focuses on three ICPPED obligations; all three are, at the same time, legal obligations under the ECHR, which is binding on both countries. Thus, the states' duties to comply with these remains, irrespective of their decision not to sign (in the case of Turkey) or ratify (in the case of Cyprus) the ICPPED.

First, even when investigations in a given case are concluded, and where information about the disappearance is available and has been requested, the CMP does not fully satisfy the obligation to inform the families of the outcomes of these investigations under Article 18 of the ICPPED. A similar obligation exists under the ECHR. As the Court held in *Varnava v. Turkey*, an inadequate reaction by the state when a disappearance of a missing person is brought to its attention can result in a violation of inhuman treatment under Article 3 of the Convention. In particular, the Court continued,

The finding of such a violation . . . can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of the missing person.¹⁰¹

The CMP employs Greek Cypriot and Turkish Cypriot psychologists tasked with informing the relatives that the remains of their loved ones have been found and identified.¹⁰² The relatives are then invited to the CMP's Family Viewing Facility, where they can see, and are formally given, the remains. At that stage, they also have the opportunity to meet and talk to the group of scientists who worked on identifying their relative's remains and ask any questions they might have. However, although relatives have rated positively the psychologist's involvement in the process,¹⁰³ the fact remains that the CMP cannot share any information about the outcomes of its investigations.¹⁰⁴ Relatives leave without being told about their loved one's whereabouts between the moments of disappearance and death, without being given information about how the person

¹⁰⁰'Breakthrough: Turkey Grants Access to 30 Military Areas over Three-Year Period', *CMP Press Release*, 5 November 2015, available at www.cmp-cyprus.org/press-release/breakthrough-turkey-grants-access-to-30-military-areas-over-three-year-period-2/.

¹⁰¹See *Varnava and Others v. Turkey*, *supra* note 32, Para. 200.

¹⁰²CMP website, 'Phase 5 – Return of Remains', available at www.cmp-cyprus.org/phase-5-return-of-remains/.

¹⁰³See Hadjigeorgiou, *supra* note 93.

¹⁰⁴Although the CMP does not carry out a police investigation, it still investigates in the sense that it talks to witnesses and conducts research in archives in Cyprus and abroad. The CMP itself refers to this part of its proceedings as 'Phase 1: Investigation'. See, CMP website, 'What We Do', available at www.cmp-cyprus.org/phase-1-investigation/.

died, and not knowing who was responsible for this. Additionally, even the information that is shared with the relatives, is disclosed only when the investigations have been fully concluded. This means that approximately half of all relatives have not received any information from the CMP to date, while the rest have been contacted several decades after the disappearance.¹⁰⁵

Second, despite the right of the victims under Article 24(4) of the Convention to receive ‘reparation and prompt, fair and adequate compensation’, this is not provided for by the states or the CMP. The Committee offers to pay for the funeral of the missing or disappeared person, but this is not in itself compensation and, in any case, it is something that the CMP does on a voluntary basis and could, in principle, stop at any moment.¹⁰⁶ Additionally, the ECtHR ordered in *Cyprus v. Turkey (Just Satisfaction)* that Turkey should pay €30 million to the government of Cyprus, an amount that would be distributed to the individual family members who had been identified as victims.¹⁰⁷ Execution of this 2014 judgment is still pending, and it does not address all families of missing persons – as it only concerns the Greek Cypriot missing.¹⁰⁸ In fact, over the years, neither Cyprus nor Turkey have paid any money as reparation or compensation to any of the missing persons’ relatives.¹⁰⁹

Third, Article 15 of the ICPPED provides that state parties shall cooperate and afford each other mutual assistance when searching for and locating missing persons. The ECtHR has confirmed the obligation of states to cooperate with each other in order to fully comply with the procedural obligation under Article 2 (albeit in a context that was not related to missing persons) in the case of *Güzelyurtlu v. Cyprus and Turkey*.¹¹⁰ Cyprus and Turkey have jointly delegated their handling of missing persons to the CMP, thus indicating their will to cooperate on the issue. Yet, the Committee has not always benefited from good cooperation between the parties. While it was established in 1981, the CMP only became operational and identified the first missing person in 2006. During this period, the UN considered the CMP’s dissolution on at least one occasion,¹¹¹ and the CMP itself noted in a press release that it cannot operate without the cooperation of both sides.¹¹² Thus, Cyprus and Turkey *theoretically* met their obligation to cooperate with each other to address missing persons when they jointly formed the CMP. Yet, *in practice*, no meaningful cooperation followed, as evidenced from the fact that the CMP was established in 1981, but only became operational in 2005. Eventually cooperation did materialize,¹¹³ which resulted, according to the UN Secretary-General, into ‘a model of successful cooperation between Greek Cypriot and

¹⁰⁵See Hadjigeorgiou, *supra* note 93.

¹⁰⁶This information was provided to the authors by one of the first family members to receive a relative’s remains. He identified several shortcomings in the process and informed the CMP of these. When the next set of remains was returned to the families a month later, his recommendation that the CMP, and not the relatives, should pay for the funeral, had already been implemented.

¹⁰⁷*Cyprus v. Turkey (Just Satisfaction)*, Judgment of 12 May 2014, [2014] ECHR, Para. 58.

¹⁰⁸Interim Resolution Execution of the Judgments of the European Court of Human Rights Cyprus against Turkey (Adopted by the Committee of Ministers on 16 September 2021 at the 1411th meeting of the Ministers’ Deputies).

¹⁰⁹At the same time, some state bodies in the Republic of Cyprus and the TRNC are providing benefits to missing persons’ families, in the form of academic scholarships or free medical assistance, but these are different in nature to reparations. See, N. Iakovou and N. Kornioti, ‘Missing Persons in Cyprus: Observations from the Past and Recommendations for the Future’, *PRIO Cyprus Centre Report* 7/2019.

¹¹⁰*Güzelyurtlu and Others v. Cyprus and Turkey*, Judgment of 29 January 2019, [2019] ECHR. For an analysis of this obligation, see N. Hadjigeorgiou, and D. Kapardis, ‘Police Cooperation in Cases of Unrecognised Secessions: The Joint Communications Room in Cyprus’, (2023) 22(5) *Ethnopolitics* 527.

¹¹¹Report of the Secretary-General on the United Nations Operation in Cyprus, S/1996/1016 (10 December 1996), Para. 27.

¹¹²The 1996 press communiqué was quoted in Cassia, *supra* note 73, 66. The CMP’s press communiqué noted: ‘No Committee, especially a humanitarian one, can operate successfully without the full co-operation of its Members. Until now, however, the indispensable spirit of collaboration between the Parties has not been sufficient.’

¹¹³For a discussion of the reasons that led to this change in political willingness to cooperate, see I. Kovras, and N. Loizides, ‘Delaying Truth Recovery for Missing Persons’, (2011) 17(3) *Nations and Nationalism* 520.

Turkish Cypriot communities'.¹¹⁴ It needs to be stated though, that this 'successful cooperation' still does not suffice in meeting Cyprus' and Turkey's international legal obligations.¹¹⁵

5.2. Diminishing the obligations of the duty bearers

The second consequence of the phenomenon we identify is that even when victims seek to challenge the fact that their human rights are not fully protected, they are often unsuccessful because the attempted shifting of responsibility has diminished the obligations of states, which are the real duty bearers. The ECtHR has held in the past that 'The authorities [of Cyprus and Turkey] are not exempted from their obligation [to conduct an] investigation [in cases of missing persons] but may take the benefit of the work done by the CMP in this respect.'¹¹⁶ Yet, in practice, over the years, both states have used the CMP's existence as a justification for not meeting their legal obligation to unilaterally investigate the fate of missing persons believed to be in their own jurisdictions.¹¹⁷

Neither Turkey nor the Turkish Republic of Northern Cyprus (TRNC) have undertaken any investigations, other than those conducted by the CMP, for persons who went missing or disappeared during the conflict. Since the TRNC is not a recognized state under international law, the ECtHR¹¹⁸ and the UN¹¹⁹ have accepted that Turkey is legally and politically responsible for actions in the north of Cyprus. The official narrative of Turkey is that all missing and disappeared persons were killed during the inter-ethnic hostilities and war (hence why they are referred to as 'martyrs' in official documents¹²⁰) and there is, therefore, nothing to investigate.¹²¹ Further, when Turkey was directly confronted with its legal obligations, it diverted attention by referring to the CMP. This was, for example, the argument made in ECtHR proceedings concerning missing persons when Turkey argued that it was 'only logical' that the CMP be regarded as an appropriate remedy.¹²²

Cyprus has also refused to begin investigations to locate missing or disappeared persons in the areas under its effective control, even in cases where the missing person was a Greek Cypriot and there was credible information as to where he was buried.¹²³ In some cases where remains have been located and identified through the CMP, Cyprus begun criminal investigations, but these have not resulted in any prosecutions to date.¹²⁴ Finally, when Turkish Cypriot family members of missing persons brought a case to a Cypriot court arguing that their rights had been violated because of the state's failure to investigate, the court came up with a defence (what it called 'the doctrine of an act of government') that granted immunity to the state for its actions and omissions relating to missing persons.¹²⁵ The defence is novel in that it has not been used by Cypriot courts

¹¹⁴United Nations Development Program Cyprus, 'Support to the Committee on Missing Persons in Cyprus', available at www.undp.org/cyprus/projects/closed-support-committee-missing-persons-phase-10.

¹¹⁵For example, Art. 15 would require state cooperation when searching for, locating and releasing disappeared persons. As explained above, there is no sufficient cooperation in this regard, as the CMP still does not have access to all territories under the effective control of the Turkish army.

¹¹⁶See *Emin and Others v. Cyprus*, *supra* note 77, Para. 32.

¹¹⁷This was the argument made by the Republic of Cyprus in *Özalp Behiç v. Republic of Cyprus* (Case No. 589/2006). It was also the argument alluded to by Turkey in *Cyprus v. Turkey* (Just Satisfaction), *supra* note 107, Para. 21.

¹¹⁸*Loizidou v. Turkey*, Judgment of 18 December 1996, [1996] ECHR, Para. 52.

¹¹⁹See, biannual reports of the UN Secretary-General on Cyprus, available at www.securitycouncilreport.org/un_documents_type/secretary-general-reports/?ctype=Cyprus&cbtype=cyprus.

¹²⁰Hence, the creation of the Turkish Cypriot 'Association of Martyrs' Families and War Veterans', as opposed to the Greek Cypriot 'Pancyprian Organisation of Relatives of Undeclared Prisoners and Missing Persons'.

¹²¹See *Iakovou and Kornioti*, *supra* note 109.

¹²²See *Varnava and Others v. Turkey*, *supra* note 32, Para. 177.

¹²³*Βάσος Βασιλείου κ.ά. εναντίον Κυπριακής Δημοκρατίας* (Αρ. αγωγής 13863/2002) [*Vasos Vasiliou v. Republic of Cyprus* (Case No. 13863/2002)], which was decided by the Nicosia Assize Court on 5 November 2010.

¹²⁴For examples of these unsuccessful investigations, see *Nazlı Gürtekin and Others v. Cyprus*, *supra* note 31.

¹²⁵*Özalp Behiç v. Republic of Cyprus* (Case No. 589/2006) Republic of Cyprus Supreme Court, 29 May 2008. For a discussion of this case, see N. Hadjigeorgiou, *Protecting Human Rights and Building Peace in Post-Violence Societies* (2020), 103.

in cases other than the ones concerned with persons who went missing during the conflict. According to this defence, missing persons are among the consequences of ‘the Cyprus Problem’, an issue of political nature, falling within the exclusive competence of the executive, and therefore, non-judicially reviewable. The political nature of the conflict makes a political body, like the CMP, better suited to handle it. With this argument, Cypriot domestic courts effectively used the CMP to shield the authorities from their legal obligations in relation to those who went missing during the conflict.

When it delivered its seminal *Cyprus v. Turkey* judgment in 2001, the ECtHR noted that, ‘although the CMP’s procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation’.¹²⁶ Even a cursory reading of the judgment suggests that there was no ambiguity, in the Court’s mind, that the CMP was not delivering what states were legally obliged to do.¹²⁷ It is in light of this that the Court’s finding in the latter case of *Varnava v. Turkey* should be understood. In *Varnava*, a 2009 judgment, the ECtHR held that missing persons’ cases from Cyprus that had been submitted to the Court after the end of 1990 would be found inadmissible. Its rationale was that by 1990, nine years after the establishment of the CMP, it should have become apparent to the families that the Committee ‘no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of their relatives in the near future’.¹²⁸ By that time, therefore, relatives of missing persons should have realized that the CMP would not provide the remedy they expected, and they should have resorted to the ECtHR instead. Those that did not (who, in practice, are all victims except the applicants in *Varnava* itself¹²⁹) are barred from accessing the Court. Thus, the time frame the ECtHR established to assess when the applicants should have applied to the ECtHR was based not on domestic proceedings or the initial violation, but on the Courts’ assessment that by 1990 it was clear the CMP was ineffective.

It appears from the Court’s reasoning that the deadline for submitting an application to the ECtHR can be extended, if the applicants are attempting to make use of an effective remedy domestically. However, since by 1990 it should have become clear that the CMP did not provide such effective remedies, the families should have, by then, applied to the Court. This reasoning and its humanitarian consequences may be criticized on other grounds (such as that the date chosen by the Court was arbitrary); what is clear for our purposes is that the ECtHR connected the admissibility of this and future cases to the performance of the CMP. Thus, although the Court did not treat as, and did not label the CMP, a duty bearer, it considered its performance an important factor in determining whether it should consider Turkey liable for human rights violations. Ultimately, the practical implication of the judgment is this: the establishment of a humanitarian body (and, paradoxically, its inability to work effectively), shielded Turkey and Cyprus from their legal responsibilities under the European Convention on Human Rights.

6. Missing migrants in the Mediterranean

Thousands of migrants go missing in the Mediterranean each year. The IOM has recorded over 31,000 fatalities of persons crossing the sea between 2014 and 2024,¹³⁰ which is about half of all

¹²⁶See *Cyprus v. Turkey*, *supra* note 50, Para. 135.

¹²⁷The Court repeatedly makes this point in *ibid.*, Paras. 27, 135, and 149.

¹²⁸See *Varnava and Others v. Turkey*, *supra* note 32, Para. 170.

¹²⁹Since *Varnava and Others v. Turkey*, the ECtHR has found a number of missing person cases from Cyprus inadmissible based on this ground. See, for example, *Karefylides and Others v. Turkey*, Decision of 1 December 2009, [2009] ECHR; see *Charalambous and Others v. Turkey*, *supra* note 31; see *Emin and Others v. Cyprus*, *supra* note 77.

¹³⁰The IOM Missing Migrants Program has recorded 31,238 missing migrants on the Mediterranean since 2014 (as of December 2024), available at missingmigrants.iom.int/. However, the project records only those migrants that have died at external borders of states, or in the process of migration towards an international destination. It excludes deaths that occur in immigration detention, refugee camps or housing, or after deportation.

globally recorded migrant deaths. There are three main migration routes in the Mediterranean: the Central one covers crossings from Libya, Tunisia, Egypt, and Algeria to Italy, and to a lesser extent, Malta. On this route migrants go missing both because of drownings and due to so-called pullbacks, that is departure prevention measures.¹³¹ Migrants who have been brought back from this route to Libya have been reported to be forcibly disappeared.¹³² The Western Mediterranean route encompasses journeys to Spain from Morocco and Algeria, while the Eastern Mediterranean route covers the maritime migration from Turkey to Greece, and to a lesser degree Cyprus and Bulgaria. Each of these routes has its own trends and peculiarities, but the overall data on all routes demonstrates that they are extremely dangerous and most migrants who die are not identified. For example, on the Western Mediterranean route about 91 per cent of the deaths were caused by drowning. Out of those, only 28 per cent of the remains were recovered.¹³³

Since the vast majority of the migrants goes missing in the Mediterranean while travelling irregularly, official records and documentation – which usually are available after shipwrecks – do not exist. Establishing the fate of the missing migrants and informing the families is not possible without close cooperation between different states and actors, as it requires, among other, collecting data, cross-checking it, and conducting DNA testing both of the human remains and of relatives, who usually are in different countries than the one the person went missing in.

A 2021 document published by the European Commission is an interesting example of how EU member states show off Red Cross and Crescent movement actions when relating to missing migrants in the Mediterranean. The document includes five boxes with examples of national policies and good practices, out of which three relate to the International Red Cross: first, the ICRC missing persons project; second, the Red Cross and Crescent movement restoring the family links network; and third, a collaboration between a national Red Cross society and municipalities.¹³⁴ In fact, the International Red Cross addresses migrants missing in the Mediterranean regularly. For example, it has developed innovative tools helping to identify missing migrants, as it runs a project in Spain to analyse networks of social connections of migrants missing at sea, to uncover more avenues of inquiry for tracing and forensic activities.¹³⁵ In 2022, it also published a report on migrants' deaths, revealing that on Europe's southern borders only 13 per cent of the remains were found and buried.¹³⁶ While actions and research by the International Red Cross are welcome, presenting them as part of national policies and good practices diminishes the obligations of the states, who are the duty bearers.

6.1. Rightlessness of victims

Just as with regard to their own citizens, states have an obligation to prevent and investigate migrants' losses of life occurring within their jurisdiction. However, states appear not to be taking these legal obligations seriously with regard to migrants in the Mediterranean and, in particular, with regard to irregular ones. This becomes apparent in how states react to the discovery of human remains that are assumed to belong to potentially irregular migrants: a study on the Greek island Lesbos showed that while 97 per cent of remains of persons (perceived as) citizens are identified,

¹³¹N. Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', (2016) 27 *European Journal of International Law* 591.

¹³²Amnesty International, Human Rights in Libya, available at www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/#:~:text=Dozens%20of%20people%20were%20arbitrarily,as%20hostages%20to%20extort%20ransoms.

¹³³See IOM, 'Country Report: Spain', *supra* note 53, 7.

¹³⁴See European Commission, *supra* note 61, 3–7.

¹³⁵See ICRC 2022 Annual Report, Volume II *supra* note 44, 379.

¹³⁶ICRC, 'Counting the Dead: An ICRC Report on the Migrants Dying on Europe's Borders', 15 December 2022, available at www.icrc.org/en/document/counting-dead-icrc-report-migrants-dying-europe-borders.

the identification rate drops to 20 per cent in cases of irregular migrants.¹³⁷ Such outcomes in the region stem from different reasons, including policy decisions. For example in Malta, only those migrants who have died in the country itself are registered and identified; those whose remains arrive on boats or on the shore are not registered.¹³⁸ Also, in Italy, an autopsy on death migrants is conducted only in selected circumstances and at the discretion of provincial authorities; thus, identification is not always of primary interest.¹³⁹ In Libya, reporting of missing persons is only available for citizens of Libya, making it impossible to file claims for the thousands of migrants passing through Libya to Europe, or brought back to Libya from Europe.¹⁴⁰ Such policies lead to rightlessness of missing migrants and their families in the Mediterranean.

As states refer to ‘accidents’ and ‘tragic’ incidents with regard to border deaths and missing migrants, language itself becomes a tool for renouncing their responsibility for the acts.¹⁴¹ While the phrases might mirror the humanitarian approach taken by the International Red Cross, such wording is different when used by states: finding remains of persons that died at a border raises strong suspicions that there was a violent loss of life, as the persons might have died because of actions of smugglers or traffickers. Thus, states are required to investigate. As state violence with regard to irregular migrations at borders has been widely reported,¹⁴² the remains could also belong to persons who died as a result of actions of state officials. However, when finding human remains of irregular migrants, Mediterranean states generally do not initiate investigations; instead, the humanitarian initiatives adopted are often driven by the Red Cross and Red Crescent movement.

A clear example of an enforced disappearance is the secret detention of migrants, which takes place at some border crossings. When the existence of these detention centres is denied by the state, or the fate and whereabouts of the disappeared persons are kept secret, this constitutes an enforced disappearance. Although in the migration context, the disappeared persons are often subsequently released after several days or weeks, this does not change the categorization of the initial act as an enforced disappearance under international human rights law.¹⁴³ States need to ensure that all individuals who allege that an enforced disappearance occurred have the right to report the complaint to competent authorities. However, states often do not perceive, or they wilfully ignore, missing migrants to be (possibly) victims of enforced disappearance;¹⁴⁴ thus, often, only the International Red Cross is left to address the needs of the forcibly disappeared.

¹³⁷I. Kovras, and S. Robins, ‘Death at the Border: Managing Missing Migrants and Unidentified Bodies at the EU’s Mediterranean Frontier’, (2016) 55 *Political Geography* 40, 44. This is not (solely) connected to capacity and possibilities, as other research shows that the level of decomposition of the body does not influence identification rates: T. Last, ‘Who is the “Boat Migrant”? Challenging the Anonymity of Death by Border-Sea’, in V. Moreno-Lax, and E. Papastavridis (eds.), *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights* (2017), 79.

¹³⁸See Robins, *supra* note 49, 23.

¹³⁹*Ibid.*, at 20.

¹⁴⁰ICMP: Assessment of the Scope of the Missing Persons Problem in Libya, Including an Overview of Libya’s Institutional, Legal and Technical Capacities to Find Missing Persons’, April 2021, available icmp.int/wp-content/uploads/2021/04/LibyaReportEnglish-1.pdf, at 83.

¹⁴¹A. Gündoğdu, ‘Border Deaths as Forced Disappearances: Frantz Fanon and the Outlines of a Critical Phenomenology’ (2022) 5(3) *Puncta. Journal of Critical Phenomenology* 12, at 16.

¹⁴²Border Violence Monitoring Network, *The Black Book of Pushbacks* (2020), available at left.eu/issues/publications/black-book-of-pushbacks-volumes-i-ii/.

¹⁴³In contrast to the definition of enforced disappearances in international criminal law, which contains a time limit. See Committee on Enforced Disappearances (CED), Views of 11 March 2016 in case *Yrusta and Yrusta v. Argentina*, CED/C/10/D/1/2013, Para. 10.3, confirming that there is no time limit in the definition.

¹⁴⁴Replies of Greece to the List of Issues in Relation to Its Report Submitted under Article 29(1) of the Convention, CED/C/GRC/RQ/1 (21 September 2021), Para. 45, in reply to List of Issues in Relation to the Report Submitted by Greece under Article 29(1) of the Convention, CED/C/GRC/Q/1 (21 October 2020), Para. 18.

6.2. Diminishing the obligations of the duty bearers

This section argues that states are attempting to diminish their obligation as duty bearers by relying on three pieces of evidence: first, arguments raised by states at the UN treaty bodies dialogue; second, the Global Compact on Migration; and third, wording on international initiatives to address missing migrants in the Mediterranean.

In the dialogue with the UN Committee on Enforced Disappearances, Greek authorities were asked about identification and return of remains of disappeared migrants. The authorities did not explain how they engaged in these activities. They also did not argue that identifying and returning remains of missing migrants is not their legal obligation under the ICPPED. Instead, they stated that relatives of missing migrants ‘may use the services of the Red Cross’ and that the ‘Red Cross can also undertake to locate the remains of victims’ so that they will be returned to their relatives.¹⁴⁵

States treat the deaths of migrants on the move as a humanitarian crisis to which they may, benevolently, *choose* to react, rather than a situation that triggers a legal duty with which they *must* comply. This is exemplified by the Global Compact on Migration. The role of the International Red Cross is made clear in the very text of the Global Compact, as it provides that it will be implemented in cooperation with the International Red Cross and Red Crescent movement.¹⁴⁶ Its objective 8, ‘Save lives and establish coordinated efforts on missing migrants’, reads as follows:

We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, *in accordance with international law*. We further commit to identify those who have died or gone missing, and to facilitate communication with affected families.¹⁴⁷

Accordingly, states commit to cooperate to save lives and prevent migrant deaths ‘in accordance with international law’.¹⁴⁸ Conversely, the second part of the commitment – identifying those who have died or gone missing and facilitating communication with affected families – is not accompanied with a note that this is done in accordance with the law. Such a phrasing of the Global Compact on Migration can create the impression that states are only under international legal obligations to save lives and not to identify people and communicate with families.¹⁴⁹ In practice, with regard to missing migrants instead of communicating with the families in order to search for the disappeared, states focus their efforts on enforcement control and intelligence gathering.¹⁵⁰ However, if a violent loss of life occurs on the territory of a state, authorities are under an obligation to identify the human remains, as this is necessary to conduct the investigation. Additionally, in cases of enforced disappearances of migrants, states have an

¹⁴⁵See CED/C/GRC/RQ/1, *supra* note 144, Para. 45. For a similar position outside the Mediterranean see the dialogue with Mali, which pointed to non-governmental organizations dealing with identification and repatriation of the bodies (See CED/C/MLI/RQ/1, *supra* note 2, Para. 73.).

¹⁴⁶See UN Global Compact on Migration, *supra* note 15, 44.

¹⁴⁷*Ibid.*, Objective 8 (emphasis added).

¹⁴⁸Consistency with international law (through ‘in accordance with’, ‘obligation under’, ‘in conformity with’, ‘consistent with’, ‘in line with’) is quite prevalent in the Global Compact, as it appears 20 times.

¹⁴⁹It has been argued that under international law there is no general duty to rescue migrants, and – in many situations – drowning in the high sea does not in itself violate international law. I. Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’, (2018) 29 *European Journal of International Law* 347. On the fragmentation of the international legal framework concerning state obligations with regard to drownings at sea see also: see Moreno-Lax and Papastavridis, *supra* note 137; V. Morena-Lax, D. Ghezlbash, and N. Klein, ‘Between Life, Security and Rights: Framing the Interdiction of ‘Boat Migrants’ in the Central Mediterranean and Australia’, (2019) 32(4) *Leiden Journal of International Law* 715; S. Grant, ‘Recording and Identifying European Frontier Deaths’, (2011) 13(2) *European Journal of Migration and Law* 135.

¹⁵⁰See IOM, ‘Country Report: Spain’, *supra* note 53, 26–7.

obligation to facilitate communication with families. These legal obligations are, however, not highlighted in the Global Compact on Migration, thus mirroring the approach of the International Red Cross and creating the impression that such acts are merely humanitarian responses states may take.

It is not only the ambiguous wording of Objective 8 that provides evidence of states' attempt to diminish their obligations as duty bearers. While states have committed to implement all objectives of the Global Compact on Migration, Objective 8 receives less 'pledges' – that is, commitments member states have undertaken to advance the Global Compact on Migrations' implementation – than other objectives.¹⁵¹ It is also striking that a big share of the pledges for Objective 8 was submitted by international organizations, rather than states, showing the huge involvement and relevance of these bodies, including the International Red Cross, on missing migrants.¹⁵² The 2022 UN Secretary-General report on the Global Compact on Migration has also identified 'limited attention in the regional reviews' to the loss of migrant lives.¹⁵³ This shows that states are not willing to commit to the better implementation of this objective, and are happy, therefore, to leave any work that has to be done to other actors, including the International Red Cross.

Lastly, the diminishing of the obligations can be observed in the way words are chosen to speak about missing migrants. In the early 1990s, several NGOs, journalists, and academics started various initiatives aiming at collecting data on the number of migrants who died during their journey in the Mediterranean. This task was eventually taken over by the IOM, which set up a 'missing migrants' programme in 2014, professionalizing and centralizing the collection of data on migrant deaths. There are significant differences between the databases set up by NGOs and the IOM. This is exemplified by the very choice of words for the titles of the databases used in these programmes. One of the first civil society initiatives for recording migrant deaths was the NGO United for Intercultural Action publishing a 'List of Refugee Deaths'.¹⁵⁴ While both this initiative and the IOM's are recording the same events – that is migrants, including refugee seekers, that have died – one database uses the word 'deaths' in its title, while the other settles for the more palatable term 'missing'.¹⁵⁵ This difference in language is connected to the goal of the databases, as the NGOs were aiming at establishing responsibility for the deaths and pushing states to take actions to protect migrants, while the IOM's project aims primarily at recording data.¹⁵⁶ Moreover, the NGO initiative made the choice to refer to 'refugees', assuming that the persons it was addressing had particular rights to protection under international law. The IOM missing migrants programme, in contrast, does not make this assumption, as it uses the (more neutral and less legally protected) term 'migrant'.¹⁵⁷ Factually, at the point of recording deaths, it is in most cases not possible to establish whether the person had indeed a particular right to protection under international law as a refugee or not, thus in case of both databases, the term used is a choice its creators made. The differences in the wording are significant because the NGO version highlights

¹⁵¹As of June 2023, out of the 23 objectives, 17 received more pledges than objective 8. See migrationnetwork.un.org/the-pledging-dashboard.

¹⁵²Pledges to Objective 8 were made by 35 states, 14 international organizations, four civil society organizations, two migrant organizations and two others. Information available at migrationnetwork.un.org/the-pledging-dashboard.

¹⁵³Global Compact for Safe, Orderly and Regular Migration, Report of the Secretary-General, A/76/642 (27 December 2021), Para. 75.

¹⁵⁴Accessible via unitedagainstreugeedeaths.eu/about-the-campaign/about-the-united-list-of-deaths/.

¹⁵⁵As such the very term 'missing migrants' used within the program can be misleading, as the program does not record all missing migrants, it only 'records incidents in which migrants, including refugees and asylum-seekers, have died at state borders or in the process of migrating to an international destination.' See missingmigrants.iom.int/methodology.

¹⁵⁶C. Heller and A. Pécoud, 'Counting Migrants' Deaths at the Borders: From Civil Society Counterstatistics to (Inter) Governmental Recuperation', (2020) 64(4) *American Behavioral Scientist* 480, 485; Y. Al Tamimi, P. Cuttitta, and T. Last, 'The IOM's Missing Migrants Project: The Global Authority on Border Deaths', in M. Geiger and A. Pécoud (eds.), *The International Organization for Migration. The New 'UN Migrations Agency' in Critical Perspective* (2020), 195.

¹⁵⁷While the IOM's titles do not contain the term 'refugee' the database does include also refugees and asylum seekers.

the legal obligations by states with regard to persons who have the right to protection (refugees), while the IOM – which is itself made up of states – moves the focus away from legal responsibility. This observation is relevant for the argument made in this paper, because ‘missing migrants’ is not only the term used by the IOM, but also by the ICRC.¹⁵⁸

7. Conclusion

This article has illustrated that in two separate contexts – when addressing persons who went missing in conflict and during migration – states attempt to shift their international legal responsibilities to the International Red Cross. The connection between these two contexts has been acknowledged by the ICRC itself, as it explained its involvement in missing migrants by referring to its extensive experience in contexts of armed conflict.¹⁵⁹ In the case of missing persons in Cyprus, the shift to the ICRC happens through Cyprus and Turkey outsourcing their obligations to the CMP, a body that was conceptualized by, and continues operating today with involvement of, and cooperation with, the ICRC. In the case of missing migrants in the Mediterranean, this is evidenced by statements of states to this effect, but also their actual failure to act in accordance with international law, which implies their expectation that it is the International Red Cross that should pick up the slack.

This phenomenon has two important consequences: it undermines the rights of victims on the one hand, and it diminishes the obligations of states, as duty bearers, on the other. For example, in Cyprus, while family members have the right to be informed of their relatives’ fates and should also receive compensation, these rights remain unmet by both Cyprus and Turkey, and by the CMP to which they have outsourced their responsibilities. Further, even though the ECtHR has explicitly acknowledged that the CMP is a humanitarian body, it has held that the failure of the relatives to treat the CMP as an ineffective remedy in time, barred them from having access to the Court for the protection of their rights. Thus, the strategy that Cyprus and Turkey adopted, of shifting their legal obligations to the CMP, was effective in shielding them from these very responsibilities.

Similar observations also appear in relation to missing migrants. States do not engage effectively in the search or identification of remains, but often merely observe the International Red Cross and other actors conducting such operations. When reporting to UN bodies what actions they have taken to meet their legal obligations in relation to missing migrants, they again shift their responsibility by explicitly pointing to the actions of the ICRC and national Red Cross societies. Whether these actions are enough to meet their legal obligations, somehow stops being the states’ concern, as it is now the International Red Cross that is in the spotlight. This strategy is particularly detrimental for the victims because of who the states shift responsibility to. Had they attempted to shift responsibility to another state – which would have been possible in both case studies because of their transnational elements – this would have been less of a problem for the victims because another duty bearer would have had a legal obligation to act. However, the decision to shift responsibility to the International Red Cross, which is not a duty-bearer, means that the gap that is now created must be filled by a humanitarian approach; while noble, this approach simply does not protect the rights holders to the same extent.

As the International Red Cross has immense experience and know-how concerning missing persons, it is reasonable for states to rely on the organization and cooperate with it. This is even more pertinent when the states’ resources are limited, which is the case for many post-conflict countries, as well as countries which major routes of irregular migration pass through. However,

¹⁵⁸See, for example, the ICRC’s webpage on missing migrants at www.icrc.org/en/missing-migrants.

¹⁵⁹See Le Bihan, *supra* note 45, 101.

while the International Red Cross can conduct effective search, and provide trainings and families with psycho-social support, its activities cannot exhaust state obligations concerning missing persons. It is states, and not the International Red Cross, which have the capacity – and the obligation – to conduct investigations, prosecute perpetrators, and provide reparation to families. Thus, while cooperation between states and the Red Cross and Red Crescent movement is often the most effective way of addressing missing persons, the tendency of states to portray the movement as the leading (or, often, the only) actor in this collaboration, must be identified and avoided.

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